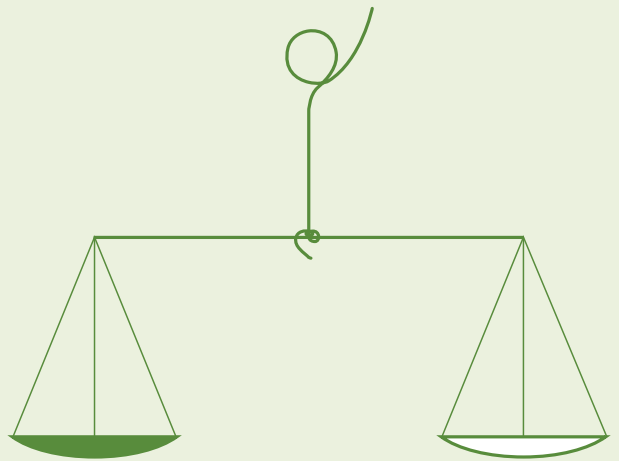


African Development Bank

Law for Development Bulletin 2006

Using Law as a Tool
to Help Promote Africa's Development



Legal Services Department

African Development Bank

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The African Development Bank is a multilateral development finance institution whose members are 53 African countries and 24 non-African countries from Asia, Europe, North America, and South America.

The purpose of the Bank is to further the economic development and social progress of African countries, individually and collectively. To this end, the Bank promotes the investment of public and private capital for development, primarily by providing loans and grants for projects and programs that contribute to the growth and development of African countries. Established in 1964, the ADB started operations in 1966 from its Headquarters in Abidjan, Republic of Côte d'Ivoire.

Thereafter, the African Development Fund (ADF) and the Nigeria Trust Fund (NTF) were created in 1972 and 1976, respectively. Together with the ADB they constitute the African Development Bank Group.

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The Law for Development Bulletin is an annual publication of the Office of the General Counsel & the Legal Services Department of the African Development Bank. It is intended to highlight some of the key activities of the Department in the preceding year and underscore some significant developments by the Bank that affect legal and judicial reform work in Africa. Produced by the Legal Services Department, the opinions expressed in the Bulletin are not necessarily the official policy of the Bank's Board of Directors or Management. Copies of these publications are available upon request from the Office of the General Counsel & Legal Services Department, African Development Bank.

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FOREWORD

The second edition of the Law for Development Bulletin will be published at a critical juncture in the Bank Group's history, and at a time when there is a convergence of opinion about the appropriate development agenda for Africa. In 2005, there was renewed international commitment to achieve the Millennium Development Goals, and various International Summits, notably the United Nations Millennium Summit + 5 and the G-8 Gleneagles Summit focused on the development challenges confronting the African Continent. 2005 was therefore the year of Africa, and several initiatives were launched to address the special challenges faced by the continent.

Within the context of a mutually agreed paradigm for promoting sustainable development in Africa, the international community and African leaders underscored the importance of the rule of law and stable institutions. Several initiatives and reports by special commissions and development scholars emphasized the imperative of Good Governance in accelerating growth and preserving the recent gains made by African countries. Legal and Judicial reforms are essential components of a comprehensive strategy to institutionalize Good Governance as a *sine qua non* for sustainable development in Africa.

It is, therefore, appropriate that this second edition of the Law for Development Bulletin focuses on issues pertaining to Good Governance in Africa, including a review of one of the Bank's internal governance institutions and an article on the sensitive subject of protecting Human Rights.

2005 was also a year of transition at the Bank. Honorary President Omar KABBAJ completed his second and final term in office and passed on the baton of leadership to President Donald KABERUKA, former Minister of Finance of Rwanda. I would like to take this opportunity to pay tribute to Honorary President KABBAJ for his keen understanding of the importance of the rule of law, and for his support as well as encouragement of the Legal Department's initiatives to use law as an effective tool for Africa's development. I am confident that our new President, with his declared emphasis on development effectiveness, will continue to provide a conducive and an enabling environment for the Department's Legal and Judicial Reform programme.

Adesegun AKIN-OLUGBADE
General Counsel

February 2006

INTRODUCTION

One commentator on matters of law states rather axiomatically that: 'A free and just society needs the rule of law even as man needs air to live.' In a globalizing world where minimum standards of basic human rights, pacific intercourse amongst nations, and development objectives have risen to the top of the international agenda and are reflected in various declarations including the Millennium Development Declaration, the legal commentator's statement, premised as it is on the needs of free and just societies, is not hyperbole. Establishment of such societies and attainment of what are called the Millennium Development Goals that emerged from a consensus by the world's leaders in the year 2000 continue to be a pivotal point for activities of multi-lateral development banks. In Africa, over 26 African leaders have accepted to have their respective countries undergo self-assessments and peer reviews to strengthen their democracies and their individual capacities for good governance and socio-economic development. These goals are achievable only in an atmosphere that allows free and transparent participation within a framework of just laws and order.

This issue of the Law for Development Bulletin, among other subjects, contains reflections by the ADB's General Counsel and by the World Bank's Deputy General Counsel on work towards legal and judicial reform

in Africa. It presents an explanation of the process in the African Peer Review Mechanism (APRM) with emphasis on an area in which the Bank is dynamically involved - corporate governance, which is one of the four focal areas of the APRM. This issue of the Bulletin contains a description and analyses of the Bank's new non-sovereign guaranteed loan (NSGL) program for public entities. The NSGL program is designed to minimize financial burdens on the governments of the Bank's Regional Member Countries but at the same time allow certain public entities to utilize the Bank's financial products. Perhaps most significantly, the Bulletin looks at one of the most gruesome tragedies ever committed - the genocide in Rwanda during 1994. This issue of the Bulletin reflects on the genocide and the legal framework that could have an impact as the world seeks to avoid recurrences anywhere.

Hopefully, the contents of this second edition of the Law for Development Bulletin would stimulate further thoughts on some of these subjects and add to available information about the Bank and selected law-related activities in Africa.

Seward M. Cooper
Editor

ADB'S PERSPECTIVE ON LEGAL AND JUDICIAL REFORMS

BY ADESEGUN A. AKIN - OLUGBADE

This article is culled from a keynote address made by Mr Adesegun A. Akin-Olugbade, General Counsel of the African Development Bank Group, during a seminar on Legal and Judicial Reforms in Africa. The seminar was part of the events marking the 40th Anniversary of the African Development Bank.

Introduction

This article deals with the importance of “legal and judicial reforms as necessary pre-requisites for economic and social progress in Africa”. To this end, it initially discusses the role of law and good governance as essential to sustainable economic growth and development. In subsequent paragraphs, it tackles the experiences of the ADB in supporting the implementation of law and justice programs in its Regional Member Countries (RMCs) with emphasis on its good governance policy and conclusions thereafter.

The rule of law -- and indeed the role of lawyers -- lies at the crux of substantive development efforts, and constitutes the bedrock of good governance in a developing society. It is self-evident that without an acceptable system of laws and a predictable legal and judicial framework economic development and social advancement cannot be attained. Indeed, in the past few years there has been a growing recognition that sustainable economic growth and development cannot be achieved if African countries do not adhere to the tenets of the rule of law

and if they do not act resolutely to promote justice for all their citizens. In addition to securing the protection of individual rights, economic development requires security, stability, peace, market-oriented economies and good governance. I may be preaching to the converted when I underline the fact that the idea of law as a dynamic and living process requires that all countries continually improve and adapt their legal systems to changing societal and global realities. Since in many of our Regional Member Countries the laws and framework that provide these are obsolete or not fully developed, or poorly implemented even where developed, legal and judicial reform measures are imperative. This is borne out by the New Partnership for Africa's Development (NEPAD) that sets governance matters at the center of Africa's development strategy.

It should not be mistaken, however, legal and judicial reform work cannot be a panacea nor is it a prescription or the sole recipe for progress. Societies are dynamic by nature, and these reforms serve to lawfully translate the evolving orientations and options adopted by society to cope with changing demands. Of course, while first world post-industrial societies have over time established reasonably efficacious legal systems and are now developing or strengthening legislation on genetics, corporate governance, cyberlaw and other areas of the law, developing countries are still working to build the basic legal and judicial in-



frastructure needed for optimal functioning of free markets, and democratically-based institutions, including a public civil service that would efficiently regulate, monitor and enforce laws, as well as manage the public finances. We are also yet to evolve effective legal regimes that successfully promote private capital flows and guarantee protection for the assets of investors, domestic as well as foreign.

As a multilateral development finance institution, the African Development Bank was founded with a clear mission to assist its member countries to promote rapid economic development and long-term sustainable growth. As an institution founded on the basis of treaty law with a membership embracing 77 nations, the Bank is an embodiment of international development law. Through its operations and corporate experiences, it has contributed to the evolving corpus of international development law. Through its financing programs and technical assistance, it has also contributed to legal and judicial reforms in its member

states.

The ADB experience in RMCs

The Bank's premise is that legal and judicial reform work cannot yield instantaneous results. The Bank believes, nevertheless, that the efforts made must be measurable over time, and, most importantly, should be sustainable.

Consequently, the Bank Group has in the last few years put great emphasis on improving governance systems in its regional member countries. In its Vision Statement adopted in 1999, good governance was identified as a priority area of intervention and in 2000 the Boards of Directors of the Bank and of the Fund formally adopted a Good Governance Policy. Based on the Vision Statement and the Good Governance Policy, senior management endorsed the *Law for Development Strategy* prepared by the Legal Services Department.

The Bank defines good governance to include respect for the rule of law and human rights, enhanced accountability and transparency in the management of public resources, as well as a credible legal and regulatory system. The Good Governance Policy states that “... a *pro-governance and pro-development legal and judicial system is one in which the laws are clear and are uniformly applied through an objective and independent judiciary. It is also one in which the legal system provides the necessary sanctions to deter or penalize breach. It promotes the rule of law and respect for human rights, and private capital flows.*”

The Strategy Paper on Law for Development recognizing, the Bank's Vision of an

Africa with reduced poverty levels, proposes that the approach should not be narrowed by ‘ . . . a focus on market orientation, but [should] include ensuring access to justice for the poor as a means of redressing injustices, of ensuring stability, and of promoting informal transactions.’ The Strategy further states that: ‘The Bank realizes that in many of its RMCs literacy rates are low and as such certain aspects of judicial reform may be considered less relevant to those whose interaction with the law might be limited to low level bureaucrats and the police, and whose understanding of the legal system is poor. Accordingly, the Program for legal reform will be fashioned within the context of the prevalent legal regimes in RMCs, and will not be geared to a mere transplanting of foreign laws, legal concepts, and bureaucracies’ Continuing, the Strategy Paper builds on the Bank’s emphasis on greater economic integration and, towards that goal, calls for special attention to regional harmonization and approaches to legal and judicial matters.

Provision of Financial and Technical Assistance number of measures have thus been undertaken to enable the Bank to operationalize the objective of promoting good governance and implementing the Strategy in its regional member countries.

- **FIRST**, the Bank Group has provided financial and technical assistance to improved systems of governance and support in a number of countries such as Cameroon, Cape Verde, Cote d’Ivoire, Djibouti, Mozambique, Nigeria, Rwanda, Senegal, Tanzania, and Zam-

bia. In these projects, the Bank Group, consistent with the country strategy papers approved by its Boards of Directors, focused on promoting the rule of law, transparency in the management of public resources, and strengthening capacity through legal and other types of training. The Cameroon project, for example, seeks to strengthen the judicial system, while the Zambia project, known as the *Fiscal Transparency and Accountability Support Program*, seeks to bring about an overhaul in the country’s fiscal management system. In some of these projects, as with the Institutional Support Project for Governance, Capacity Building and Poverty Reduction in Nigeria, assistance has been given to provide equipment and facilities to national institutions entrusted with the administration of justice.

- **SECOND**, in furtherance of its governance activities, the Bank has started preparing *Country Governance Profiles* for all its regional member countries. These are used as diagnostic tools to help in policy dialogues, to design the Bank’s country strategies, as well as to help assess areas and issues that call for reforms or strengthening, including legal and judicial reforms. In fact, the Country Governance Profiles include a detailed checklist of questions on the laws and the functioning of the judiciary in RMCs.
- **THIRD**, the Bank Group is providing support to the NEPAD, where it has been assigned the lead roles in Banking and

Financial Standards as well as in Infrastructure Development. In addition, the Bank, together with the UN-ECA is providing assistance in the area of governance, and particularly in promoting corporate governance. A strategy to address corporate governance in Africa is therefore being devised through close collaboration among the Private Sector, Operations Policy, and Legal Departments of the Bank.

- **FOURTH**, the Bank has provided financial assistance to other regional initiatives such as OHADA and the International Law Institute (ILI), and has facilitated the establishment of the African Law Institute, the first African legal think-tank designed to help harmonize, simplify, and clarify laws in RMCs. Last year, the Bank co-sponsored the First All Africa Conference on Law, Justice and Development in Abuja as well as regional learning seminars with the African Union and Transparency International in Addis Ababa and Yaounde on *Preventing and Combating Corruption in Africa*. The Bank is also co-sponsoring the African International Financial Law School, with Euromoney Legal Training. Two schools have been held in Accra, Ghana during March 2003, and in Capetown, South Africa during March 2004. Legal experts from the Bank lecture regularly at the International Development Law Organization (IDLO) in Rome, Italy. In addition, the Bank has Observer status with the Financial Action Task Force (FATF) on matters pertaining to money

laundering.

- **FURTHERMORE**, the Bank's Legal Services Department is preparing its first publication of the *Law for Development Review*, a scholarly yet pragmatic law review on topics germane to legal discourse in Africa. This is being done as a means of promoting innovative views and sharing insights about the legal framework in African countries. The *Law for Development Review* will be published once every two years.

Presently, all legal and judicial reform projects undertaken by the Bank have been components of capacity building and institutional support projects, or stand-alone programs. This trend is likely to continue.

A review of legal and judicial reform in Africa reveals that the Bank's involvement has focused mostly on legal rather than judicial reform. This emphasis may be considered unhealthy. Indeed, as the Law for Development Strategy observes: '... *The transaction costs for resolving disputes within RMCs is high due to process delays, mounting caseloads, fees charged, and obsolete managerial techniques that impose high demands on the time judges must spend on administrative matters.*' Added to this is the inadequate level of funding for judiciaries. A major recent positive departure from this trend of benign neglect of African judiciaries was a grant of nearly US\$1 million by the African Development Fund to the Common Court of Justice & Arbitration of OHADA (CCJA). That grant is helping

to strengthen an appellate commercial court that serves sixteen African nations. Judicial assistance of the type provided OHADA helps tremendously because the absence of adequate commercial justice systems have been a hindrance to enhanced investments in African States. It would seem obvious that assistance to judiciaries, not just in the commercial sphere but also more broadly in terms of general access to justice, is indispensable to ensuring stability and to managing conflicts. Regrettably, assistance for judicial reforms continues to lag behind other forms of governance-related assistance even here on a continent where failure to peacefully resolve conflicts have frequently led to violence and to the loss of human lives and

destruction of property. Improvement of the judicial systems throughout Africa must therefore be recognized as an indispensable part of the development agenda, if social and economic progress is to be attained.

Conclusion

Law as a vehicle for development can only be realized with the commitment, both in terms of political will and financial resources, from the governments of the Bank's Regional Member Countries. However, it is also clear that most of our countries cannot go it alone. Therefore, multilateral and bilateral assistance is required and should be made available.

LEGAL AND JUDICIAL REFORM IN AFRICA WORLD BANK EXPERIENCE

BY ELIZABETH O. ADU¹

This article is culled from a presentation made by Ms Elizabeth O. Adu during the Seminar on Legal and Judicial Reforms which was convened as part of events surrounding the 40th Anniversary celebrations of the African Development Bank.

I. Introduction

The purpose of this presentation is to illustrate the World Bank experience in legal and judicial reform in Africa. The presentation includes a historical perspective of the Bank's involvement in assisting developing member countries in legal and judicial reform from the 1960s, to the dramatic increase in such programs following the 1991 decision by the Bank on areas of governance of relevance to its mandate. This presentation also includes a description and analysis of a selected, but representative number of Bank-assisted programs in Africa and reflections on the lessons of experience garnered from them. In addition, some thoughts will be offered on the future of Bank's involvement in legal and judicial reform in light of the new initiatives being developed in the World Bank.

II. Historical Background

When the first wave of legal and judicial reform in developing countries took place (1960s and early 1970s), the World Bank did

not exhibit keen interest in this area, nor did it provide the critically needed financial assistance required for this work. Interestingly, there is also no record or significant evidence of any requests from the then new member countries for assistance from the Bank in this area of work, even though, legal reform was an important facet of the development process in many countries.

The Bank started to support significant activities in legal reform, mostly, with the introduction of the structural adjustment programs in early 1980s. Structural adjustment programs were designed to assist governments in supporting a clearly defined set of reforms aimed at economic growth and development. Under these programs, initial reforms, critical to the implementation of particular policy objectives and often involving amendments to the legal frameworks, are agreed upon prior to the disbursement of loan funds.

However, the major shift and interest in the role of law and the legal system occurred when the Bank embarked on providing significant support for private sector development, which was seen then, and is still considered, as a requirement for growth in developing countries. This is how the Bank went on to support programs of legislation reform in the areas of banking, insurance,

¹⁾ Deputy General Counsel for Operations, Legal Vice Presidency, World Bank

securities, commercial corporations, trade and land law.

For example in 1988, Uganda received a credit for a privatization program, including the development of an appropriate legal and regulatory framework for sound management of its public enterprise sector. Also Mozambique was supported in the strengthening of its banking law, including training of staff in its Central Bank, a follow-up project in 1990 assisted in the financing of legal advisers to help prepare the legal framework for privatization.

Legal and judicial reform became an even more important aspect of the Bank's assistance programs from 1991 onwards, following the long and arduous discussion on the parameters and extent of the Bank's work on "governance". This discussion in the Bank, which was held at the level of its Executive Directors, took place against the backdrop of the concern about the evolution of development activities in Africa. Concern was expressed in some quarters, however, that issues related to "governance", while of interest to the Bank might entail aspects which may not be within the mandate of the Bank.

In 1990, upon the request of the Executive Directors of the Bank, the late Dr. Ibrahim Shihata, the then Bank's General Counsel, prepared a legal opinion analyzing the issues of "governance" in borrowing members of the Bank and the extent of their relevance under the Articles of Agreement. The legal opinion concluded that "good governance" is the manner in which power is exercised in the management of

a country's economic and social resources for fostering development, and, to that end, not all issues related to "governance" of its borrowing members fall within the Bank's mandate, such governance becomes an issue of concern to the Bank only in its strict sense of the good order required for a positive investment climate and for the efficient use of resources such as activities in connection with accountability for public funds, budget discipline, and legal reform (including judicial reform). The legal opinion also noted that, while legal and judicial reform was not specifically mentioned in the Articles, it could not be ignored in the process of economic development, and that legal and judicial reform, complemented by civil service reform, together constitute the basic elements of "good order" in the management of a country's resources.

In early 1991, the Executive Directors of the Bank adopted the General Counsel's approach and, this decision opened the way for a dramatic shift in the Bank's assistance programs directed to legal and judicial reform. The caveat for the Bank's involvement was put in these terms by the General Counsel: "Legal reform requires profound knowledge of the economic and social situation in the country involved and can only be useful if it is done by the country in response to its own felt needs. The Bank may favorably respond to a country's request for financial assistance in this field, if it finds it relevant to the country's economic development and to the success of its lending strategy for the country."

III. Parameters of Bank Involvement in Legal Reform in Africa

The parameters of Bank involvement in legal and judicial reform in Africa were developed by the Legal Vice Presidency of the Bank. They reflected the political circumstances of many African countries at the time, in particular the existence of military dictatorships. There was concern, for instance, on how to treat requests for legal assistance from military dictatorships which by their nature do not abide by the rule of law. The following few principles were agreed upon:

- (a) the Bank should require and assist with legal reform if there is demonstrable relevant and material link between the reforms in question and economic development of the country;
- (b) the Bank should assess the possible impact of legal reform as well as its sustainability and weigh this against the amount of resources that will be necessary to bring about reform;
- (c) the Bank should not support activities with direct political connotations, which involve competition between rival interest groups seeking power and leadership of the country concerned. Bank should act with circumspection where the proposed legal reform has significant impact on political issues or other sensitive areas which fall outside of our mandate; and
- (d) the Bank should not assist in the strengthening of legal frameworks or legislative reform where such assistance would breach or induce the country to breach its international obligations.

This approach has been followed in general in Africa. For example, the Bank has specifically avoided reform of the criminal justice area, which tends to have significant and direct socio-cultural and indeed political considerations. However, it should be noted that the Bank's work on legal and judicial reform does promote generally the rule of law, judicial training, training for lawyers, anti-corruption activities, and the independence of the judiciary and related legal institutions. While these efforts may not be geared directly towards the criminal justice system, they do assist in improving it.

IV. Examples of Bank Assisted Legal and Judicial Programs in Africa

A number of legal and judicial reform activities were supported in the Africa Region with objectives ranging from revision of laws which were outdated (particularly those in the business and economic sectors) to financing of activities to rehabilitate, upgrade and modernize the courts which were to handle primarily commercial disputes that arose from time to time. In this connection, Bank financing was provided for projects in several countries, including Benin, Burundi, Burkina Faso, Cameroon, Cape Verde, Chad, Cote d'Ivoire, Ghana, Guinea, Kenya, Mauritania, Rwanda, and Tanzania. In Francophone African countries, the projects were within the context of "economic management projects", which also included aspects relating to the strengthening of civil and public service management and public procurement, strengthening private sector development and budget management.

These projects were also tied to the harmonization of the “droit des affaires” – the business-related laws – which were being developed at the time under the auspices of the *Organisation pour l’Harmonisation en Afrique du Droit des Affaires* (OHADA). An example of these types of projects may illustrate the nature and objectives of such projects.

The Burkina Faso Public Institutional Development Project was designed to improve economic management in the country with components relating to information and data management, budget management, public procurement reform, civil service reform, legal and judicial reform and public information on economic policy. With respect to legal and judicial reform, the project included components, supporting technical assistance for the revision of the commercial code as well as the mining code, and land-tenure law, it also assisted in the training of lawyers and magistrates in the country, supported the establishment of the institutional framework required for arbitration and provided technology to ensure the production and safe storage of court decisions, the upgrading of the Supreme Courts library, the rehabilitation and modernization of facilities for preparing the official gazette. The Bank’s resources were used to finance aspects of this program.

A review of this project several years after completion indicated a number of lessons. While the promulgation of laws was successfully completed in part because they were tied to the OHADA process, and a significant training program on the new laws offered to several lawyers and judges,

with the training seminars being especially effective, the judicial system continued to exhibit major constraints especially to private sector development. There appeared to be inadequate access to, and delivery of, quality legal and judicial services, poor accountability and transparency, and inadequate resource allocation to ensure sustainability. The major factors indicated for the unsatisfactory performance were the lack of sufficient government commitment to these reforms and the severe insufficiency of financing of recurrent expenditures by the government. As important, it was noted for all the components that institutional development is uncertain, takes significant time and effort and requires sustained and skilled engagement if it is to be successful.

Meanwhile, in the Anglophone part of Africa, similar projects were supported in several countries including, Zambia, Kenya and Ghana, with the objective of upgrading financial and legal management in the countries. The flagship project in this respect was the Tanzania-Financial and Legal Management Upgrading Project (FLMUP) which had various objectives, including the upgrading of the accounting and auditing professions in the country. This project was prepared as a result of the dire state of the legal sector in Tanzania in the early 1990s. The legal sector as is the case in most developing countries had been grossly under-funded all throughout its history. Approved budgetary expenditures for the sector totaled less than 1.5% of the aggregate government expenditure each year, an indication of the low priority paid to the sector. In addition, almost all the institutions in

the sector lacked the necessary infrastructure, desks, stationery, library systems and the justice system, particularly in the rural areas, suffered from poor access, delays and corruption. Finally, most of the laws on the books were outdated and needed updating.

The legal component therefore included training of staff in the Attorney-General's office, provision of office and computer equipment to that office, the Judiciary, the Registrar of Companies and the Law Reform Commission and revisions and publication of the laws of Tanzania. While hardware was provided and the laws of Tanzania have now been revised and published, the most significant aspect of this project was the methodology that was utilized to assist the government in developing its own legal sector program, which outlined for the first time in its history, actions to be taken to improve the legal and judicial system in the short, medium and long term. This study, the preparation of which was led by distinguished Tanzanian lawyers, economists, civil servants and all relevant stakeholders, including governmental representatives, as well as civil society, has served as an example for projects elsewhere in Africa, notably, Ghana, Kenya and Nigeria. This requirement of bringing together all stakeholders in the legal and judicial system led to the building of commitment to the program, an important prerequisite for successful legal reform programs.

A review of the Project on completion indicates what is now a shared view in the international development community – that ownership and commitment by the borrower country concerned is key to program ef-

fectiveness. In the case of FILMUP, it was a Tanzanian initiative from the outset, which was driven by so-called “national champions”. These national champions were composed of a new generation of professionals, including accountants, auditors and lawyers who had both strong personal and organizational incentive to make change happen. In addition, this project led the way on how donor support should be integrated and coordinated in program preparation. The external financiers, consisting of the Bank, Denmark, Norway, Sweden and the United Kingdom allowed the Tanzanians to take the lead and the donors coordinated their assistance through periodic meetings among themselves and with relevant representatives of the borrower.

Further the World Bank sponsored with the African Development Bank and some Bilateral Donors the All Africa Conference on Law, Justice and Development, which took place in Abuja, Nigeria in February 2003. This conference brought together, Chief Justices, Ministers of Finance, Ministers of Justice and other lawyers from 41 African countries to discuss and share experiences with respect to legal and judicial reform. The World Bank has also supported various organizations in addressing gender and law issues, strengthening legal literacy and access to justice issues in several African countries.

V. Challenges and Lessons Learned

It is clear from the foregoing description and analysis of the results of some of the Bank-supported programs on legal and judicial reform that the Bank's interest and involvement

in this important and rejuvenated field has been progressive as well as opportunistic. It has responded to the main challenges of the time and has adapted to the changing world order while keeping its activities on the whole within its mandate as set out in the respective Articles of Agreements of the World Bank (IBRD and IDA).

It is indeed somewhat surprising that the Bank was not involved in the first wave of legal and judicial reform in its developing member countries during the 1960s and 1970s, considering that the changes made to the legal systems were directly in support of the economic aspirations of these countries, an area of significant interest to the Bank. Looking at the facts retrospectively, there may probably be good reasons for that situation. The main explanation which may be advanced for this lack of action on the part of the Bank relates to the focus of the Bank on infrastructure and public utility programs. Also, during the period in question, the Bank was staffed with significant professional experience in the infrastructure sector but more importantly, requests for assistance from its borrowing countries may have been predicated on the fact that infrastructure was a prerequisite to facilitating significant economic development and also because of the expertise and comparative advantage it had demonstrated as compared to other institutions.

However, the Bank's involvement seems to be appropriate because it took very much into account the constantly changing world scene. The Bank during this period, has had neither the competence nor the analytical framework necessary to be involved in this

difficult area of work. Involvement under these circumstances could have produced disastrous results and could have been disruptive of programs in the Bank borrowing countries, especially since government commitment in this field was often lacking.

The birth discreetly of legal reform in the context of structural adjustment lending in the 1980s may however have been timely for several reasons. First, the economic downturn in the early 1980s and the necessity to design and implement policies needed to address systemic and institutional issues required significant changes in the legal framework. Second, structural adjustment lending was based on the notion that balance of payment support would be forthcoming only when the borrower concerned had fulfilled the conditions included in its agreement with the Bank. One indicator of this was a demonstration of government commitment, and actions through the enactment of appropriate legislation was often the first step. Finally, there existed by that time more academic literature and analysis distilling the effects of different types of legal frameworks and their relative usefulness in advancing economic and financial objectives in developed countries. These lessons of experience provided an appropriate knowledge base which served as an impetus for the legal reforms envisaged under the structural adjustment operations.

Bank's involvement in this area since 1991, while making a positive impact in several contexts, has not been without difficulties. One of the most glaring observations is that legal and judicial reforms are long-term processes that require commitment

from the government concerned and indeed commitment at the highest levels. The main approach which has been used consistently in Bank-financed projects completed and reviewed to this point, is that the borrowing countries should have the space to engage their own relevant stakeholders in a participatory process and to gain their support before a project or program is prepared. Mechanisms which have been utilized include providing funding for diagnostic studies to study the need for, and nature of, legal and judicial reform and carrying out workshops and seminars to develop programs which are appropriate for the country concerned with its citizens in the lead. These processes often involve foreign consultants, which is entirely appropriate so long as they bring fresh ideas and lessons of experience into the process. This approach has been used very successfully in the projects financed in Ghana, Guinea and Tanzania and is a worthwhile practice to be continued and to be followed. The consultation and preparatory work undertaken under the Tanzania Financial and Legal Management Upgrading Project is best practice in this respect. Without commitment, programs will be unlikely to achieve their objectives; supply-oriented reform should be avoided.

One issue which is closely related to the notion of commitment, is the requirement that those involved in legal and judicial reform programs must be acutely knowledgeable about the socio-political and cultural context in which the reforms are to take place. In this connection, the Bank has gone to great lengths through its dialogue with its borrowing countries to and in some cases

through covenants in its legal agreements with borrowers to ensure that the persons carrying out such projects have the knowledge of the social norms, socio-economic political and cultural factors underpinning the legal traditions in the country concerned. A mechanism frequently utilized is to advise the country to carry out its analysis and programs in an interdisciplinary context with lawyers, as well as social scientists and civil society. Also, the carrying out of research is considered appropriate in these circumstances. Another related issue is the role of foreign experts in the implementation of these programs. Such experts, while needed in the implementation of these programs, must work hand in hand with local experts.

Another issue of importance is the content and nature of programs even when they have been developed in a participatory manner in the country concerned. The question which is raised is whether all programs should be comprehensive in the sense that programs should include all inter-related activities. A critical step is carrying out of a thorough legal and judicial sector assessment, the diagnosis of which to be used to design appropriate project components. Comprehensive reform plans are developed based on such assessments. Also, the sequencing of activities envisaged under a program is an important consideration. Lessons of experience gleaned from the reviewed projects indicate that programs should be carefully conceived and where possible, appropriately sequenced to stand a chance of achieving the desired objectives.

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Furthermore, experience in the last ten years has shown that the Bank has to take into account the difficult dilemmas that the borrowing countries are faced with when they have to borrow funds for legal and judicial reform programs. The lack of interest in this field has been partially due to the legitimate concern in developing countries to deal with what their authorities perceive as more pressing and worthwhile issues such as those in agriculture, health, education as well as issues in other social sectors. Up until the recent past, many Bank borrowers did not appreciate the need for legal and judicial reform even when there were the calls for the improvement in the rule of law in countries. They viewed this sector as less important and less of a priority than other sectors. A familiar refrain was that citizens did not receive any real benefits from the legal system and improvements to it was not cost effective, especially since the courts have been marginalized, as there was no certainty that reformed courts would attract the citizenry back. To this end, budgetary provisions to that sector were often low in many countries and the legal and judicial establishments were considered the last entities to receive budgetary allocations as illustrated by the case of Tanzania. In view of the above, efforts are being made to secure funding to assist in the financing of legal and judicial reform related activities in borrowing countries. At the very least, the presence of grant funding would facilitate crucial diagnostic work and other studies which would indicate the needs of the sector as well as the impact reform may have on the development prospects of the coun-

try concerned. The Bank's recent decision to focus its Institutional Development Fund grants on fiduciary issues and on much needed legal and judicial reform means that interested countries would now have an opportunity to obtain grant funding for this most important aspect of the development process. Some donors are also providing support to legal and judicial reform activities through the Bank as administrator of their funds, such as Japan through its Japan Social development Fund administered by the Bank.

Even when countries decide to borrow, there is the perennial issue found in almost all areas in the development process relating to the sustainability of programs financed with external resources, including the maintenance of facilities and equipment provided or acquired. This is a major problem in a number of programs financed by the Bank and other external financing agencies. This issue is also very much related to the issue of commitment to reform programs which has indicated the need to include the Finance Ministry or Treasury as one of the key stakeholders in the reform process. In this connection, the Bank requires countries at the end of the projects it finances to prepare a report on the "future operation" of the facilities financed, but this hardly deals effectively with the problem. Also, even though discussions on this issue normally continue during the course of the Bank's dialogue with its member countries following completion of a project, this remains an intractable problem.

As is evident from the above discussion, it is difficult to predict accurately the re-

sults of any legal and judicial reform program. The mere fact that laws are enacted will not mean that the laws will necessarily achieve their objectives. Also, the effects of improvements made in judicial processes or provision of infrastructure in the delivery of justice in the country concerned cannot be empirically ascertained. There are many variables which are determinants of how well a program will do. Thus, one of the most urgent needs for work in this area is to develop appropriate systems and programs for the monitoring and evaluation of legal and judicial reform programs.

Coordination of foreign assistance is another perennial problem. Typically, foreign donors and international institutions do not coordinate their activities and assistance to recipient countries. It would appear that, the most promising solution is for the countries themselves to take control of coordinating the external financing agencies, by developing the necessary institutional capacity to do so. The Bank is also working more closely with other entities having competence in this area and has forged better relationships with the regional international financing agencies, including the African Development Bank, bilateral agencies, and with institutions such as the Commonwealth Secretariat and the international bar and other associations. A good example of this, in the context of legal reform, is the very collaborative engagement of several agencies in a program supporting environmental law and institutions reform in Africa. This program is executed by the United Nations Environment Programme, in collaboration with the United Nations

Development Programme, the Food and Agriculture Organization of the United Nations, the Bank and International Union for Conservation of Nature. The laws prepared are reviewed by the agencies and all the comments presented to the experts of the country concerned who make the final decisions.

VI. Looking Forward

The Bank's Legal Vice Presidency has a special practice group on legal and judicial reform. A program of action which includes, a series of legal and judicial sector assessments, dialogue with potential recipient countries on Bank assistance, developing tool kits and developing and sharing knowledge products is being implemented. All these actions should lead to better and hopefully more successful projects in the borrowing countries of the Bank so long as they take fully into account the lessons of experience gleaned from completed and ongoing Bank-financed projects as well as those supported by other agencies.

The Bank finances should lead to the development and enactment of laws which are appropriate to the socio-political and economic situations of the countries. Experts and professionals in the countries should continue to play a major role more than before and they should take full advantage of the existence of very successful programs which offer good practices in this difficult area of work. Legal reform activities should lead to the promulgation of laws which are consistent with developmental objectives of the country concerned and be fully implementable. With respect to judicial reform programs, it is hoped

that, after assistance is provided, the judicial systems concerned would have characteristics which would assist in the better administration of justice.

Other challenges facing the future of Bank's work on and judicial reforms in Africa and other parts of the world include the Bank's possible involvement in human rights when dealing with legal reform issues, and the treatment of gender issues and of minority stakeholders in the design of legal reform operations.

Legal and judicial reform continues to

be an integrated part of development in the 21st century. In an effort to enhance the focus of legal and judicial reform in the development agenda, the Bank is working on a Legal Modernization Initiative with a Judicial Reform Action Plan being prepared for all the various Regions where the World Bank is active. As part of this, the World Bank is considering the establishment of a Judicial Reform Trust Fund to enhance the ability of the Bank to mobilize concessionary financing in this sector.

CORPORATE GOVERNANCE IN THE AFRICAN PEER REVIEW MECHANISM¹

BY SEWARD M. COOPER²

“NEPAD must resolve the problem that while the world is awash with financial resources and liquidity, Africa is a [financially] resource poor region. The last two decades have witnessed unprecedented expansion in global prosperity. In particular, the post-cold war decade of the 90’s saw an exponential growth in cross-border movement of private capital, mergers and acquisitions. Africa missed out in all of this!

“ . . . African leaders must cast their net wider than before to find ways and means to unleash the enormous resource potential in [the] private sector at home and abroad.”³

These words are an excerpt from the New Partnership for Africa’s Development [NEPAD] Action Plan which also states in unequivocal terms: “Good economic and corporate governance including transparency in financial management are essential prerequisites for promoting economic growth and reducing poverty”.⁴ Rwandan President Kagame states it elegantly: “Embracing and practising good corporate governance is of both strategic importance and a matter of survival . . . a State that applies rules and policies predictably and fairly . . . that ensures order and the Rule of Law, and protects



property rights will generate confidence and attract more domestic and foreign investment.” Perhaps former World Bank President James Wolfensohn was not being hyperbolic nor exaggerative when he sought to encapsulate the growing importance of corporate governance in his prediction that: “Proper governance of companies will become as crucial to world economy as the proper governance of countries”.

The global recognition of the adverse impact of the Asian financial crises; the corporate scandals in Enron and WorldCom in the United States of America; Parmalat in Europe; and crises in financial circles in several major African countries over the last decade

¹ The APRM [African Peer Review Mechanism] is a mutually agreed instrument voluntarily acceded to by Member States of the African Union for self-monitoring purposes.

² Chief Counsel, Governance, Office of the General Counsel, African Development Bank.

³ Summary of NEPAD Action Plans

⁴ NEPAD Action Plans para.16

raised the alarm for the effective regulation of corporations.

On the other hand, greater awareness of the lost opportunities to mobilize financial resources on both domestic and international capital markets have stimulated interest among African leaders to develop measures for corporate governance.

The Implementation Committee of Heads of States & Governments for NEPAD first met in October 2001 and again in June 2002, both times in Abuja, where the African leaders issued the *NEPAD Declaration on Democracy, Political, Economic & Corporate Governance*. In February 2004, the 1st Summit of the Participating Heads of States & Governments on the African Peer Review Mechanism met in Kigali. The peer review mechanism concentrates on four areas: (i) Political Governance and Democracy; (ii) Economic & Financial Management; (iii) Corporate Governance; and (iv) Socio-Economic Development.

This article briefly gives (i) the rudiments of good corporate governance; (ii) expounds on the importance of corporate governance; (iii) explains the objectives of corporate governance within the APRM; (iv) outlines some applicable corporate governance standards; and (v) highlights some challenges for corporate governance development in Africa.

What is corporate governance?

The APRM guidelines state that good corporate governance provides a level of disclosure and transparency regarding conduct of corporations (which are legal persons) and the conduct of corporate boards of directors in

a manner that enables supervision of their obligation to be accountable, while ensuring that corporations and their boards comply with their legal obligations and remain accountable to shareholders and responsible to stakeholders. It is a system that ensures corporations are directed, controlled and held to account.

The Bank in its draft Strategy for Corporate Governance defines Corporate Governance as: ‘The mechanism that frames duties and powers of corporations to deliver benefits to investors and those directly impacted by the corporation’s activities.’

There exists a commonality of interests inherent in the two definitions. Both definitions recognize duties, obligations and accountability on part of the corporation to shareholders; similarly both accept the premise that corporate impact extends beyond those who have bought shares in the corporation – that corporate impact, and indeed interests, extends to a wider range of stakeholders. This wider range of stakeholders includes labour (not just as a factor of production but as living human beings), consumers, creditors, suppliers, the community, the environment, and government (which in some instances plays multiple roles as shareholder, regulator, and tax collector). It subsumes the notion that corporations, in addition to being financially responsible, must be socially responsive and socially responsible.

Why Corporate Governance?

African Economic Outlook 2004/2005 co-published by the Bank and the Organization for Economic Cooperation & Develop-

ment (OECD) points out in discussing the financing of Small & Medium Enterprise development in Africa that the vast majority of firms predominating the African private sector encounter legal and financial constraints that hinder capital accumulation. This is not only applicable to African SMEs; but also to many African corporations, including private companies, state-owned enterprises (SOEs), and family-owned enterprises – all of which are covered in the corporate governance review.

Capital accumulation or financial resource mobilization, if you will, is a means to fulfilling the desired end of poverty reduction. It is generally recognized that nearly all African countries have large informal sectors whose assets are unrecorded and potential contribution to economic growth is frequently the subject of conjecture. What is no speculation is this: An improved investment climate for both domestic and foreign investment can stimulate economic growth and help spur development. Good Corporate Governance within this context can help improve access to bank financing and to capital markets (domestic and international). It can enhance the corporation's ability to mobilize domestic financial resources, obtain credit, help in the development of viable capital markets, expand the tax base, increase levels of personal income for investors, help attack the supply side of corruption, and attract quality businesses. Good corporate governance also has a multiplier effect – it increases purchasing power, increases demand for goods and services, which yields increased production with its concomitant increase in employment and

likely increase in savings and investments.

Adoption of common corporate standards for accountability, fairness, transparency, and responsibility amongst African countries can help foster regional integration and enlarge markets, protect human and labour rights, and safeguard the environment.

Corporate Governance

Objectives in the APRM

The APRM has five principle objectives in corporate governance. First, it seeks to determine how effectively a country is establishing and promoting an enabling environment for investment. Second, it inquires about the existence of an effective regulatory framework for economic activities - a framework that ensures corporations are good citizens in respect of human rights, social responsibility and environmental sustainability. Third, the APRM examines whether a framework exists within which all stakeholders are fairly treated. Fourth, the Review assesses whether an adequate regime is in place for accountability by corporations, directors and corporate officers. Finally, it makes an inquiry into whether internationally established good business codes and standards have been adopted. The Review seeks to establish the country's level of adoption and compliance to international standards and codes.

What are the Applicable Standards?

Some of the well-established business standards and codes suggested for adoption and integration in the legal framework of States and corporations, as appropriate, are:

- Principles of Corporate Governance (OECD Principles, Commonwealth Commission Report, King Commission Report.)
- International Accounting Standards
- International Standards on Auditing
- Core Principles of Effective Banking Supervision
- Core Principles for Securities & Insurance Supervision and Regulation
- African Charter on Human & Peoples' Rights
- International Labour Organization Conventions
- Codes on industrial & environmental safety & hygiene of the World Health Organization (WHO);
- Anti-money laundering recommendations; and the
- AU Convention on Combating Corruption (which breaks ground by targeting unfair and unethical practices in the private sector.)

The Challenges

Generally speaking, inadequate administrative systems compounded by heavy bureaucracies stifle corporate development and governance in most African countries. The challenge is to reduce the bureaucratic impediments to business and corporate registration, improve and decentralize business registries, establish and integrate registries for secured transactions, strengthen and attract competent human resources back in country and to the sector, improve regulatory oversight, elevate more African

corporations to the level where they can get internationally recognized credit ratings, improve the legal and judicial milieu within which the corporations operate, enforce greater transparency and accountability, establish and develop national rating agencies, develop effective reporting and compliance mechanisms. These are some of the main challenges in this process. The most important challenge however is garnering the political will to make this happen. The fact that 26 African countries have opted for review is a positive political signal. Much depends on the depth of the Review, the implementation of that follows.

Conclusion

The objective of corporate governance can be succinctly stated: It is to ensure good stewardship of corporations. Africa's regulatory environment for corporations and for corporate development is at various levels of development. Templates exist for effective corporate governance. Universal 'best practices' have evolved and continue to evolve. The application of 'best practices' and lessons learned can be transferred and adapted in African States. The APRM's focus on good Corporate Governance seeks to positively effect changes in not only the corporate arena; but in Africa's private sector as a means of harnessing Africa's entrepreneurial resources, attracting investment, stimulating economic development and reducing poverty.

LEGAL RISKS AND GOVERNANCE: SOME CONSIDERATIONS FOR AFRICAN CENTRAL BANKS & REGULATORY AGENCIES

BY SEWARD M. COOPER¹

Established in 1964, the African Development Bank (ADB) serves as Africa's premier development finance institution. As a multinational development bank, it is supported by 77 nations, including 53 African countries and 24 countries from North and South America, Europe and Asia. Its authorized capital is UA 21.87 billion (US \$30.63 billion), and its subscribed capital is UA 21.56 billion (US \$30.2 billion). The ADB's mission is to promote the economic and social development of African states through loans, equity investments, and technical assistance.

This article will first provide a brief overview of the African situation, and then examine both risks and governance issues in general and those specific to Africa. Finally it will suggest what should be done both generally and by central banks in particular.

I. Overview of the African Situation

Africa's socio-economic situation is not monolithic. The continent includes 54 economies at varying stages of development. However, since the mid-1990s, Africa has overall made some economic progress. Since 1996, average GDP growth has reached 3.5%. Also,

the average inflation rate has declined from a high of 41% in 1994 to 11% in 2003. The ratio of external debt to GDP has dropped significantly, from 74% in 1994 to 47.6% in 2003.

These changes can be attributed to major reform programs that some countries have undertaken in their fiscal and monetary management, and to the support of international financial institutions. But, despite increased access to international capital markets, the flow of resources has not kept pace. Few African states are sufficiently creditworthy to access global financial capital markets. Africa's share in global private capital flows (including foreign direct investment (FDI) and portfolio investment) have fallen to less than 1%. Overseas Development Assistance (ODA) flows have also decreased over the last ten years, from US \$25 billion in 1990 to US \$15.7 billion in 2001.

African states can be placed in three broad categories, namely middle-income countries, reforming countries and post-conflict or conflict countries. Middle-income countries include North African countries, South Africa, Botswana, Mauritius and others. They tend to have varied sources of financing, access to global capital markets. They are attractive to relatively significant

¹⁾ This note is adopted from a presentation made at a Course on Central Banking held at Oxford University, England. Thanks to Jenny Page of the Harvard Law School, who was an intern with the Bank's Legal Department, for her research assistance in preparing this note.

amounts of FDI. Most African states fall into the second group of reforming countries, which have implemented varying degrees of economic reforms that have raised GDP growth rates. These countries are still dependent on ODA, but are attracting the attention of international investors. The final group, post-conflict or conflict countries, have economies that are devastated by conflicts. They are heavily dependent on ODA.

II. Legal Risks and Governance: Issues of General Application

Legal risk can be defined in many ways, depending on the context. By one broad definition, it is the risk that a loss may be sustained by an entity for failure to abide by the laws. Such a failure could be the result of ignorance, negligence or illegality. In the context of central banking and supervision, legal risk is generally subsumed into the category of operational risk under the Basle Accord. To mitigate such supervisory-related risks, financial entities rely on compliance units.

Like 'risk', the term 'governance' is used in many different contexts, for example good governance, economic governance, corporate governance, participatory governance and democratic governance. The objective of governance is to ensure good stewardship of institutions, whether they are political or non-political in nature. The ADB defines governance as a process referring to the manner in which power is exercised in managing the affairs of a nation, and its relations with other nations.

Good governance is critical in central

banks to maintain integrity, confidence and balance in financial markets, and consequently the macro economy. The general mandate of central banks is to ensure good governance in several ways. Central banks must ensure an adequate supply of money, protect the national currency, supervise the primary banks, set reserve requirement ratios for banks, and set rediscount rates and consequently prime bank lending rates. Though such a supervisory function is a function of central banks in most of Africa, in a few jurisdictions the responsibility is shared with other supervisors. For example, in Tunisia, the Banking Commission exists, but the technical staff comes from the central bank.

There are two principal areas of central banking and regulatory governance: internal governance and governance of the targeted industry. The classic internal governance issue is independence from political power. It includes issues of the appointment and tenure of service for bank governors, interaction between fiscal authorities and monetary authorities and the availability of qualified staff for examination and inspection functions. Governance of the targeted industry includes issues pertaining to human resource capacity in the financial services sector, governmental interference and effective internal control mechanisms and tools.

III. Legal Risks and Governance Issues: Issues Specific to the African Case

Most African central banks and financial regulatory authorities confront problems that are not common in developed financial or regula-

tory systems. They can encounter antiquated laws applicable to the banking sector or commercial transactions and dealings in the financial sector. Obsolete laws can govern debtor-creditor relations. Judicial systems for debt collection or corporate re-organization, insolvency or bankruptcy can be inadequately equipped and staffed. Some African countries lack an effective means for regulating money exchangers, in particular unlicensed exchangers. Some also lack effective collateral and security registries for realty and personalty, as well as IT systems, thereby affecting clearinghouse functions and inter- and intra-bank transactions. An absence of credit reference bureaus hampers development of the financial sector. Often in the African context, numerous and large transactions occur outside the formal banking sector. African economies are typically cash-based, and the informal sector predominates. In Africa, there tends to be a concentration of formal financial institutions in urban areas. There is also a narrow customer base, meaning that there are fewer than optimal financial institutions.

Central banks also face the significant problem of foreign exchange/capital flight. There can be restricted official use of national currency within the national territory, creating problems of currency inconvertibility. In many African countries, the government retains substantial ownership of key banks, for example housing, agriculture and development banks.

Examiners and regulators are often under-compensated. Managers of political and fiscal affairs can exert excessive external pressure to influence decisions on money supply. Central banks must deal with insider lending and

other forms of malpractice. Capital markets are emerging and fledgling. Undue political influence results from a lack of autonomy in some instances. For example, the central bank of Nigeria used to report through the Minister of Finance. As recently as June 2004, Morocco passed legislation granting autonomy to its central bank.

IV. What Should Be Done: Both General and African Perspectives

Generally, a number of measures need to be implemented to address these legal risks and governance issues. First, African countries must deepen reforms to mobilize both domestic and foreign resources. Countries should also establish national or regional capital markets similar to the Regional Bourse in Abidjan. More countries should also have international credit agencies to rate them. Botswana and Senegal have already been rated as middle-income countries.

A key component of reform is to improve governance systems, especially through legal and judicial reforms. African governments must force greater transparency and accountability in the financial sector. Several regional organizations have begun to make progress in this area. The Organisation Pour l'Harmonisation Afrique du Droit des Affaires (OHADA) is a unified commercial legal system that is working to achieve transparency and accountability by unifying accounting laws and integrating companies and collateral registries. L'Union Monétaire Ouest Africaine (UMOA) has worked to unify bank laws and laws on negotiable instruments. Governments can also strengthen financial intermediation. Either government

or the private sector should establish national consumer credit agencies, with government providing the requisite environment for truthfulness of information and the ability of consumers to correct information. Establishing national systems to rate banks would all help strengthen African financial institutions. Nigeria has done this through Augusto & Co., an indigenous company that has been established to rate commercial banks in Nigeria. Augusto has proved to be a tremendous tool for potential investors in the country. Another measure, improved debt-collection mechanisms, would help expand African economies and safeguard lending institutions.

The efficacy and expansion of the African Peer Review Mechanism established by The New Partnership for Africa's Development (NEPAD) is an important initiative for addressing governance issues. Finally from a general perspective, it is essential that the problem of African brain drain be curtailed.

Central Banks have a specific role to play in addressing legal risks and governance issues. They can enhance both internal training and training for the financial sector, and recruit, train and adequately compensate competent staff. Central banks must penalize malpractice in the banking center consistently. They can also devise effective means of utilizing foreign currency remittances from nationals abroad.

There are also a number of actions that central banks can undertake in collabora-

tion with others. These include assisting in moving informal cash-based economies into formal interaction with the financial sector by creating easy business registration processes and customer education and training, by strengthening collateral registries and systems for protecting security interests, by creating a creditor-friendly and credit-secured environment in which to do business and by establishing or strengthening existing deposit insurance agencies.

V. Conclusion

Because Africa's regulatory environment for financial institutions is at various levels of development, the specific challenges facing each economy vary. However, the templates for the effective governance of the financial sector exist globally. Universal 'best practices' have evolved over the years, and they can be applied and adapted in African states. The pace of this adaptation is a function of the availability of resources and the political will to effect the required changes. The growing recognition of the international community of the linkages and interdependence of secure, accountable, and 'monitable' financial systems globally could lead to better financial sector governance even in Africa's developing countries.

SELECTED BOARD APPROVED PROJECTS WITH LEGAL AND JUDICIAL COMPONENTS

MALAWI: Support for Good Governance Loan

Approval Date: 08/12/2004

Loan amount: UA 12,000,000¹

The proceeds of the ADF loan will be used to finance both private sector and public sector imports. The procurement of goods under the loan by the private sector will be carried out in accordance with existing commercial practices in Malawi. The procurement of goods and services by the public sector will be in accordance with the Bank Group's Rules of procedures.

Good governance is a fundamental element in the management of an economy. When high standards of accountability and transparency are upheld in the public sector, public financial management is more likely to be undertaken according to best practices. The proposed program aims at enhancing accountability and transparency throughout Malawi's public sector and supporting targeted legal reforms aimed at improving access to justice, curbing corruption, and accelerating the law reform process. The aim is that the rigorous implementation of this program will enable Malawi to embark on a path of increasing economic growth and declining incidence of poverty.

Significant positive changes have taken place in the country since 1994 when the

first democratically-elected government came to power. The Constitution establishes institutions of democracy that help ensure checks and balances and uphold fundamental freedoms in the country. New institutions have been established including an Ombudsman, and Anti-Corruption Bureau, a Law Commission and a Human Rights Commission.

Establishment of Anti-Corruption Bureau: One of the initiatives which the Malawi government took in order to achieve good governance in Malawi, was the passing of the Corrupt Practices Act 1995. The approach of combating corruption has now expanded beyond prosecution to include investigation, civic education, and corruption prevention.

Overtime, the 1995 Act was found inadequate to satisfy the demands of society and the needs of the campaign against corruption. Consequently, in March 2004 amendments to the CPA were enacted by Parliament. The perception of corruption in Malawi has been a rising trend over the past three years. Several bilateral and multilateral donor agencies have recently expressed concerns about corruption and misappropriation of public resources in Malawi and in some cases have withdrawn their support to the country's development efforts.

The legal and judicial system in Malawi

¹⁾ UA= 1.5 US Dollars

suffers from a number of weaknesses: there is a backlog of documents required to be examined by the Ministry of Justice; the dockets of the courts are clogged with cases waiting to be heard. The newly established Law Commission lacks the capacity required to assume its role of reforming the law; the information management of the legal system is poor, the University Faculty of Law needs capacity building to increase the supply of lawyers and other legal personnel; the policy and procedures of the prison system need to be reviewed. DFID and the EU are providing support under the Rule of Law Project to address these specific weaknesses. In addition to the Constitutional provisions on rules of law and the creation of oversight bodies to strengthen the security and judicial frameworks, the Government has adopted an integrated approach to security and justice in the Malawi Safety, Security and Access to Justice Program (MASSAJ), which proposed three interlinked strategy to reduce crime, improve access to, and delivery of, efficient and effective justice, and ensure respect for the rule of law.

TANZANIA: Institutional Support Project for Good Governance

Approval Date: 13/12/2004

Grant Amount: UA 4,797,000

The project comprises two components. The first component involves providing support to the mainland's Public Finance Management Reform Programme, and specifically the Procurement Component. In this regard, the project aims at contributing to the development of a public procurement system that is transparent and professional.

Secondly, the project will also assist the Revolutionary Government of Zanzibar in the improvement of its legal sector and the management of public finances. The support to the legal sector will contribute to the development of a transparent, efficient and fair judicial system that guarantees the rule of law and administration of justice. In addition, assistance will be provided to improve the island's management of public finances.

The sectoral goal of the project is to contribute to improving economic growth and reducing poverty on Tanzania. The objectives include (i) improving the management of public finances and specifically contributing to the development of a public procurement system that is transparent and professional; (ii) enhancing the efficiency of the legal sector and judiciary system; and (iii) enhancing good corporate management practices.

The Government's commitment to reform the legal sector dates back to 1993 when the Government established the Legal Sector Reform Task Force. The Task Force carried out a comprehensive review of the legal sector and identified the problems and challenges facing the sector and proposed changes that were needed to reform the sector.

The major problems that were identified included a low quality of legal services available to the population, and institutional constraints. With regard to the former, the Task Force noted that the system was characterised by: (i) inordinate delays in resolving disputes and dispensing justice, evidenced by large backlogs of both criminal and civil

cases; (ii) limited access to legal services for the majority of the citizens who either lack awareness of their basic rights and the opportunities for judicial redress, or cannot afford the services or do not have confidence in the integrity and fairness of the legal system; (iii) corruption and other unethical conduct of officers in the legal system; (iv) an outdated system that has not been responsive to either social, political, economic and technological changes, or increasing resource constraints over the years; and (v) limited public trust in the legal system.

As concerns institutional constraints, the shortcomings comprised: (i) a fragmented, excessively bureaucratic and outdated legal and regulatory framework; (ii) weak management and coordination of legal sector institutions; (iii) low competence and morale of public sector legal personnel, (iv) inadequate numbers of professionally trained legal personnel; (v) constrained independence and low integrity of the judicial system; (vi) ignorance and poverty of the majority of the citizens; and (viii) excessively limited and poorly maintained work environment for all public institutions in the legal sector.

To address these constraints, the government launched the Legal Sector Reform Programme (LSRP). While some achievements have been recorded, there have been some delays in implementation of the programme. First, there has been a problem emanating from weak implementation capacity of the key sector institutions, especially the Ministry of Justice and Constitutional Affairs (MJCA) and the judiciary. Second, the program was affected by weak coordina-

tion. Oversight and strategic leadership is entrusted to a Steering Committee, which is chaired by the Chief Justice while technical leadership and coordination falls under the deputy Attorney General. All key legal sector institutions are represented in these committees, but unfortunately, it has not been easy for the Committees to meet regularly. Third, the programme has been adversely affected by lack of planning units in the key legal sector institutions and inadequate staff for the facilitation unit. Fourth, the programme has suffered from inadequate resources.

However, in order to revamp the reform process, the Government and a number of development partners have agreed to cooperate in the “Quick Start Project. The areas identified for the project are: (i) New legal framework for legal sector institutions; (ii) Enhancing administrative capacity and division of work and supervision mechanism; (iii) Training needs assessment for the legal sector institutions; and (iv) District-based support to the judiciary.

The LSRP does not cover Zanzibar because the island has a distinct and separate legal system. Apart from sharing the Court of Appeal of the United Republic with Mainland Tanzania.

MADAGASCAR: Proposal for an ADF Grant to Finance the Project on Institutional Capacity Building for Good Governance (PRIBG).

Approval Date: 08/12/2004

Grant Amount: UA 5,860,000

The PRIBG will attain all of its objectives by focusing on interventions on the following three components:

- (i) support to the enhancement of transparency and accountability in public finance management;
- (ii) support to the modernisation and securing of the legal and judicial environment; and
- (iii) project management.

Since 1996, the Madagascar government and development partners have instituted certain measures that have brought about positive progress in the justice department. The creation of a national school for the training of magistrates and court clerks, the recruitment and training of numerous magistrates and court personnel, text compilations and distribution of the preliminary reforms in business regulations and the publication of a new constitution are all inspired from the above-mentioned collaboration. However, despite these reforms, the justice department is still marred by numerous constraints in need to more grass-roots reforms that timely interventions have not been able to alleviate. This concerns especially delays in the legal system, the difficulties encountered by the less-fortunate to access legal assistance, lack of cooperation between the different services, corruption and impunity of legal professionals and delays in the execution systems introduced in the constitution.

The private sector is very wary of the justice system in Madagascar, due to many cases that have seen the unfair condemnation of business people to pay huge fines. This situation discourages private investment, employment and therefore encourages corruption.

The high cost of legal services is one of the major problems of the legal department. Also the difficulties encountered by the less fortunate members of society such as women to access legal services. Indeed in civil and commercial matters, the defendant has to pay all legal costs in advance by depositing an amount to the court clerk in order to have his case examined. This amount does not cover other costs that have to be provided for legal assistance. In criminal cases, for a case to be examined and heard and acquitted, the defendant must pay all legal costs as well as lawyers fees. A provision for legal aid does exist but it is rarely applied in favour of those in favour of those that need it most.

To find sustainable solutions to these present constraints, the government and its development partners have decided to address the shortcomings in the justice department first in its bid to alleviate poverty and promote the rule of law. That is why the Ministry of Justice has just launched a national strategy for the modernisation of the department in order to boost public confidence in the system and to make it more accessible, more human and more efficient. This is a direct result of the participatory approach unifying all players in the judiciary, private sector representatives, civil society and the civil service. Resolutions and recommendations proposed were given due consideration in drawing up a action plan of the Ministry of Justice for a period covering 2003-2008. The main lines of this document call for a vibrant, fair Justice Department respectful of the basic human rights and investment-friendly. It focused on the

following priorities:

- (i) reforming the legal system and judicial infrastructure as well as the prison system;
- (ii) strengthening anti-corruption mechanisms;
- (iii) expediting case management;
- (iv) improving the legal framework particularly the economic aspect; and
- (v) humanizing prison conditions.

Conscious of the need to put in place conditions favourable to the development of the private sector, in other words, likely to attract and retain investment capital that would stimulate economic growth as well as reduce poverty, the government decided

to modernize the business environment in Madagascar.

In light of the above, the main challenge to Madagascar's drive for promoting transparency and probity in the management of public funds as well as modernizing and building a robust and secure legal system, will be to uplift national capacity to meet the demands of the project. Within this context, the main aim of PRIBG is to provide adequate and focused support in the areas of training, equipment and technical assistance with a view of strengthening national capacity as well as facilitating the implementation of national goals in such crucial areas as good governance and poverty reduction.

ADB TRIBUNAL PROCEEDINGS IN 2004 – A REVIEW

BY DOTSE TSIKATA¹

In 1996 a Panel of three eminent persons, established by the Board of Governors of the African Development Bank to undertake a study on governance of the Bank and related issues, recommended that an Administrative Tribunal be set up with final and binding authority to adjudicate disputes that may arise between staff members and the Bank. As a result of that study the Administrative Tribunal of the African Development Bank came into existence on 1 January 1998 following the approval of its Statute by the Bank's Board of Directors on 16 July 1997. The Tribunal was established to serve as the forum for final determination of disputes between staff members and the Bank specifically in respect of claims arising from staff employment contracts.

In establishing its own Tribunal, the Bank has followed a well-established trend among international organizations dating back to the League of Nations, followed by the International Labour Organisation, the United Nations, the World Bank, and the International Monetary Fund among others. The decisions of these Tribunals are published and constitute the source material of a body of law identified as international administrative law.

As with other organizations the Tribunal is the ultimate recourse mechanism for staff when all other mandatory channels have

been exhausted. The relevant channels are the administrative review of the contested decision of the Bank by the Vice-President Corporate Management and the filing of an appeal before the Staff Appeals Committee, whose mandate is to hear appeals and to make recommendations to the President of the Bank for a final decision. If the appellant is dissatisfied with the outcome, that person may then file an application before the Tribunal. In the case of disciplinary measures, however, there is no appeal to the Staff Appeals Committee. A staff member who wishes to contest a disciplinary measure may proceed directly to the Administrative Tribunal.

The Tribunal is constituted by six judges appointed from member countries of the Bank. No two judges may be appointed from a single member country. The requirements for appointment are high moral character, and qualification for high judicial office or recognised competence as a juriconsult. All judges appointed have either held high judicial office nationally or are distinguished academic lawyers with international recognition in their field. Some have also served on other administrative tribunals or similar bodies.

Since its establishment the ADB Tribunal has held on average two sessions a year, has received forty-one applications

¹⁾ *Acting Division Manager, Administrative and Finance Division*



and has given judgment in thirty-two cases. The year 2004 was a relatively quiet one for the Tribunal. Final judgment was given in three cases: *Barry v African Development Bank*; *Komlan v African Development Bank*; and *Oloni v African Development Bank*. In a fourth case, *Fadika v African Development Bank*, the Tribunal denied the Bank's preliminary motion to dismiss the Application. The Bank had contended that the Application was filed out of time and therefore inadmissible. While the *Fadika* ruling raises a number of interesting issues of interpretation of the Bank's Staff Rules, it will not be further discussed here as the proceedings are continuing. The main issues on which the Tribunal gave its final decisions were (i) the locus standi of applicants, (ii) jurisdiction over proceedings of the Board of Governors, and (iii) the requirements for valid termination of an appointment for unsatisfactory performance.

Barry v. African Development Bank

The Applicant in the Barry case was a former staff member of the Bank whose appointment had been terminated in 1995, and who had since brought a number of different claims before various fora including a previous unsuccessful claim before the Administrative Tribunal. The subject of this particular Application was the Applicant's unsuccessful attempt to be elected an Executive Director of the Bank during the 2001 Annual Meetings of the Board of Governors of the Bank in Valencia, Spain. The Applicant, a Guinean national, had been nominated by the Government of Guinea for the position of Executive Director. He complained that a document had been circulated by the Secretary-General of the Bank at the Annual Meeting at which the election of Executive Directors was to be held. The said document contained factual information regarding the Applicant's career at the Bank and its eventual termination. The Applicant contended that the circulation of this document unlawfully deprived him of the right to be elected Executive Director. He therefore claimed compensation in an amount of three years of salary and allowances of an Executive Director as well as an additional three years salary in damages.

The Bank filed a motion to dismiss the Application arguing that the Tribunal had no jurisdiction over proceedings of the Board of Governors, that no administrative decision had been taken by the Bank concerning the Applicant's employment that could be contested before the Tribunal, and that the circulation of a document could not be considered an administrative

decision which the Applicant could contest. Furthermore the Respondent argued that the decision to withdraw Mr. Barry's candidacy was a decision taken by the Government of Guinea, his country, which had initially made the nomination and therefore did not involve an administrative decision by the Bank. Counsel for the Applicant in response contended that the Tribunal had jurisdiction since the contents of the "defamatory memorandum" related to the Applicant's career as a staff member.

The Tribunal granted the Respondent's motion to dismiss on the basis that since the matter complained of did not concern the Applicant in his capacity as a staff member or former staff member, it did not fall within the competence of the Tribunal as set out in the Tribunal's Statute. The Applicant lacked *locus standi* in respect of the subject matter of his complaint. The Tribunal also observed that the circulation of the document was an exercise of the President's duty to inform Governors about the candidates for election in light of the stated standards of conduct required of Executive Directors in the Code of Conduct of Executive directors and in light of a Resolution of the Board of Governors imposing this duty on the President. The Tribunal further upheld the contention that proceedings of the Board of Governors and Directors are

not subject to its review, citing Staff Rule 103.01 (c) (ii) which excludes such proceedings from the scope of the Staff Appeals Committee's competence. For these reasons the Application was dismissed.

Komlan v African Development Bank; Oloni v African Development Bank

These two applications arose from the same series of events. In 1998, following the disappearance of a large quantity of paper from the Bank's warehouse in a suburb of Abidjan, three staff members, who had responsibilities with regard to the storage of paper and its transportation, were suspended. The three eventually faced disciplinary charges related to the incident. The disciplinary committee concluded that the evidence available against the individuals did not support the charges. Shortly thereafter, the employment of the three persons was terminated for unsatisfactory performance. Terminal benefits were paid to them as prescribed in the Staff Regulations for cases of termination for unsatisfactory performance. The three persons then filed applications before the Tribunal contesting their terminations as wrongful and claiming substantial amounts in damages.² There were a number of procedural disputes in these cases which resulted in their coming before the Tribunal at an early stage and being remitted to the laid down administrative

²⁾ *Komlan's claim in Franc CFA is stated in the judgment as follows : compensation for the absence of motive for the dismissal: 35,850,888; compensation for unfounded accusation of theft: 23,850,880; damages for moral prejudice 35,850,888; damages for financial prejudice: 23,900,592; leave for 1998: 796,686; leave 1999: 613,885; reimbursement of legal fees: 1,150,000. Oloni's claim was similar. As the Tribunal observed in both cases no specific justification was provided for these calculations.*

review processes as the Applicants had not then satisfied the requirement to exhaust available remedies. The cases therefore came before the Tribunal for final determination well after the original termination decisions being contested. In its judgment delivered on 16 December 2004, the Tribunal found that the Bank had not at the time of the termination set up the administrative machinery prescribed under the new staff regulations to deal with cases of termination for unsatisfactory performance. However, the Tribunal recognized that there were documented serious shortcomings in the performance of the two staff members that constituted a basis for the Bank's determination that their performance was unsatisfactory such as to warrant the termination of their appointments. The Tribunal concluded that while there was a basis for the terminations, the Bank had committed certain procedural lapses for which the Applicants should be compensated. These lapses included an element of retroactivity in the termination of their appointments as the effective date was stated as the date on which the suspension of the staff had ended. Accordingly, each Applicant was awarded six months salary in compensation and the sum of \$1000 to partially cover their legal costs. In coming to its conclusion in these two cases, the Tribunal distinguished the facts from the previous case of Ngueneba, the

third of the staff whose appointments had been terminated for unsatisfactory performance following the paper theft. In *Ngueneba v African Development Bank* decided in 2003, the Tribunal had found, in addition to procedural lapses, insufficient evidence of the shortcomings in performance alleged to have been the basis of the termination and therefore ordered the maximum compensation of three years salary to be paid to the Applicant.

Conclusion

The Administrative Tribunal anticipated by the report of the committee of eminent persons is fully functional and has become an important component of the internal governance structure of the Bank. The Tribunal's decisions provide guidance to staff as well as to management as to their respective rights and obligations under the terms of the employment contract within the framework of the governing legal instruments of the African Development Bank. The decisions of the Administrative Tribunal are published on the Bank's intranet, accessible to staff. A bound volume of the earlier judgments has also been published. It can be expected that over time the Tribunal's jurisprudence will gain wider recognition among students and practitioners of international administrative law.

THE AFRICAN DEVELOPMENT BANK'S NEW NON-SOVEREIGN GUARANTEED LOANS PROGRAMME

BY TITUS EDJUA¹

In 2001, the Bank, at the request of the Board of Directors, created a Task Force to review the Bank's lending operations in Regional Member Middle-Income Countries (MICs). The Task Force was specifically mandated to reflect on the constraints, challenges and prospects for Bank operations in regional MICs and to make recommendations on the appropriate and most effective strategies to boost those operations. The Task Force presented its findings² to the Board of Directors in September 2002. Those findings recommended, among other measures, that the Bank should consider providing loans, on a case-by-case basis, to commercially oriented state-owned enterprises in MICs, without the necessity of a sovereign guarantee. The Board of Directors welcomed the proposal and directed Management to prepare guidelines for its implementation. The Guidelines were prepared and eventually approved by the Board of Directors in October 2003³. In August 2004, the Bank provided its first non-sovereign guaranteed loan under the policy.⁴

This article examines the legal implications of the Non-Sovereign Guaranteed Loans Programme (NSGL) for the Bank. It starts with a brief exposé on the history and evolu-

tion of the Bank's practice and requirements (statutory or otherwise) relating to sovereign guarantees in MICs. The second part of the article addresses the key legal issues that were considered during the discussions leading up to the adoption of the operational guidelines for the NSGL programme.

I. The Bank's Lending Operations in MIC countries.

a. *The concept of the MIC*

The Credit Policy of the Bank classifies regional member countries into three categories. Category A are ADF-only countries that are eligible only for concessional ADF resources; Category B are "Blend" countries and are eligible for both ADF and ADB resources; and Category C are ADB-only countries that are eligible only for ADB resources. For the purpose of the NSGL programme, MICs are those considered sufficiently creditworthy to be eligible for non-concessional ADB resources. These comprise Categories B and C countries, which have relatively more developed economies and a higher per capita income than the lower income Category

¹) *Legal Consultant, African Development Bank*

²) *Proposal for enhancing the Bank operations in Middle-income countries - reference : ADB/BD/WP/2002/47.*

³) *Operational Guidelines for Non-Sovereign Guaranteed Loans.*

⁴) *A USD 50 million loan to the International Development Corporation (IDC) in South Africa.*



A countries. This paper deals primarily with MICs even if most of what will be discussed is of general application.

b. *Sovereign Guarantees for public sector loan transactions: a statutory requirement?*

When the Bank lends directly to a member state, the loan becomes a direct obligation of that member state, and for that reason, no guarantee is required. The Bank also provides loans through its private sector window for which a sovereign guarantee is not a requirement. But until the advent of the NSGL programme, whenever the Bank made a loan to a *Public-Sector Enterprise*, a sovereign guarantee was always a requirement, with the exception of *Enclave Projects*.⁵

The statutory justification for this requirement can be found in Article 18(3)(b) of the Bank Agreement. It provides that the Bank,
“Where the recipient is not a member,

may, when it deems it advisable, require that the member in whose territory the project concerned is to be carried out, or a public agency or institution of that member acceptable to the Bank, guarantee the repayment of the principal and the payment of interest and other charges on the loan”.

The use of the word “may” implies a choice. Therefore, by employing the phrase, “*may, when it deems it advisable*”, the draftsman seemed content to leave the matter to the discretion of the Bank’s management. Yet, despite this discretionary element, the Bank, until the advent of the NSGL policy, treated sovereign guarantees for all loans to public sector enterprises as mandatory. This begs the question as to why this was the case. First, it could be argued that the Bank always “deemed it advisable” to obtain a sovereign guarantee for any loans it made to a state-owned enterprise. Second, it is not far-fetched to argue that the practice of treating sovereign guarantees as de rigueur might have been influenced by the practice of some sister Multilateral Development Banks (MDBs), notably, the International Bank for Reconstruction and Development (IBRD), whose Articles of Agreement⁶ expressly calls for a sovereign guarantee for such loans.

Finally, there is also evidence to sug-

⁵ *The spirit of the Bank Policy Guidelines on Enclave Projects is to make resources available to viable public-sector projects in ADF-only countries.*

gest that the Bank Group Industrial Sector Policy Guidelines, adopted by the Boards of Directors in 1986 (the “Industrial Guidelines”) could have helped sustain the practice of treating sovereign guarantees for loans to public-sector enterprises as mandatory. The Industrial Guidelines considered it prudent to obtain government guarantees for loans to state-owned entities “given the fact that all loans granted to institutions in the member country have to receive prior government approval.”⁷ This assertion, though, is predicated upon a flawed interpretation of the relevant statutory provision. While Article 17(1)(b) of the Bank Agreement requires a member’s non-objection to all Bank operations in its territory, that does not in anyway equate to a requirement for a guarantee. It should not go unnoticed that pursuant to Article 17(1)(b), the Bank obtains this non-objection, sometimes in the form of a comfort or government assurance letter, of member states for its private sector transactions, without ever seeking a sovereign guarantee.

c. *The Shift towards the NSGL*

In terms of its lending operations, the governments of MIC have been an important segment of the Bank’s traditional client base. But in the past decade, the Bank has experienced an uneven and high concentration of its portfolio, with the likes of Tunisia and Morocco busy on the borrowing front while others such as Algeria, Mauritius, South Africa and Egypt have been involved with little or no borrowing at all from the Bank. This relative inactivity in some of its MICs provoked the Bank into some self-examination: if it was not able to reach an important segment of its member states, then, *a fortiori*, it was falling short on its mandate. In exploring ways of enhancing its intervention in MICs, the Bank first of all had to identify the important constraints and challenges it faced vis-à-vis MICs. The notable ones are briefly discussed immediately below.

Firstly, it had become obvious that besides the Bank, MICs now have access to a wide menu of financing options. In addition to being able to obtain finance from other MDBs and from various bilateral sources, some MICs can raise finance rather easily from their domestic as well as the international capital markets.

⁶ Article III, Section 4(i) of the Articles of Agreement of the IBRD provides that the IBRD may make loans when the member in whose territories the project is located is not itself the borrower, on the condition that “the member or the central bank or some comparable agency of the member which is acceptable to the Bank, fully guarantees the repayment of the principal and the payment of interest and other charges on the loan.”

⁷ See paragraph 2.2.11.1 of the Industrial Sector Guidelines.

Secondly, the Bank recognised the fact that MICs were also changing their approach to borrowing to adapt it to their changing needs and preferences. Accordingly, many MICs have since put into place prudent borrowing policies and proactive debt management strategies. One consequence of this is that some MIC governments no longer guarantee the borrowings of state-owned enterprises. In the context of their new debt management strategies, this is perfectly understandable and justifiable. Just as loans borrowed directly by the central government are paid from the government's central budget, loans guaranteed by the central government are also voluntarily assumed contingent liabilities for the government's central budget. Therefore, guaranteed liabilities from other public entities (owned by central government) represent an implicit contingent liability in the government's budget.

Thirdly, the Bank identified its own internal constraints, including the range and competitiveness of its products, and the negative customer perception about its loan processes and conditionalities as being complicated and rigid. It was in response to these challenges and constraints that the Bank set in motion the review process that culminated in the adoption of the NSGL programme.

d. Conditions of eligibility for NSGL

The Operational Guidelines defines Non-Sovereign Guaranteed Lending

Operations to Public-Sector Enterprises (Public-Sector NSGLs) as the provision of loans, lines of credit, agency lines or guarantees to public enterprises that meet the eligibility criteria of the guidelines, without the requirement of a sovereign guarantee by the host government.

In terms of country eligibility, the NSGL programme applies only to MICs. The Programme does not specifically target any particular sectors. Therefore, regardless of the sector, any commercially oriented state-owned enterprise may be eligible for financing, provided however that the Bank's financing will benefit the host economy and that the enterprise concerned satisfies certain "corporate" tests. Firstly, it must be majority (i.e. more than 50%) owned by the state. Secondly, it must be managed autonomously from the state and must be financially viable. Thirdly, it must be duly incorporated under the laws of the member state and must enjoy a distinct legal personality. It must also not enjoy any sovereign immunities or if it does, it must be prepared to waive them.

II. Legal Issues

Having discussed the background and some of the salient aspects of the NSGL Programme, its legal implications on the Bank will now be explored. This will involve a discussion of (i) concerns relating to the question of the governing law and the related question of dispute resolution, (ii) the impact, if any, on the Bank's preferred creditor status and (iii) the Bank's Sanction Policy.

a. *The Governing Law: International or Municipal Law*

Since loans to member states are governed by international law, a question must arise as to which law should govern NSGL transactions provided by the Bank to state-owned entities. Should the transaction be governed by international law because the entity is state-owned or should domestic law apply to it because of the lack of an international personality of the state-owned entity? This has been the subject of an interesting legal debate, a detailed discussion of which is not warranted here. Suffice to say that, in his seminal paper, Aron Broches, a former General Counsel and Vice President of the IBRD, posited the view at the time that (i) loan agreements of the IBRD with member states were governed by international law, and (ii) loan agreements with state-owned entities were not governed by international law.⁸ In the context of the NSGL programme, such a position would lead to the conclusion that disputes arising from such agreements will not be resolved by international arbitration applying the principles of international law, with the added consequence that the Bank may encounter

difficulty in enforcing its security under the NSGL. This was clearly a concern of the Bank during the discussions leading to the adoption of the policy on NSGL. But such concerns were easily allayed thanks to the evolution of the law since Broches's article was published in 1959. Today, the view that international law can be selected as the governing law in contracts involving one or more parties that are not subjects of international law is considered trite law.⁹ Therefore, the question as to whether domestic or international law applies to NSGL is matter for negotiations by the parties, or what contract law scholars refer to as "party autonomy". There is no automatic exclusion of one or the other just because the Bank is dealing with a state-owned entity, and not directly with a member state. This position is lent credence by Article 42 of the International Convention on the Settlement of Investment Disputes (ICSID) which provides that any "international person in its relations with domestic law persons [has] the authority to contract under [international law]."¹⁰ Article 33 of the UNCITRAL Arbitration Rules further strengthens the current position by providing that "...the arbitral tribunal shall apply the

⁸⁾ See Aron Broches, *International Legal Aspects of the Operations of the World Bank*, 98 *Recueil des Course* 297 (1959)

⁹⁾ See John W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and other Multilateral Development Banks*, *The American Journal of International Law*, 214 (1996), at 228. See also Kimmo Mettälä, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 *International Law*, 219 (1986), at 240-241.

¹⁰⁾ It is now commonplace for oil concession contracts between states and private parties to include provisions designating international law as the governing law, which is further evidence of the growing emphasis on party autonomy in the selection of governing law.

law designated by the parties as applicable to the substance of the dispute.” In this respect, it is significant to note that the European Bank for Reconstruction and Development (EBRD) specifically provides in its loan agreements that public international law will govern, irrespective of whether the borrower is a member state or a state-owned entity. While this is a notable deviation from the traditional rule applicable to multilateral development banks, it should come as no surprise, given that the extant and ever growing body of public international law is now sufficiently extensive to serve as the governing law for MDB public sector loans,¹¹ regardless of whether they are sovereign guaranteed. Regarding dispute resolution, the current practice of the Bank for private sector transactions, is for agreements to be drafted to specify that disputes shall be resolved by international arbitration. If this can be done in the context of private sector operations, there is no reason why it can't be done for NSGLs.

b. The Bank's Preferred Creditor Status

Given that it is central to the Bank's own

very existence, it is important to gauge how NSGLs impact on the preferred creditor status (PCS) of the Bank. The preferred creditor status of the Bank (and MDBs) is fundamentally a special status granted by member states which place priority on loan repayments to MDBs. Thanks to this preferred creditor status, loans by MDBs are excluded from debt rescheduling. The incentives for such status include, inter alia, the willingness of MDBs to provide new loans when other lenders will not, the lower cost of such financing, longer maturity and the threat of sanctions. A thorough examination of the provisions in the Bank Agreement that underlie the PCS¹² do not reveal any dangers to the PCS on account of NSGLs. The PCS is granted to the Bank by its member states; it is not dependent on the nature or status of the borrower, guarantor or parties to the transaction.¹³

Although the provision of a NSGL shall not necessarily deprive the Bank of its PCS, the Bank has nevertheless envisaged the need to take additional steps to reiterate its PCS in the context of such transactions. Hence, for each NSGL to

¹¹ Sources of public international law are considered to include (i) relevant and binding treaty obligations; (ii) the international conventions and treaties (whether or not binding directly as such on the parties) generally recognized as having codified or ripened into binding rules of customary law applicable to states and international financial institutions, as appropriate; (iii) other forms of international custom, including the practice of states and international financial institutions of such generality, consistency and duration as to create legal obligations; and (iv) applicable general principles of law. See generally Section 8.04 of the EBRD's Standard Terms and Conditions applicable to public sector loans.

¹² See for example, articles 26, 27 and 54 of the Bank Agreement.

¹³ It is instructive to note that the International Finance Corporation (IFC), the Inter-American Development Bank (IADB) as well as the EBRD all have preferred creditor status for their non-government guaranteed private sector loans.

a publicly-owned enterprise, the Bank shall require support from the host government in the form of a government assurance or comfort letter from the member state in whose territory it has provided NSGLs. The reasons for this are two-fold: first, the Bank believes that the role of governments in the financing of public-sector projects remains crucial. Therefore, while the Bank bears the commercial risks, the government should be expected to provide some general comfort levels regarding any likely political risks. Secondly, through the comfort letter, the host government is able to re-confirm the Bank's preferred creditor status prior to the execution of the transaction as opposed to leaving it open for discussions at a later date following an inconvertibility event.

It must be stressed therefore that requesting a comfort letter from the host government is good practice on the part of the Bank as it impresses upon the host government that while it has no financial obligations under the NSGLs, it nevertheless is expected to comply with its general obligations under Bank Agreement. In other words, while the comfort letter is only meant to re-confirm the Bank's preferred creditor status and not transfer the commercial risks of the borrowing state-owned enterprise to the government, were the government to renege on its covenants under the comfort letter, such as not to take any action which would jeopardize the transaction, it may be faced with an Article 44 suspension, given the broad terms of that

Article. This calls for a brief consideration of the impact of the NSGL programme on the Sanctions Policy of the Bank.

c. *NSGL and the Bank's Sanctions Policy*

The Bank Group's Sanctions Policy on Loan Arrears Recovery, adopted by the Boards of Directors in March 1997 (the "Sanctions Policy") lays down the rules applicable to Borrowers and/or Guarantors who fail to pay the principal and capital costs on loan granted by the Bank. This Policy only applies to defaults by member states on their direct loans, and does not cover other types of defaults. Hence, a default by a state-owned enterprise on its non-sovereign guaranteed loan would not trigger sanctions against the member state. Conversely, any defaults by the member state on its own loans or guarantees will not trigger the cross default provisions of the Sanctions Policy against the non-defaulting state-owned enterprise. The reason for this is obvious: the state-owned enterprise has a separate juridical personality from the member state.

However, there are situations in which the Sanctions Policy could conceivably be applied to NSGLs. A typical example is the situation where the default under a NSGL has been caused by foreign currency restrictions or moratoria, in contravention of member state's obligations under Article 54 of the Bank Agreement. In such a case, it may reasonably be argued that the member state should be subject to sanctions under the Sanctions Policy, in addition to sanctions under Ar-

title 44 of the Bank Agreement, which authorizes the Bank to suspend a member for breach of any of its obligations to the Bank.¹⁴

d. *Legal processing and documentation*

In embracing NSGLs, the Bank has created a new category of borrower, which is effectively a hybrid between the public sector and private sector. And this poses a different challenge in terms of how NSGLs should be structured legally. Given the corporate tests that any state-owned enterprise must meet in order to be eligible for a NSGL and given the fact that the Bank has to bear all the commercial risks, the best way to deal with such transactions is to subject them to the kind of due diligence and risk analysis as is the case with private sector operations. To this end, the Bank considers as pertinent factors such as capacity, capital structure (shareholding and existence of callable capital backed by a government or other entity with suitable financial standing), financial autonomy and standing, rating, type of operations (whether commercially operated) and track record. In terms of documentation, the Bank has used the LMA standard, which allows for more rigorous monitoring through regular reporting and a vast array of representations and warranties, and financial and other covenants. By approaching it like a private sector transaction, the Bank is better

able to identify, analyse and mitigate any risks involved in the transaction.

Conclusion

The adoption of the Policy on NSGLs is welcome, as it orientates the Bank in the right direction. The Bank should continue to strive to reach out to new clients, especially in middle-income countries. From the foregoing discussion, it is clear that the implications, legal and otherwise, of the Bank's NSGL programme have not been, and are not expected to be, far-reaching. The legal points or potential problems that merited consideration, while pertinent, were not insuperable. In terms of the legal complexity, the challenge is no more than what the Bank is faced with or used to in the context of its private sector loans. The Bank is therefore competent to deal with that, as it has proven in the transactions that it has already successfully structured under the nascent NSGL programme. When simply construed in accordance with its language, the Bank Agreement is not unduly restrictive on the issue of sovereign guarantees. That the Bank Agreement might have been subjected to a strained construction in the past in order to reduce its coverage on the subject may have been a sign of the times. That the Bank is prepared to consider NSGLs is equally a sign of the times and must be considered as evidence that the Bank is slowly but steadily becoming conscious of its relevance to its member countries.

¹⁴ This view has been endorsed by the General Counsel in Legal Note in connection with the Line of Credit to the National Bank of Egypt. Although state-owned, the loan was guaranteed by the Central Bank, and not the Government of Egypt. However, a comfort letter from the Government of Egypt was a condition precedent to the execution of the loan agreement.

THE RWANDAN GENOCIDE: TEN YEARS LATER

This paper derives from a presentation made by Mr. Adesegun A. Akin-Olugbade, General Counsel and Director of Legal Services of the African Development Bank Group, on the occasion of the International Day of Reflection on the 1994 tragic mass killings in Rwanda.

I. Introduction

The paper discusses the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. The author provides an insightful background and analysis of the Convention, the performance and setup of the International Criminal Tribunal for Rwanda and the International Criminal Court, before making his conclusions.

The Rwandan Genocide was certainly not the first mass killing in recorded history, but it is one of the most grotesque, odious and disastrous events on the African continent in recent years. The British magazine “The Economist” in April 2004 described it as the “the purest genocide since 1945”. But alas, there was nothing pure or clean about the human slaughter that began on April 7, 1994.

The purpose of this presentation, however, is not to revisit that bloody history, nor the politics or the doctrinal agenda of the perpetrators. I propose to simply limit this short presentation to a discussion of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

II. Background

First, a brief background on the Convention itself is in order. The issue of genocide was raised and addressed at the very first session of the General Assembly of the United Nations in 1946. The resulting resolution described “genocide” as a denial of the right of existence of entire human groups contrary to moral law and the aims of the United Nations, and it requested the Economic and Social Council to submit a draft convention on the crime of genocide to the next session of the General Assembly. Two years later, on December 9, 1948, the General Assembly, at its third session, adopted the Convention on the Prevention and Punishment of the Crime of Genocide and proposed it for signature and ratification by member states.

It cannot be ignored that this important resolution was driven by the prevailing context: World War II had just ended, and in its aftermath the Allies established the Nuremberg tribunal to try the Nazis who were charged, among other offenses, with persecution on racial grounds.

III. Analysis of the Convention

The Convention is contained in 19 articles. However the substantive provisions are found in Articles 1 through Article 6. The 13 remaining articles deal essentially with purely procedural and operational issues of implementation.

The analysis that follows focuses on the

substantive provisions. These provisions are written in plain language, devoid of the somewhat legalistic or esoteric jargon found in many legal documents. The articles are clear and concise.

IV. In Article 1 of the Convention the Parties 'Confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.

This provision is straightforward. It should be noted that this was written in 1949 and therefore the Contracting Parties were the independent States that had signed the United Nations Charter. There were only two African members: Ethiopia and Liberia

V. Article 2 of the Convention defines the genocide in unequivocal language as

'Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

This Article is generally seen as the heart of the Convention. It describes two elements: (a) a mental element: "the intent to de-

stroy",

- (b) and the physical element described in the five acts mentioned above.

Some legal experts have criticized this aspect of the Convention, contending that it focuses on the physical destruction of a group of people. They maintain that there have been many instances in which the group has physically survived but its cultural distinctiveness has been destroyed. They cite as examples the destruction of Tibetan culture by the Chinese, or that of indigenous tribes in some countries in South America. In their view the destruction of cultural distinctiveness also constitutes an act of genocide.

VI. Having defined 'genocide' Article 3 of the Convention sets forth certain acts that are punishable as crimes. Those acts are:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

The broad language of this Article is intended to deter and punish anyone who acts directly or indirectly in perpetrating or inflicting or causing any thing that would, within the definition given earlier, constitute genocide. This provision has the practical effect of inculcating not only the henchman who directly and physically inflicts the injury but also those who by their words stir others to inflict such injuries. It is a proper provision since history shows

the most effective perpetrators have been those who by their words arouse in others vile sentiments of bigotry, racism, and hatred.

VII. Article 4 of the Convention makes genocide a punishable offense irrespective of rank, political or societal position. It provides that: 'Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

VIII. The Convention provides that nobody is beyond or exempt from punishment. In the case of Rwanda, we know that former ministers were brought to trial; even a clergyman was indicted.

IX. It is not enough for international conventions to be signed by the parties. Each signatory needs to ratify the convention through its domestic legislature to give it effect, that is to incorporate them in their internal laws. Hence, under Article 5 'the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.' It is estimated that 70 nations have made provisions for the punishment of genocide in their domestic criminal law.

X. Article 6

Allows that 'persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

This provision in a way establishes a claim for jurisdiction by domestic courts of the country in which the act was committed, irrespective of the nationality or status of the accused. In the case of Rwanda, an ad hoc tribunal was set up by a UN resolution. In addition other tribunals have tried persons charged with genocide. Since 2003, a permanent International Criminal Court has been created.

XI. Article 7 seeks to pre-empt any claims that might politicize a charge of genocide. It states that Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Again this provision reflects the pervasive intent of the Convention to close every possible loophole that may be availed of by people charged with any of the acts defined in Article 3. As some of you may be aware, under the domestic law of many countries, people prosecuted for what may be deemed politically motivated reasons or for so called political

crimes may not be extradited to a requesting country, which usually is their country of origin.

As an indication of the cooperation shown by African countries, it is estimated that the accused persons in the custody of the International tribunal for Rwanda have been arrested and transferred from more than 15 countries.

The International Criminal Tribunal For Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was set up by the Security Council Resolution 955 of 8 November 1994 for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January and 31 December 1994. The Tribunal may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighboring states during the same period.

The ICTR is an ad hoc tribunal like the one set up for the Former Yugoslavia and its expenses are borne by the UN.

It is located in Arusha in Tanzania, and its jurisdiction is concurrent with national courts. The Tribunal may request national courts to defer to its competence.

The organs of the ICTR include three trial chambers and an appeals chamber, and a prosecutor.

The prosecutor can initiate investigations ex officio or on basis of information from any source, including governments, UN organs, IGOs or NGOs.

There is no death penalty, the maximum penalty being life imprisonment.

Performance of the ICC

This presentation would be incomplete without a passing mention of the newly created International Criminal Court (ICC).

The Statute of the ICC was adopted on 17 July 1998 at a diplomatic conference in Rome. However entry into force of this instrument only occurred on June 30, 2002 upon the 60th ratification. The Statute provides for the establishment of a permanent court with jurisdiction over genocide, crimes against humanity and war crimes.

The ICC can only investigate crimes committed after 1 July 2002. Unlike the ad hoc tribunals for Rwanda or the former Yugoslavia, which have limited geographical scope, the ICC is global in its reach.

It is expected that the ICC, located in The Hague, will help to end the impunity enjoyed by those responsible for the most serious human rights crimes. It will also provide incentives and guidance for countries that want to prosecute such criminals in their own courts and it will offer permanent back up in cases where countries are unwilling or unable to try these criminal themselves because of violence, intimidation, or a lack of resources or political will.

Conclusion

Beyond any universal morale that the tragedy in Rwanda may have served, African countries must absorb the lessons of this genocide in order to avoid a repetition of the ultimate crime on the continent.

Weak institutions in many African countries have given rise to, and encourage a culture of impunity, especially under autocratic regimes determined to remain in power at any cost. This is the first time that senior officials have been called to account before an international court of law for massive violation of human rights in

Africa and one hopes that it sends a strong signal and deter all would be mass murderers, leaders or warlords and their doctrinaires who may not yet have taken notice of the universal resolve for the prosecution of all the crimes against humanity including genocide, fittingly qualified as the crime of crimes.