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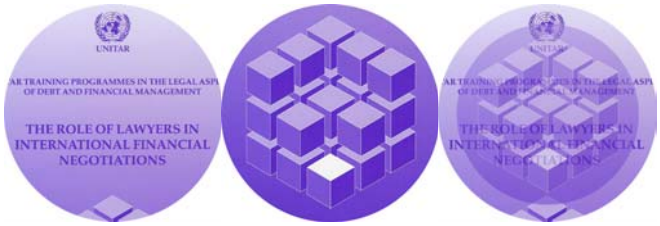
THE ROLE OF LAWYERS IN INTERNATIONAL FINANCIAL NEGOTIATIONS



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THE ROLE OF LAWYERS IN INTERNATIONAL FINANCIAL NEGOTIATIONS

Papers written following a UNITAR Regional Workshop on
Legal Aspects and Public Debt Negotiations for Government Officials
and Central Bankers from Eastern and Southern Africa
(Luanda – Angola, 24 to 28 March 2003)

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PREFACE

This publication has been developed following a UNITAR-conducted regional workshop entitled '*Legal Aspects and Public Debt Negotiations*' which was held in Luanda, Angola in March 2003 and which invited 26 senior government officials and debt managers from East and Southern African countries. UNITAR conducts periodic regional training events with its partners (in this case, the Macroeconomic and Financial Management Institute of Eastern and Southern Africa) with the aim of sensitization and skills-building on the one hand and information exchange and cross-fertilization of experiences on the other.

As part of UNITAR's training activities in the legal aspects of debt, financial management and negotiation, UNITAR has now developed a distinct *cluster* of training and skills-building in the field of '*International financial negotiations and the importance and centrality of the legal aspects and role of lawyers in the borrowing process'*. This cluster has evolved from our findings in member countries that the legal aspects in general and the role of the lawyer in particular has been neglected in the borrowing process and that this has in part led to the debt problems of many countries. Parallel to this, lawyers from developing countries are neither fully involved nor trained enough to contribute holistically in the loan negotiation and drafting processes. It is with this in mind that UNITAR has taken the lead in sensitization and skills building keeping lawyers and the legal aspects at the centre of its training and capacity building activities.

The three papers in this publication have been contributed by UNITAR's eminent experts and speakers including, *Professor Daniel Bradlow, Dr. Cyrus Rustomjee*, and *Dr. Aboubacar Fall*. I want to take this opportunity and thank them for their respective contributions to this publication and document series and for their constant support to our training activities.

For more information on UNITAR's mandate and training programmes in the legal aspects of debt and financial management, I invite you to visit our website at: www.unitar.org/dfm. Besides other materials, a complete set of documents from this series is available on our website.

I hope that this document is useful as well as challenging to the readers.

Marcel A. Boisard
Assistant Secretary-General of the United Nations
Executive Director of UNITAR

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Chapter 1

THE CHANGING CONTEXT FOR NEGOTIATIONS WITH INTERNATIONAL FINANCIAL INSTITUTIONS AND HOW AFRICAN COUNTRIES CAN RESPOND TO IT[1]

by Daniel D. Bradlow[2]

Introduction

Developing countries engage in two types of negotiations with international financial institutions like the World Bank, the International Monetary Fund and the African Development Bank. First, they negotiate the terms and conditions of specific financial transactions with these institutions. Second, they are involved in ongoing discussions about the economic and development policies that the countries are planning to adopt or already have adopted. In both cases, successful negotiation between borrower countries and the international financial institutions (IFIs) require many things. They require the borrower countries to have a clear view of their own goals and objectives in each particular transaction or interaction with the IFIs, to understand the structure and function of these institutions, to know the structure and documentation of transactions with them, and to have a skilled and knowledgeable multidisciplinary team of negotiators. In addition, the developing country negotiators need to understand how the broader context in which these negotiations take place can help or hinder their bargaining position in their discussions with the IFIs.

The challenge is that the context in which these negotiation take place are changing. More demands are being placed on both the developing country negotiators and the IFIs in these negotiations. They are being required, inter alia, to be more transparent and accountable, allow for more public participation in the negotiations and in the design and implementation of the projects or policy programs they are discussing, and to pay more attention to the social and environmental impacts of their proposed operations. The result is that the context within which negotiations take place is becoming more fluid, complicated and less predictable. The risks that the negotiators could become embroiled in controversy and that their operations could ultimately fail to achieve their objectives are growing. On the other hand, if carefully managed risks and complexity create opportunities for creative negotiators from developing countries.

This paper seeks to help developing country government officials understand the changing context for their negotiation with the IFIs and to maximize their bargaining

[1] This article is based on a talk that the author gave to the Board of Director of MEFMI in Harare, Zimbabwe in March 2001.

[2] Daniel D. Bradlow is a Senior Special Fellow of UNITAR and Professor of Law and Director of International Legal Studies Programme at the American University, Washington College of Law, in Washington, DC, USA.

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options in this new negotiating environment. In order to do this the paper is divided into four sections. The first section is a brief overview of how our perceptions of development have changed and the implications thereof. It is important to note that these changing perceptions of development affect both developing countries and the IFIs. This is followed by a discussion on globalization and its implications for the environment within which developing country-IFI negotiations take place. The third section focuses on the opportunities that the changing international situation creates for African states in their negotiations with the IFIs. The final section is a consideration of some institutional and management issues relevant to preparing for negotiations with IFIs.

I. Changing Perceptions of Development[3]

Twenty years ago, development was viewed as being primarily about economic growth. The focus, in terms of international financial and economic transactions, was on building infrastructure and stimulating economic growth. Development is now seen as a holistic process that integrates all aspects of economic, social, cultural and political life as well as the environment. Consequently, the focus of IFI operations has broadened to include such issues as poverty alleviation, empowerment, governance, equity, environment and culture, as well as the traditional economic issues.

According to the "old view", development consisted of transactions involving discrete projects, for example a dam, a road or a factory. The responsibility of the project contractor or financier was to plan and evaluate the project according to technical, financial and economic criteria and then to implement the project plan. All other issues, particularly social and environmental issues, were viewed as non-economic or political externalities, which were seen as the prerogative of the government or society in which the project was being constructed. The government or the society, acting through the political process, decided these questions and they were implicitly assumed as background factors in the negotiations relating to the financing of a specific project or program.

According to this perception of development there was no need for the project contractors or financiers to consult with other stakeholders, especially the people that were affected by the project. Their interests, after all, were addressed through the political process. The only consultations that the contractors and financiers would have to undertake would be with technical experts who could help them resolve the technical challenges that the project posed. These consultations add to the efficiency of the project, while consultations with non-technical stakeholders would merely slow down the work of the project sponsors. In this view of development, therefore, both parties could make decisions in a top-down fashion.

Accountability was also relatively well defined in this view of development. Project sponsors, contractors and financiers were only accountable to those who hired them and to their shareholders. In the case of the government, accountability for specific projects was limited to whatever remedies the national administrative and legal

[3] *See* Daniel D. Bradlow, "The World Commission On Dams' Contribution to the Broader Debate on Development Decision Making" 16 Am.U.Int'l. L. Rev. 1531-1572 (2001) for a more detailed discussion of the different conceptions of development discussed in this section.

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system allowed. Otherwise, governments were only accountable in periodic elections in which voters were more likely to judge them on their overall records rather than on the performance of one specific project.

The new approach, which sees development as a holistic process in which all aspects of development are integrally intertwined, views all development transactions including physical projects, programmes and policies as events in an ongoing process of social, economic and environmental transformation. This means that for all parties to perform their function in regard to a particular project, they need to fully understand both the individual transaction and how it relates to the development process and its evolution over time. Consequently, all project participants, including contractors and financiers, need to understand and assess the economic, environmental and social impacts of the project and must account for these in their planning, structuring, negotiating and execution of the project.

This means that project contractors and financiers can no longer just defer on environmental and social matters to governments. Instead, these considerations must form part of the substance of the negotiations about the project. Project planners and negotiators need to be confident that the project will be sustainable, and that its costs, benefits and impacts will be as predicted. In order to do so, negotiators and planners need to understand how the various stakeholders will respond to the project and how it will effect their social and physical environment. This can only happen if negotiations are opened up for consultation with all interest parties so that they can understand the project and how it will react to it. It is important to recognize that the stakeholders can only give meaningful information to the project planners and negotiators if they have enough information about the project that they can understand its impacts on them and their physical environments. This need highlights the importance of timely information disclosure to sustainable development.

One implication of this view of development is that development decision-making should be “bottom-up”. This follows from the fact that any person or group that is affected by a project can undermine its developmental success if they do not react positively to the project. Their reactions over time can adversely affect the sustainability of the project. Consequently, the interests of all stakeholders must be accounted for in the decision-making process.

This new view of development, which follows inevitably from the importance attached to the sustainability of development, has some profound implications. First, it requires us to draw a distinction between democratic governance and democratic decision-making. It is still vitally important, but no longer sufficient, for governments to be based on the principle of democratic governance in which they are held accountable in periodic elections for their overall management of society. Instead, specific decisions relating to discrete projects need to be made democratically. This means that each decision must allow for stakeholder participation and must be transparent.

Second, the new view has a broader view of accountability than the previous view of development. In the new view, development decision makers are accountable to all

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who are affected by their decisions. In addition, they are accountable not only for their decisions but also for the way in which they evolve over time.

Third, the state is no longer seen as the primary engine ("entrepreneur") of development but as one more player in the development process. Its primary function now includes support, especially regulatory support, for markets and private activities. This implies a shift in relative power between the executive, legislative and judicial branches of government. This shift may affect negotiations because it creates a greater need to keep legislatures informed and a greater risk of accountability through courts.

This shift in conceptions of development affects negotiations as it means that governments no longer have full control over the substance of negotiations. They now need to incorporate new actors (all the other stakeholders) into the negotiations. If they fail to allow these actors to participate, they will have a harder time convincing their negotiating counterparts that they can successfully implement their commitments. This complicates negotiations at both the domestic and international levels. The incorporation of these new actors tends to "globalize" the negotiations, and therefore further complicates the state's bargaining situation.

It is important to note that the change in perceptions of development highlights the fact that "experts" do not fully understand how the development process works or how to apply their understanding of it in practice. There is, therefore, greater ferment in ideas, debates over policies and greater willingness to admit doubt than before.

This lack of certainty in the face of the complexity of the new vision of development creates opportunities and challenges for government negotiators. The challenges are obvious:

- There is a general lack of certainty surrounding all development activity.
- Governments are unlikely to get any development activity "completely right" and so are likely to be blamed for what they do and what they do not do.

The negotiating opportunities derive from the greater willingness of the "experts" to listen to new ideas, especially from key stakeholders in the development process and from their negotiating partners. This means there is space to advance new ideas with a more realistic chance that they will be accepted in the course of negotiations. The rhetoric on Poverty Reduction Strategy Papers (PRSP), the debates about increasing developing country participation in IMF decision-making, and the efforts to increase "ownership" of adjustment programs with its implication that IMF negotiation will be flexible are good indicators of this new negotiating space.

II. Globalization and Changing Views of Development

The phenomenon of globalization has facilitated the shift to a new approach to development in several ways, each of which is discussed below.

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A. Developments in communications

The rapid growth in telecommunications and information technologies has dramatically increased the speed at which information can be disseminated and the ease with which people can access information. One consequence of this development is that it has become easier for opponents of particular projects to convey information on the project to their supporters and allies around the world and to mobilize support for their cause. This means that the negotiations concerning any particular project or loan transaction is now capable of being "internationalised", in the sense that it becomes of interest to a range of different actors around the world, even if they have no direct stake in the substance of the negotiations. This, in turn, adversely affects the ability of the parties to the transaction to control the negotiations.

There are a number of examples that can be cited to illustrate this point. One is the way in which NGO's were able to influence the negotiation over the Chad-Cameroon pipeline. The ability of local NGOs to interest international NGOs in this project resulted in greater attention being paid to the social and environmental impacts of the project than the negotiating parties had originally intended. In addition, the project became the subject of an investigation by the World Bank Inspection Panel. Other examples of projects which have faced similar controversies and investigations because information about them has been shared globally are the Lesotho Highlands Water Project, the Bujagali dam in Uganda, and the Western Poverty Reduction Project in China[4].

B. "Globalisation" of regulatory frameworks

Regulation, which used to be largely a national function, is being internationalized. Today, the de facto regulatory framework for a particular sector will consist of the domestic regulatory regime plus international hard law (conventions, treaties), international soft law (for example, statements of principle, standards and codes, World Bank operating policies) and private regulation (for example, the standards of the International Organization of Standardization (ISO), the International Chamber of Commerce, and corporate codes of conduct). While the soft law and private regulation may technically be non-binding, de facto, the risks created by ignoring them in a particular transaction and the costs that non-compliance may cause may be unacceptably high. For example, the failure to undertake environmental and social impact studies that conform to the "best practices" as spelled out in World Bank operating policies resulted in the Bujagali dam in Uganda and the Lesotho Highlands Water project ending up as objects of World Bank Inspection Panel investigations. In addition, it may ultimately result in the cancellation of the Bujagali project. Similarly, companies like Shell Oil have incurred considerable additional and unplanned expenses because of their initial failure to pay due regard to these soft law standards in their operations in the Niger Delta in Nigeria. In this case, Shell Oil found that it was not a sufficient defense to claim full compliance with local law.

[4] See, www. Inspectionpanel.org , for information on all the projects discussed in this paragraph and the controversies surrounding them.

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The result is that prudent governments and companies know that, regardless of the standards set out in local law, they need to be aware of the international "best practices" and to take these into account in planning important projects. The existence of these de facto regulatory frameworks complicates negotiations because it increases pressure on all parties to demonstrate conformity with all aspects of the "global" regulatory framework or run the risk of incurring political or moral liability that can be very expensive.

C. Changing Number of Actors at International Level

NGOs, multinational corporations and parliamentary groups have assumed increasing power at the international level and are ignored at high risk because of their ability to influence both policy debates and negotiation about specific transactions. A good example of their ability to influence policy level debates is the role NGO's played in the creation of the HIPC program and the establishment of the IMF's Independent Evaluation Office. Other indications of the influence of these groups is the advisory group in which banks and other financial institutions participate that the IMF has formed to advise it on developments in financial markets, and the parliamentary network that the World Bank has formed.

D. Changing Role of IFIs[5]

The role of these institutions has changed dramatically over time. Originally, all IMF member states were expected to use its financial services. However, since the later 1970s, its financial services have been used exclusively by developing countries. It is extremely unlikely that any of the rich countries will ever use these financial services again. On the other hand the developing countries have become ever more dependent either on these financial services or the IMF's approval for their policies as a precondition for gaining access to international financing. The result is that the IFIs have lost their influence in regard to the richest countries, especially the G7[6], but have gained influence over their poorer member states.

One manifestation of this change in power relations in the IMF is that the G7 countries feel free to make policies for the IMF without having to worry about the direct impact of their decisions on their own citizens. This can lead to the G7 countries exercising power without responsibility and accountability. Another consequence is that the IMF's power over its poorer member states has grown as they become more dependent on its funds and policy approval. This power imbalance is exacerbated by the power structure in the IFIs which favors richer and bigger countries in the allocation of votes and the division of seats on the Board of Directors. The latter greatly helps the G7 Executive Directors. It ensures that unlike the African

[5] *See,* Daniel D. Bradlow and Claudio Grossman, "Limited Mandates and Intertwined Problems: A New Challenge for The World Bank and the IMF", 17 Human Rights Quarterly 411 (1995); Daniel D. Bradlow, "Stuffing New Wine into Old Bottles: The Troubling Case of the IMF", 3 Journal of International Banking Regulation 9 (August 2001) for more detailed discussion of the issues raised in this section.

[6] Since 2003, the G7 has been expanded to include Russia so that the group is now referred to as G8. However, because of the transitional nature of Russia's economy, the IMF retains more influence over Russia than it does over other members of G8. For this reason, the text refers to the G7 and not G8.

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EDs, the G7 Directors are able to develop institutional expertise in the working of the IFIs and to focus on the interests of one state or a small number of countries.

In addition, the IFIs are also engaged in "mission creep", as they have expanded the scope of their operations to include such complex issues as governance, which includes such issues as legal and judicial reform as well as more obvious aspects of economic governance. The resulting increase in the complexity of the conditions attached to IFI funding has implications for financial negotiation with these institutions. For example, in the case of the IMF, the more complex conditionalities create ambiguity and result in IFI staff members having greater discretion in the interpretation and enforcement of agreements with the IMF.

III. Opportunities for Small and Poor States

The changing views of development and the consequences of globalization while they complicate the negotiating environment for African states also create some negotiating opportunities for them. There are three reasons for this, each of which is discussed below.

i) No One Knows the Correct Answer

The shifting perceptions of development and the rapid pace of globalization and its consequences have created great uncertainty about how development should be done. It is clear that no one has the answers to the difficult questions of how to "do" development.

The IFIs increasingly recognize (even if they do not always admit it) that there is no one "correct" way and that their policy prescriptions do not always lead to success. This opens space to challenge the conventional views and to advocate for alternatives. Countries can exploit this opportunity if they have well prepared proposals and they are perceived as a "player" in international policy debates. This opportunity is further strengthened by the increasing emphasis these institutions put on country "ownership" of their policies, programs and projects.

In this regard, it is interesting to note that states and international organizations are now being held responsible for the consequences of their actions when they are not consistent with current perceptions of "good" conduct even if they are consistent with applicable law. This suggests that states and international organizations need to be able to account for the way in which they have incorporated all stakeholders' interests in their transactions. This opens space for African countries in negotiations. They can use arguments about the need to accommodate all interests and to avoid later claims of liability to argue against unduly burdensome conditions and to advocate for their own policy proposals.

ii) Weakness Gives Some Bargaining Power

African countries tend to occupy a relatively weak position in their international economic negotiations. This weakness, however, may create some negotiating space. Weak countries do not involve systematic risk. This makes it easier for the IFIs to

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deal with their claims for special treatment without having to worry about the potential implications for the global financial system. Weaknesses also open space for consideration of the poor countries' non-economic claims, especially if the political cost of not dealing with the claim is too high. The debt forgiveness that is involved in the HIPC initiative, for example, was possible because it did not involve an undue financial cost. Similarly, because of the relatively small amount of funds involved, the IMF could offer poor countries concessional financing terms in the PRGF without creating a precedent that undermines the IMF's normal operating principle of uniformity.

iii) The New International Realities Create the Potential for Developing New Alliances

There are new actors such as NGOs and new realities like regional integration in international financial and economic affairs. This creates the possibility for a country to form new tactical alliances that can help them in their preparation for and during their negotiations with the IFIs. For example, regional groupings can cooperate to enhance the quantity and quality of information available to each participating country, to develop technical capacity to manage their affairs and to negotiate with the IFIs and their other international funding sources. The importance and relevance of this opportunity is likely to grow as the regional focus of the IFIs increases.

It is also important to recognize that the growing importance of new international actors, such as NGOs, creates new opportunities for developing countries. These new actors often have specialized knowledge that can be made available to developing countries. In addition, there may be tactical alliances that can be forged with these new actors. The role that the Jubilee 2000 campaign played in the creation of the HIPC initiative and the role that NGOs played in the campaign to establish the international landmines convention are examples of these sorts of tactical alliances.

IV. Implications for Negotiations

The above developments have certain implications for the dynamics of the negotiations between African countries and the IFIs. Each of these implications are explored below.

A. Negotiations in different forums impact on each other

The growing inter-connections between issues means that it is not prudent to assume that each set of negotiations in which a state is involved can be treated in isolation. Often, the same participants may be participating with the state in a number of different negotiations. Consequently, it should be assume that what happens in one set of negotiations influences other negotiations. This influence will be positive or negative depending on how the state conducts itself in the different sets of negotiations and on the level of coordination between these different negotiations.

There are a number of illustrations of this point. First, the ultimate decisions in one set of negotiations may be contingent on the outcome in another set of negotiations. For

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example, the decision taken by the IMF Board of Executive Directors in regard to a proposed financing arrangement with a particular country may be influenced by and contingent on the outcome of the country's negotiations with the Paris Club or a critical bilateral donor. Alternatively, they may be influence by the decisions taken by key actors, such as the G7 countries in other fora.

Second, in international organizations, such as the IFIs, there are always two sets of negotiations that take place. The first are the specific transactional negotiations. These negotiations involve the discussions between the member state and the institution about specific financial agreements or about specific policy issues of direct relevance to the member state. The second set of negotiations involves discussions about the general policies to be followed by the international organization in its operations. These include, for example the discussions in the World Bank and the IMF about the general parameters of the HIPC initiative, in the IMF about the sovereign debt restructuring mechanism, and discussions in all IFIs about their information disclosure policy and accountability mechanisms.

There is a connection between these two sets of negotiations. Countries that are seen as important "players" in the policy level negotiations or, who have good knowledge and understanding of these issues and how they affect them gain the respect of the staff and management of the IFIs. This has a positive effect on their negotiations with the IFIs about specific transactions and can result in their concerns and arguments in these transactions negotiations getting closer and more careful attention. This suggests that African countries should develop the capacity to participate, even if indirectly, in key policy negotiations in the IFIs.

One conclusion that follows from these examples of interactions between different sets of negotiations is that governments need a mechanism for ensuring that negotiators are informed about events in other negotiating forums and for coordinating the efforts of these different sets of negotiations. This will ensure consistency across government positions and ensure that cross cutting negotiating opportunities are identified. Financial negotiators, for example, need to coordinate with those responsible for WTO negotiations because of the relevance of the WTO to financial services and investment. Similarly negotiators in individual financial transactions with the IFIs should know what is happening in policy level negotiations in these organizations.

A second conclusion is that governments need to clearly establish the negotiation authority and responsibilities of each set of negotiators. This is important so that they know what their mandate is and when they need to consult with and defer to other government negotiators. For example, the Minister for Finance may have the sole authority to negotiate and sign international financial agreements on behalf of the Government but he/she may need to consult with other government ministries and officials in regard to the policy level negotiations in the IFIs and to the negotiations on investment and financial services in the WTO.

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B. Creating a "regulatory framework" for the debt negotiation process

Governments can enhance their negotiating position in general by establishing clear rules and procedures to govern their conduct during important negotiations. A good illustration of this point is the benefits that the state can gain from establishing a regulatory framework for its debt negotiation process.

A regulatory framework for debt negotiations would consist of a law and implementing regulations that clearly establish who in the government has the authority to borrow on behalf of the state, and negotiate and bind the sovereign. This framework should also stipulate the procedures that must be followed before the named government officials can exercise this authority. For example the regulatory framework may require that the legislature must give the official authority to enter into a particular transaction or to borrow up to a specific amount. The framework should also establish the procedures that must be followed before the agreement becomes binding on the state.

This regulatory framework offers the state a number of benefits in terms of negotiating and managing its debts. First, the law promotes transparency in the borrowing process. This should also make it easier to hold the government and specific officials within it accountable for their actions in the borrowing process. Second, the regulatory framework helps to define the mandate of negotiators and to clarify the limits of their authority in the negotiations. It also can help the state's negotiating counterparties understand the limits on what the state can accept in the negotiations. In this sense the regulatory framework provides some protection for the negotiators against unreasonable demands from the creditors. It does so by making it possible for the negotiators to reject certain demands on the grounds that they are not consistent with the government's regulatory framework. The framework makes it possible for the negotiators to argue that it is not in the lender's own interest to insist on terms that violate the requirements of the framework and so may ultimately render the agreement unenforceable or void under the borrower's own law. This protection can be formalized by governments, formulating guidelines on key terms and conditions in loan negotiations.

It should also be noted that a well drafted regulatory framework that clarifies the scope of each of negotiators mandate may facilitate coordination between the debt negotiations and the other financial sector negotiations in which the debtor is involved.

A third benefit that flows from having an effective regulatory framework is that it may help protect the state against over-borrowing. The reason is that the framework reduces the risk that individuals in the government can bind the state without others having an opportunity to consider the implications for the state of the transaction.

It is important to note that the benefits of a regulatory framework depend on the state fully implementing the framework. Unfortunately, many states have regulatory frameworks but either do not implement them or do not fully comply with them. For example, a state may have a statute that establishes the outlines for the framework but

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may have no implementing regulations or the regulations may be observed in a formal but not substantive sense.

Failure to fully implement the law, in fact, may weaken the governments' bargaining position for two reasons. First, the government's failure may suggest to its negotiating counterparties that the regulatory framework is not a hard constraint and that the government negotiators can agree to proposals that are not consistent with the law. Second, it may suggest to the counterparty that the government does not take its commitments seriously and so may be less than scrupulous in complying with the terms and conditions of the loan agreement.

C. Making effective use of all resources in preparing for negotiations

It is clear that African countries only have a limited amount of resources that can be dedicated to their negotiations. Consequently, they need to make sure that they effectively utilize all these resources. There are a number of steps that African governments can take to optimize their use of their negotiating resources.

C.1 Measures at National Level

It is important that the government negotiating team understands the concerns of all stakeholders in the negotiations and is able to communicate with all relevant parties in preparing for any negotiation. These interactions help the negotiators obtain the information they need to develop their negotiating positions and to negotiate effectively.

There are a number of steps that governments can take to promote this communication. First, they can put in place measures to facilitate inter-agency communications within the government. Second each state needs mechanisms for receiving the views of and consulting with interested parties that are outside the government. There are a number of mechanisms states can create for this purpose. For example, states can establish advisory committees on which experts from relevant interest groups – for example, businesses associations, bar associations and trade unions-- can serve; or they can establish strong links to experts in universities, think tanks and research groups. These groups may help government negotiators address the technical aspects of an issue, devise solutions to negotiating issues, and to design strategies for winning public support for a negotiating position.

All complex negotiations require a multi-disciplinary approach, which means that governments need to have multi-disciplinary negotiating teams that work together to plan, structure and negotiate the government's negotiating position. To be effective, this team needs to have technical experts who can advise it on the financial, economic, political, and technical aspects of the matter under negotiation. In addition, it needs people who know how to interpret the draft agreements that the government receives and to translate agreements in principle into workable, valid, binding and enforceable arrangements.

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This means that all these negotiating teams need to have lawyers as fully participating members[7]. In addition to the above two contributions, lawyers can help the negotiating team understand the legal regime applicable to the IFIs and the documentation that they use in their financial transactions. They can also help identify and resolve negotiating and drafting problems and opportunities. Other contributions they can make include their understanding of the domestic law regarding borrowing and procurement procedures. They can also help develop negotiating guidelines.

This multi-disciplinary team needs to meet on a regular basis. It also needs to have the expectation that it will be used by the government in all negotiations that fall within its area of expertise. If this is the case, team members have an incentive (and responsibility) to develop their expertise in subject areas relevant to the state's negotiations with the IFIs and to identify policy issues that government should address. In addition, because they know that they will be involved in all future debt negotiations, they have the ability and the need to conceive of the state's debt negotiations as an ongoing process in which they can seek to achieve improvements in terms and conditions over time. Thus, they can develop a more strategic approach to their ongoing negotiations with the IFIs.

C.2 Support at International Level

Given the resource constraints on the state's negotiating capacity, it should take advantage of all the outside sources of support that it can identify and which are appropriate. In this regard, it is important to note that there are a number of resources at the international level that government negotiators can draw upon when preparing for specific negotiations. These include:

- The Executive Directors Offices at the IFIs – The office of the Executive Director representing the state at the IFI can be a useful source of information and advice. They can advise the state on the concerns of the institution, on how best to make their case to the institution, and help it obtain relevant information on the institution and its positions in the negotiations with the state. In addition, this official can help make the state's case to the other members of the Board of Executive Directors and (to a lesser extent) to the management of the IFI.
- Non-state actors – This includes many of the international NGOs. They can be useful tactical allies in specific policy and transactional negotiations. Good examples of this are the role that NGOs played in the negotiations regarding the HIPC initiative and the support that some NGOs have offered to developing countries in international trade negotiations.
- Intergovernmental organisations – These organizations can provide policy advice, capacity building and technical support. In addition, they may be able to provide useful information on how the IFIs have dealt with other similarly situated member states and about developments in the policies and negotiating positions of

[7] *See* Daniel D. Bradlow, "The Role of the Lawyer in the International Debt Operations of Developing Countries" UNITAR Document #6 (1999) and "Some Lessons About the Negotiating Dynamics in International Debt Transactions", UNITAR Document #9 (1999).

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the IFIs. Examples of such organizations include the G-24, the South Centre, UNCTAD, UNITAR, MEFMI, WAIFEM and Pole-Dette.

C.3 Preparation for specific loan negotiations

C.3.1 The Role of Lawyers in International Financial Negotiations

All financial agreements are contracts. The experts in drafting and interpreting contracts so that they advance the government objective in the agreement are lawyers. For them to effectively perform this function they need to be involved in all stages of the planning, structuring and negotiating of the specific agreement.

Lawyers' contributions to transactional negotiations include the drafting of workable agreements and identifying and allocating risks. In the case of African countries, which are most often borrowers, the job of lawyers is usually less to draft new international financial agreements than to help negotiators understand the significance of the draft proposed by the lender. There can be many traps hidden in this draft. Provisions may not be applicable to the particular situation of the borrower, they may be unduly harsh or they may be inconsistent with existing obligations or with the borrower's objectives for the transaction. There may be drafting and negotiating options that can be used to avoid or mitigate these problems. However, for lawyers to identify these options and, generally provide the client with more than rudimentary service, they need to be included in the transaction discussions from an early stage. This will enable them to understand the government's objectives and to analyze draft proposals in the light of these objectives. Other tasks that lawyers can perform include determining the powers of the borrower to undertake the commitments being discussed in the context of the loan transaction, counseling, and facilitating negotiations by ensuring that all issues are addressed.

C.3.2 Importance of past bilateral history

The history of prior relations between the state and it negotiating counterpart is relevant for both strategic planning and for tactical planning. This history gives the states insights into the thinking of the IFIs and knowledge of the precedents that were set in these prior negotiations. These precedents can set the "floor" for the current negotiations in the sense that there is no a priori reason for the state to accept worse terms in the current negotiations than they accepted in prior negotiations. The importance of this history highlights the need for good record keeping and a network of contacts for information about negotiations between the IFIs and other similarly situated member states.

V. Conclusion

This paper has discussed the changing environment within which international financial negotiations take place. It explores how changing perceptions of development and globalization are influencing negotiations between African states and the IFIs. The article then considers how African countries can respond to the challenges that this new environment has created in ways that will maximize their negotiating efficacy. The measures that it suggests relate to the institutional

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arrangements for negotiations, the international actors that may be available to support developing countries in these negotiations and to the structure of the specific country negotiating team.

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Chapter 2

The Role of Lawyers in Negotiating Programmes with the IMF

by Cyrus D. R. Rustomjee

Introduction

This chapter comprises two parts. The first part examines some of the issues which it may be useful for lawyers in Sub-Saharan African countries to be aware of, in regard to the structure and work of the International Monetary Fund (IMF), when negotiating arrangements with the IMF. The chapter covers an extensive range of issues. Some of these are directly related to the process of negotiating a facility with the IMF, including the process followed when a financing facility is negotiated; and the key elements of IMF conditionality. Several aspects of the chapter also examine some of the factors which may be indirectly related to the immediate process of programme negotiations, but which may nevertheless comprise useful knowledge for lawyers, in their preparations for negotiations.

The chapter commences with an overview of the key roles performed by the IMF in member countries. Thereafter, the governance structure of the IMF is examined, highlighting particularly the manner in which both African countries in general and the countries of the MEFMI group who participated in the seminar in Luanda, are represented in the IMF[8]. Subsequently, the chapter outlines the key elements of IMF conditionality which are found in IMF-supported financing arrangements.

In the second part of this chapter, we examine the most recent public debt management guidelines which have been prepared by the IMF and the World Bank. The guidelines, which are voluntary, provide a key tool for developing countries to assist in the process of improving the structure of their public debt management. Improvements in public debt management contribute to strengthening developing countries' ability to effectively manage their economies, to reducing reliance on external aid and to better integrating debt and debt management into the overall objectives of macroeconomic policy. For these reasons, African countries, including all those in the MEFMI group, can obtain particular benefit from a close study of the recent PDM guidelines. This section of the chapter examines the key provisions of the PDM guidelines; and then proceeds to consider the key lessons which have emerged from a series of case studies of PDM in developing countries. These case studies are contained in an accompanying document to the guidelines and draw on the lessons gleaned from 18 developing countries' experiences in building better PDM systems and procedures.

[8] The countries of the MEFMI group comprise: Angola, Botswana, Lesotho, Malawi, Namibia, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

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Key Roles of the IMF in Member Countries – Part One

Introduction

The IMF performs three broad functions in its member countries. Understanding what these functions are and how they are performed, can be of use to lawyers when negotiating agreements with the IMF. These three functions, comprising surveillance, financing and technical assistance, are examined in greater detail below. It is important to note, however, that not all member countries of the IMF utilize all three functions. The advanced industrial countries, for example, are subject to surveillance by the IMF, but do not utilize the financing facilities of the IMF and in only some instances utilize technical assistance. For the low-income members of the IMF, including many but not all SUB-SAHARAN AFRICAN countries, all three roles of the IMF are exercised, with all countries being subject to IMF surveillance and all members utilizing technical assistance; and with almost all members utilizing IMF financing.

The Surveillance Role of the IMF

The major act of surveillance by the IMF over member countries' economies is conducted in terms of the Article IV Surveillance exercise. Article IV of the IMF's Articles of Agreement mandate the staff of the IMF to conduct an annual surveillance exercise in each country that is a member of the IMF. The surveillance exercise focuses on an examination of the member country's:

- Exchange rate, fiscal & monetary policies
- Balance of payments & external debt developments
- The influence of a member's policies on its external accounts
- The international & regional implications of a members' policies
- The identification of potential vulnerabilities
- Capital account, financial & banking sector issues
- And where relevant to macroeconomic stability, issues such as labour markets, governance and the environment.

In addition to the Article IV surveillance mission, the IMF also conducts other forms of surveillance, including surveillance of regional groups of member countries, on a voluntary basis; and multilateral surveillance of the global economy, in terms of the IMF's World Economic Outlook exercise.

In addition, surveillance is conducted over member country's economies through a variety of processes, including through the process of programme and post-programme monitoring.

IMF Financing Arrangements

A second major function of the IMF is the provision of financing facilities to members. Financing is provided to members who request such financing, typically to satisfy a temporary balance of payments need. In the case of low-income countries,

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the IMF has developed a specific financing instrument, the Poverty Reduction and Growth Facility (PRGF), through which concessional financing is provided.

When negotiating a PRGF arrangement, it is important to recognize that some elements of the arrangement cannot be negotiated. These include the price of the facility, which is fixed at 0.5%; and the term of the facility, which is 10 years and which includes a four and a half year grace period. Many other aspects of the arrangement are subject to negotiation and in practice many of these centre around the specific conditions required by the IMF as a quid pro quo for granting approval for the use of the PRGF concessional resources.

Aside from the PRGF, the IMF also offers an Emergency Post-Conflict Facility to members emerging from conflict who are able to demonstrate their capacity to undertaking a stabilization and adjustment programme with the IMF. Once again, the pricing of this facility is fixed at 0.5%.

Technical Assistance

The third important role performed by the IMF in member countries is the provision of technical assistance (TA). TA is provided through a variety of channels, including through the IMF's training institute, the IMF Institute, through a range of functional departments in the IMF, through the relevant regional department of the IMF and through the IMF's Legal Department. The IMF Institute provides high-quality training, through seminars and courses conducted both in Washington DC and in the home countries, as well as at the IMF's Joint Africa Institute, a regional institute co-managed by the IMF, the World Bank and the African Development Bank. Other functional departments of the IMF, including the Monetary Affairs and Exchange Department, the Statistics Department and the Fiscal Affairs Departments, provide technical assistance in their respect areas of competence, to member countries requesting such assistance. In addition, the relevant regional department – the African Department in the case of Sub-Saharan African countries – provides direct technical assistance to member countries upon request. Finally, on occasion the Legal Department of the IMF can offer specific technical assistance to member countries who request such assistance.

Because of the significant growth in demand for the IMF's technical assistance, which is of very high quality, in recent years a substantial resource constraint has emerged, which often prevents the IMF from providing the full range of technical assistance requested by the IMF's 184 member countries. In practice, this has meant a prioritization of technical assistance delivery, as well as a clearer focus by requesting members, in regard to their technical assistance needs.

The Process followed in Negotiating a Financing Arrangement with the IMF

Introduction

As noted above, in most instances low-income countries approaching the IMF for financial resources do so in the context of a PRGF arrangement. In embarking on the

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negotiating process, it becomes important for lawyers to be aware of the process typically followed in a concluding an arrangement with the IMF.

Key Steps in the Process of Programme Preparation

The first step in the overall process commences when a member country requests a financing facility from the IMF. Upon receiving the request, the IMF's staff in Washington, as well as the institution's staff who may be located in the requesting country, seek to obtain comprehensive data on the member country, prior to traveling on a mission to the relevant country. Requests for updated data on a host of variables is sent to the member country authorities. It is important that lawyers are made aware, at an early stage of the nature of the data being supplied by national authorities. Having this awareness can help lawyers at a later stage, when contentious details are being discussed during the intensive stages of the negotiating process.

Once sufficient data has been obtained by the IMF staff, the latter integrate this data, in the context of a common methodology, to determine the broad parameters of any potential financial support which the IMF may consider providing the member country. During this process, a mission brief is prepared, on the basis of internal agreement among the staff and management of the IMF. The brief contains the parameters of the negotiating brief which the IMF staff will be guided by once the mission visits the member country.

Thereafter, the mission travels to the member country and through detailed negotiation with the member country, conducts negotiations on a variety of issues, including:

- The amount (from all sources) of financing which the member country intends to raise;
- The type of facility which the IMF will consider providing (although in the case of low-income countries the standard facility is the PRGF);
- The schedule of actions, including an associated timeframe, on the basis of which the IMF will conduct one or more reviews of progress in terms of the facility being negotiated; and
- The content of the programme conditionality which is to be included in the terms of the financing agreement. As we will note later in this chapter, there are a wide range of conditionalities which can and are negotiated in a typical PRGF arrangement, including quantitative and structural performance criteria, prior actions, benchmarks and indicative targets. In each instance, the role of lawyers in actively intervening in programme negotiations is crucial, in ensuring that the best possible overall outcome is achieved for the member country.

Once the details of the programme have been agreed between the IMF staff and the member country authorities, a Letter of Intent and a Memorandum of Economic and Financial Policies is prepared. In the past, these documents were often prepared by the IMF staff and simply signed by the member countries, in whose names the documents are issued. More recently, member countries have developed the technical acumen to be able to prepare robust documents, which are internally consistent and which make

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commitments which the member country authorities are capable of achieving, within the timeframes indicated. Once again, the role of lawyers in being afforded the opportunity to make inputs into the drafting of these two significant documents, is considered crucial. Lawyers' inputs can help avoid the member country making representations which will later be held against the member country, possibly in breach of the agreements entered into with the IMF; and the inputs of lawyers can help sensitise all parties to some of the time, human and administrative constraints which may be present when member countries make commitments. These are particularly pertinent in the case of commitments which envisage legislative changes and legal professionals, when inputting into the drafting of the Letter of Intent and the Memorandum of Economic and Financial Policies can often present a more realistic and meaningful input about the likely pace of legislative change, given their advanced knowledge of legal procedure.

Once the documentation has been prepared, these are forwarded to the IMF Managing Director. For the process to continue, the Managing Director is required to accept the content of the documentation.

Thereafter, the package of documentation is brought to the IMF's Executive Board for a decision. If the Executive Board approves the arrangement, the first tranche of the facility is disbursed. Thereafter, the country is expected to follow the terms of the programme, implementing the reforms and other measures specified in the arrangement.

After approval, the arrangement becomes subject to continuous monitoring, including both during the course of specific country review missions and in the context of the regular Article IV staff missions.

Opportunities for Lawyers in the Negotiation Process

As noted earlier, some aspects of the financing arrangement are not subject to negotiation, including particularly the pricing and duration of the facility. Most other issues become subject to negotiation. During the negotiation process, it is instructive to consider who actually negotiates. Typically, the chief negotiators on the part of the member country are the senior finance officials from the member country's treasury department or Finance Ministry; and their counterparts in the central bank. Often in the past, legal professionals in these institutions have tended to play a modest and background role, when in fact their active participation can be vital in securing concessions for the member country during the negotiating process. It is incumbent on the senior officials of low-income countries to ensure that their legal teams are afforded an early opportunity to input into the negotiating process.

The IMF's Assessment Methodology

In compiling data in preparation for negotiations, IMF staff seek data from four key sectors:

- National Income & Product Accounts for GDP

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- Govt. Financial Accounts for Fiscal Sector
- Consolidated Banking System Accounts for the Monetary Sector
- External Accounts for the Balance of Payments Position

These data are integrated into a financial programme for the member country and enable the staff to make specific proposals to the member country on, inter alia, the amount of financing to be provided by the IMF. As the variables concerned are often imprecise, there is often ample scope for meaningful discussion and negotiation with IMF staff in arriving at a financing arrangement. Once again the role of lawyers becomes important, particularly where these individuals have had detailed experience in working with the same data which the IMF staff use to compile a financial programme

The data used in building a financial programme are cross-checked and efforts are made to ensure that they are consistent. This process is achieved on a case-by-case basis, working with country officials.

Instances of Unsatisfactory Progress

On a number of occasions, the programme arranged between the member country and the IMF proceeds smoothly and the periodic reviews of the programme are completed as scheduled, enabling further disbursements of financial resources by the IMF. In a number of cases, however, problems emerge which can precipitate a breach in the conditions the member has negotiated with the IMF. Where, in such cases, the IMF Executive Board is not willing to grant a waiver of the relevant conditionality or conditionalities, the review of the programme is not completed by the Executive Board. In such instances, scheduled disbursements are delayed. The IMF staff notify management of the issues which have emerged. Where management concur, the matter is brought to the Executive Board. In such instances, there are significant opportunities for the legal professionals in the administrations of member countries to provide inputs which can help explain the reasons for the apparent breach of conditionality. In some instances, the breach may be due to the legislative timetable for some reforms being delayed; and in such cases, there may be valid procedural reasons which may have caused the delay. Lawyers may be more familiar with these reasons, as well as the likely remedies. Having the input of lawyers at this stage can prove crucial in avoiding unnecessary misunderstanding between the member country and the IMF; and can provide a channel for resolving issues as they arise.

The Importance of IMF Conditionality in Negotiating Loan Agreements

Introduction

In the context of negotiating with the IMF, the role of conditionality in IMF financing arrangements is of particular importance in determining the role of lawyers in influencing the outcome of negotiations with the IMF. In this section, we examine three issues of direct relevance to this aspect of negotiations:

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- The types of conditionality in IMF financing arrangements
- The limitations if any, on IMF conditionality; and
- Key Aspects of the recently issued New Guidelines on Conditionality.

Types of IMF Conditionality

There are a range of conditionalities in IMF financing arrangements. Key among these are:

(i) Performance Criteria

Performance criteria feature in IMF arrangements in two types. Firstly, **quantitative** performance criteria. Examples include the level of net international reserves; the size of a member's budget deficit; or the level of non-concessional external borrowing permissible in terms of the financing arrangement. Secondly, **structural** performance criteria, including for example new banking legislation, or the establishment of a new bankruptcy law. Where performance criteria are not achieved as stipulated in the relevant IMF arrangement, this constitutes a serious breach of the arrangement. In many cases, the programme can be suspended.

The IMF can also make use of waivers, in cases where previously-agreed conditionalities are breached. Waivers can be granted by the Executive Board of the IMF in instances where the non-observance of the conditionality is minor or temporary; or where the member is shown to have been prepared to take corrective action.

(ii) Prior Actions

A second conditionality typically found in IMF financing arrangements comprises prior actions. These are measures which are required to be taken by the national authorities prior to the IMF Executive Board being able to approve a financing arrangement with the IMF. Prior actions generally comprise structural measures, which tend to be relied on where the member country's past track record is poor. Prior actions were previously not considered a formal conditionality, but have recently become an integral part of formal IMF conditionality.

(iii) Structural Benchmarks

A third element of IMF conditionality comprises structural benchmarks. Structural benchmarks are introduced as part of IMF conditionality in Fund-supported programmes where a measure cannot be specified in terms that may be objectively monitored, or where non- implementation does not warrant programme interruption

(iv) Indicative Targets

Indicative targets are utilized where a performance criteria would normally be used, but where a performance criteria cannot be established, due to uncertainty about economic trends

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(v) Programme Reviews

A fifth component of the overall framework of IMF conditionality comprises programme reviews. Reviews enable both the IMF and the member country the opportunity to modify a programme as it progresses. Programme reviews are also used to establish conditions for future drawings. It is important to note that disbursements are withheld by the IMF until a scheduled review is completed.

Limitations Imposed By Articles of Agreement

While limited, there are a few limitations on IMF conditionality. For example, in terms of the IMF's Articles of Agreement, conditionality requires to be consistent with the IMF's purposes. It cannot be used by the Fund to interfere with the legal rights of members that are created or recognised under the Articles. Hence for example, the Fund cannot establish conditions requiring members to remove restrictions on capital movements, since capital account liberalisation is not a purpose of the Fund; and the Articles expressly recognise the right of members to restrict capital movements

The New Guidelines on Conditionality

The IMF introduced new guidelines on conditionality in IMF-financed programmes, in September 2002. The new guidelines were introduced after extensive internal and external discussion. The guidelines reflects attempts both to curb excessive conditionality which had emerged in recent years; and to recognise both administrative and other capacity constraints, particularly in low-income members of the IMF.

The new guidelines represent a potentially major tool for IMF Member countries when negotiating their programmes with the IMF. The guidelines are particularly valuable for legal practitioners and the guideline document, which is publicly available, should be studied closely and should form a part of the negotiating teams standard reference documentation.

The new guidelines require that when negotiating conditionality, IMF staff must ensure that conditions will be applied parsimoniously. In addition, it is now required that conditionality will be applied on the basis of variables or measures reasonably within the members' direct or indirect control. Where conditionality is to be applied, it must also be either (i) Of critical importance for achieving the programme goals or for monitoring the programme; or (ii) necessary for implementing specific provisions of the Articles, or policies adopted under them. In most cases, conditions must normally consist of macroeconomic variables & structural measures within the Funds' core areas of responsibility. Where these variables and measures are outside core areas, conditionalities can also be established, but may require more detailed explanation of their critical importance to the programme. For this reason, it is important for lawyers who are contributing to the negotiation of an IMF arrangement to be aware of the core areas of the IMF's responsibilities. These comprise:

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- Macroeconomic stabilisation

- Monetary, fiscal & exchange rate policies, including underlying institutional arrangements and related structural measures and

- Financial system issues related to the functioning of both domestic and international financial markets

The most recent conditionality guidelines also introduced the concept of Floating Tranche Conditionality. This form of conditionality applies mainly to structural performance criteria which are important for medium-term external sustainability and growth and is applied where a structural measure or performance target is to be implemented during a programme, but not by a specific date. This enables the relevant member country to control the timeframe for implementation and in this manner contributes to promoting domestic ownership of the programme.

The new approach to conditionality also represents a stronger attempt to coordinate policy advice with other international financial institutions, including particularly the World Bank. In this instance, the guidelines also introduce the concept of a "Lead Agency" viz-a-viz. World Bank, in which either the Bank or the Fund are designed the lead agency in the Bretton Woods Institutions' overall dealings with the member country.

Additional Factors of Relevance to Legal Practitioners

Introduction

In addition to factors of direct relevance in assisting lawyers in developing countries in their interactions with the IMF, there are a number of other issues of importance. Understanding these issues can be useful in helping lawyers better understand the overall environment in which a member country arranges its relationship with the IMF.

There are many such issues. These include the nature of recent trends in aid flows to developing countries and to African countries in particular. These trends suggest that the extent of concessional resources to sub-Saharan Africa is in decline and in turns suggests that negotiating teams may have, in general, limited scope to negotiate. In addition, sub-Saharan African member countries voting share in the IMF Executive Board is limited, suggesting that maximum effort needs to be placed in ensuring strong and effective negotiation of programmes prior to their arriving at the point where they are decided by the Executive Board. Furthermore, there are a range of factors associated with the new international financial architecture, including particularly the IMF's role in assisting members develop standards and codes of international best practice, which may be of importance to legal practitioners in member countries. All of these issues are considered in more detail below.

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(i) Recent Trends in Aid Flows

One of the most significant developments in recent years, which has a direct influence on the scope for developing countries to effectively negotiate financing arrangements with the Bretton Woods Institutions, is the issue of availability of concessional assistance. In recent years, the gap between the availability of aid and the needs of potential recipient countries has been widening. This has reduced the ability of developing country authorities, including the legal practitioners in these administrations, to negotiate, as the creditor community has gained greater leverage in insisting on stronger measures of accountability and in refusing to provide flexibility in the terms of financing arrangements. One of the significant consequences of these developments have been a significant increase in pressure to borrow domestically.

Recent evidence suggests that aid flows have declined sharply in the last decade:

- By 2000, aid flows were more than 10% below 1990 level;
- During this period, flows had declined from 0.33% to 0.22% of GDP;
- During this period ,only five donors successfully achieved the internationally agreed goal of 0.7% of GNP;
- In last two years for which data is available, aid flows declined by 3.8% (2000) and by 3.4% (2001);
- Most crucially, there appears to be no sign of a potential reversal of this trend; and
- The key implications for developing countries seeking to expand their negotiating strength vis-à-vis creditors, are that these developments will place increasing pressure on countries to manage their existing debts well; and to find new sources of finance. In addition, the scope for effectively building negotiating leverage is likely to have become more limited, with increased demand for concessional resources from a growing pool of potential debtors, in the context of a diminishing pool of available concessional resources.

In this context, it is important to recognize that the need for aid continues to grow in the developing world:

- In the 1990's, the population of developing countries rose by 17% in 1990's.

- At present more than 60 million people are infected with HIV.

- And it is increasingly clear that the Millenium Development Goals (MDG's) cannot be met without increased aid. For example, it is estimated that to achieve a halving of poverty by 2015, there will need to be a doubling of aid. Based on current patterns of global aid, this seems to be an unachievable objective, suggesting that the MDG's will have to be revised if they are to offer realistic objectives for developing countries.

(ii) The Voting Capacity of Sub-Saharan African Countries

A further issue of relevance in determining the effective scope for African countries, including the MEFMI countries, to negotiate with the Bretton Woods Institutions and

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with other creditors, pertains to the voting capacity of these countries in international fora.

In the IMF, African countries, for example have a limited voting strength. The 10 MEFMI countries hold less than 1% of the voting share in the Executive Board; and 44 Sub-Saharan African members hold only 4.3% of total voting share. The scope for achieving a stronger outcome in negotiations is therefore circumscribed by the limited capacity of the representatives of these members in the IMF Executive Board, to be able to influence decision- making in the Board.

There are, nevertheless, some important opportunities for sub-Saharan African countries. Chief among these is the fact that many decisions of the Executive Board are arrived at on the basis of a collegial, consensus-based approach. As a consequence, through effective provision of information, in a timely manner, the Executive Board member representing sub-Saharan African countries can be placed in a position in which he or she effectively lobbies other Board members ahead of key Board meetings. For lawyers in these countries, this can be useful information. For example, where there is early information on the passage of key legislation which is the subject of IMF programme conditionality, lawyers in the financial administrations of sub-Saharan African countries can significantly assist, by ensuring that detailed information is provided to the Executive Director in Washington. This information can be shared with other Board members, to sensitise them to particular circumstances as they emerge. And this process can contribute to helping avoid unnecessary delays in the progress of an IMF arrangement.

(iii) The Enhanced Heavily Indebted Poor Country Debt Initiative (HIPC)

Introduction

One of the most important developments in recent years in the BWI's has been the emergence of the HIPC framework. Through this framework, significant debt relief has been provided to a wide range of developing countries. Throughout this process, the role of lawyers in the administrations of developing countries has proved significant. As the HIPC process develops, the potential role which lawyers can play in improving the benefits accruing to their countries through the HIPC initiative, remains significant.

Progress with HIPC To Date

Notwithstanding significant remaining challenges, there has been substantial progress with the HIPC initiative:

- Seven countries have reached the Completion Point, in terms of which significant debt relief is disbursed to the member country.

- 19 countries are currently between the Completion and Decision Points. For these countries, debt relief has commenced and is being provided by the

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BWI's. Nevertheless, debt relief for several of these is delayed, inter alia due to:

- Lack of PRGF Progress
- Delays in the process of PRSP Preparation

- Nevertheless, all 26 countries are receiving some debt relief

- 12 countries have yet to reach their decision point. Many of these are conflict-affected and have substantial arrears to one or more of the BWI's.

Challenges With the HIPC Initiative

Notwithstanding progress, there are many significant challenges with the HIPC initiative. These include:

- **Post-Completion Point Sustainability**; Even countries which have achieved the completion point, such as Uganda, are experiencing significant difficulties in remaining in a situation of sustainable indebtedness. The terms of trade have shifted against these countries, usually due to external factors beyond the control of member authorities; and this has rendered their debt sustainability ratios clearly unsustainable. For these members, the current HIPC framework provides no remedies, because there is no provision for additional relief after the completion point.

- **Pace of Debt Relief:** As noted in the above assessment, the pace of relief has been slow. The HIPC initiative was launched in 1996 and there remain many countries which have not received any relief at all. Many developing countries consider that the reason for the slow pace of relief has been the design of the HIPC initiative.

- **Fiscal Dimension of Unsustainable Debt:** It is frequently argued that the HIPC debt sustainability ratios do not adequately consider the fiscal capacity of governments and for this reason place unsustainable fiscal burdens on member countries emerging from the HIPC initiative.

- **Insufficient Attention to Human Development Goals:** Similarly, it is argued that the HIPC framework, which focuses on macroeconomic variables to determine debt sustainability, does not take adequate account of the objectives of human development, in particular the financing needs which are necessary to achieve certain basic levels of social development and human and institutional capacity, all of which are necessary to ensure a sustainable exit from unsustainable levels of debt.

- **Diversion of Aid Resources:** A further emerging difficulty with the HIPC framework is that net aid resources have not increased despite the initiative. As a consequence, it is argued that there has, at best, been a diversion of aid resources, rather than a necessary increase in the overall quantum of financial resources to developing countries.

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- **HIPC Debt to Non-Paris Club Members:** An emerging challenge to the HIPC initiative has been the recent expansion in litigation by non-Paris Club creditors against HIPC governments. These creditors refuse to be bound by the terms of HIPC and are increasingly securing judgment against HIPC countries. This process subverts the overall intention of the HIPC framework. The case of Uganda, which has successfully achieved the completion point, is relevant, as the Ugandan government has been subject to a series of successful claims by such creditors. The prospect of other HIPC members experiencing this challenge is expected to become more likely, as these members successfully achieve their completion points and then seek to secure HIPC terms from their non-Paris Club creditors.

- **HIPC-to-HIPC Debt:** A further challenge to the HIPC is the presence of a situation in which both debtor and creditor are HIPC countries. An example is the case of Burundi, which is a creditor to Uganda. Both HIPC members can be argued to have an important basis, at least in terms of principles of economic development, to claim. However, both have limited financial capacity and they should not be placed in a position in which they find themselves litigating against each other. The HIPC framework, which did not foresee this challenge, ought to be revised to provide a remedy for this type of circumstance.

Challenges For sub-Saharan African Countries

The series of challenges which have emerged through the HIPC initiative have made it particularly important for HIPC countries, including those in sub-Saharan Africa, to significantly and urgently strengthen their capacity. Among key early measures which these countries could take, include, the need to strengthen:

- Sub-Saharan African member countries' bargaining position with the Paris Club. Here it is considered that there exists a particularly important role for lawyers, in preparing the HIPC country's case ahead of negotiations.

- Sub-Saharan African members' capacity to assess what levels of debt are indeed sustainability. Substantive analysis of this can be useful information in negotiating the eventual levels of debt relief provided to sub-Saharan African HIPC members.

- The capacity of sub-Saharan African members to challenge creditor litigation. In this regard, consideration could be given to developing a pool of expertise across sub-Saharan Africa; to sharing of legal personnel who have been involved in litigation; and to building a network of personnel resources, to be drawn on by all of these members. In addition, consideration can be given to providing a database of key legal cases, which may be of relevance to all HIPC countries.

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- Strengthening Debt Management Capacity. In the longer term, strengthened capacity to manage debt offers a permanent solution to the challenge of unsustainable debt. Important steps can be taken by sub-Saharan African members to expand access to expertise, both within and outside of individual countries in the region, to help improve debt management; and to better integrate the objectives of debt management with the macroeconomic objectives of government.

Summary

There are many actions which legal practitioners in the administrations of sub-Saharan African countries can take to better contribute in the process of successfully negotiating agreements with both bilateral and multilateral creditors. These include:

- Strengthened familiarity with the various institutional arrangements which prevail in the multilateral environment, including a comprehensive understanding of the ways in which both the IMF and the World Bank structure their lending arrangements; improved familiarity with the roles and functions of the Executive Boards of these institutions; and detailed knowledge of the functions performed by the various key departments in these institutions.

- Lawyers can also take steps to benefit from the extensive technical assistance and training programmes provided by the IMF and the World Bank; and in particular, seek to complete training courses provided by the IMF on the methodology used by the IMF to structure a financial programme with a member country. Indeed, in the period following the conclusion of the UNITAR/MEFMI seminar on public debt management, a number of follow-up steps can be considered, in order to enable both MEFMI countries in general and sub-Saharan African countries as a whole, to better benefit from IMF technical assistance. These steps include:

  - Urging the financial authorities in sub-Saharan African countries to expand the range and scope of IMF technical assistance to these Countries

  - Urging the financial authorities in sub-Saharan African countries to encourage the enrolment of more lawyers on key IMF Institute & World Bank Institute training courses. In this regard, a particularly valuable course for lawyers would be the Financial Programming & Policies Course conducted by the IMF Institute. The course provides details of the methodology used by the IMF to structure a financing arrangement with a member country.

  - Expanding legal practitioners' use of IMF & World Bank distance learning courses.

  - Strengthening liaison between the Attorney-General's offices in sub-Saharan African member countries, with Executive Director's office in Washington DC.

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- Establishing stronger links between lawyers in the administrations of sub-Saharan African countries, with the various functional departments of the IMF.

- Proposing a dedicated Public Debt Management Legal Training Initiative with IMF & WB Legal Departments, in conjunction with UNITAR and sub-Saharan African countries.

- Lawyers in sub-Saharan African countries should also consider establishing a forum for the dissemination and sharing of new developments, new case law and new practices in regard to public debt management and to recent developments with the HIPC process. The experiences of one member can be of vital knowledge and benefit to another, particularly when the process being followed – for example the HIPC process – is common to most members. Consideration can be given to developing: (a) A forum of legal practitioners in sub-Saharan African member country administrations; (b) A shared roster of key case law and legal practices pertaining to debt negotiation and public debt management; and (c) A common, or at least converging process of training of lawyers in sub-Saharan African Finance Ministries and Central Banks.

- Strengthening familiarity with the IMF's recent new guidelines on conditionality; and ensuring that these guidelines are readily at hand before and during all negotiations with the IMF.

- Expanding the role of lawyers at all stages of interaction with the IMF, including not only during the formal negotiating process, but at the earliest stages of dialogue between a member country and the IMF with regard to a possible programme; and during all Article IV missions. In addition, the participation of lawyers during technical assistance missions by IMF staff and international experts recommended by the Fund, would strengthen the role of lawyers in contributing to enhancing the member country's bargaining ability considerably.

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The World Bank & IMF Guidelines for Public Debt Management – Part Two

Introduction

In this section, we examine recent international developments in public debt management, particularly the development of recent new guidelines by the BWI's, for Public Debt Management.

These guidelines are considered useful for sub-Saharan African countries, as they provide a series of principles and recommendations, to be applied on a purely voluntary basis, by individual member countries. The systematic reference to an application of these principles can be considered to be an important opportunity for sub-Saharan African countries to strengthen their PDM capacity; and through this process to improve the sustainability of public debt.

Background to the Guidelines

The Public Debt Management (PDM) Guidelines were requested by International Monetary and Finance Committee in 2001. Subsequently, the Bank and Fund staff prepared draft guidelines with input from debt management experts in over 30 countries. The guidelines were discussed by both the Bank and Fund Executive Boards. In the process, staff conducted outreach exercises, comprising five regional conferences, to discuss country practices and to receive comment from member countries. The final guidelines were endorsed by the IMFC in 2002, during the Spring meetings of the IMFC.

The guidelines are designed to help policymakers strengthen the quality of their public debt management and to reduce vulnerability in their financial systems. The guidelines encompass both domestic and external debt. They focus on areas of agreement for sound practice and they are intended to assist in capacity building, rather than to serve as minimum standards by which member countries are judged. For this reason, the guidelines provide a useful voluntary tool for national administrations pursuing strengthened systems and procedures for improved PDM.

Sovereign debt management involves the strategy and tactics for meeting the government's financing needs efficiently and for managing the government's debt portfolio. For this reason, there is a need for clear debt management objectives, supported by a sound governance and risk management framework. There is also a need to ensure that all portfolio transactions are consistent with the PRM strategy; and a need to establish clear reporting procedures.

For many if not most developing countries and for almost all sub-Saharan African countries, sovereign debt constitutes the largest portfolio in the economy, embodying considerable risk to the government's balance sheet. Sound sovereign debt management can lower cost and risk for the government, while poorly designed

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strategies can induce adverse investor sentiment and financial market instability. Significant importance should therefore be attached to sound PDM.

Key Details of the PDM Guidelines

The PDM guidelines are structured into six key sections, comprising:

- Debt Management Objectives & Coordination
- Transparency & Accountability
- Institutional Framework
- Debt Management Strategy
- Risk Management Framework
- Development & Maintenance of an Efficient Market for Government Securities

Debt Management Objectives & Coordination

The guidelines recommend that the **Objectives** of PDM should be to ensure that governments' financing needs & payment obligations are met at the lowest possible cost over the medium-long term, consistent with a prudent degree of risk. The guidelines further suggest that the **scope** of PDM should be the main financial obligations over which the central government exercises control and that **Coordination with Monetary & Fiscal Policies** should entail a sharing of the understanding of objectives of PDM; an endeavour to separate debt management and monetary policy objectives and accountabilities; and to share information on the government's current and future liquidity needs

Transparency and Accountability

The guidelines propose that there should be clarity of roles, responsibilities & objectives when establish coherent PDM systems. In particular, there needs to be public disclosure of the allocation of responsibilities for PDM between the relevant ministry of finance and central bank (or separate debt management agency), for:

- Debt Management Policy Advice
- Primary Debt Issuance
- Secondary Market Arrangements
- Depository Facilities and
- Clearing and Settlement Arrangements for Trade in Govt. Securities

Moreover, the guidelines urge that in an efficient and transparent PDM system, steps should be taken to clearly define and publicly disclose the objectives of debt management. In particular, steps should be taken to explain the measures of cost and risk which are adopted; establish an open process to formulate & report debt management policies; and there should be public availability of information on PDM Policies. In this regard, the relevant authorities should regularly publish details of the stock and composition of public debt, including the details of the relevant currency, maturity and interest rate structure.

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In order to promote accountability in PDM and to provide assurances as to the integrity of a given PDM framework, the guidelines propose that national authorities ensure that there is an annual external audit of debt management activities

The Institutional Framework for PDM

The new PDM guidelines propose several suggestions to enhance and strengthen the institutional framework for PDM. In regard to g**overnance** the new guidelines suggest that the authorities clarify which agency or agencies have authority, inter alia, to borrow, issue new debt, invest and conduct transactions on Government's behalf. In addition, it is suggested that the authorities clearly specify the organisational framework for PDM; and that there be a clear articulation of mandates and roles.

The guidelines also make suggestions regarding the **Management of Internal Operations.** A number of proposals are made, including that the PDM authority:

- Manage risks according to sound business practices
- Develop an accurate & comprehensive management information system, with proper safeguards
- Ensure that staff are subjected to appropriate and enforceable code-of-conduct and conflict-of-interest guidelines
- Develop sound business recovery procedures, to mitigate the risk of disruption to debt management activities due inter alia to natural disasters, social unrest, etc.

Debt Management Strategy

The guidelines also provide a range of benchmark for developing a sound debt management strategy. All of these can be usefully developed by sub-Saharan African member countries, in building a coherent strategy for PDM. For example, the guidelines suggest that for a PDM authority to develop a sound debt management strategy it will be important to:

- Monitor the risks inherent in governments' debt structure
- Consider the financial and other risk characteristics of Government's cash flows
- Take account of risks associated with foreign-currency and short-term or floating rate debt
- Establish cost-effective cash management policies, to ensure that financial obligations are met with a high degree of certainty, when these obligations fall due.

Risk Management Framework

A fifth element of an overall strategy to develop a sound system of PDM comprises the development of a coherent risk management framework. In this regard, the new

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PDM guidelines offer several proposals, suggesting that it would be important for the relevant authorities to develop a framework to enable the identification and management of trade-offs between expected cost and risk; regularly conduct stress tests of the debt portfolio, based on the types of economic and financial shocks to which government is potentially exposed; and to consider the impact of contingent liabilities, when making borrowing decisions.

In addition, in contemplating the scope for active management of the debt portfolio, the guidelines suggest that in order to seek to profit from interest rate and exchange rate movements, it is essential for debt managers to be aware of the risks involved and accountable for their actions.

Development & Maintenance of Efficient Market for Government Securities

A final area of focus of the new guidelines is the steps which a national authority can take to develop and maintain an efficient market for government securities. This is indeed a central challenge for low-income developing countries, who are seeking in the long-term to develop robust domestic financial markets, capable of mobilizing the savings necessary for economic development. In regard to the government securities market, the guidelines offer many useful suggestions, all of which are of relevance to the sub-Saharan African member countries. These include, firstly, efforts designed to diversify the government debt portfolio, including the range of instruments available to government. Here, governments are advised to strive to achieve a broad investor base, for domestic and foreign obligations, with due regard to cost and risk; and to treat investors equitably.

In the primary market, operations should be transparent & predictable, using market-based mechanisms, including competitive auctions & syndications.

Where Possible it is also crucial to promote the development of resilient secondary markets, which are able to function under a wide range of market conditions. Moreover, the systems used to settle and clear financial market transactions should reflect sound practices.

Observations from the Accompanying Document on PDM

Introduction

In addition to the specific recommendations of the PDM guidelines themselves, an intensive study has been conducted of PDM practices and development in a range of developing and advanced industrial countries. These studies have been included in an accompanying document to the guidelines.

Several key observations emanate from an overall assessment of PDM practice in these countries, all of which are of key importance for sub-Saharan African member countries seeking to develop their own PDM systems. Among the most relevant of these observations, which it would be useful for the national authorities in these member countries to consider, include the following observations:

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Firstly, there has been a trend toward more formalised objectives and institutional frameworks for PDM. This trend has entailed most countries seeking to manage their debt at the lowest cost over the medium-to-long term framework; and has seen a greater focus on the development of a domestic market for government debt.

Secondly, there has been a trend toward developing a proper legal framework to support debt management, with the separation of monetary policy conduct from debt management. Coupled with this, there have been improvements in communications and greater transparency among countries in regard to their debt management strategy. This has tended to be demonstrated through the publication of more reports on aspects of PDM, more media announcements in respect of the PDM strategy and in some cases, there have also been external reviews of the relevant PDM Strategy.

Thirdly, the repertoire of risk management techniques is expanding. Most countries examined in the 18-country study of PDM systems are now using cash flow modeling to analyse costs and risks of their debt management strategies. Some are also modeling their debt service and macro-variables jointly. For sub-Saharan African countries, particularly those that have been subject to the fiscal discipline measures required to qualify for the HIPC initiative, these findings are important, suggesting that there may be scope for these countries to learn from the experiences of more advanced emerging market and industrial country PDM strategies, particularly in finding ways to integrate their debt service and macro-economic modeling exercises.

A fourth observation from the experience of countries implementing PDM strategies is that t operational risk is being better managed. Increasingly, operating manuals are being developed, detailing all important procedures. Conflict of Interest rules are increasingly being developed and applied; clear reporting lines are being established; and the use of formal audits has expanded. All of these are important and valuable lessons for sub-Saharan African countries in building their PDM strategies and systems. Moreover, recent experience has shown that in many countries, offices are being established by the relevant PDM authorities to analyse risk and to implement risk control procedures.

Development of Technology & Systems to Perform Debt Management Tasks

A final important set of observations from recent experience with PDM pertains to the substantial developments which have taken place regarding the use of updated technology and modern systems to perform the tasks required for public debt management.

Recent evidence suggests that increasingly national authorities have been acquiring commercially available systems designed for private sector institutions to model cost and risk. In the case of some countries, the relevant systems have been developed in-house. All systems focus on debt recording, reporting and analysis; while some also focus on cash management, accounting and budget systems.

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Limitations to the Benefits of Sound Debt Management

While sound debt management can contribute to significantly strengthening the macroeconomies of low-income countries, debt management alone is, of course, no substitute for sound policies, including sound macroeconomic, fiscal and monetary policies, an appropriate exchange rate regime, ensuring that there are sustainable levels of public debt, ensuring a sound external position and developing a well-supervised financial system.

Conclusion

For sub-Saharan African countries and particularly for the MEFMI countries for which the UNITAR/MEFMI Seminar on the Legal Aspects of Public Debt Management was conducted, the World Bank/IMF Guidelines on Public Debt Management, together with the Accompanying Document containing case-studies, represent particularly valuable resource material, which should be intensively studied. The material is particularly relevant for HIPC countries, particularly in assisting these members in their efforts to introduce appropriate governance and institutional structures when developing their frameworks for public debt management; in helping them develop information systems which fully capture the financial characteristics of government financial obligations and contingent liabilities; and in assisting these countries in developing PDM frameworks which encompass both domestic and external debt.

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Chapter 3

THE ROLE OF THE LAWYER IN THE PROJECT CYCLE AT THE AFRICAN DEVELOPMENT BANK[9]

by Aboubacar Fall

I. Introduction

The African Development Bank Group (AfDB) is a regional multilateral development finance institution. Its membership is comprised of 53 African countries (regional member countries) and 24 non-African countries (non-regional member countries) of America, Asia and Europe. It was established in 1964 and is headquartered in Abidjan (Côte-d'Ivoire). The AfDB is comprised of *the African Development Bank*, which lends at non-concessional terms, *the African Development Fund*, which is the soft window of the AfDB providing concessional resources to the poorest Regional Member Countries (RMCs), and *the Nigeria Trust Fund*. The agreement establishing the AfDB stipulates that "*The purpose of the Bank shall be to contribute to the economic development and social progress of its regional member countries---individually and jointly"*. Towards achieving this objective, the AfDB uses resources at its disposal to finance projects and programs in its RMCs and to provide technical assistance to African countries as may be required for the preparation of development projects and programs. To this end, the AfDB finances projects and programs as well as studies in agriculture, energy, industry, infrastructure, public utilities, and the social sector and also provide non-project lending to support policy reforms. The AfDB also provides resources to address the cross-cutting issues of environment, gender mainstreaming, governance, and regional integration as well as finances projects in the private sector.

The objective of this Chapter is to examine the role of the lawyer in the project cycle at the AfDB. The focus is on public sector projects, which are projects co-financed by the AfDB, the government of the borrowing country, and any other development partner. It is shown that, currently, the role of lawyer in the project cycle at the AfDB is more active in the case of governance-focused operations, which aims at improving good governance. After this introduction, section II reviews the project cycle at the AfDB and discusses the role which the lawyer on both sides plays in the process.

II. The AfDB lawyer in the Project Cycle

Project and program development at the AfDB follows a well-established process, which is usually referred to as the project cycle. This cycle comprises of the following *six stages*: (i) *identification*, (ii) *preparation*, (iii) *appraisal*, (iv) *loan negotiations*, Board consideration and signing of the loan agreement, (v) *project*

[9] The author is grateful to Mr. Ferdinand Bakoup, Senior Economist at the African Development Bank, for his valuable assistance in the preparation of this chapter. The project cycle in AfDB is quite similar to that of the World Bank's concessional window (IDA).

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execution and supervision, and (vi) *post-evaluation*. Lawyers at the AfDB serve primarily in the Office of the General Counsel and Director of the Legal Services Department. The extent of their involvement in the project cycle depends primarily on the objectives of the project being considered. It can be argued that the lawyer participates in all the stages of the project cycle in the case of projects or programs, which have a clear focus on improving governance such as legal and judicial reform projects, policy-based lending aiming at promoting reforms in the area of governance, or capacity building projects targeting key governance institutions.

Governance-Focused Projects

The AfDB, in 1999, adopted a policy on good governance, which seeks to mainstream good governance into Bank's operations in a manner, which is consistent with its mandate. In implementing this policy, the AfDB finances policy reforms with conditionalities designed to improve the governance framework, capacity building projects aimed at strengthening key governance-fostering institutions in RMCs and, also carry out economic and sector work aimed at strengthening the knowledge base on governance issues. The key elements of good governance in the AfDB policy on good governance include the promotion of transparency, accountability, participation, anti-corruption and legal and judicial reforms. It therefore, appears, that given the key role that the legal and judicial reforms plays in the promotion of good governance, the participation of lawyers is usually sought in the early stages of the project development in the case of governance-focused interventions. The lawyer, therefore, participates in the project cycle from project or programme identification to execution and supervision and post-evaluation. This participation is often key to the success of the operation, as their design usually requires technical expertise in legal and judicial matters. In the course of project development, the lawyer also participates in Bank missions, which visit the country during each stage of the project cycle to hold discussions with the authorities and other stakeholders interested in the project.

Sectoral Projects

These are investment projects and programs, which aim at addressing a developmental problem of a clearly sectoral nature. Projects in the agricultural sector aiming at increasing agricultural production, the construction or rehabilitation of certain specific infrastructure such as roads, irrigation systems, or health or education facilities, for example, would fall under this category. For these projects, relevant expertise in the sector is very often the key input in their design and implementation. Sector experts, therefore, play a lead role in the project cycle, from identification to execution and supervision and post-evaluation. The participation of the lawyer is often less comprehensive in scope, as it is usually at the appraisal stage that the lawyer becomes involved in project design activities. The lawyer may not participate actively in the identification and preparation of these projects, and may not also be part of Bank missions to the countries. However, the lawyer plays a key role during loan negotiations and in the drafting of the loan agreement.

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III. The Borrower's lawyer and the Project Cycle at the AfDB

It is important to recall that the focus for the Bank on project lending is aimed at ensuring that the funds are invested in sound, productive projects which contribute to the development of the borrowing country's economy as well as its ability to repay the loan. Therefore projects must be carefully selected and prepared, thoroughly appraised, closely supervised and systematically evaluated.[10]

Following is a description of each phase of the project cycle with an emphasis on the role of the borrowing country's lawyer.

A. Identification

Until recent years, the identification phase was done in response to proposals by the borrowing country. Nowadays, the Bank assists the RMCs to develop their own methods of generating projects and carrying out economic and sectoral analysis. This analysis provides the basis for the identification of projects that fit into a coherent development strategy, such as the Poverty Reduction Strategy Paper (PRSP) or the Country Strategy Paper (CSP).[11] Because of the strategic nature of the country's decision to borrow, the lawyer's role is, at this stage, quite limited. However, his or her advice may be sought as to some aspects of the feasibility of the project envisaged and the financing plan.

It can also be very helpful to have the lawyer participate in the discussion precedent to the proposed transaction. This will enable him or her to (i) gain a better understanding of the borrowing country's economic objectives, (ii) intervene more efficiently at the later stages of the borrowing process and (iii) foresee the legal consequences of the different financing options the borrower would contemplate at this stage. Further, the lawyer's participation in the discussions concerning the identification phase can be useful in that he or she can advise the borrower about pre-conditions to be fulfilled later in the process and the way to carry them out. That can be the case of impact assessment or study.[12]

B. Preparation

On the Bank side, once the project is identified and included in its lending program, it enters the pipeline. Then a "Project Memorandum" is prepared which describes its objectives, identifies critical issues to be addressed, and establishes the time table for its potential carrying out. While the Bank may have an active role in ensuring that the project is being well prepared, the formal responsibility for this preparation phase rests with the borrowing country. The Bank's role indeed includes making sure that

[10] Warren C. Baum in "the Project cycle". International Borrowings D. Bradlow, Editor – International Law Institute – 1994.
[11] On these notions see A. FALL in Best Practices for Poverty Reduction and Sustainable Development in Africa: Public Participation – UNITAR – Best Practices Series # 4. (2003).
[12] D. Bradlow – Selected Essays on Development Finance and the Role of the Lawyer in International Debt Operations. UNITAR – Document n°6 – Geneva, July 1999.

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the borrowing country has the capacity and resources to prepare the project according to its requirements and standards. In that respect, the Bank may provide the technical assistance necessary to adequately prepare the project. It may, under certain circumstances, provide special grant or loan, such as the Project Preparation Facility (PPF) for the same purposes. The role of the borrowing country's lawyer, in this context is essential and must be carried out in many respects:

(i) Preliminary issues to be addressed

Before going into the feasibility of the project, the lawyer must help the borrowing country address key issues such as: Is this project viable enough to generate sufficient funds to cover all the costs associated with the said project, including the servicing of the debt to be incurred. In addressing this issue, the lawyer will participate in determining the different impacts that the project might have at the technical, financial, environmental, economic and social levels. For example, would an environmental impact assessment be needed?

The legal aspects of this determination will be central and require the lawyer to answer questions, such as:

1) What legal power is necessary to undertake such a project?
2) How to obtain such a legal power, if necessary?
3) Will a governmental authorization be necessary to bring the project forward?
4) What are the potential costs associated with such an authorization?
5) Does the borrower have clear legal title to the assets and properties it plans to use in the project?
6) In that respect, what are the potential obstacles and how to overcome them?
7) What types of legal actions can those who oppose the project take to delay its implementation and increase the costs (environmental groups, people to be displaced and resettled, etc.)?

The lawyer will have to explore the domestic law in all its related aspects in order to help the borrowing country answer these preliminary questions. He or she may also need to research in international law as the country may have committed to accept certain obligations such as the undertaking of an environmental impact assessment which is often embodied in international treaties and international financial institutions' policies.

With regard to the participation of the public in the designing and implementation of projects, the lawyer must ensure that there are fora available at the national level to make the voice of the public stakeholders heard (administrative and judicial courts as well as Inspection Panel). These are considered as constituting the "best practices" indispensable to the success of any development project.

(ii) Potential sources of funding

The identification of available sources of external funding is central at this stage.
It must be recalled that, in general, external funding available to borrowing countries may range from commercial banks (single bank or syndicated loans), investment

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banks (which underwrite a bond issue), multilateral development banks such as the African Development Bank, to official bilateral sources of funds which include official development assistance (ODA) and export credit agencies.
While the selection of one or many of these sources can be regarded as a business decision, the taking into account of the legal regime of each particular source is of paramount importance. Each specific legal regime will have an impact on to whom the source of funds can extend credit, how much it can extend to the particular borrower, what will be the conditions under which the credit will be extended to the borrower. For example, the African Development Fund (ADF) which is the concessional window of the AfDB Group can only lend to member states or to borrowers who have a sovereign guarantee. In order for the lawyer to help the borrower in the selection of the most adequate source of funding, he or she must have access to information concerning rules and procedures of multilateral development banks, the various statutes and implementation regulations and procedures of the official bilateral funding sources, and the laws and regulations that govern the borrower's commercial sources of funding.[13]

Given the difficulties encountered by government lawyers in accessing this information, UNITAR will be setting up a Database of Loan Agreements and contracts to be posted on its website (www.unitar.org/dfm). This initiative is aimed at providing government lawyers the usual financial and legal conditions of the different sources of funding.

Ultimately, the borrowing country will be in a position to make a more informed decision and will be prepared to negotiate efficiently with the selected funding source(s).

C. Appraisal

This is a very crucial phase of the loan transaction process, since the project takes shape, and the feasibility studies are near completion. Appraisal, which is the culmination of the preparatory work, provides a comprehensive review of all aspects of the project and lays the foundation for implementing and evaluating the project when it is completed.[14] If the preparation phase has been well done, appraisal can be relatively easy. It is important to stress that the responsibility for the appraisal rests solely with the Bank which has to ensure, among other, that:

- The project is soundly designed, economically and socially viable.
- The cost estimates are accurate.
- The Bank's procurement requirements are met.
- The operating project facilities are available.
- The project unit is properly organized to adequately manage the project.
- The investment program for the sector considered is examined through its strengths and weaknesses.
- The project has been subjected to a detailed analysis of its costs and benefits to the country.
- A risk or probability analysis is also carried out.

[13] D. Bradlow – idem – supra n°4.
[14] Warren C. Baum – ibid – idem.

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- There are sufficient funds to cover the costs of implementing the project.
- The borrowing country finances the costs in local currency.
- The financing plan sets out the different contributions in terms of currency and per source of funding.

The Bank will have to evaluate that all relevant information is available and meet its lending criteria and standards. The Bank's lawyer will therefore need to assess the legal feasibility of the project. This means to determine whether or not the Banks is allowed to make the loan pursuant to its own operating rules and procedures. The lawyer will also help in assessing the financing instruments it could use to make the loan and the best way to structure the deal.

D. Negotiations and Board Presentation

(i) The Negotiations

Once the borrower and the lender have reached an agreement on the measures necessary to assure the success of the project this agreement is then converted into legal obligations and set out in a loan document. In fact, all of the main issues that have been raised before and during the appraisal phase are dealt with in the loan agreement.

The Negotiations are a process of give and take on both sides of the table. The Bank must adapt its general policies, when possible, to accommodate the borrower's concerns. On the other side, the borrower must recognize the Bank's professional expertise and experience in wisely investing the funds to achieve sustainable development. The main purpose of these negotiations is to enter into a financing transaction by coming up with a workable and legally binding and enforceable contract. The parties will spell out the specific conditions under which the Bank will disburse the funds to the borrower and the borrower will pay the loan principal plus the interests and fees associated with the loan. Ultimately, the negotiations will end with the borrower expressing its acceptance to receive the funds for a given period of time, at a certain price and on the conditions that are consistent with the Bank's policy and strategic objective. It goes without saying that the transaction will provide the Bank with a rate of return at a manageable level of risk. These are the prerequisites for the loan agreement to be satisfactorily executed by both parties.

In this context, the role of the lawyer (in the negotiation team) is predominant in that he or she will be in charge of drafting the terms of the contract in a clear and precise language that will facilitate the operation of the loan. This is mainly true regarding the division of risks between the parties. In this regard, the borrowing country's lawyer must understand the objective of the project to be funded and therefore be in a better position to advise his or her client as to the alternative ways to draft the loan agreement in order to limit the scope of the allocation of the risk to the borrower.

During the negotiations over the drafting provisions of the transaction, the lawyer should not forget that the main feature of the loan agreement is that, in this particular type of business arrangement, the lender performs its obligations at the beginning of the loan, i.e. when it disburses the funds to the borrower. The borrower does not fully

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perform its obligations until the end of the loan, when it has fully repaid the principal of the loan to the Bank. Therefore, a compromise must be found between the Bank's position to restrict the borrower's freedom to use the funds as it wishes and that of the borrower to reduce to the minimum the requirements of the covenants and other restrictive clauses. Central to this bargaining process from the Bank's perspective are the Conditions Precedent that the borrower must satisfy before any disbursement is operated. Indeed, the objective of the conditions precedent is to assure the Bank that the loan agreement is legally valid, binding and enforceable against the borrower.
According to AfDB's lending policy, the borrower's failure to conform to these conditions precedent will excuse the Bank from executing its commitment to disburse the funds.

Another important legal aspect to consider by the lawyer consists in the incorporation, by reference, of the Bank's General Conditions in the loan agreement. Therefore, it is imperative that the lawyer gets a copy of these General Conditions long before sitting for negotiations. The General Conditions incorporate, among others, provisions relating to (i) definitions, (ii) commitment fees, (iii) currencies in which to make the repayment of the loan, (iv) conditions precedent to the entry into force of the loan, (v) causes for suspension of the loan etc...[15]

In order to perform efficiently his or her mission during the negotiations, the lawyer must, among others:

- prepare for the transaction in developing a negotiation strategy.
- formulate and develop persuasive arguments.
- identify priorities and set a limit to what is acceptable in the borrower's interest, i.e. trade offs or compromises.
- take notes and make sure that each issue is addressed.
- rely on his or her own record of the negotiations.

The negotiation phase is closed by the adoption of a draft which reflects the compromise reached by the parties on the terms and conditions of the loan.

(ii) Approval of the Loan by the Board of Directors

At the African Development Bank Group, all the negotiation documents (draft agreement, proceedings of negotiations and appraisal report) are submitted to the Board of Directors for their formal approval. It is important to note that, at this stage, only the Bank's lawyer attends the Board meeting. He or she, in these specific circumstances, will be advocating for the approval of the loan agreement. He or she will stand for all the parties and beyond them, for the success of the project to be financed. In this respect, he or she will have to answer questions relating to legal issues as they have been negotiated and agreed upon by the parties. If the Executive Directors approve the operation, the loan is then signed during a formal ceremony.
It should be stressed that, on the sovereign borrower's side, the loan agreement will require its approval by the Parliament following some pre-established procedure and the evidence of such an approval will be conveyed to the Bank.

[15] See – African Development Fund General Conditions applicable to loan and guarantee agreements adopted 23 November 1989. See in particular Section 5.01 relating to conditions precedent.

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The Bank's lawyer, after a careful check, will then declare the conditions precedent as satisfied according to the Bank's standards, policies and procedures[16].

E. Implementation (Project Execution)

The next phase in the project cycle is its execution or implementation, since the conditions precedent to the loan effectiveness have been satisfied and the borrower can indeed access the funds. It must be recalled that the responsibility of the implementation rests only with the borrower.

At this stage, the role of the lawyer is limited, unless a dispute arises in which case, he or she will be in the forefront of negotiating a settlement according to the Bank General Conditions provisions relating to arbitration. But it should be borne in mind that a well negotiated and well drafted loan agreement should prevent a litigation from occurring and facilitate the implementation of the related project. It is important, however, to admit that all projects face implementation problems, some of which cannot be foreseen. They may derive from changes of different origins (economic, political, managerial, environmental, etc.). This is why in the AfDB's project cycle, an adequate supervision of the implementation of the project is of paramount importance.

F. Supervision

The Bank will supervise the project as it is implemented by the borrower.
Although the role of the lawyer, at this stage, is almost non-existent, it is useful to understand the importance of the supervision process. The main purposes of this phase are:

- To ensure that the proceeds of the loan are used only for the purposes for which the loan has been extended;
- To ensure that the funded project achieves its development objectives;
- To ensure that all problems that arise during the implementation phase are properly identified, dealt with and solved in an efficient and cost effective way.
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From the Bank's side, the lawyer may be asked to give an opinion in cases such as changes in the destination of part of the proceeds of the loan by the borrower. This would be addressed according to the Bank's general policy on the use of the proceeds of the loan. In this regard, it is important to underline that, as a matter of policy and best practice, any change in the use of the proceeds of the loan require the approval of the Board of Directors.

Another purpose that the supervision phase has been serving in these recent years is that of enabling the Bank to gather accumulated experience to feed it back into the design and preparation of future projects and into the improvement of policies and procedures.

[16] One of the conditions precedent will be the insurance of a legal opinion letter by judicial authorities to opine that the loan agreement has been negotiated and signed according to the national debt management procedures.

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It is also very important to note that, already during the negotiation phase, the supervision of the project implementation is contemplated through an agreement on a schedule of progress reports to be submitted by the borrower. These reports relate to the physical execution of the project, its costs and information on the evolution of the project benefits for the borrower. Field missions may be sent when specific difficulties are identified. These missions may include a lawyer, although this possibility is rare, except in procurement of goods and works.

Procurement is carried out according to the Bank's guidelines incorporated by reference to the loan agreement and designed to ensure that the goods and works are procured in the most efficient and economical way. Generally, this objective is achieved through international competitive bidding opened to candidates from all the Bank's member countries. Furthermore, in order to develop local capabilities, preference is accorded, under certain circumstances, to local suppliers and contractors. This is the case in projects for which the works are too small for international bidding to be appropriate. The observance of the agreed-upon procurement rules such as the preparation of the specifications and tender documents and the evaluation of the bids, constitute an overriding part of the supervision process.

G. Evaluation

Once all the phases of the project cycle are complete and the Bank funds fully disbursed, then appears the need for a comprehensive monitoring and evaluation process of the project as it has been implemented and supervised. The responsibility of this *ex – post* audit rests with the Bank's Operations Evaluation Department which reports directly to the Board of Directors and is separate from the operating staff. This separation is designed to ensure the Department's independence and objectivity and its full accountability.

It must be recalled that, at the end of the disbursement period of the project, both the borrower and the Bank prepare a Completion Report which constitutes a self - evaluation exercise. These reports are reviewed by the Evaluation Department which then prepares a separate audit report. The Bank encourages borrowers to establish evaluation systems to review their development investments. The audit and completion report operates a re-estimation of the economic rate of return on the basis of actual implementation costs and updated information on operating costs and expected benefits.

The evaluation system is an invaluable source of information, which supplements and complements that provided by the project supervision reports. It is important to note that from the lessons learned at the evaluation phase the Bank and the borrower are able to adopt new approaches, policies and procedures. These lessons of experience are therefore incorporated into the design and preparation of future projects. In this respect, the contribution of the lawyer should be of an overriding importance.

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IV. Conclusion

The main purpose of this chapter is to describe the role that the lawyer can and should play in the project cycle. Emphasis is put on the fact that the earliest the lawyer is involved in the process, the better.

In actively including the lawyer, with an understanding of international financial law, in all the phases of the project cycle, the sovereign borrower will enhance its understanding of (i) the legal and regulatory procedures of its various creditors and, (ii) the contractual terms and conditions of each of their loan obligations. This will enable it to obtain more beneficial loan transactions.

Experience has shown that, most of the time not only does the borrower's lawyer not participate in the phases preceding the negotiations (although he or she was invited), but is absent at these negotiations, leaving the Bank's lawyer handle all legal issues and draft the loan agreement.

The lawyer's role is to participate actively in developing and implementing the sovereign's borrowing strategy. As a member of a team, he or she must demonstrate creativity in helping overcome difficulties, searching for alternative solutions. In achieving his or her mission, careful attention must be paid to drawing an artificial line between financial or business issues and legal issues.

The value added by the presence of the lawyer in the project cycle is priceless in any respect.

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Daniel D. Bradlow is Professor of Law and Director of the International Legal Studies Program at the Washington College of Law, American University, Washington, D.C. where he specializes in international economic law. His current scholarship focuses on the international financial institutions, the international legal aspects of sustainable and equitable development, and the legal aspects of debt and financial management. He is a Senior Special Fellow in the Legal Aspects of Debt and Financial Management Programme of the United National Institute on Training and Research (UNITAR) and is a consultant to the World Bank. He has worked as a Consultant to the World Dams Commission, MEFMI (The Macroeconomic and Financial Management Institute for Eastern and Southern Africa) and the MacArthur Foundation and served as an advisor to the Rethinking Bretton Woods Project. In 1996 he was a Visiting Professor at the Community Law Centre at the University of the Western Cape, South Africa. He has lectured in the United States and many countries in Africa, Asia and Latin America on both the public and private aspects of international economic and financial law and on the negotiating and structuring of international economic transactions.

Prior to joining WCL, Professor Bradlow was a Research Associate at the International Law Institute and a consultant to the United Nations Centre on Transnational Corporations, as well as an attorney in private practice.

He has edited books and published articles on international financial law, the international financial institutions, foreign investment, the World Bank Inspection Panel, globalization and its implications for global economic governance and the changing responsibilities of the World Bank and the IMF in the management of the global economy. Professor Bradlow holds degrees from the University of Witwatersrand in South Africa, and Northeastern University and Georgetown University in the USA and is a member of the New York and District of Columbia Bars.

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Dr. Rustomjee is a South African national. He has recently served as Executive Director for 21 African countries in the Executive Board of the International Monetary Fund. He began his career in corporate banking in South Africa in 1984 and worked in this field for a period of about eight years, focusing on tax-based project financing. Thereafter he worked with the Department of Economic Planning of the African National Congress, conducting research on investment behaviour in the South African economy, ahead of the country's first democratic elections in 1994. After elections, he joined the Finance Ministry of the new government, serving as Advisor to the Deputy Minister of Finance.

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In 1996, he was assigned to the office of the Executive Board member representing South Africa at the World Bank in Washington, DC. In 1998 he was appointed Alternate Executive Director of a 21-member group of African countries in the IMF Executive Board and was elected to the position of Executive Director by the constituency member governments in 2000.

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UNITAR

UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt, financial management and negotiation are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's **Training and Capacity Building Programmes in the Legal Aspects of Debt, Financial Management and Negotiation** are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa and Vietnam. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, and training of trainers workshops. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2003, the programme will focus on:

- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Developing On-line Training Courses (in parallel with its traditional regional training) with a view to tapping a wider audience and reducing cost of training per participant;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

A description of UNITAR's latest activities and training programmes in the area of debt and financial management is available on its website at : www.unitar.org/dfm.

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