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Challenges of the Law and Development Practitioner*

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“Even though the world is incomparably richer than ever before, ours is also a world of extraordinary deprivation and staggering inequality.”

Amartya Sen¹

Growth, equity, development, and reduction of poverty are all concepts inextricably linked to the principle that economic policy, must be grounded on the law and sound legal and judiciary institutions to help the poor climb up the economic ladder. As it has long been established, the relationship between law and equity is essential for development, with the principle of equity playing a central role in legal traditions. The overarching concept

*The opinions, findings, interpretations, and conclusions expressed here are those of the author and do not necessarily reflect the views of the World Bank Group, the Board of Executive Directors of the World Bank, or the governments they represent. The World Bank cannot guarantee the accuracy of the data included in this work and accepts no responsibility whatsoever for any consequence of their use.

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1. Amartya Sen, *Ten Theses on Globalization*, NEW PERSPECTIVES QUARTERLY, Fall 2001, at 4, available at http://www.digitalnpg.org/archive/2001-fall/ten_theses.html.

of fairness cuts across different cultures and nations indicating that most people share a concern for equity.²

But even if there are signs of some acknowledgment about the law as an essential component of development,³ often policymakers and financial experts neglect to investigate what the true legal underpinnings of policy reform really are. Regrettably, lawyers are not yet well recognized as essential actors in promoting development.

Likewise, the evolution of economic development from a project-based approach to a more holistic strategic programmatic view requires a new concept of legality about the transactions, taking into consideration the economic field, institutional arrangements, and regulatory frameworks. A lawyer practicing in the sensitive area of development (hereinafter Development Lawyer) faces new and complex challenges requiring permanent adjustments and changes in the way we work to meet the demands of our increasingly diverse universe of clients. To further strengthen our contribution to development in general, we need to identify concrete areas where our global law and development practice needs to transform itself.

Therefore, it seems only natural that we should start by asking ourselves, first, what is the role of today's Development Lawyer and how do we fulfill it? And second, what are the priority areas for strategic transformation of the law and development practice that are in line with the challenges affecting development?

I. The Role of the Development Legal Practitioner of Today

Understanding the law as a discipline that is both theoretical and abstract, we may conclude that a lawyer is the professional that translates these norms into practical applications of legal theory and knowledge. The Development Lawyer is a specialist who tries to solve real life problems by applying the law and the principles of the juridical sciences for the promotion of equitable development. An approach to understanding equitable development is the concept stated in the World Development Report 2006: "[R]ecognizing the importance of equity (that is, equality of opportunity and the avoidance of absolute deprivation) implies the need to integrate and extend existing approaches."⁴

The role of a Development Lawyer, however, entails a more comprehensive concept than can be inferred from this or any other definition. This role is the result of a complex knowledge matrix resulting from an application of the principles of juridical sciences, laws, rules and regulations, while also requiring non-legal skills to build bridges of understanding among the abstract principles therein contained and the policy and institutional realities of

2. Robert Dañino, Former Senior Vice President and General Counsel, World Bank, Opening Remarks at the Legal Forum 2005 (December 1, 2005) (transcript available at <http://worldbank.org/>(Search Robert Dañino and "2005").

3. Julio Faundez, Professor of Law, Univ. of Warwick, Legal Reform in Development and Transition Countries: Making Haste Slowly, Address at the World Bank Conference Comprehensive Legal and Judicial Reform: Towards an Agenda for a Just and Equitable Society in the 21st Century (2001) (June 5-7, 2000) (transcript available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/faundez/).

4. The World Bank, World Development Report 2006: Equity and Development, at 226 (2006) [hereinafter WDR 2006]. This report argues that equity has a central place in the interpretation of development experience and in the design of development policy—a place that has been inadequately understood and undervalued in much current thinking. Further, it does not propose another new framework for development. Instead, "recognizing the importance of equity (that is, equality of opportunity and the avoidance of absolute deprivation) implies the need to integrate and extend existing development approaches." *Id.*

uncharted territory and unfriendly or unusual circumstances, under the all-encompassing principles of development.

Therefore, a legal professional contributing to domestic or international development must possess specialized professional training, practical development experience, and a complex set of skills indispensable in the multidisciplinary context in which we work. The scope of these skills may vary depending on the individual practice, but taking into account that the concept of development is also constantly evolving as a multidimensional issue, an effective practitioner must have ready access to the sources of, and familiarity with, several extra-legal disciplines and technical fields. The Development Lawyer would also, preferably, have developed expertise in public policy, government, and in-depth knowledge of social and institutional frameworks.

To carry out this daunting mission, over the years I have compiled my own toolkit that has been instrumental in building my current development legal practice. This toolkit comprises two sets of "instruments" aptly described as behavioral and professional skills. Both skill sets are essential in the delivery of legal services aimed at contributing to the promotion of economic growth and alleviation of poverty in the developing world.

On the behavioral side, the Development Lawyer needs to be a self-motivated, confident individual with an indefatigable creative energy to overcome constant obstacles and painful defeats. Along with other professional qualities, this lawyer must possess three important character capabilities. First, a lawyer must exhibit sensitivity to diverse and vulnerable groups, especially populations marginalized by economic and political systems, which deprive them from equitable access to the benefits of development. An example of this is our contribution to the legal dimension of gender and law work, particularly our capacity building efforts for the promotion of access to justice for women victims of violence, and the carrying out of legal diagnostic work to identify institutional capacity needs and remedial interventions for engendering of law and justice systems.⁵

Second, a lawyer must believe in the higher goal of helping vulnerable populations and the poor find their own way of overcoming such deprivation, by building homegrown legal and economic institutions, as well as empowering them to understand the intricacies of international financial institutions. A good example of this is the organization of local consultations with civil society groups, including women's nongovernmental organizations, to ensure that financial authorities include their views when the strategies for development assistance⁶ are defined.⁷

5. The World Bank, Legal Vice Presidency, *Impact of Legal Aid: Ecuador*, Report No. 26915, at 45, 47-48 (Feb. 2003). The Bank's first Legal and Judicial Sector Assessment led to the establishment of the Fund for Law and Justice, through which the Bank-funded Judicial Reform Project provided funds to support civil society activities, designed to improve the delivery of legal services throughout Ecuador. This study demonstrates that, in addition to developing more efficient, specialized services to improve access to legal services for poor women, the Program for Law and Justice created an important mechanism through which civil society organizations were encouraged to participate in the process of legal and judicial reform, and facilitated cooperation between the justice sector and civil society.

6. As an example of international assistance to a country's development strategy, the World Bank Group develops, on a periodic basis, a framework document entitled *The Country Assistance Strategy* (CAS) as the basis for cooperation with a client country. The CAS provides: (a) a detailed description of the World Bank Group strategy for a specific time; (b) indicators of the levels and areas for loan provision, Analytical and Advisory Activities work (AAA); and (c) the Bank's technical assistance based on such strategy and the country's

Third, a lawyer must have resilience, patience, and perseverance in the face of tragedy (e.g. post-conflict pandemics and environmental disasters), delays, and at times failures in implementing development projects at the country level. The Development Lawyer must also show tremendous energy and flexibility to create new documents, interpret new procedures and rules, and ensure quick, life-saving results.

On the professional front, the Development Lawyer must be a pragmatic lawyer who can integrate legal concepts and theory into the design and implementation of custom-tailored solutions to constantly changing specific needs of the countries or regions involved, in uncertain environments and within weak institutional settings. This requires, *inter alia*, three fundamental skill sets. First, the lawyer must have the ability to interpret complex legal and policy frameworks, including the international, regional, and national financial contexts, through the lens of diverse cultural and social norms and traditions. An example of this is the challenging translation, into legal terms, of complex social concerns, such as labor and women's rights, into the discussion of lending instruments, designed in support of trade liberalization regimes.⁸

Second, the lawyer must have the capacity to diagnose weaknesses within the client's legal system and provide technical advice, including the drafting of contractual language to bridge the gaps between these legal systems and financial institutions' requirements. For instance, financial intermediation to promote small and medium enterprises at the subnational level in a federal state required detailed analysis and adjustments, including the creation of subsidiary credit documentation, to allow full use of local and foreign resources.⁹

Third, a lawyer must have the flexibility to identify just-in-time legal solutions to the dynamic changes imposed by the dynamic development process, carefully translating incipient economic and policy language into legal documentation. Good cases in point are banking and financial crises that require an overhaul of regulatory frameworks,¹⁰ raising matters of increasing overlapping jurisdiction, at the international and local levels, and a delicate balance between legal certainty and business opportunity.¹¹

In a very broad sense, my own legal practice encompasses the three essential sides of the polyhedral reality of Development Law: designing and building the legal architecture of development operations, performing legal due-diligence examinations—or “the legal reality check”—and contributing to the furtherance of development law.

portfolio performance. The CAS is discussed with the government and external bodies prior to its submission for Board consideration. At the end of July 1998, the World Bank Board of Executive Directors approved a new policy allowing for public disclosure of the CAS upon consultation with the concerned government.

7. The Country Assistance Strategy for the Oriental Republic of Uruguay (2005-2010) is an example of this, as it includes concrete support for gender equity development activities. The World Bank, *Country Assistance Strategy for the Oriental Republic of Uruguay 2005-2010*, <http://siteresources.worldbank.org/INTURUGUAY/Resources/CASFinalIngles.pdf>.

8. This is a constant challenge for countries within the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). The World Bank, Central America Department and Office of the Chief Economist Latin America and Caribbean Region (2006), *DR-CAFTA: Challenges and Opportunities for Central America*, at ch. III, available at http://siteresources.worldbank.org/LACEXT/Resources/258553-1119648763980/DR_CAFTA_Challenges_Opport_Final_en.pdf.

9. The World Bank, *Southeast Regional Development Learning and Innovation Project*, Report No. 31204, Loan No. 7079-MEX (Feb. 7, 2005).

10. GUILLERMO E. PERRY AND DANIEL LEDERMAN, *LATIN AMERICAN AND CARIBBEAN STUDIES: FINANCIAL VULNERABILITY, SPILLOVER EFFECTS, AND CONTAGION: LESSONS FROM THE ASIAN CRISES FOR LATIN AMERICA* (World Bank Latin American and Caribbean Studies 1998).

11. Luis de la Plaza & Sophie Sirtaine, *An Analysis of the 2002 Uruguayan Banking Crisis* (World Bank Policy Research Working Paper No. 3780, 2005).

A. DESIGNING AND BUILDING THE LEGAL ARCHITECTURE

This legal craft includes a variety of tasks of diverse complexity and legal sophistication, determined by a host of factors, *inter alia*, the nature of the transactions, the country context, and the urgency of the financial product to be delivered. The added dimension of the comparative or multiple jurisdiction aspect of our work requires careful analysis of local conditions and legal systems as well.

The specific instruments and legal advice I provide in my practice include drafting international and subsidiary financial agreements and amending documents and legal notices. Also, a regular part of my practice is negotiating a variety of contractual agreements and providing legal interpretation to policy reform measures to comply with disbursement conditions. Finally, I also advise on designing legal remedies for non-compliance of agreements and developing capacity building and law development initiatives that require reforms to existing norms for efficient implementation.

B. THE LEGAL DUE-DILIGENCE OR "LEGAL REALITY CHECK"

Legal due diligence is one of the most demanding services that a Development Lawyer must provide daily to non-legal clients, including economists, engineers, social scientists, and financial specialists. This legal task builds on practical knowledge from non-legal fields, and includes business ingenuity, knowledge of institutional and financial architecture, and public policy and includes risk assessment techniques as referred to earlier in this article.

Delivering this particular kind of legal advice requires a quick grasp of the objective, scope, contents, and institutional features of the proposed financial or economic intervention and an evaluation of it for consistency with institutional legal and policy framework to ensure its feasibility, legality, and efficient implementation within the financial institution. For instance, how can we ensure that a matching-grant¹² facility aimed at promoting the development of competitive enterprises is legally and financially viable in a country with undeveloped financial institutions lacking appropriate banking supervisory skills?

This exercise also requires rapid assessment at the country-level of the current policy and institutional circumstances. In the proximity of political transitions, for example, the legal risks that an eventual major institutional overhaul may cause are as important as the financial risks of the transaction. As Development Lawyers, we are expected to absorb all such information, and integrate the findings into our "legal reality check" to provide concrete guidance that would enable our clients to answer the following questions: (1) whether the proposed project realistically would be implemented within the given set of norms and government regulations; and (2) whether, under current circumstances, we should go ahead and propose the project to the management of a financial institution for approval.

C. CONTRIBUTING TO THE FURTHERANCE OF DEVELOPMENT LAW

This aspect of my professional practice involves sharing the experiences gathered over the years with colleagues, students, and other professionals in a systematic and useful way, as well as building on these experiences to make recommendations deepening the meaning of our work. The presentation I made at Southern Methodist University in March 2006 and this article are examples of how a Development Lawyer can actively contribute within the

12. This mechanism provides for international funding, in equal amounts, to match locally raised or privately offered financing.

professional area we have chosen and consistent with our ultimate goal as lawyers—namely, translating principles and theory into concrete realities with a focus on improving the living conditions and development of our fellow human beings.

Our contribution can be made in a variety of ways, including through conferences, workshops, seminars, in-house and external trainings, publications, and the increasingly utilized distance learning events. Additionally, to fulfill our role as Development Lawyers we should carefully consider the pressing challenges affecting our practice, by creating new knowledge and legal instruments, and devise ways to influence the outcome.

Particularly in the last five years, my work has changed and it continues to change and reinvent itself. As a general observation, I see that the practice is constantly permeated by multiple and different challenges of growing complexity and magnitude. Increasingly, we tend to respond to such challenges in a reactive way, by intuitively adjusting our legal craft and diligently providing our evolving set of clients with new types of legal services.

There are inherent risks in this equation. A rapid response, even though client-oriented, may fail our own “legal reality check.” A promptly delivered but poorly crafted legal instrument is not a legally sound contribution; rather, it is likely to hinder the development process we seek to support. We need to anticipate and more strategically forecast the types of challenges we may face and propose concrete areas where lawyers can play a more proactive role in the transformation. So what are the most pressing challenges affecting our practice?

D. THE NEW CONCEPT OF EQUITABLE DEVELOPMENT

“There are only two families in the world, as my grandmother used to say: the haves and the have-nots.”

Miguel de Cervantes Saavedra¹³

Global development institutions such as the World Bank and the United Nations Development Program bring equity to the center of development, arguing that an equity lens enhances the poverty reduction agenda and the achievement of the worldwide development agenda as proposed by the Millennium Development Goals.¹⁴ This article draws its intellectual underpinning from the World Bank’s seminal report, *The World Development Report* (WDR). The WDR states that global inequity can be reduced by faster growth and human development in poorer countries. As remarked in the WDR, “[w]e live in a world with massive inequalities in the opportunities to live a free, healthy, and fulfilled life.” This statement emphasizes the reality of predetermined circumstances or life chances beyond our control (country of birth, gender, ethnic group) which determine our opportunities in life.¹⁵

13. United Nations Development Program, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, trade and security in an unequal world*, available at <http://hdr.undp.org/reports/global/2005/>. This report appropriately starts its second chapter, “Inequality and Human Development,” by quoting Miguel de Cervantes’ masterpiece, “Don Quixote de la Mancha,” wherein Sancho Panza says the above referred sentence.

14. United Nations, UN Millennium Development Goals Home Page, <http://www.un.org/millenniumgoals/> (last visited Oct. 2006). “What are the Millennium Development Goals? The eight Millennium development Goals (MDGs)—which range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015—form a blueprint agreed to by all the world’s countries and all the world’s leading development institutions. They have galvanized unprecedented efforts to meet the needs of the world’s poorest.” *Id.*

15. WDR 2006, *supra* note 4, at 55.

The WDR argues that in an equitable society there are greater opportunities for all, by improving the participation of the poor in the development process. Greater equity leads to better institutions, more effective conflict management, and a better use of resources, thereby improving the success of a development strategy. Global and domestic actions complement each other, as increased economic growth in poor countries contributes to a reduction in global inequities while, global action can likewise change external conditions and affect domestic policies.

E. THE IMPACT OF GLOBALIZATION

The heated debate on globalization points to the inequalities in affluence and in political, social, and economic power among countries engaged in global trade and commerce.¹⁶ Internationally, the rules and processes of the global market arguably can be described as unfair to developing countries, as they are said to lack leverage in influencing decision-making processes for two reasons: the lack of institutional capacity to understand the complex negotiation process, and their weak presence at the international fora.¹⁷

At the country-level, political and legal institutions may not provide citizens with fair, transparent, and inclusive environments, depriving them from having influence or a voice in their own development.¹⁸

Additionally, accessible justice systems are critically important to promote equitable development, as well as accountable legal institutions and fair laws and practices. These are essential to protect the rights of all citizens in a non-discriminatory way and to safeguard such rights against abuses of the state.¹⁹ Current research trends seem to articulate the intrinsic relationship between the degree of globalization achieved by a country and the specific weight carried by the rule of law in each country.²⁰

Encouragingly, the World Social Forum was formed in pursuit of a common interest and has met annually since 2001. In January of 2006, the meeting took place in Caracas where Efraín Jiménez, Vice-President of Zacatecan Federation of Southern California said, "[w]e're all in the same boat. We're all fighting for our rights, for a better way of life."²¹

It has been suggested by international experts that poverty reduction strategies must move prominently towards reflecting human rights' legal framework, ensuring consistency between this framework and domestic legal systems.²² To ensure equitable access to justice,

16. Int'l Labour Org., World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All*, at 35 (Feb. 24, 2004), available at <http://ilo.org/public/english/wcsdg/docs/report.pdf>.

17. Dr. Vinay Bhargava, World Bank Dir. of Int'l Affairs & Asli Gurkan, World Bank Consultant of Int'l Affairs, World Bank Seminar Series, Global Issues Facing the Humanity, *Global Compacts: A Better World for All*, at 3 (Oct. 19, 2005), available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/Globalcompacts.pdf>.

18. WDR 2006, *supra* note 4, at 55.

19. *Id.* at 156.

20. The World Bank, Policy Research Report, *Globalization, Growth and Poverty: Building an Inclusive World Economy*, at ch. 1 (Dec. 5, 2001).

21. Robert Lovato, *Immigrant's Wall of Death*, THE NATION MAGAZINE, Mar. 24, 2006, at 2 (quoting Efraín Jiménez at the 2006 World Social Forum), available at <http://www.alternet.org/story/33594/>.

22. Victor Abramovich, *Una Aproximación al Enfoque de Derechos en las Estrategias y Políticas de Desarrollo en América Latina*, presentado en el seminario, Derechos y Desarrollo en América Latina: un Reunión de Trabajo, organizado por el BID y la CEPAL en Santiago de Chile, 9 y 10 de diciembre de 2004, [en línea] http://www.iadb.org/sds/publication/gen_2547_3973_S.htm.

a greater framing of poverty reduction policies and compliance with international legal instruments is needed.²³ Furthermore, the due-diligence standard has been invoked in cases involving violations of human rights in local and international courts. These courts have found that states are under an obligation to prevent, protect, investigate, punish, and repair violations of human rights. Furthermore, this evolving theory advocates to extend this obligation to international bodies and development agencies as well.²⁴

F. STRUCTURAL CHANGES IN DEVELOPMENT SYSTEMS AND INSTITUTIONS

The new roles and evolving governance of financial institutions, including updating risk prevention criteria, crisis management, expanded voting powers, and subsidiary financing schemes,²⁵ present us with a challenging but promising opportunity to face old problems with new perspectives.²⁶ Inasmuch as we are able to modernize the way in which Development Lawyers contribute to this change, we will have succeeded.

The legal framework of trade as a contributor to growth and development also poses a new front to consider in our evolving practice. Initiatives such as the integration of global trade and aid agendas,²⁷ for example, encompassing harmonization of donor procedures in support of poverty strategies, are developed to meet the special needs of groups of countries or regions. Clear examples of these are initiatives that are adapted to reflect country conditions, such as financing trade, promoting projects for middle-income countries,²⁸ and debt relief initiatives for heavily indebted poor countries approved by the international financial institutions.²⁹

23. Martín Abregu, Exec. Dir. Center for Legal and Social Studies, Argentina, *Barricades or Obstacles: The Challenges of Access to Justice* (2001).

24. Yakin Ertürk, U.N. Special Rapporteur on violence against women, Conference on Due Diligence Standards and Their Application, Berne Switzerland, Sept. 22-24, 2004, available at http://www.izfg.unibe.ch/duediligence/pdf/Report_Yakin_Erturk_E.pdf.

25. Michel Camdessus, Per Jacobsson Foundation, International Financial Institutions: Dealing with New Global Challenges (Sept. 25, 2005), available at <http://www.perjacobsson.org/lectures/092505/pdf>. "The legitimacy of the Bretton Woods Institutions is increasingly questioned. Indeed, the world faces mounting universal demands for more participatory governance at all levels of governance in society, including, of course, in the multilateral institutions, which must accommodate the growing role of new players. A lot is at stake for the international climate of the next decades, depending on whether these new players will be invited soon to share global responsibilities or they will have to fight for them." *Id.*

26. Robert Picciotto, King's College of London, *The Development Idea: How Did It Evolve? What Did We Learn? Where Are We Going?* (ppt presentation 2006), available at siteresources.worldbank.org/DEV/DIALOGUE/Resources/RobertPicciottoTHEDEVELOPMENTIDEA.ppt.

27. Jeffrey D. Sachs, *Foreword to UN Millennium Project: Trade For Development*, New York, Jan. 17, 2005. "The world has an unprecedented opportunity to improve the lives of billions of people by adopting practical approaches to meeting the Millennium Development Goals. At the request of UN Secretary-General Kofi Annan, the UN Millennium Project has identified practical strategies to eradicate poverty by scaling up investments in infrastructure and human capital while promoting gender equality and environmental sustainability. These strategies are described in the UN Millennium Project's report *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*, which was coauthored by the coordinators of the UN Millennium Project task forces." *Id.*

28. The World Bank, *Report of the Task Force on the World Bank Group and the Middle-Income Countries* (2001), available at <http://0-siteresources.worldbank.org.library.vu.edu.au/COUNTRIES/Resources/mictf.pdf>.

29. The World Bank, IDA's Implementation of the Multilateral Debt Relief Initiative, *Resource Mobilization Department* (Mar. 14, 2006), available at <http://siteresources.worldbank.org/IDA/Resources/MDRIfinalimplementation.pdf>.

As a natural consequence of the structural changes mentioned, we started to see country regional synergies beyond "economic development." These initiatives based on commonality of ideology, once a theoretical or only a suggested course of action,³⁰ are now a frequent scenario as countries realize the benefits of horizontal cooperation in unprecedented ways. Cross-border development issues, such as money laundering, migration and trafficking, and public health crises, (such as HIV/AIDS, Avian Flu, and natural disasters) constitute the new development challenge for Development Lawyers to contribute in a meaningful way.³¹

We also see now that the global war on poverty requires a strategy based on selectivity, flexibility, and efficiency in selected areas for intervention, which will lead to increased development effectiveness. To do so, we must realize that the two essential areas of law and development work on this front include the establishment of an enabling legal framework to improve the investment climate and social inclusion.³² Finally, structural changes are even more urgent if we want to operationalize the legal institutions that promote equitable development as a multidimensional endeavor, encompassing social justice, fairness, and access to equitable opportunities to those left behind by standard development formulas.³³

G. EVOLVING CLIENT BASE

The challenges that Development Lawyers face everyday are also found in increasingly more sophisticated national and regional scenarios, opening an unprecedented set of new clients. For instance, regional priorities such as climate change, natural disasters, and trade integration, may position regional institutions as the direct beneficiaries of development on behalf of individual countries. Sub-national lending in turn, requires an extended understanding of local law, procedure and administrative practice, local politics and power structure, and an essential dialogue with civil society organizations.³⁴ Standard features in the new development scenarios include new social contracts and safety nets requiring innovative cash transfer programs³⁵ for the most disadvantaged, expanding support to private sector intermediaries or direct beneficiaries particularly in the area of infrastructure,³⁶ and complex negotiations of support or guarantee by central or federal bodies.

A special comment should be made for states in post-conflict or economic transition. Failing states, autonomous regions, privatization and de-privatization add not only to the challenges mentioned above, but also to the uncertainty of non-existent or non-functioning legal institutions.

30. Joseph E. Stiglitz, former Sr. Vice President and Chief Economist, The World Bank, 1998 Prebisch Lecture at UNCTAD, Geneva, Towards a New Paradigm for Development: Strategies, Policies, and Processes (Oct. 19, 1998), available at <http://siteresources.worldbank.org/CDF/Resources/prebisch98.pdf>.

31. Patricio Márquez, The World Bank Group, *Scaling up the Struggle: Barbados HIV/AIDS Prevention and Control Program* (July 2004), available at <http://www1.worldbank.org/devoutreach/july04/article.asp?id=249>.

32. Lynn Bennett, The World Bank, *Empowerment and Social Inclusion: A Social Development Perspective on The Cultural and Institutional Foundations of Poverty Reduction* (Mar. 2003).

33. Richard Bond et al., *Impact Assessment for Sustainable Development Unit* (Inst. For Dev. Policy & Mgmt., Univ. of Manchester Working Paper Series, Paper No. 1, 2000).

34. The World Bank, *Good Practice Note for Development Policy Lending: Subnational Development Policy Lending* (June 2005), available at <http://siteresources.worldbank.org/projects/Resources/GPNSubnational7-21.pdf>.

35. Bénédicte de la Brière and Laura B. Rawlings, The World Bank, *Examining Conditional Cash Transfer Programs: A Role for Increased Social Inclusion?* (June 2006), available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-Papers/Safety-Nets-DP/0603.pdf>.

36. The World Bank Group, *Operational Guidance for World Bank Group Staff: Public and Private Sector Roles in Water Supply and Sanitation Services* (Apr. 2004).

Global new actors such as multinational corporations play a critical role in development by consolidating the emerging client base with which Development Lawyers work. The Organization for Economic Co-operation and Development (OECD), a global new actor consisting of the wealthiest nations, published "Guidelines for Multinational Enterprises."³⁷ The Guidelines provide voluntary principles and standards for appropriate conduct by multinational enterprises in such areas as labor relations, human rights, disclosure of information, and environment and consumer protection. They apply to global operations of multinational enterprises based in adhering countries. Development Lawyers must familiarize themselves with this global legal framework. The OECD further contributed with the "Convention on Combating Bribery of Foreign Public Officials"³⁸ to guide partner countries' anti-corruption agenda. In line with this global priority, the World Bank recently approved the OECD's worldwide strategy to contribute to this agenda.³⁹

H. NEW DEVELOPMENT PRODUCTS

The factors mentioned above, as an approach to the multifaceted professional challenges that Development Lawyers must be willing to face in our daily practice, will not be complete if we do not address the new development products that are becoming available to our clients. Improved governance and increased accountability at the country level requires interaction with all branches of government—not limited to financial authorities—and significant access to externally funded capacity-building programs such as Action Plan for Africa.⁴⁰

Improving the investment climate through reforms is also a major part of poverty reduction strategies. Employment and income opportunities for poor people can be constrained by a weak investment climate. Countries are therefore advised to periodically upgrade their legal and regulatory frameworks in sensitive sectors, such as water and sanitation, telecommunications, energy, and transport. Resolving legal conflicts caused by sudden policy changes is a specific area of important intervention by Development Lawyers, for instance water as a human right⁴¹ versus existing concession contracts.

As is often the case with strengthened business climates, enhancing business activity in developing countries creates new jobs. According to the World Bank in its *Doing Business*

37. This is a government-backed, voluntary code of conduct for international business. See, Organization for Economic Co-operation and Development [OECD], *Policy Brief, The OECD Guidelines for Enterprise: A Key Corporate Responsibility Instrument*, OECD OBSERVER, 2003, <http://www.oecdobserver.org/> (search "OECD Guidelines for Multinational Enterprises") (last visited Oct. 2006). "The OECD Guidelines for Multinational Enterprises are one of the world's foremost corporate responsibility instruments and are becoming an important international benchmark for corporate responsibility. They contain voluntary principles and standards for responsible business conduct in such areas as human rights, disclosure of information, anti-corruption, taxation, labour relations, environment, and consumer protection. They aim to promote the positive contributions multinational enterprises can make to economic, environmental and social progress." *Id.*

38. International Monetary Fund, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction* (Sept. 18, 2001), available at <http://www.imf.org/external/np/gov/2001/eng/091801.pdf>.

39. The World Bank, *Raising the Bar on Anti-Corruption: Improving Governance and Accountability, Fostering Development* (2006).

40. The World Bank, Africa Region, *Meeting the Challenge of Africa's Development: A World Bank Group Action Plan* (Sept. 26, 2005), available at http://siteresources.worldbank.org/INTAFRICA/Resources/aap_final.pdf.

41. Salman M. A. Salman and Siobhán McNerney-Lankford, The World Bank, *The Human Right to Water: Legal and Policy Dimensions* (Sept. 2004).

2006: *Creating Jobs*⁴² report, one way out of poverty is to have access to a decent job, by either starting one's own business or finding work in an existing one. The report ranks countries according to a set of indicators as follows: (a) starting a business (procedures, time, cost and minimum capital); (b) dealing with licenses; (c) hiring and firing workers; (d) registering property; (e) getting credit; (f) protecting investors; (g) paying taxes; (h) trading across borders; (i) enforcing contracts; and (k) closing a business. Examples of proactive approaches in this sense are El Salvador, which has reduced the time it takes to start-up a business by seventy-five days and Honduras, where registration fees have been cut in half.

Contributing to the development of legal and judicial reform and building institutional capacity to ensure equitable access to justice for disadvantaged populations continues to be a challenge for Development Lawyers, at the country and international levels. Empowering the poor to participate meaningfully in public decision making and promoting fair public consultation on the impacts of development are important and relatively new products. Relevant stakeholders must be proactively involved in their own development strategies, to ensure local ownership.⁴³ And governments likewise may be concerned about rapidly authorizing infrastructure investments in the absence of community participation, arguing that such investments may be subsequently delayed by costly consultations with potential involuntary resettled persons or indigenous peoples eventually affected by a proposed development project. As in other areas, new products continue to emerge such as sector-wide approaches, which aim at providing the poorest countries with a unified donor strategy through prioritized investment objectives areas.⁴⁴

II. The Evolving Law and Development Practice

The strategic transformation of the law and development practice dictates, as a prerequisite, that Development Lawyers must take a more proactive role in their own transformation. We are in a unique position to do this, both as legal practitioners with real life experience and as perpetual witnesses of the pros and cons of different approaches to development.

While the process of raising awareness of the importance of the legal aspects of development may at first seem like a daunting task, it can be done through a simple three-step assessment of any development initiative. First, we must assess whether we have the right legal framework in place to proceed with the initiative. If not, we must assess whether it will be delayed or substantively changed in the absence of such framework. Next, we must decide between proposing legal reform before we submit for approval a concrete investment or including it as a development objective to be achieved during the implementation of the project.

Second, we must evaluate whether we can effectively approve and implement the project through the existing legal institutions. This involves further evaluating whether the right legal procedures are in place to declare the financial instrument (e.g., loan, grant, or credit) effective for disbursement of funds. If so, we must identify the proper legal authorities for providing authorization, ratification, and/or legal opinions to ensure that the contracts are legally binding on the parties.

42. The World Bank and the Int'l Finance Corp. [IFC], *Doing Business 2006: Creating Jobs* (2006), available at http://www.doingbusiness.org/documents/DoingBusiness2006_fullreport.pdf.

43. The World Bank, *Global Monitoring Report 2006*, at 198-202 (2006).

44. Such as rural development, education and health in Central America.

Third, we must assess whether we can negotiate and sign the proper legal documents, and whether the legal obligations derived from such documents are sufficient and conducive to promoting sustainable and equitable development. In my view, we must strive to achieve legal certainty in all that we do, as the law is undoubtedly an essential tool⁴⁵ for achieving equitable development.

While the discussion above highlights just how important lawyers are in development, they are not yet widely recognized as essential actors in the development promotion business. As described so poignantly by an international development economist:

Economists have lessons to learn from lawyers: On the global sphere, countries interact within the parameters of international law. Economists are not used to tread on lawyers' territory so I will not venture far. But keeping the international legal framework in sight offers important insights. First, a concern for equity encompassing notions of both corrective and distributive justice, is not new, so there is experience to draw upon in moving towards more equitable policies and institutions. Second, the degree to which laws emerge from processes that are perceived to be fair affects their adoption and implementation, a point forcefully brought home in Europe in recent months by the French referendum rejecting the European constitution. Third, the processes that interpret, apply, and enforce international laws are crucial to realizing them. These are important lessons to be kept in mind by lawyers when we are working for greater global equality.⁴⁶

While it safely could be argued that preventive legal advice generally is not as prevalent a concept as it is in other professional fields such as medicine or architecture, lawyers should carefully identify the legal risks that may arise from development initiatives. For instance, if we are not included as early as possible in development discussions, highly unsatisfactory or inequitable projects may result. This exclusion happens both at the country and at the international levels. Government financial authorities oftentimes do not include lawyers on their negotiating teams, and economists in development institutions may not agree to call lawyers to participate in the initial stages of project design.

The underlying problem is that policymakers and economic and financial experts neglect to investigate the legal underpinnings of policy reforms when such reforms, in many cases, require congressional approval and not just an executive decree. Additionally, many of our country counterparts believe that they are above the law and tend to blame legal and judicial institutions for slow progress or lack of reform when the results are not what they expected.

It is interesting to note, however, that the development field is undergoing a rapid evolution from project-based development approaches to a more strategic, programmatic approach. This emerging viewpoint requires a new conceptualization of the legality of the transaction, taking into account that in providing our advice we may need to crossover several economic fields and propose institutional arrangements and regulatory frameworks, which in the absence of appropriate legal protections, could impinge upon the existing rights of a diverse set of stakeholders, e.g., the private sector indigenous populations, and ethnic minorities. This makes our role as global facilitators even more important. Our legal advice must be crafted in such a way that we facilitate equitable access to the benefits of

45. The World Bank, *World Development Report 2006: Equity and Development*, at 207 (2005), available at http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2005/09/20/000112742_20050920110826/Rendered/PDF/322040World0Development0Report02006.pdf.

46. Giovanna Prennushi, Lead Economist, Poverty Reduction Group, The World Bank, *Achieving Greater Global Equality*, presented at the World Bank Legal Forum (Dec. 2, 2005).

development, preventing concomitant unwanted social impact, which may hinder the very essence of what we seek.

It is clear that Development Lawyers can make a substantive contribution to the development process by first recognizing that we have evolved into a multi-dimensional profession with its own identity, particularly when we deal with weak or emerging legal realities. A sample of this is the clear need for lawyers to contribute with the development of policy reform proposals. We must ensure that these proposals, although technically sound, are also legally feasible, taking into account country laws and procedures. However, this needs to be envisioned from an even deeper perspective than could be inferred by assimilating this contribution to plain legal advice. It is not only to find potential flaws and legal pitfalls, or to try to avoid them; rather, we must truly become an active part of the core decision process of development. A guiding principle that should affect our daily practice is that our legal documents, if devoid from this multidimensional flavor, could promote further inequity under circumstances where familiarity with political economy and country-specific reality are of paramount importance.

It is also critical to be able to translate economic language into meaningful and enforceable legal covenants that must take into account prior obligations of the country not only under local law, but increasingly under international conventions as well. Failing to do so puts the country at risk of violating international obligations, and ignoring these covenants could imperil or delay further development assistance. It is our professional responsibility to prevent this, as well as to suggest new legal documentation or to promote the negotiation of changes to existing obligations.

It cannot be stressed enough how important it is for the Development Lawyer to be creative in the daily practice of the profession. For instance, financial institutions periodically update their framework policies concerning the scope, content, and framework regarding obligations to be met by recipient countries to respond to the criticism against unreasonable conditionality.⁴⁷ This new framework leaves no doubt as to the legal craftsmanship necessary to successfully structure the operations.⁴⁸ This flexibility, combined with the consistency necessary in any practice area of the legal profession, becomes the essential and difficult middle ground where we, as Development Lawyers, practice every day. A survival technique, in this sense, is to strike a creative balance between the fine print of the law and the overwhelming goal of poverty reduction. For example, in the absence of an appropriate and effective country legal framework we may create a project-centered contractual framework.

Therefore, it is indispensable to become more comfortable with the uncertain language of the technical fields and include more frequent legal reality checks in the development process based on our pragmatic experience and common sense of fairness. For instance, a government proposal may include an implementation agency lacking legal personality to carry out procurement or financial management. Instead, we could propose a joint implementation agreement with the respective line Ministry.

Unless we build flexible, creative, and adaptive legal practices, we run the risk of "becoming the neglected factor" in development. This is how, a few years back, Professor Hector

47. See The World Bank, *Review of World Bank Conditionality, Operations Policy & Country Services*, at 25-34 (Sept. 2005), <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1114615847489/webConditionalitysept05.pdf>.

48. See *id.*

Fix-Fierro labeled Mexican lawyers for their lack of proactive participation in the legal reform process in that country, deferring to financial and economic government officials.⁴⁹

III. Reflecting on the Strategic Way Forward

We all come to development with different perspectives and backgrounds. This is a distinctive advantage in that the holistic combination of these approaches can truly create a new and different path to achieve better living conditions for all. It should be emphasized, however, that the way forward requires a dramatic change in how Development Lawyers conduct business and in the creation of new tools of the trade. In a broad sense, our way forward should encompass three critical actions: (1) learning; (2) developing new areas of professional expertise; and (3) influencing the development process through creativity.

A. LEARNING

Learning is crucial even for those experienced lawyers who have been in practice for a long time. We cannot be complacent. We must make a personal commitment to stay abreast of new legal thinking and practice while we both learn and help others master these new realities.⁵⁰

The Development Lawyer is responsible for taking a proactive approach in transforming the reach and impact we may have. We must constantly reinvent ourselves, learning by doing and teaching others, promoting learning opportunities, and expanding our understanding of new areas of the law. This process will also lead us to venture into other professional streams while exploring creative instruments that could help us adapt our legal practice to the emerging global and regional development challenges.

It is important to stress that promoting learning opportunities means, in this context, learning from and among our development counterparts. This interactive capacity building has proven to be the most efficient way of educating all the essential actors in development. Parallel to the legal analysis at the regional, national, and sector level, we should always be proactive in integrating local counsel to give us advice on contract drafting and negotiations, as well as providing training to local lawyers on international legal frameworks.⁵¹ These interactions and exchanges with local legal professionals and academics in our clients' countries are a most enriching experience that constitutes the backbone of understanding the real impact of our legal work. Implementing this process through such means as field missions can help us grasp the local legal requirements and administrative practices of the specific country and the likely effect of one proposed legal strategy over another. Additionally, attending and organizing learning events, conferences, and dialogues are effective ways to discuss, systematize, and disseminate the findings and suggestions that the results of learning initiatives bring to our knowledge base.

49. Hector Fix-Fierro, Visiting Professor, University of Houston Law Center, *Lawyers: A Neglected Factor in Legal and Judicial Reform in Mexico*, presented at the World Bank's Lawyers Forum III: Meeting the New Challenges of the Legal Profession Through Partnerships (May 2001).

50. I started in my own country in the late 1970s and have more than twenty years of hands-on experience with African, East Asian, and Latin American legal realities.

51. See The World Bank, *Country Assistance Strategy for the Oriental Republic of Uruguay 2005-2010* (2005), <http://siteresources.worldbank.org/INTURUGUAY/Resources/CASFinalIngles.pdf>.

B. DEVELOPING NEW AREAS OF PROFESSIONAL EXPERTISE

Without intending to be casuistic, many other areas of the legal profession are becoming matters that need immediate consideration by the Development Lawyer. Among others, our legal documentation must incorporate human and social aspects of development such as indigenous people rights, gender and law, youth at risk, access to justice, macroeconomic policy reform, pro-poor growth initiatives, trade integration and facilitation, and labor law reforms.

Other than tailoring legal instruments to better serve our clients and institutions, probably the furthest reaching contribution we can make to Development Law is to include legal reform components in development projects. We also contribute to the development of legal analysis through joint funding of legal assessments with development partner institutions, for example in the area of women's rights.⁵²

Another area of development that needs to be prioritized and to which we, as Development Lawyers, can make a significant contribution is the gender dimension of development. This has been recognized by many international instruments⁵³ and organizations,⁵⁴ as summarized by the Office of the High Commissioner for Human Rights of the United Nations as follows:⁵⁵

Equality is the cornerstone of every democratic society which aspires to social justice and human rights. In virtually all societies and spheres of activity women are subject to inequalities in law and in fact. This situation is both caused and exacerbated by the existence of discrimination in the family, in the community and in the workplace. While causes and consequences may vary from country to country, discrimination against women is widespread. It is perpetuated by the survival of stereotypes and of traditional cultural and religious practices and beliefs detrimental to women.⁵⁶

A recent depiction of the real gender dimension of development as an economic matter with clear legal underpinning was delivered by Mr. Paul Wolfowitz, President of the World Bank Group, on February 16, 2006 at the 2006 *High-Level Consultation: Promoting the*

52. The Danish International Development Agency (DANIDA) Danish Consultant Trust Fund provided funds to the World Bank to conduct analytical legal work in Central America (2005-2007).

53. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.ohchr.org/english/law/cedaw.htm>.

54. The World Bank Operational Manual, *Operational Policies: Gender and Development*, OP 4.20 (Aug. 2004), <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf> (follow "Volume I" hyperlink; then follow "Sector/Thematic Strategies" hyperlink).

55. U.N. High Comm'r for Human Rights, Fact Sheet No. 22, Discrimination Against Women: The Convention and the Committee (1993) (see section titled "Introduction"), available at <http://www.unhchr.ch/html/menu6/2/fs22.htm>.

56. *Id.* Further, it is argued that:

Combating poverty and achieving gender equality require a major reorientation of economic and development planning. Governments and their international development partners need to recognize that there are no short-cuts in this effort: economic growth, even if supplemented by social policies, too often fails to stimulate the kind of secure, protected employment needed to enable the working poor to earn a [sufficient income].

United Nations Development Fund for Women, *Progress of the World's Women 2005*, at 13 (2005), <http://www.un-ngls.org/women-2005.pdf>.

Gender Equality MDG: The Implementation Challenge. In his opening remarks, Mr. Wolfowitz commented as follows:

When we talk about gender equality, or about empowering women, or bringing more girls into the classroom, many think this is a women's issue. They are wrong. It's a development issue. . . . [n]o country can expect to progress if half its population is held back from achieving what they're capable of. . . . [c]reating opportunities for women is clearly smart economics.⁵⁷

This depiction almost begs the question of what kind of contributions we, as Development Lawyers, can make to this specific area in which the way forward is still wide open. A quick reading of the report from UNIFEM gives us a valuable hint, identifying very precisely some of the core priorities necessary to address this problem.⁵⁸ It is quite evident that these priorities represent a plethora of possibilities for us to significantly contribute to equitable development by bringing together international, regional, and national public and private actors, harmonizing their needs and goals through the careful crafting of legal instruments and preventive legal measures. This is also an environment conducive to having an impact on policy formulation from the Development Lawyer's vantage point.

Beyond the priorities referred to above, there are still other priorities that we should not forget in many other areas of the law and development as they are still very much in need of our input. For instance, international laws governing global markets that are the product of complex negotiations require our technical assistance to facilitate the understanding of the poorest countries, which lack the resources to attend such negotiations. In addition, legal documentation for the financing of post-conflict reconstruction⁵⁹ and strategies in support of fragile states, in our client countries are areas where much legal creativity is necessary.⁶⁰

Another very exciting area for Development Lawyers, which started to emerge in the mid-1990's to become a mainstream strategy, is a public-private investment modality.⁶¹ This

57. Paul Wolfowitz, President, World Bank Group, Opening remarks at High-Level Consultation: Promoting the Gender Equality MDG: The Implementation Challenge (Feb. 16, 2006), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/0,,contentMDK:20824024~menuPK:2643809~pagePK:64020865~piPK:149114~theSitePK:336868,00.html>.

58. Unifem's Core Priorities Include:

Core Priority # 1—To promote decent employment for both women and men as a key pathway to reducing poverty and gender inequality. A concerted effort is needed to ensure that decent employment opportunities are viewed as a target rather than an outcome of economic policies, including national Millennium Development Goals (MDG) strategies and Poverty Reduction Strategies. *Core Priority # 2*—To increase visibility of informal women workers in national labor force statistics and in national gender and poverty assessments, using the employment by type and earnings indicators recommended for Millennium Development Goal 3. *Core Priority # 3*—To promote a more favorable policy environment for the working poor, especially women, in the informal economy through improved analysis, broad awareness building and participatory policy dialogues. *Core Priority # 4*—To support and strengthen organizations representing women informal workers and help them gain effective voice in relevant policy-making processes and institutions.

Progress of the World's Women 2005, *supra* note 56, at 13.

59. See The World Bank, *Conflict Prevention and Reconstruction (CPR), CPR and Related Publications on Conflict and Development* (2005).

60. See The World Bank, *Indonesia: Initiatives for Local Governance Reform Project Appraisal Document, East Asia and Pacific Region* (2005), http://siteresources.worldbank.org/INTPRS1/Resources/383606-1119904390686/bbl051005_PAD_P076174.pdf.

61. We find clear examples of these new instruments for development in the agreements reached by the Gates Foundation with the Pan-American Health Organization, the regional arm of the World Health

is a challenging undertaking for lawyers trying to merge public and private law concepts.⁶² These partnerships should be addressed from many angles, determining their legal cost and benefits, the degree of familiarity with complex issues among partners, and the creation of new legal tools for their efficient implementation.

Conflict prevention and resolution by international bodies is another important landmark on our way forward. Several international institutions serve clients in this sense, such as the International Center For Settlement of Investment Disputes (ICSID), covering issues pertaining to foreign private investment conflicts.⁶³ As a tool to protect the interests of civil society and citizens that could eventually be affected by development initiatives, a new breed of institutions has emerged, led by the World Bank Inspection Panel⁶⁴ and the Compliance Advisor/Ombudsman.⁶⁵ They embody distinctive examples of how the future of our profession will be shaped and how Development Lawyers can contribute in the evolution process.

Organization for the Americas and a member of the United Nations Systems, and the Clinton Foundation with the World Bank, UNICEF and others.

62. Press Release, Clinton Foundation, Clinton Foundation, Global Fund, World Bank and UNICEF Extend Deep Price Reductions for AIDS Drugs and Diagnostics, New Agreements Aim to Make Lowest-Priced AIDS Drugs and Diagnostics Available to Hundreds of Thousands of Patients Throughout the Developing World (Apr. 6, 2004), <http://www.clintonfoundation.org/040604-nr-cf-hs-ai-arv-usa-ind-zaf-pr-coalition-aims-to-provide-low-cost-aids-drugs.htm> (last visited Oct. 13, 2006).

63. The World Bank Group, Int'l Centre for Settlement of Inv. Disputes (ICSID), *ICSID Convention, Regulations and Rules*, at 5, ICSID/15 (Apr. 2006), http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf.

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). The Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (The World Bank). On March 18, 1965, the Executive Directors submitted the Convention, with an accompanying Report, to member governments of the World Bank for their consideration of the Convention with a view to its signature and ratification. The Convention entered into force on October 14, 1966, when it had been ratified by 20 countries. As at April 10, 2006, 143 countries have ratified the Convention to become Contracting States.

Id.

64. The World Bank, *The Inspection Panel Annual Report July 1, 2004—June 30, 2005*, at 9 (2005), <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/IPN-2004-2005.pdf>.

The Inspection Panel consists of three members who are appointed by the Board for nonrenewable periods of five years. As provided for in the Resolution that established the Panel, members are selected on the basis of their ability to deal thoroughly and fairly with the Requests brought to them, their integrity, their independence from Bank Management, and their exposure to developmental issues and to living conditions in developing countries. A Panel member is disqualified from participating in the investigation of any Request related to a matter in which he or she has a personal interest or had significant involvement in any capacity. Panel members may be removed from office for cause, only by decision of the Executive Directors.

Id.

65. See The World Bank Group, International Finance Corporation, *Annual Report 2005, Compliance Advisor/Ombudsman* (2005), http://www.ifc.org/annualreports/ar2005/pdfs/english/IFC_AR05_V1_compliAdvisor.pdf.

The Office of the Compliance Advisor/Ombudsman is the independent accountability mechanism of IFC and MIGA, established in 1999 and reporting directly to the president of the World Bank Group. The CAO serves as an ombudsman who responds to complaints from people affected or likely to be affected by projects; as an auditor who assesses IFC's and MIGA's compliance with environmental and social safeguards; and as an advisor, who provides independent advice to the organizations' senior management and president on policies and systemic issues, including those that arise in the process of complaint investigations and compliance audits.

Id.

Additionally, we are called upon to exercise our creativity by contributing to the devising of municipal strengthening programs and sub-national interventions to improve governance and financial management. There is a clear legal role in the improvement of the business environment by conducting more analytical work and advisory services.⁶⁶ Poverty reduction initiatives are instances of our way forward as Development Lawyers in the future.

C. INFLUENCING THE DEVELOPMENT PROCESS THROUGH CREATIVE LEGAL INSTRUMENTS

I am convinced that the daily practice of our profession allows us countless ways to influence the development process if, and only if, we keep ourselves aware of the realities in which our actions have an impact. In a broad sense, a pro-poor agenda encompasses many actors, but there is only one common denominator—the law as the harmonizing, equity balancing factor. This can easily be inferred from the following paragraph extracted from a more inclusive economic theory: “A successful pro-poor growth strategy should have, at its core, measures to achieve sustained and rapid economic growth. These include macro-economic stability, well-defined property rights, a good investment climate, an attractive incentive framework, well-functioning factor markets and broad access to infrastructure and education.”⁶⁷ Indeed, none of the above could be viable without the right legal instruments and enabling legal framework.

Policy reform dialogue, between country financial authorities and development agencies clearly needs creative Development Lawyers as discussions could endure for several phases with multiple lending legal agreements to ensure sustainable changes in a priority sector such as infrastructure. In turn, new governments that may be launching radical changes in the ownership structure of sources of growth such as energy, mineral resources, electricity, and water, need critical legal advice as they redesign their legal framework and renegotiate concessions. This may raise concerns about breach of contracts among investors, thereby necessitating our intervention to facilitate project restructuring and amendment of contractual agreements.

In my practice I've observed that, particularly where middle-income countries and federal systems are concerned, sub-national lending agreements must meet constitutional requirements, and lenders must obtain certain guarantees and approve financing packages. As a lawyer this entails working with multi-layered contracts and legal opinions and complying with different legal conditions and legal remedies custom-tailored to reflect different jurisdictions,⁶⁸ offering us another opportunity to better shape development through law.

Likewise, subsidiary financing and implementation agreements, such as those between government agencies and enterprises and among different branches of government, that

66. See The World Bank, *Doing Business in 2006: Creating Jobs*, at Contents (2006), www.doingbusiness.org/documents/DoingBusiness2006_fullreport.pdf. “*Doing Business in 2006: Creating Jobs* is the third in a series of annual reports investigating the regulations that enhance business activity and those that constrain it.” *Id.*

67. Agence Française de Développement, Bundesministerium für Wirtschaftliche Zusammenarbeit und Entwicklung, United Kingdom Department for International Development, The World Bank, Operationalizing Pro-Poor Growth Research Program, *Pro-Poor Growth in the 1990's, Lessons and Insights from 14 Countries*, at 2 (2005), <http://www.enterprise-impact.org.uk/pdf/Pro-poorGrowthinthe1990s.pdf>.

68. See The World Bank, *Good Practice Note for Development Policy Lending: Subnational Development Policy Lending*, at 5-9 (June 21, 2005), <http://siteresources.worldbank.org/PROJECTS/Resources/GPNSubnational7-21.pdf>.

are drafted in accordance with local law and practice must be legally binding for cross-conditionality and/or cross-default, thus strengthening multilateral financing operations as a whole.⁶⁹ A relatively new approach in this area is replacing standard conditionality with performance targets attached to a country's budgetary requirements and legally approved annual deliveries of works, services, or reforms. Another recent reform in development practice is the introduction of country systems, that is, the use of local procurement and financial management rules, rather than applying the international financier's principles and procedures. This also must be translated into meaningful legal wording. Finally, regional programs such as climate change and biodiversity, and management of natural climatic disasters otherwise managed by international and regional bodies on behalf of beneficiary countries, require legal due diligence in each of the affected countries, as well as the complex crafting of implementation agreements and supporting legal authority documentation to conduct in-country work.

IV. Elements of a Strategic Action Plan for Future Development Lawyers

I am convinced that we are at the crossroads of law and development, requiring us to be more strategic in the way we do business and in our promotion of equitable development. In order to meet the growing number of such global and regional challenges, the Development Lawyer must take on a new role in the future. As we have seen, equitable development requires a new global legal practitioner possessing the professional and behavioral skills mentioned throughout this article and, even more importantly, one who can efficiently fulfill different roles and functions as required by the specific development context.

Beyond the tools mentioned at the beginning of this article, it would be useful to summarize, after reviewing the intricacies described throughout this article, the general elements that would make a successful Development Lawyer in the future. A Development Lawyer of the 21st century must be a consensus builder and facilitator, playing a pivotal role in conflict prevention and dispute settlement. This lawyer must also be a translator and interpreter of diverse legal realities, not in an abstract modality, but in close consultation with multiple audiences at the country, regional, and global levels. In sum, we must be the designers of effective legal solutions that are custom-tailored to a country or region requiring a response that is fast-acting, realistic, and pragmatic to adapt law to an evolving development strategy.

Additionally, the Development Lawyer of the future must be an active listener of multiple and diverse interlocutors to articulate the best solution to implementation issues by negotiating, developing, and strengthening partnerships. In other words, a Development Lawyer must be an expert at building bridges between domestic and global legal environments and institutions.

On a personal note, I hope future Development Lawyers can have someone like Professor Roberto MacLean as their inspiration. My own personal transformation was deeply influenced by Roberto when he was a visiting professor at Southern Methodist University in 1985. I noticed a brief announcement that stated, "Prof. R. MacLean interested in legal

69. See The World Bank, *Review of World Bank Conditionality: Legal Aspects of Conditionality in Policy-based Lending*, at 10-12 (June 29, 2005), <http://siteresources.worldbank.org/PROJECTS/Resources/40940-11114615847489/LegalAspectsofConditionality.pdf>.

research to write a book on 'economic coercion.'" The announcement was void of any other details regarding the required skills or qualities of the preferred candidate. I badly needed the extra cash and the subject matter seemed intriguing, so I decided to apply for the research assistant position. I was somewhat concerned, however, about not being able to convince what I had imagined to be the "Scottish/British professor" looking for an "expert in European law, native English speaker with strong knowledge of Economics" to hire me, and I really needed the cash!

Much to my surprise, when I was called to interview with Prof. MacLean, I came across this kind, approachable *simpático* Peruvian professor who reassured me that I was the right person for the job, and after lengthy discussions (and a few chocolates and candies), we agreed that lawyers had a critical role in promoting development, particularly in the Latin American context. He shared his vision of the candidate for the assignment: "I need somebody who can understand: (a) the legal intricacies of international and comparative law, (b) the challenges of regional integration through trade and investment, (c) the impact that international organizations have on developing countries" and "I value your practical development experience." He also was interested in a more global view of law and wanted me to understand the views of various authors, not just the European, in the languages that, thank God, I could read (English, French, Spanish, and Portuguese). By providing me with the best lesson a great teacher can give us—trust, confidence, and empowerment to learn and grow through the journey of self—he eagerly convinced me to accept the job on the spot.

Professor MacLean always spoke of his own practice as a journey of discovery and professional development requiring a close integration of real-life legal experience with the tough discipline of legal research and analysis, even in subject matters that challenge us the most. I met several times with Roberto to discuss my work. Our talks were filled with larger-than-life legal stories, multiple lessons of generosity, friendship, encouragement, positive thinking, and hope. And through all this, he taught me how to expand the rigid limits of the law to venture into economics, philosophy, political science, culture, social values and traditions, and sometimes even religion. This was a truly enlightening and transforming experience in my legal development, and I sincerely hope every Development Lawyer can have a similar experience.