Session One: Development Processes in Perspective

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Recommended Citation
https://scholar.smu.edu/lbra/vol12/iss4/5

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I want to talk about development. When I first went to Africa in 1963, that was my first encounter with development and development theory. It is a word we use quite a bit, and really development studies and development economics date from the post World War era when the world began to see that there is something we could do through human intervention to try to improve the economic lives of people around the world. With the advent of many countries from the decolonialization process, this added importance. This is a diverse world of countries that have emerged from colonialism and various forms of subjugation. One of the things they all had in common was that development was a national goal. In the years I have been involved in development we have seen lots of fads, lots of fashions, come and go. Let us try this, and it does not work, so let us try that. As we think forward we ought to take some lessons from the past and ask ourselves, as we are in a new era of development, and the United Nations has declared new millennium goals, what will work and how we will achieve those goals.

I want to talk about development models. Models, patterns, approaches have a way of capturing the mind. One of the things that models do is they simplify the complexity of life and are helpful. On the other hand, they do distort because they simplify. When we talk about development, we use it in two senses and I think we ought to be very clear in the sense that we are using development. There are two meanings: one is development as a social goal (better health, better nutrition, and better literacy). These are the millennium goals that the United Nations has declared and many non-governmental organizations are working toward. The second meaning is development as a process; how you get to these particular goals. Development studies and development economics often address this particular aspect.

When you look at the history of development and development studies going back to the post World War era, there is a model that emerged that captured the imagination of development economists, planners, and government officials. This is what I would call Model One. That model had four basic elements that it was built around. First is the notion of public ordering of the economy. I think many countries, particularly those who emerged from colonialism, emerged with the belief that it was the job of the government to direct development. One of the functions of that was through state planning. This was an era where every developing country I know was writing plans: three year, five year and even twelve year plans.
The notion is that the state needed to drive the economy, guide the economy, and take the commanding heights of the economy. The second element of this model was the reliance on public enterprises. Given the fact that the private sector was small, underfinanced, and often in the grasp of political opponents of government, the movement for development had to be relied on by state enterprises. State enterprises flourished throughout the developing world, from insurance to airlines to steel companies. It was the government-owned enterprise that became seen as the fundamental engine of development. A third element was the pervasive regulation of the private sector. There was regulation about everything, because the need to regulate stemmed from the notion that the state was to plan and direct the economy. The final element is the notion of closed economies. This was the era of self-reliance in economics, high tariffs, and the Andean pact when there were restrictions on foreign investment, including a whole series of tight controls over foreign exchange. One significant approach in industrial development was import substitution—develop your own industries in order to be substituted. There was a concern by government officials that too free an interaction with the rest of the world’s economies might lead to economic subjugation. Those of us who were interested in law, it is important to recognize that the models had implications to the legal system.

We talk about development law as it is sometimes autonomous, but it is not. It springs from the economic models, theories, and plans that governments and international agencies tried to put in place. This had some significant implications. First, law was seen in many parts of the world as a tool for social engineering. It was a way to change society. Second, going along with heavy regulation, freedom of contract became restricted. Third, the institutions of private property were weakened. This was a time when you had nationalizations and expropriations, not only of foreign, but also of domestic national entrepreneurs and property owners as well. I was in Egypt, and what the Egyptian government did under President Nasser was engage in wide-scale land reform and you can see the same pattern repeated in various parts of the developing world. The institutions of public law were emphasized over the institutions of private law. The institutions of public law were often the most important elements for those persons engaging in private transactions. There was a time when the executive was strengthened. If you are going to plan the economy, you need a strong executive with strong powers and strong technical competence. That was the way to develop. For example, when competing institutions were not seen as helpful, then often the judiciary was weakened.

By the mid 1980s, Model One began to lose its grasp on the imagination of planners and government officials, and there was a search for other models. First, Model One did not bring about development and government officials, and international institutions began to look closely at this approach to development. Second, the Soviet Union, which had
been one of the strong supporters and exemplars of Model One, disappeared as communism disappeared from many countries throughout the world. Third, international institutions, both private and public international financial institutions and governments, began to push in other directions. So you begin to have in the late 1980s and 1990s a new model developing that I would call Model Two.

Model Two was the adverse of Model One. First, in terms of allocating resources, the planning process was a means for allocating resources. That is what development plans were all about: how we are going to invest our funds and how we are going to invest our resources to achieve development. The planning process was a means of allocating resources. Now countries began to look at markets to allocate resources. We saw the emergence of stock markets, capital markets. We also saw the decline in planning. I had students in Turkey who were part of a very powerful planning ministry and then they saw the decline of that ministry's power. You may still have planning ministries and planning departments in developing countries, but they do not mean very much anymore. They do not have the political clout they did in the 1960s and 1970s.

The second element of Model Two is privatization. We began to see all of the nationalized industries—the industries that were created—suddenly become privatized. Those assets that were under public control were transferred into private hands. I remember, for example, in the 1970s going to a large conference in Kuwait on the Law of Public Enterprises in the Arab World. If you held that conference today, nobody would come because nobody cares. Public enterprises and public enterprise law is becoming irrelevant.

Third we are seeing increasing deregulation, in order to strengthen and liberate the private sector.

Finally, as economies are opening up, tariffs are dropping. Countries are joining the WTO, and various foreign investments are increasing. For example, in 1980 only about 8 percent of all capital flows to developing countries were in the form of foreign direct investment (FDI); now it is over half. There has been an opening up to the international economy as part of globalization.

I think Model Two has also had implications for development law. First, instead of seeing the law as a means for social engineering, we are seeing law as the rules of the game. These are the rules of the private sector and the rules the government has to play by, and we also emphasize the notion of the rule of law. The World Bank and other institutions are spending a great deal of time in strengthening the rule of law throughout the developing world. During the time of Model One, that was not seen as a significant issue. Second, contract is emphasized. The mode of interaction within the private sector is contract. Contract has been strengthened by various law reform programs aimed at strengthening contracts. Third is the strengthening private property. This is the notion of developing the institutions of private property, titling property so that
people truly can own, in a legal sense. What they have is a path towards development. Regulation is still very much a part of governments but we are seeing an emphasis on directive regulation, where governments are trying to direct the economy in a particular way, as opposed to protective regulation, whereby the rules of regulation are protecting the players in the market.

With Model Two we are seeing the growth of new international legal institutions, such as the WTO. Many countries have increasingly joined the WTO. When you join the WTO, you immediately have to reform your domestic legal system with regard to a variety of aspects, including intellectual property. We now have 2400 bilateral investment treaties. We have to facilitate the flow of capital. We have the International Center for the Settlement of Investment Disputes (ICSID), which now has a busy schedule as it is resolving, through arbitration, disputes between private investors and states.

The whole area of economic law has burgeoned as well.

Finally, the courts have been strengthened. In the kind of system that Model Two has envisaged, where you have private players, you need the courts to act as the arbiter to resolve disputes that take place within that particular sector.

Model Two is often called the Washington Consensus. We have had about fifteen years of this approach toward development. We are beginning to raise questions about Model Two. There are a series of challenges Model Two faces that it has not resolved. First is the problem of equity and wealth distribution. The concern is that we still have enormous numbers of people in poverty, over 20 percent of the world’s population lives on less than $1 per day. The failure of Model Two to do much about that has raised some concerns that we need to find new models.

Second is the concern that, particularly in the private sector, unrestricted investment and private sector development may have adverse environmental consequences and health impacts. Many of the international environmental organizations are critical about certain aspects of Model Two particularly the unrestrained entry of foreign investment in many countries.

Third is the need to protect the most vulnerable. In the kind of economy that emphasizes the market sector, the strong win and the weak lose; and therefore, there is a concern about how the legal system should protect the most vulnerable among those in developing countries.

A fourth concern is exacerbation of ethnic conflict. In many countries where there has been a shift to market economics, certain ethnic groups win and others lose. Certain ethnic groups are able to take advantage of this new approach to development often for historical reasons, and the fact that certain ethnic groups seem to be winning and capturing more of the gains than others is causing an exacerbation of ethnic conflict.

A fifth criticism is the notion of restriction on sovereignty. Many countries that have signed investment treaties and international commitments
with respect to economic transactions and economic activity are beginning to say: have we limited our sovereignty too much. Is the sovereignty so limited that we are unable to meet the needs and challenges as they arise to protect the welfare of the people we are supposed to look after?

Finally, the question of culture comes in. None of these models take account of culture—it is a one-size-fits-all approach to development. This is a criticism that has been leveled at the World Bank and other international institutions. They have taken their economic models and applied them to countries in a diversity of cultures and there is a need to take into account those cultures in economic planning. This is the topic of this particular conference. Culture is a set of behavior patterns of a given community that are socially transmitted and are characteristic of that community. For example, one of the big problems of many developing countries is that there is ethnic conflict and fragmentation, often because of the diversity of cultures. Culture is an economic system and a social system that has a variety of functions. I think it is important to identify that. First, culture is the glue that holds a community together. We are Ebos in Nigeria, and that gives us a sense of unity.

On the other hand, culture can also create a barrier between one community and another. The most extreme form is ethnic conflict, and we are seeing that in various parts of the world. We are seeing it in Iraq. For example, two communities, the Shiite and the Sunni, seeing their culture as one defense to threats from the outside, are taking refuge within their culture and are on the verge of engaging in civil war. Culture can be a weapon, particularly when we bring in ideas and models from outside. It is often seen as a weapon aimed at a particular community and a particular cultural group. When you are faced with a weapon, you use culture as a defense, as a protection against that. We are seeing, for example, in the Islamic world that is facing the travails of globalization, the Islamic culture is being raised as a defense.

In conclusion, it is well to remember that culture can be a bridge between communities. The challenge for development is to find ways of trying to create that bridge. Through culture we begin to understand each other better; and hopefully, by taking the next step, we can find ways of creating a bridge to deal with cultures and to advance development.

THE HONORABLE ROBERTO DAÑINO

What I wanted to do this morning was to focus my reflections on Roberto MacLean's legacy at the World Bank, an institution which, until a month ago, I was the General Counsel. I would like to focus on what he did and what he built on top of what he has done at the Bank. To put this in context, I would like to reflect on Professor Salacuse’s comments because I think they are a very accurate description of the way the concept of development has evolved, and the way that multilateral organizations are reacting to that evolution to that concept of development.
Specifically, in the case of the World Bank, when I was a student of Roberto, the World Bank was mostly an institution devoted to the financing of infrastructure: roads, highways, dams. For some reason, that is the perception that remains. However, nowadays, and especially in the last ten years, I think the Bank has changed dramatically. Precisely, it has changed dramatically as a reflection of the change of the model of development that Professor Salacuse reflected on and has just analyzed. This concept of economic growth as the very essence of development has been proven not to be sufficient. Therefore, the concept of social equity has become an equally important component of the current definition of development, and it is the guiding principle of the current workings of the World Bank and of most, if not all, of the multilateral financial organizations, especially in Jim Wolfensohn's tenure. He was intent on emphasizing, not only the poverty alleviation, which is the mission of the Bank nowadays. It cannot be achieved by just economic growth, but it needs also to be achieved by some social equity. If you care to see, this year's Annual World Report that the Bank puts out is precisely about equity and development. We have all come to recognize that economic growth just does not cut it. Another very important contribution that Mr. Wolfensohn made during his tenure at the Bank has been the fact that the Bank should no longer come with a very neat one-size-fits-all method for development between member countries. But it should listen to what its members need, listen to what their cultures and their context dictate, and become a partner in development. This approach and the other one caused a major debate between the chief economist at the Bank, Joe Stiglitz, a few years ago, and the International Monetary Fund (IMF), which still has a one-size-fits-all approach. Eventually, Stiglitz got the new price, and the relevance of the IMF is being severely questioned by most economists around the world. They are questioning whether the role itself has changed also dramatically.

It is in that context in the early 1990s that Roberto MacLean came to the Bank. He came to the Bank to do some seminal work on justice and judicial reform. He really began this whole process, traveling all over the world and opening new roads for all of us, and specifically for the work of the Bank. The Bank came to recognize that if we wanted economic growth and social equity, we need to have an environment in our member countries that was conducive to social equity. You cannot achieve development if you do not have strong, independent, and transparent judiciaries, and that is the role that Roberto started at the Bank. So then we have followed that, and it has become one of the largest areas of activity in the legal department of the Bank. Just so you get a sense of how dramatically this type of work has changed. Some twenty years ago, the Bank had two thirds of its portfolio and loans in infrastructure and the rest was in health, education, and agriculture. Today, infrastructure represents one third of the lending of the Bank, whereas the bulk of the lending today is on health, education, and institutional reform. Here, we, the lawyers, play a critical role, but it is very telling to see how dramati-
cally the lending practice of the Bank has shifted from brick and mortar infrastructure to the social sector.

It is in that context that, as I indicated, judicial reform has become a very important component of the work of the Bank. What we have done, building on Roberto's legacy at the Bank and his seminal work he has done at the Bank, is to try to integrate the different resources that the Bank has to be able to play a major role in improving the judiciaries all over the world. We have also tried to focus our attention on three specific areas: (1) access to justice, (2) case management, and (3) training of judges. I think it is a wise way of going about it. There are many areas to which you can devote yourself and your time and resources, but you will not maximize. There are so many things to be done, and there are so many players in this field doing seminal work, and there is no need for overlapping. Within the context of creating fair and equitable societies of developing this concept of social equity, the concept of human rights has been a concept that has been quite elusive to the work of the Bank. It has been elusive consistent with the evolution of the concept of development. For a long time many people inside and outside the Bank claimed that human rights had nothing to do with the World Bank's work. That was asserted, in part, because the concept of economic development was needed to fix mortar type of activity.

However as this concept has evolved, as Professor Salacuse has indicated and described to you the specifics, it has been translated to the work of the Bank. The concept of human rights, in my opinion, is the very essence of what the World Bank does. It is just what the World Bank is about, because I believe that there is no worse form of denial of human rights than poverty. I am quoting here Louise Arbour, the current High Commissioner for Human Rights of the United Nations. This has put both the Bank and the U.N. Commissioner for Human Rights in convergent directions.

In looking at human rights in the work of the Bank, there are also legal issues that were raised by some as impediments for the work of the Bank. They are threefold, and they are in the Articles of agreement that created the Bank. The first one is article one that says that all Bank activities must be guided by the purposes set forth basically as a financial institution with a mandate for reconstruction and development. What this says is basically that we are a financial institution, and we do not have a political mandate. The second consists of two very related political positions. The Bank cannot interfere in the country's political affairs. The Bank's decisions cannot be influenced by the political character of a member country. The ban on political interference required the Bank to distance itself from partisan politics, from favoring political parties, and from active participation in the political life of its staff. It is a prescribed neutrality and express political prohibition. The third and trickier one is in article three of the charter. It says that only economic considerations shall be relevant to the decisions of the Bank and its officers. These must be
weighed impartially. These three issues, the financial mandate of the institution, the political prohibitions for the institution, and the economic considerations only requirement for its work, meant that for a long time the Bank was precluded from expressly addressing the topic of human rights.

Let me make a parenthesis here to remind you that twenty-five years ago a similar situation occurred with environment, and today it was considered political interference of the member countries. Today, environment is mainstream in the work of all multilateral organizations. Even closer to now, in 1997, Jim Wolfensohn said he consulted with one of my predecessors as General Counsel of the Bank, and he took him aside and said “We do not mention the word corruption in the Bank. It is the “C” word, and you should not mention the word corruption because it violently violates the political provisions of the Bank.” Jim Wolfensohn, as disciplined and obedient as he is, went to one of the annual meetings and delivered a speech in which he said that “C” stands for the cancer of corruption, and he developed the most vigorous program any multilateral organization has had against corruption. This has led to a special unit that fights corruption in the Bank. It is created from scratch and I think it has done great work and can do much more. It has already, for example, debarred some 350 companies that engaged in corrupt practices in the Bank.

The point I am making is that, in my view, five years from now, we will all see that human rights will be mainstream in the work of the Bank. It is the very essence of what the Bank does. To prove it, while I was there, I took the trouble of going through a bill of rights and made a column with each of the bill of rights and then I put several boxes alongside—we call it the matrix very pompously. Next to each we put all the rules, regulations, and policies of the Bank that affect those rights. The next step was to take all the programs of the lending practices that the Bank had undertaken in the last two years which affected each of the bills of rights; and the whole matrix was full, because that is what we do. We fight corruption with developing judiciaries; we do health and education. That is the essence of what the Bank does, but for some, the legal restrictions remain so we in the legal department took on a collective effort in having a fresh reading of these three restrictions: the financial mandate, the political prohibitions, and the economic considerations of the Bank.

The financial mandate was probably the easier one because we did not have a political mandate, but the mandate of the Bank has evolved constantly. There has been a dynamic interpretation of the charter of the Bank. Nobody will doubt today the mission of the Bank is poverty alleviation. The word poverty does not appear once in the charter, but that is the main purpose of the Bank. The Bank was created to rebuild Europe after the war; that is a very different context and is complimentary to the work in developing countries, and that has changed dramatically. The first loan of the Bank ended up permitting the creation of Air France, and
that was very different. So there has always been a very dynamic interpretation. If no one doubts that poverty alleviation is the mission of the Bank, officially stated through economic growth and social equity, then how can we not say that human rights is an essential component of social equity. So, on that one, I think we took care of it quite quickly.

On the second one, on the political provisions, I think how political interference is defined has also changed dramatically in the last ten to fifteen years. The concept of sovereignty has also changed. People have given up sovereignty for some common values or shared values in the international community. You saw how law has changed, though not completely successfully, in the Pinochet case with the international tribunals. You have seen it with money laundering, antiterrorism, and antitrust. The very concept of sovereignty has also evolved, and I do not think that the occupations support of human rights can be considered as an interference in the sovereignty of any country. I think no one can seriously argue that. Even in China, which was one of the countries that was more conservative in the interpretation of the charter, last year they amended the constitution. They amended the constitution for two purposes: one, an open market economy, and two, the observance of human rights. What is considered interference and what is not has also changed. Serious crimes against humanity and violations of human rights, in my opinion, cannot be considered interference with the sovereignty of a country.

The third one, in its reading, the economic considerations only, at first proved to be a little trickier. But I am going back to my private practice, and every Bank I have worked with on Wall Street or London, as clients of mine, all of them, without exception, have political risk analysis units. They have political risk analysis units because they do not make political decisions, but they factor in the political realities of where they are lending in order to make economic decisions that really take into consideration the whole context of the place that the deals are going to be made. In my opinion, there is no reason that the Bank should not be doing the same. Probably the Bank would not call it political risk analysis, but the fact is that the political and social realities of the places the Bank lends the money, or makes investments in the case of ISC (International Steering Committee), is a very relevant component of the decision-making process of the Bank. The Bank should only make economic decisions, but in the decision making process it is perfectly legitimate to incorporate, amongst others, political considerations in as much as they have an impact on the economics of the project.

It has been with these three fresh readings of the apparent obstacles which, Salacuse was right, sometimes the law appears to have value in itself, but the law most times is the reflection of political persuasions. In this case, my sense is that the law was used mostly as an excuse or pretext not to get the Bank into those areas for very different reasons than the legal reasons. I have to tell you that I felt very proud that my last act as
General Counsel of the World Bank on January 31, 2006, was to sign a legal opinion with precisely this analysis, which I hope will open the doors for a more active role of the Bank in the area of human rights. In my opinion, this does not mean that the Bank, from now on, should put another conditionality component in its lending. I think it is important for the Bank to remain engaged in the dialogue with countries, to play a constructive role in countries which do not have perfect human rights records. We have the experience rather recently, with the case of the environment, NGOs raised bloody hell about a certain project in a project nation and, at the end of the day, the Bank pulled out. The project went along, but with none of the environmental safety policies that the Bank would have imposed, with none of the social measures of a safety net that would be required. The same NGOs came back to the Bank and asked “Why are you not playing a role there?”, but we had to pull out.

I think it is easy to say that we only lend to countries that have perfect records on human rights. I do not think there are many countries in the world, including the developed world, where the Bank would be able to change that way because I am no longer there, but the Bank can only lend. I think it is important with this new reading that we do not create a barrier to the ongoing dialogue that the Bank and multilateral organizations in general should keep on having with countries that do not have perfect human rights records. The second practical consequence is that, in my opinion, the Bank is not bound by the bill of rights. The bill of rights is an obligation undertaken by our member countries, and the bank should be there to assist member countries in fulfilling their obligations in human rights. I know this is somewhat controversial, but from a legal point of view, I do not believe you can salvage a precedent that the Bank is bound by international treaties that it has not signed, bound by international treaties not meant for multilateral organizations, or bound by treaties that are signed and negotiated by sovereign governments. The Bank has to pay due deference to these treaties but not be bound by them. Some NGOs have asserted that this should be the case; I do not believe that. They have also asserted that the Bank should play a role in the enforcement of human rights. The Bank does not have the capability to be an enforcement agency and does not have the mandate to be an enforcement agency. But it has the ability and resources, above all the human resources, to play a major role in helping member countries fulfill their obligations and also engage in the progressive realization of their human right obligations.

My forecast is that in the next few months you will see that there are some key instruments in the Bank that are going to be more permeated; they are already permeated by human rights considerations. I think it is going to be in a more deliberate and explicit way. One is our country policy and institutional analysis, the CPIA, and the other is the poverty and social impact analysis of the Bank, the PSIA of the Bank. These two instruments are crucial because they are the steppingstone and starting
point of any activity of the bank in any given country. This is the equivalent of the political risk analysis of the commercial banks. These two instruments will become permeated with human rights considerations, and through them we will start seeing some more explicit and proactive engagement of the Bank in this very important area of development which is human rights.

DR. TERESA GENTA-FONS

Let me put everything in the context of a lawyer from the trenches. I am going to be very practical and very pragmatic, and hopefully some strategic comments will be given. Everything that Dean Salacuse and my former boss Dr. Dañino mentioned have to be delivered by actual lawyers who are doing the work, so that is my take on this. I will be talking from the trenches about a very practical way of looking into the practice which I have had for the last twenty years at the Bank, but also will be talking about my experience and observation about our colleagues in other development institutions, like the Inter-American Development Bank, Asian Development Bank, African Development Bank, and the European Bank; because I have been working with all of these colleagues all over the world, I think I have many common observations. What I will do today is give you a few ideas of what the practice is all about, what are the challenges, and how I see lawyers as proactive agents of change. I want to really say agents of change because all of the change that has been discussed today cannot be really implemented if we are not proactive on that.

How can we work together with all of these other professionals when we sometimes do not even share the same language and sometimes do not share the same objectives? Facts and models can change, and ways of thinking or reality can change, but in the end of all this discussion, you have poverty, even in the U.S. You have poverty in the richest countries, and in countries like Brazil and Argentina, which are middle income countries, you still have pockets of poverty. Jeffrey Sachs just printed another book on the end of poverty. The calculations are that in extreme poverty you have 1.5 billion people. You have another billion poor people which are not able to come out of poverty, and even in middle income countries and rich countries, you also have poverty. So, if you are a law and development practitioner trying to help those people come out of poverty, you have a great clientele. So I think it is a booming practice, and I encourage all of you to think about it, and also to see that you can contribute and be a domestic law practitioner in any jurisdiction. I have really enjoyed doing my work, and I still do.

I also teach economists about the importance of law and development. I teach them all how we can really bring forward our thinking process and our analytical tools into this major goal that we really do not know how to get to. Economists try it on their own terms and they seem to fail. So when everything fails, they call the lawyers, and sometimes they call us
very late. My first reflection is that a good friend of mine, Professor Fiero in Mexico, did a review on why lawyers in Mexico, a major jurisdiction, were called a neglected factor in legal reform. I was part of that legal reform in Mexico too. You would see lawyers that were called quite late. The policy reforms are made up by financial authorities—members of the ministry of finance—and with no connection to reality of whether the local framework and legal institutions have the capacity to implement them. I think we really want to break that mold and bring in lawyers. I teach young lawyers at the Bank as well, and in other institutions, and I always try to say that we are like architects, and I want to talk about that. How do we do our legal craft, and where do I see that changing? What is it that we need to do?

There is a very recently published report by the World Bank saying that even though in Latin America many countries have grown, and it is amazing how much they have grown, you still have poverty. There are facts and models. We have many different words to talk about that. These vicious circles are also called by the seminal development report that Dr. Dañino mentioned, the World Development Report on Equitable Development, that there seems to be an impossible task both for national governments and global institutions because people cannot really climb the ladder out of poverty, and so they call it the poverty trap. If you are really growing, but you are not looking at the poor and what they need, you are not going to have this equity that we are looking for. So basically we are saying, and this is the latest report we have in Latin America, we have to find a way to really help these people come out of poverty, meaning being socially active in the community and with the political voice or participation in decision making process, not only voting, but also being members of a change. At the same time, you have to have equitable access to economic resources and the benefits of development. If you do not have that then it is impossible. But they cannot do it on their own, so the new thinking is that we have to help them. Maybe we need to do more of this distribution from a policy point of view, more directives. There has to be a way of doing that without taking away incentives for anybody to participate in any market even though the markets can be imperfect. That is a way we are thinking in the next five years of development.

A development lawyer has to be an essential actor, meaning that we should be involved as early as possible. I have seen and I have worked in many negotiations where ministers of finance do not involve lawyers, and they are negotiating international treaties and agreements that we draft. They have implications both in terms of their local legal framework, but also economic policy reform. I also have some of my colleagues who forget to call me. When we get involved, we have all these questions. Lawyers may not the best and most popular people in that corporation or any other institution. We are moving away from a project-centered development into a more problematic transformation in terms of the instruments.
SESSION ONE

What does it really mean? It means that when I negotiate with Brazil in another week, I am going to have this major package of finance, but it will be for the recognition of expenditures already taken by the central government in rebuilding roads. So there is a swap integrated, meaning from an economic and financial point of view, but at the same time a very strong policy content without conditionality. That is the kind of thing that we are doing in getting into how the budgets work and how we can still comply with environmental policies. This is what we are doing; we are creating new instruments. The lawyers have to be involved early on. We can be totally neglected, and that is something that really worries me a lot.

If I wanted to define a law and development practitioner, I would say that, first, you need to have special and professional training. Although a few law schools are providing that, I still call for a new kind of consortium, including maybe practitioners like myself, academics like the law schools, and any other professional having a say on this. We need to really think very hard on that, because the development process is a very complex matter, constantly changing. If we really stay behind, we are not going to catch up. So you need a complex set of skills. I understand law schools give us many, but some of the critical ones you have to develop yourself. You have to really do it. Practical experience comes out of doing it. You can bring it from private practice or from government practice, but you still have to develop these other skills. You need to have certain behavior skills. I went to work in Africa, my first trip back in the late 1980s, and I could not believe it. It was a time when the Sahara was bringing all the sand and the winds, and here I am trying to convince a minister of agriculture that they needed to change a regulation to allow the possibility of more incentives for producers. The whole thing is mind boggling. You can really have an impact on that, and you can really change the lives of people. You feel so close to it. At the end of the day it was just a new decree that needed to be drafted.

That is the kind of thing that we can contribute to. But, at the same time, we can really go wrong if our legal documents are not based on reality both in terms of local and international global context.

The lawyer also needs to manage some international knowledge of what is going on in international law, and at the same time be able to ask questions about local jurisdictions. Here I am trying to be an architect. The architect means somebody who gives foundations for sound development. We do that through what I conceive are my two great contributions—what I call the legal craft is what you know as a lawyer. Basically you give advice, draft, negotiate, and produce documents. But I think the particular aspect is that you need to do something that is feasible within the country context, the culture, the institutions, and at the same time is respectful of these other practices. You cannot impose it. Let me tell you that I have not followed the model of one-size-fits-all. You have got to talk to the local lawyers and economists, and you have to see where the
sensitivities are. We cannot just come up and say to Brazil that this is what I want. You really have to understand, listen, interpret, and translate the concepts.

I will say that a legal reality check is another critical contribution that we have. What does it really mean? I have to talk to these economists, and I am a minority in terms of my gender and in terms of my representation in an institution full of economists. You have to translate what they want to do on the policy reform side into local evidence that can be provided by the local authorities. I was negotiating a major adjustment for Ecuador before the President was ousted, and they wanted to do everything by Presidential decree. I was arguing that there has to be a law, and it has to go to Congress, and we were right. Sometimes, you have to balance these political, institutional emergencies with a financial crisis looming where everything is urgent, but you still have to have legal coherence and a legal feasibility assessment. So my legal reality check is basically saying, "Will that be able to be implemented in the local jurisdiction? Will I have difficulties in implementation?" We had a case in Nicaragua recently where the demarcation of indigenous lands was one of the critical elements. But, basically, you have a divided government. You have a Congress and an executive power fighting over that. So what do you do? Do you wait? Do we change? Do I amend the legal documents? Being part of the discussion is very important for lawyers. We are pragmatic. We are realistic, and that sometimes hurts the economist—they do not want to hear the bad news. Why should I ask for a law when they can do it through decree?

Let me talk about the vicious circle of poverty and inequality and what does it really say. It says that over time, you have political inequalities, and that is a fact of life in every society. You have social culture inequality, and at the same time you also have economic inequalities. They seem to feed on each other, and they seem to permeate everything in a society. Basically, we call it a vicious circle because unless you have institutions that can break that circle, and by institutions I mean local, indigenous, and sound institutions which are equitable and provide access to all, and who can really call what the economists say the level playing field is, you are not going to get out of that. So where do we come out as lawyers on that? I also was part of and contributed to the team that prepared this report, and when I had to argue in an auditorium full of economists that law and justice were important, at the very early stage of the document, they wanted to shut me out. Of course, I kept on coming up, and said that equity and access and justice and fairness are so important if you really want to share in the benefits of development. Finally, we included a lawyer in the team throughout the report, which I recommend you should read. You see that institutions can really help the poor people come out of this inequality trap.

Equity has been discussed, and there are so many arguments on equality and equity by philosophers and religious groups. From a legal point of
view, you need to have a legal or justice system that allows for the review of cases or the infringement of rights or breach of contract to all who have that type of problem, and not because an elite can capture the political and justice system. We are not going to be able to really work with that. The main message is to provide a voice to those who really are not heard.

One of the challenges to our legal profession is the development system and institutional changes. There is a discussion right now to review the governments of the World Bank. WTO has one country and one vote. In the World Bank, we buy shares. The U.S. has 16.4 percent of votes and Africa, which is so huge, has only 5.2 percent, so those things are being reviewed. On the other hand, WTO has one vote, one country; but there are really important aspects of influencing institutions. So there is a major discussion going on. Other changes are basically telling you that the global aid and trade agendas are evolving depending on the countries. Maybe the objective will go with trade in the middle income or maybe with aid for Africa. The country and regional context are really driving the development agenda.

We also have close border development issues. For example, the AIDS epidemic, the Avian Flu, or even natural disasters really pull together efforts so you are not talking only in a country context.

We also have evolving clients. The clients I am seeing more and more of, particularly in Latin America, are the sub-national governments, municipalities such as Sao Paulo, a huge development center. They come to us and say, "We are big enough. We have an economy. We have a government system. Give us the money directly. Why do we need to go through the central government?" We will be seeing more and more of that. What does it mean to lawyers? I have to sit with the lawyers in Sao Paulo and understand the structure. So you are not only seeing the national jurisdiction, you are also going to the sub-national one. You really have to grasp a major universe of legal frameworks.

We also have post-conflict economies in transition. I worked in Mozambique and Angola in Africa. They were still in civil war, and we were signing the agreements. You had to reconstruct the total legal framework. Professor Carl was our advisor with other professors in Europe, so I put together a plan to reopen the law school in Mozambique that had been closed for five years. We had to train professors and new lawyers. There were seventy lawyers in the whole country. I had to support the breaking up of the legal department in the Bank of Mozambique, which was the central bank but was doing commercial work, into two different institutions and two different legal departments. Lawyers can contribute both in terms of what we can bring to the table and legal institutional reform, but also capacity building for legal institutions. You do not need to reform the law, but you can bring the legal profession out of the state to do their own reforms. I believe in that philosophy. We cannot, from an external institution or reality, come and impose legal reform.
It takes longer, but you have to train local lawyers to really come up with a direction of legal reform.

Another change is the new development products. For example, I mentioned the swaps, but there are other types of sectoral approaches. What I have seen in Nicaragua and other countries in the central American context were all donors, meaning the bilateral treaties like with Japan or Germany, the American Development Bank, or the World Bank. We signed a memorandum, and we covered all the investments across the sector. If you have a weak institutional framework, a weak political system, or an emerging legal framework you cannot impose different procedures.

So where do we go if we do not constantly raise the importance of the legal aspects in development? I have developed my own three step assessment of any development initiative that comes to me for review, and I have a very wide portfolio. I not only provide comments and guide the operations in certain countries, I also do review reports of what we call economic sector reports. I also handle and manage legal analytical work, particularly in the area of discrimination and human rights.

What do we do and what can we contribute? For example, in Honduras, there was an election coming up. The Minister of Affairs said that with the tools that the U.N. also co-financed and many others, she went to all the national candidates for president and said that if you were to win this election, these are the gains we have, this is what we need, and this is what you can contribute. It is another indirect way of improving an effective development process. One of the important things to remember is that you may have a very weak legal profession. So when you go to Honduras and you try to meet with practicing lawyers, or even academics, you have a very limited source. But you have to bring them up to speed and train them and really work with them. It is a wonderful experience, particularly for me, to see how in two or three years they are contributing to their own reform.

The challenges are great. Are we really in a position to meet these challenges? To tell you the truth, I find that we have a long way to go, and there is so much to discuss. We do that very frequently.

How can you dissect the policy reforms and translate them into meaningful documents that are going to be enforceable and feasible within the local legal framework and that really respect international law? That is a very tough thing to do because you have really got to pull many skills out of your hat and be able to deliver them. Translating economic language into legal language is tough for anybody. But if you really go down to telling your economist, at the end of the day, what is a piece of paper that you will give me so that I can tell you that you can disperse ten million dollars? That is how you have to look to the bottom line. You may have fifteen different reforms, taxes, GNP increases, or how many poor should come out of the extreme poverty line. How are you going to do that? The translation of that is very important. As lawyers we want to think
that everything is in the print, the law, the document, the contract. I think it is very difficult for us to move beyond that and to take the uncertainty of some of this language that comes to us. That is part of the development legal practitioner's challenge. I am still unable to meet the test of international community or NGOs because our documents get to be registered with the United Nations treaty section, and they are dissected by NGOs. So whenever I write something, particularly on policy reform, I have to be confident that it will meet the minimum test of feasibility, reality, and also legality within the jurisdiction.

I will mention to you the risk of becoming the neglected factor, and that is a daily factor. You have so many demands. You really want to be strategic, but on a daily delivery, we are really losing it. I think it is important for all of us who have a say on this to be able to express that importance because you cannot have development divorced from legal reality. In the country, the law has to be a foundation, as I mentioned. I want to mention my experience on this one because I think that is where we can contribute as lawyers and legal profession, but also as legal academics if we are in that field. I have always tried to learn from and with our development parties, both lawyers and non-lawyers. To do that, you need to be consistent in terms of developing, following through and following up on exchanges and interaction, and bringing people to meet with us and work with us. Going there, field missions are very important to do a legal analysis with them to see how they view their own reality. At the same time, organize learning events. The academic frame is a very important tool to discuss sensitive matters. If you call it a conference or roundtable, people are bound to come and be more at ease, and then you can really get to the very difficult topics.

I never thought I would get into human rights through gender discrimination, and it was only because the Bank has a very solid policy on that that I understood that I could do many other things and do that. Still you could help more than 50 percent of the population. This is becoming a seminal topic. We met with President Wolfowitz as part of the gender development board, and we all had the impression that it is one of the important things he wants to support. Why? Because it makes sense. It is not just a women's issue, it is a development issue. I think women contribute to development in terms of urban culture, commerce, the informal sector, and even in micro-credit and financial institutions. As long as you bring into the process that very important group you are really achieving development objectives in the whole society. Economists have said that, even better than I have in such a short time, in the World Development Report, which I strongly recommend you should review.

What do we have to do with influencing the development process? I have seen that you can do that through many ways. First, we have seen that we are moving beyond the project type of development and we are going into multi-year lending with many different financial instruments, the sources of growth were privatized, nationalized, and other changes.
Look at the scenario in Latin America. We will have major legal reform and impact that. We need to be flexible and adjust. We have a lot of subsidiary financing. If we lend to the central government in Argentina, they need to lend to the province. Where are the political gains and the institutional weakness, what is the legal framework? I find that we can really influence the development process, and I think we have a major contribution to make. I want to think of myself as a global practitioner, and I want to define for you what I feel should be the key features of a global practitioner, one which really goes beyond the law in many ways. By doing that, I mean that you are constantly at a crossroads between law and development, law and economics, and many other law and social sciences (e.g., anthropology). If we really want to contribute to this equitable development, you are playing many roles, and one of them that I have seen we can play is consensus builder between the international scene and the local scene and all the ministries of finance and the other ministries. Sometimes, we are really bringing some of the agenda of the weakest social sectors so that the financial minister will include their review and whatever they need.

Conflict prevention is very important. Sometimes you can really help, and it is very simple. This is something that I really enjoy doing, translating and interpreting legal realities. I mention this because you have multiple audiences, even the press is listening when you do. We are also effectively designing our solutions, but we need to be opportunistic and realistic. But we have to change the law many times. Do we change it before we do the development process or during? We really have to work with them. We need to listen. It is not always an easy thing to do when you have different languages, different cultures, and culture and language go together. And we want to listen to ourselves more than anybody else. It is very important when you have this diverse interaction to be able to translate the thinking process even analytically. Somebody mentioned building bridges, and I think it is important that we do that all the time. I do it constantly, and it is a major role. Sometimes you can do it in a simple way by proposing, like I was doing for Brazil, a supplemental letter to the contract. They do not want something in the contract so we put it in a supplemental letter. It is a simple thing, but it can really help us.

We really are becoming richer and we have come a long way through science, technology, the internet society, and having access to information. But we continue to be unfair; there is an unfair distribution of those gains of these improvements and modernization. Inequality continues to be the critical challenge. Those words should guide us for those of us working in law and development to be more strategic. There is a dramatic change going on in this evolving area of the law, and we need to have a very serious way of reinventing ourselves constantly. For that we need the help of everybody, not only our ownership of the legal thinking, but it is all these professionals that really contribute to development.