JUDICIAL REFORM IN DEVELOPING COUNTRIES AND THE ROLE OF THE WORLD BANK

IBRAHIM F.I. SHIHATA

Vice President and General Counsel, The World Bank;
Secretary-General, International Centre
for Settlement of Investment Disputes

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...it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of their courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.

Justice Arthur T. Vanderbilt, The Challenge of Law Reform, 4-5 (1955).

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Ibrahim F. I. Shihata*

I. RELEVANCE OF JUDICIAL REFORM

Law has long been recognized not only as a reflection of the prevailing forces in a given society but also as a potential instrument of change and progressive development. These two attributes enable it to play two seemingly conflicting roles: that of a keeper and interpreter of the status quo and, simultaneously, that of a catalyst for its change and the mechanism through which such a change may be brought about in an orderly manner.

The intricacies of the role law can play in introducing policy changes and influencing the pace and pattern of development and, conversely, its possible role as an obstacle in the face of further development are yet to be fully understood. A branch of legal education attempts at present to address the role of law in the development process. Building on earlier writings in jurisprudence, it also attempts to provide answers to the time honored questions related to the true role of law in society and why it may function at times to serve its originally intended purposes and at times to promote different or even conflicting purposes.[1] A number of

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*Vice President and General Counsel, The World Bank; Secretary-General, International Centre for Settlement of Investment Disputes. The author wishes to acknowledge the assistance of Mr. Paatii Ofosu-Amaah and Ms. Gillian Kettaneh in the preparation of this paper and the comments made by Messrs. Andres Rigo, Antonio Parra, Peter Fox and Malcolm Rowat on earlier drafts. Responsibility for the views expressed in the paper rests with the author alone.

[1] See generally P. Ebow Bondzi-Simpson, The Law and Economic Development in the Third World (1992); Marc Galanter, Delivering Legality: Some Proposals for the Direction of Research (1977); The Political Economy of Law: A Third World Reader (Yash P. Ghai et al. eds. 1987); John H. Merryman, Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement, 25 Am. J. Comp. L. 457 (1977); Robert B. Seidman, The State, Law and Development (1978); David M. Trubek, Towards a Social Theory of Law: A Essay on the Study of Law and Development, 82 Yale L. J. 1 (1972); Roberto Unger, The CLS [Critical Legal Studies] Movement, 96 Harv. L. Rev. 563 (1983). For a general discussion of Law & Development Studies, see

modern national and international institutes also provide training and encourage research in the various practical aspects of the subjects raised by these questions.[2]

Yet, for the most part, the discussion of legal reform has hitherto concentrated on the most effective ways in which law may be modernized, that is the introduction of changes in the rules (both substantive and procedural, primary and secondary, etc.) to enable them to meet the constantly evolving needs of the societies they are meant to regulate. This approach assumes that once appropriate changes are introduced in the rules, the legal system as a whole will be more responsive to the demands of modernization and development. Rules, however, are seldom self-executing and even when they are, they need appropriate institutions to ensure their correct application and enforcement and to settle disputes which inevitably arise in the course of their application. A legal system, in other words, consists not only of applicable rules but also of the processes through which these rules are to be applied and of the institutions in charge of these processes. Without such processes and institutions, rules may remain abstract concepts which do not always reflect the law in force.[3]

An adequate legal reform program cannot therefore be limited to a review of existing rules with a view to introducing the most appropriate changes under the circumstances of the society concerned. It must also include such legislative, administrative and judicial reforms as may be needed to ensure that the rules will be changed to serve the public interest, will be applied in a correct and fair manner

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Research Advisory Committee on Law and Development of the International Legal Center, Law and Development (1974).

[2]E.g., The Institute of International Law (ILI) in Washington, D.C. and the International Development Law Institute (IDLI) in Rome.

[3]This is not to suggest, however, acceptance of Learned Hand's view that "[t]he words he [the judge] must construe are empty vessels into which he can pour nearly anything he will." Learned Hand, Spirit of Liberty 81 (1952). Rather, it is to acknowledge that "[t]here is no such thing as 'pure' law. The profession of the law in all its forms has never detached itself completely from the various kinds of human activity out of which it grew. It is essential that no complete detachment ever takes place." Max Radin, Law as Logic and Experience (1940).

so that they may continue to serve this purpose, will be complemented by the necessary regulations and interpretations which facilitate their application and will be subject to future reviews to ensure their continued relevance and usefulness. Such reforms must equally be concerned with the process and outcome of conflict resolution so that the mechanisms of such a process may always be, and appear to be, efficient, fair and non-arbitrary.

The need for a comprehensive reform in the rules, processes and institutions which express and implement policy reforms in every field of societal organization is all the more evident in the context of the prevalent transition of many economies from a command to a market system or from the predominance of the public sector to that of the private sector, with the inevitable redefinition of the role of the state which accompanies such transformations.

Private investors in particular, whether domestic or foreign, and their financiers even more so, take into account in their investment decisions, along with the primary issues of financial returns and political risks, such questions as whether the legal system allows investors' rights to be enforced routinely and disputes arising out of their activities to be resolved in an evenhanded, expeditious and efficient manner. Indeed, serious investors look for a legal system where property rights, contractual arrangements and other lawful activities are safeguarded and respected, free from arbitrary governmental action and from pressure by special interest groups or powerful individuals. In this respect, the proper functioning of the judicial system is of immense importance, even where an investment is of sufficient size and importance to attract its own special legal regime, as, for example, is common in the mining and energy sector in both developing and developed countries.

Such a proper functioning is often lacking, however. In a typical developing country the following features are only too commonplace:

> The court system and judiciary may follow protracted procedures resulting in unreasonable delays and may be unable to enforce judgements. No system of commercial arbitration may exist. Even minor commercial disputes may remain unresolved for years. The local legal and accounting professions may be underdeveloped or, given the excesses of the regulatory framework, may perceive their role as agents of avoidance or evasion of

binding rules. This situation makes investment decisions more difficult and costly for domestic and foreign investors alike.[4]

Other problems have also been noted by writers describing the judicial systems in developing countries in the context of the role of law in social change and development.[5] In particular, they have observed cases where the lack of independence necessary for judges to discharge effectively their function has been obvious, especially in disputes arising between the government, on the one hand, and individuals or corporate entities on the other hand. In many developing countries today, the judiciary is strongly influenced, if not controlled, by the executive or legislative branches either directly or indirectly. This influence is manifested in the appointment, promotion and removal of judges, in the determination of their salaries, allocation of budgetary resources required to carry out judiciary functions and, in certain situations, in the control of the outcome of judicial proceedings through special tribunals and quasi-tribunals.

In addition, the judiciary may lack the experience and knowledge necessary to apply new legislation. In many cases, there is also a dire need for well-developed administrative and other facilities, including buildings, office space and equipment, and for appropriate systems for the communication of laws to the population at large. In addition, arbitration facilities and an appropriate legal framework for arbitration are not readily available in many countries. Typically,

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[4]Ibrahim F.I. Shihata, The World Bank and Private Sector Development - A Legal Perspective, in The World Bank in a Changing World 203, 227 (1991) [hereinafter Private Sector Development].

[5]For a review of some of these problems, see, for example, Lawyers in the Third World: Comparative and Developmental Perspectives (C. J. Dias et al. eds., 1981) [hereinafter Lawyers in the Third World]. See also, Universidad Externado de Colombia, Comparative Analysis of the Administration of Justice, a paper submitted to the IDB Seminar on "Justice in Latin America and the Caribbean in the 1990s," San José, Costa Rica, February 1993 [hereinafter Comparative Analysis].

cases take years to be decided whether by civil or penal courts.[6] The predicament of the judiciary in many developing countries is most obvious in rural areas where "the judge frequently lives as something of a stranger among the people he is assigned to serve, lacking knowledge of their language and customs."[7]

With this background, it is not surprising that the ongoing structural economic reforms in many developing countries are leading governments to address the reform of the legal system, including the judiciary, as a necessary complement to economic reform. The subject is also gaining increasing recognition in development fora due in particular to its direct effect on good governance in the management of resources,[8] and especially on the creation of a hospitable investment climate.[9]

II. ELEMENTS OF JUDICIAL REFORM

Underlying any successful program of judicial reform are two basic prerequisites: (1) the building of consensus among the judiciary and in the other branches of the state on the relevance and importance of judicial reform and, based on this consensus, (2) an ensuing commitment to make available the required

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[6]For example, "in 1991 the Argentine civil law courts settled only 6 percent of the suits filed in that year; in Bolivia, the average duration of a penal suit is about 5 years; and in Paraguay, out of a total of 5,492 cases (499 a month) in 1992, only 409 had been settled by November of that year." Comparative Analysis, supra note 5 at 20.

[7]Clarence J. Dias and James C. N. Paul, Observations on Lawyers in Development and Underdevelopment, in Lawyers in the Third World, supra note 5, at 337, 348.

[8]For the relevance of certain governance issues to economic development, see Ibrahim F.I. Shihata, The World Bank and "Governance" Issues in its Borrowing Members, in Shihata supra note 4, at 53 [hereinafter Governance Issues].

[9]See, e.g., Ibrahim F.I. Shihata, Promotion of Foreign Direct Investment - A General Account with Particular Reference to the Role of the World Bank Group, in Shihata supra note 4, at 237-70 and Private Sector Development, supra note 4.

resources on a sustainable basis. Indeed, lack of funds is among the principal reasons for the understaffing of judicial positions and inadequacy of court buildings and other facilities that together account for the congestion of courts prevalent in most countries. Almost every judicial reform program must therefore attempt to tackle the issue of budgetary constraints, as is the case in any reform program of an institutional nature. It would be a mistake, however, to reduce the question of judicial reform simply to a financial issue and to believe that increasing the funds available to the judiciary would automatically alleviate the congestion of courts or upgrade their services. As will soon be seen, the process has many elements; for its successful implementation, financial resources constitute only one of the basic prerequisites.

Among the issues to be addressed in a developing country's judicial reform program, the following may prove to be crucial elements. Such elements are not of course a substitute for, but should rather be considered a necessary complement to, the continued search for the causes of disputes with a view to reducing them through legislative and regulatory reform. This latter reform, which is a precondition for private sector development,[10] would greatly benefit from comparative experience in other countries and should keep abreast of developments in legal science and the constant attempts towards harmonization and unification of law, on the regional and universal levels.

1. Role of the Judiciary

While the judiciary is generally seen as the arbiter of legal disputes and the provider of criminal justice in the society, the scope and boundaries of the judicial function differ from one legal system to another and, indeed, from one country to another. Greater differences in this area may also be found in jurisprudential writings. One extreme view claims that the only true law is judge-made law.[11]

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[10]See Private Sector Development, supra note 4 at 225-32.

[11]See, e.g., Jethrow Brown, Law and Evolution, 29 Yale L. J. 394 (1920); John Chipman Gray, Nature and Sources of Law, § 296, 366, 369 (2nd ed., 1927); Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897). Expressed in a more moderate tone, a similar view considered that "the utterances of the judges [are] the best evidence of the state of the law...[because]...in the end

Others assert that "[j]udges make law only in the way that electrons make physics, amoeba make biology and Trobriand Islanders make anthropology."[12] Another extreme position limits the role of the courts to merely declaring the law as issued by the legislature, the judge being nothing but the mouth which pronounces the law.[13] A host of mainstream views concede, however, that the role of the judiciary is the interpretation and application of the law in specific disputes but differ in the acceptable latitude accorded to judges in the process of such interpretation and application. The fact is, courts under all systems apply existing law (legislation, binding custom and, in the Common Law system, accumulated judicial precedents) but occasionally have to fill gaps in applicable law, sometimes explicitly recognizing such lacunae and sometimes treating them under the cloak of "interpretation."[14] In the increasing number of countries where the judiciary reviews the constitutionality of laws (usually through the highest court or a specialized constitutional court) judges can play a more active role in the preservation and promotion of constitutional principles and values as they interpret them. In these contexts, courts do play a role in law-making, although the extent of that role differs from one system to another; the "Common Law" and "Islamic Law" systems

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it is what the courts choose to say, the courts considered as an entire hierarchical system, that determines the substance of the law." Owen Dixon, Concerning Judicial Method, in Jesting Pilate, 154-155 (1965).

[12]Felix Cohen, Ethical Systems and Legal Ideals 12 (1933).

[13]See Charles de Secondat, Baron de Montesquieu, L'Esprit des Lois, Liv. XI., Ch. VI, at 181 (Edit. de Leyde 1749).

[14]The rule against the bringing of a finding of non liquet prompts many, especially among civil law scholars, to claim that a legal system must be deemed to be complete as a necessity not only of logical, but also of social order. According to Kelsen, the theory of gaps in law is a fiction which enables judges to innovate new solutions when existing ones lead to inequitable results. See Hans Kelsen, General Theory of Law and State, 146-49 (1945). The absence of gaps in the legal order does not mean, however, that every legislation provides complete answers to every situation. It may be more realistic therefore to concede, as Justice Cardozo suggested, that the judge "legislates only between gaps. He fills the open space in the law." Benjamin N. Cardozo, The Nature of the Judicial Process 113 (2nd ed. 1949).

being the most explicit and the broadest in their recognition of such a creative role.[15]

While the question will remain controversial among scholars, three requirements seem to me to be essential from the practical viewpoint of having an appropriate system of administration of justice.

First, the judiciary in a given country should, as a starting point, have a clear and uniform approach to the nature and extent of its role. The extent of the role of the judiciary is a basic feature of the legal system in every country and is usually defined through the highest court in the land which overrules decisions deviating from the generally agreed approach. Where different courts hold different or conflicting views on the extent of the judge's role, for instance, on whether the judge can abstain from applying a certain statute, unwanted confusion and complications may be expected.

Second, while the legal codes of a country may deny a creative role for courts and refer them in the absence of text and custom to such sources as "natural law" or "the general principles of morality," it is probably more useful to concede, as the Swiss Civil Code does, that in such cases the judge will rule according to the rules he would have established had he had to act as a legislator.[16] In doing so, one recognizes the need for developing a system to assist courts in the identification of appropriate rules. Such a system may result in what a well known French scholar has termed "free scientific research" in the sense that it is removed from the

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[15]While both systems of law give the judge a great latitude in devising appropriate solutions in the absence of applicable rules, the common law system seems to allow the view that the judge should have the freedom "to do all he legitimately can to avoid [any rule which impairs the doing of justice] or even to change it - so as to do justice in the instant case before him. He need not wait for the legislature to intervene because that can never be of any help in the instant case." Alfred Thompson Denning, The Family Story 174 (1981).

[16]"Selon les règles qu'il établirait s'il avait à faire acte de législateur." Code Civil (Suisse), Art 1. The Article adds that in such a case, the judge will draw his inspiration from the solutions sanctioned by the doctrine of the learned and the jurisprudence of the courts ("par la doctrine et la jurisprudence").

action of positive authority and is based on objective elements identified only through scientific research.[17] In this way, to quote Justice Cardozo, the judge would not "innovate at pleasure" but could "draw his inspiration from consecrated principles... exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life."[18] Such a disciplined innovation may indeed be inevitable in the modern world where sophisticated commercial practices reach from the developed to the developing countries through international business and finance, a process which often includes adapting and adopting international codes and statements of practice where no local rules exist, for example, in areas such as bills of exchange or letters of credit.

Third, the judiciary should be conscious of the important role it ought to play in the protection of basic individual rights, especially in countries where both legislative and executive powers are held by the government either because of the nature of the political system or because of emergency situations which allow governments to legislate by decree. In such situations, the judiciary constitutes the only safeguard against tyranny. While a constitution "does not demand the impossible or the impracticable,"[19] the judiciary should be able to develop criteria

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[17]See II François Geny, Methode d'interprétation et sources en droit privé positif: essai critique 77 (1919).

[18]Cardozo, supra note 14, at 141. This, after all, is how the common law developed, as recognized by Lord Evershed M.R. in his observation that "[w]hat might otherwise be haphazard and dependent far too much upon the sense and susceptibility of the individual judge, is here knit together by an academic quality, nonetheless scholarly because it is founded on custom and history, and other human qualities of experience that go to make up the Judicial Process." Francis Raymond Evershed, The Practical and Academic Aspects of English Law 30 (1956). See also M. Golding, Principled Decision-making in the Supreme Court, in Essays in Legal Philosophy 208, at 218 (Robert S. Summers ed. 1970).

[19]Kiyoshi Hirabayashi v. United States, 320. U.S. 1375, 1387 (1943) (with respect to the U.S. Constitution).

to ensure that rules, including emergency rules, are applied in a non-arbitrary manner and only to serve the public purpose for which they are enacted.[20]

Thus, the challenge to legal reform programs in developing countries is not simply to outline the role of the judiciary in an unambiguous manner but, where necessary, to redefine it to enable the judiciary to ensure the most effective administration of justice under the prevailing circumstances. It could be argued that this goal may require a greater degree of activism by the judiciary, that is an expansion of its responsibilities to enable it to protect the individual from the abuses of government and deliver to the individual the promise of the welfare state. Such activism, if exercised, will have to come from within the judiciary itself, since it can hardly be legislated or mandated by the other branches of the state. For this reason, it would have to be exercised disinterestedly and with the greatest possible measure of objectivity, lest the process become one of individual judges independently "wresting the law to their authority."[21]

2. Independence of the Judiciary

The notion of the independence of the judiciary has now been established in most developing countries through specific constitutional provisions or through appropriate legislation. This notion is rooted in the separation of powers doctrine, which, though hardly applied in an absolute sense, has long been advocated as a cornerstone in the checks and balances system characteristic of a democracy.[22]

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[20]For a famous example of criteria to be devised by courts to limit the exercise of the government's encroachment on individual rights in a war situation, see the dissenting opinion of Justice Murphy in Toyosaburo Korematsu v. United States, 323 U.S. 214, 233-42 (1944).

[21]Owen Dixon, supra note 11, at 158.

[22]Separation of powers was early advocated by Montesquieu in L'Esprit des Lois , supra note 13.

In many developing countries, the independence of the judiciary is enshrined in their Constitutions[23] or in statutes in order to protect the judiciary from political pressure and other influences, especially from the executive branch, which may interfere with its objectivity and independence. In several cases, this substantive judicial independence is assured by the protection of the personal independence of judges through the guarantee of tenure for judges, the safeguarding of their salaries and strict constitutional or statutory safeguards for their removal from office (only in cases of misconduct or proven incapacity).[24] It is only in such an environment of substantive and personal safeguards that judges are assured a degree of independence conducive to the impartial administration of justice.

However, examples exist in some developing countries where the executive branch has unilaterally dismissed judges for decisions unfavorable to the government. An extreme incident took place in Ghana in 1963, when a panel of Supreme Court judges acquitted several persons who were charged with subversion by the executive branch. The Government took action against the judges and finally dismissed them after obtaining in 1964 a constitutional amendment giving power to

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[23]See, e.g., Constitution of Bolivia, Titre III, Article 117, which specifies that judges are independent in the administration of justice and are only subject to law; Constitution of Brazil, Title I, Article 2; Constitution of Turkey, Part I, Article IX; Constitution of Hungary, Chapter X, § 50; Constitution of Egypt, Part Four, Article 65; and Constitution of Burkina Faso, Titre VIII, Article 129.

[24]For a detailed discussion of the "substantive" and "personal" independence of judges and their application in one country, see S. Shetreet, Judicial Independence and Accountability in Israel, 33 Int'l & Comp. L. Q. 979 (1984), where the author concludes that judicial independence in that country should be strengthened by restricting executive control over judicial administration and revising the method of preparation of the courts' budget. Also, for a review of the policies on the staffing of courts in the United States, Britain and France, whose practices sometimes influence those in developing countries, see Henry J. Abraham, The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France (4th ed., 1980).

the President to dismiss judges for any reason which seemed to him to be sufficient.[25] The predicament of the judiciary in many African countries, which may also be true in a host of other developing countries, was explained by the fact that:

> It would seem that on the whole governments in the newly independent countries hanker after the simplicity of the colonial arrangement, with the primary aim of the courts to uphold the power of the State, enforce its laws and provide stability. The courts' function of protection of the individual from the abuse of power is relatively new and less well appreciated.... In any event until the people develop values to guide their courts, other than that of upholding state power, the constitutional enactment of the separation of powers is bound to remain largely a declaration of intent.[26]

The importance of the independence of the judiciary has led some countries in Latin America to provide in their constitutions that a certain percentage of the government's annual budget (6 per cent in the case of Costa Rica) should be devoted to the judiciary. The executive branch would thus have no means to influence the judiciary through budgetary allocations. The predetermination of the judiciary's financial needs in such an arbitrary manner may not be advisable however. What is important is that the judiciary should have a say in the planning and allocation of its budget and that the resources allocated to it should meet adequately the needs of modernizing and upgrading its services according to well thought out programs which receive the broad support of the legal community and the society at large.

While the independence of the judiciary is an important element of a judicial reform program, it should be recalled, however, that such independence is not an end in itself. Rather, it is a means to achieve the goal of the impartiality of the

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[25]For a brief description of this case, see A.N.E. Amissah, The Role of the Judiciary in the Governmental Process: Ghana's Experience, 13 Afr. L. Stud. 4 (1976).

[26]Id. at 21.

judge and the fairness of judicial procedures.[27] This, along with the great expansion in the role of courts in modern societies, have led to the growing recognition that judicial independence ought to be coupled with judicial accountability and that judicial immunity cannot therefore be an absolute concept.[28] Indeed, the liability of judges for "wrong" judicial decisions is being recognized increasingly, albeit within certain limits, in developed countries.[29]

The principle of the independence of the judiciary should not therefore mean that judges be free from any responsibility; it does suggest, however, that disciplinary action should not be left to the executive branch of government. While some countries entrust their parliaments with such a function, it might be more appropriate to vest formal administrative powers over the judiciary in a judicial disciplinary tribunal or council consisting mainly of senior judges, but with significant participation of respected persons from outside the judiciary. Such a council can be of an ad hoc or permanent character. In any case, a transparent and open system should be in place to enable litigants and their counsel to request that judges disqualify themselves from considering the dispute in cases of conflict of interest or prior involvement and to make complaints regarding the incompetence, prejudice or corruption of judges, subject to strict safeguards against the abuse of such procedures. Indeed, judicial accountability and the transparency it requires are necessary corollaries to the independence and security which must be accorded to the courts.

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[27]See Mauro Cappelletti, Who Watches the Watchmen: A Comparative Study on Judicial Responsibility, 31 Am. J. Comp. L. 1, 16 (1983).

[28]Id. at 3-17.

[29]Id. at 11-12, and 53-62, where the author concludes by suggesting a "responsive model" that combines a reasonable degree of political and societal responsibility of judges with a reasonable degree of legal responsibility without, however, either subordinating the judges to the political branches, to political parties and other societal organizations, or exposing them to the vexatious suits of irritated litigants.

3. Security of Judges, Prosecutors and Other Judicial Officers

Closely linked to the question of the independence of the judiciary is the issue of security of the judges, both personal and financial. In a few countries, members of the judiciary lead a risky life which requires physical protection from the threats of organized crime and at times from persons in power. Their ability to perform their duties independently and conscientiously under such circumstances becomes a matter of concern and a primary duty of the state.

Security of tenure has also been mentioned as a means of promoting the independence of the judiciary from the other branches of government. Equally important is the adequacy, not only of remuneration but also of post-retirement pensions and other benefits. While the former provides financial security that reduces the vulnerability of the judiciary to bribery and corruption, the latter provides judges with the insurance needed for the carrying out of their function without the fear associated with an early or abrupt retirement without a secure income. A judiciary which is constitutionally independent will still fail to meet the needs of society if low salaries and a prevailing atmosphere of corruption combine to undermine such independence in practice or to select out potential candidates to judicial appointment who are the most capable and honest.

4. Simplification and Streamlining of Judicial Procedures

The objective of this area of reform is to improve the efficiency of the system of administration of justice without sacrificing due process and the safeguards inherent in an appropriate judicial process. The methodology is to identify administrative bottlenecks, in other words, those procedures which create delays and backlogs, and then find ways of eliminating or alleviating them. It is imperative in this respect, however, to find appropriate solutions while maintaining for the parties the protection which was meant to be provided by the procedures that have proved to be cumbersome in practice, that is, to make sure that simplified procedures maintain the opportunity of a "fair hearing" for each party to the dispute.

The processing of cases through the system can be accelerated by the implementation of procedures conducive to the expeditious review of cases, the elimination of duplicative or unnecessary measures and the replacement of written procedures with oral ones in certain situations. These improvements can be

achieved through revisions of civil and penal procedure codes and the reorganization of court systems to create parallel streams for different types of cases, for instance, small claims tribunals and specialized courts for complicated types of cases such as bankruptcy cases. Where administrative courts do not exist, the creation of a separate system for administrative justice may be advisable in view of the highly specialized nature of this area of the law.[30]

Also along these lines are programs to introduce alternative dispute resolution mechanisms. These may include informal procedures which emphasize the rapid settlement of disputes and ensure at the same time that justice is being provided for all.[31] They may also include quasi-judicial tribunals in fields such as labor disputes, regulation of financial markets and restrictive business practices where membership may not be limited to magistrates and the tribunals may have investigative staff.[32] Here again, one of the challenges is to ensure that these alternative procedures are carried out in an evenhanded manner, providing the parties with the same safeguards against arbitrary decision-making as those available under the traditional judicial system.

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[30]Separate administrative justice is particularly known under the French originated system of administrative tribunals grouped under the Conseil d'Etat (which combines in certain countries the judicial function with that of the government's legal advisor under two separate departments). This system allows administrative tribunals not only to award compensation for damages resulting from illegal or arbitrary administrative acts but also to annul such acts with immediate, and at times, retroactive effects. This annulment power may have created, however, certain rigidities especially in personnel matters and may account for the lack of innovation in the systems where the judiciary has this power.

[31]For a discussion of alternative dispute settlement mechanisms in the U.S. context, see New Directions in the Administration of Justice: Responses to the Pound Conference, 64 A. B. A. J. 48, 50-1, 53-5 (1978). The Pound Conference was also known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held in 1976.

[32]See, The 1991 Annual Report of the Chairman of the Development Coordination Committee, Development Issues 1991: U.S. Actions Affecting Developing Countries 22 (1991).

It has been reported for instance that congestion of appellate courts was alleviated in certain states of the U.S. through the use of "settlement conferences." In this system, "[t]he parties and their attorneys appear before a settlement conference judge, who may be a sitting judge, a retired judge or a seasoned staff attorney, depending on state requirements"[33] with the aim of encouraging early resolution of the dispute (as is more common under the so-called mini-trial system in private arbitration).

5. Improving Judicial Management

The objective of improving the efficiency of the system of the administration of justice can also be achieved through the introduction or enhancement of managerial and administrative functions of non-judicial staff within the judiciary and the law enforcement agencies. Management and administrative personnel in the courts may thus be given increased responsibilities in "case load management" and may be trained in time saving office technology skills. This could considerably reduce the non-judicial duties of courts which often occupy a significant part of the judges' time. For this purpose, certain countries have appointed court administrators who manage all the administrative functions required of the courts, leaving the judges to decide only the disputes submitted to them, that is, to do the job for which they were appointed in the first place.

Improved efficiency will also be achieved through the proper institutional allocation of disputes throughout the judicial hierarchy. As already mentioned, this may be achieved through the creation or strengthening of judicial and quasi-judicial tribunals of limited or local jurisdiction,[34] as well as by the creation of specialist superior court divisions to deal with complex cases.

In fact, the appointment of specialized administrative officers in the judiciary with appropriate managerial qualifications and experience could also facilitate

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[33]See, Roger A. Harrison and George W. Hersey, Appellate Court Congestion on How Do You Spell R-E-L-I-E-F?, 1 Governing Florida 11 (1991).

[34]See, e.g., B.J. Brown, Justice and the Edge of the Law: Towards a "Peoples'" Court, in Fashion of Law in New Guinea 181-215 (B.J. Brown ed. 1969).

planning for future court administration and budgeting, allow for better management of personnel matters including career development and training, and improve the systems for procurement procedures, logistical requirements, physical installations and facilities, statistics and computer services, court libraries, etc.[35]

6. Selection and Training of Judges and Other Judicial Officers

As "the quality of justice depends more on the quality of the men who administer the law than on the content of the law they administer,"[36] issues relating to the selection and training of judges become of paramount importance. The basic criteria in the selection of judges should be personal integrity, good judgement and professional legal expertise.

The selection may best be made by the judiciary itself. While countries differ in the methods followed in the selection of judges and several methods may be appropriately followed in the same country, an entrance test of the personal and legal qualifications may be advisable. Many of the skills required for the judiciary are not taught at law schools. Nor are qualities such as personal integrity or good judgement. A rigorous selection process through written and oral tests and simulation exercises could therefore be useful in this respect, especially if followed by a reasonable period (two years for example) of technical preparation in a judiciary school for the selected candidates.[37] This could constitute a good

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[35]For details on judicial management, see I. Lavados Montes and J.E. Vargas Viancos, Judicial Management, a paper submitted to the IDB Seminar on "Justice in Latin America and the Caribbean in the 1990s," San José, Costa Rica, February 1993.

[36]Evan Haynes, The Selection and Tenure of Judges 5 (1944).

[37]For a description of the specific objectives of a judicial institute, which go beyond training in the required juridical skills and reasoning to include ethical values, the role of the judge in society, etc., see G. Hermosilla Arriagada, Training and Continuing Education for Judges, paper submitted to IDB Seminar on "Justice in Latin America and the Caribbean in the 1990s," San José, Costa Rica, February 1993.

beginning for a system where a judicial career is based on comparative merit, which is itself an important factor in judicial efficiency and distinction.

The selection of able judges devoted to the promotion of justice and their education in a specialized institute do not obviate the need for continuous training throughout their career. For laws to be properly applied, judges must not only be thoroughly familiar with the substance of such laws as they emerge, but also with the manner in which they are applied in fact. In many developing countries, significant pieces of legislation have been promulgated in new areas of the law, such as banking and securities regulation, to assist in the rapid economic development pursued by governments. Even when these laws are written in accordance with the legal traditions and in language familiar to the judiciary (which is not usually the case), judges may still have difficulty in their interpretation or application. This difficulty may also be faced by legal practitioners across the country. The matter becomes more complex when, as is often the case, such laws are promulgated without taking into account the socio-economic, political and cultural milieu in which they will be implemented. The situation is further complicated in those countries which are ruled by military governments or other forms of dictatorships, which lack the benefit of a legislative branch to debate draft laws and provide the legislative background (travaux préparatoires).

To ensure their effectiveness, judges should thus undergo continuous training and study programs to bring them up to date with new laws, especially in the relatively complex areas of economic law such as the laws and regulations governing banking transactions and operations, capital markets and securities, bankruptcy, mining and petroleum, trade in intangibles and futures, etc. Continuing study programs are in fact a feature of the preparation of judges in several developed countries. The issue is more relevant in some developing countries where law schools have become a last resort in university education, typically attracting the least qualified applicants and admitting the largest numbers of students, with obvious negative effects on the quality of their graduates. Some judicial reform programs in developing countries have thus involved the training of the legal profession as a whole in economic and business law, including the upgrading of law schools by strengthening their curricula and orienting them to deal with practical cases and to provide students with the basic skills needed in the various aspects of the legal profession (rather than the simple lecture method followed in most of these schools at present).

Independently from the judges' qualifications and training, the efficiency of the courts also depends in part on the work of process servers, court clerks, transcribers and executors of judgements. The effectiveness with which these individuals carry out their activities contribute to the expeditious administration of justice. As staff to the judicial branch, they are also affected by the budgetary constraints referred to above; in many countries they are underpaid and not qualified to carry out their functions. More often than not, this invites corruption at the lower level of the judicial service which seriously affects the overall performance of the judiciary. It should also be noted that this support staff is especially affected by the lack of appropriate institutional facilities, including computing systems and in many cases even modern typewriters. Thus judicial reform programs should address the upgrading of such services and training programs should equally reach such lower level officers.

These comments apply, perhaps more forcefully, to the recruitment and training of others in the judicial hierarchy who preside over courts and tribunals of limited or local jurisdiction, which are increasingly established to reduce the load on ordinary courts by handling the majority of minor civil and criminal actions.

7. Institutional Facilities

The budget deficits affecting all branches of government in the face of the serious economic problems confronting developing countries since the late 1970s and the need for governments to take severe measures to assist in the structural adjustment of their economies have often resulted in inadequate allocation of resources necessary for the maintenance of institutional facilities, such as offices and courts. Major difficulties are encountered in the maintenance of proper archives, acceptable storage facilities for court records and modern office equipment, such as typewriters, computers and copying facilities. In some African countries, it is not uncommon to find equipment dating from the colonial era more than twenty or thirty years after independence. The financing of buildings and equipment for courts is therefore a typical component of judicial reform programs in developing countries.

In a period of budgetary constraints, the acquisition of books, particularly law books, and the maintenance of up to date libraries have not been found in many developing countries to merit high priority. Indeed, the publishing business in many of the least developed countries has ground to a halt and seldom includes legal

publications. Few court buildings include a law library and judges typically write their decisions at home, relying on their limited personal acquisitions. This necessitates the inclusion in reform programs of the establishment and maintenance of a basic law library or libraries including the reference books and periodicals most likely to be in demand.

8. Legal Information Systems

In some developing countries it is not surprising to find that laws promulgated by the government are either published in very limited quantities or not published until a significant time has passed. In a few cases, laws have not been published at all for years. The problem is especially acute in some francophone African countries where Official Gazettes have not been published for two decades. This means that the substance of the law is very often known only to a few individuals. This nonexistent or reduced publication of laws and the paucity of books in law libraries for use by the legal profession and the public at large has hampered legal research activities and the development and application of laws in many countries. Without the prompt publication of judgements, both judges and legal practitioners are also hindered in the carrying out of their respective activities. Judicial reform programs must therefore assure that laws, regulations, and court decisions are regularly published in a timely manner, are efficiently indexed so as to facilitate reference to them and are made available in public places. This requires the development of modern legal information systems with adequate resources to cover their costs, and as a minimum, the regular publication of laws and judgments.

9. Access to Courts; Fees and Costs

Court fees and costs can be used to regulate the number of claims instituted in the court system by discouraging frivolous claims. However, these same fees and costs can act as a barrier to the access of the poor to the judicial system.

In order to ensure respect for the principle of "justice for all" while preventing the build-up of a backlog of cases by discouraging frivolous litigation, it is important for the court system to set court fees and costs at a reasonable level which necessarily will vary from one country to another. To the extent that these fees prohibit the access of poor, legitimate claimants, it is essential that society, through the judicial system or otherwise, provide financial assistance to these

litigants. This could either be achieved through public and private legal aid schemes which could cover poor litigants' expenses, following a preliminary screening of the seriousness of their claims, or through a means test administered by the courts which would excuse from payment those individuals who meet certain requirements.

10. Availability of Arbitration and other Alternative Facilities

Many developing countries have traditional systems of arbitration which are separate from the official dispute settlement systems. However, these traditional systems are hardly suited for use in the settlement of disputes arising in the context of complex modern commercial transactions. They are particularly inadequate for dealing with disputes arising out of foreign investments in developing countries. While some countries have in their laws provisions relating to arbitration in cases of commercial disputes, many of these laws are also archaic and difficult to implement in contemporary circumstances.

The establishment of new and modern arbitration facilities, including the promulgation of appropriate legislative frameworks and the training of arbitrators, may therefore be an important component of a comprehensive judicial reform program. The same may also be true for non-binding conflict resolution mechanisms such as mediation and conciliation which may be particularly effective in the context of certain cultures such as those in the Far East and in Arab countries. For these to be effective, however, an elaborate system should be devised for the procedures to be followed in the selection of the mediators and conciliators and the rules to be applied by them in handling the cases.

III. WORLD BANK JUDICIAL REFORM ACTIVITIES

1. Examples of World Bank-Financed Projects

According to the Articles of Agreements of both the International Bank for Reconstruction and Development (IBRD) and its affiliate, the International

Development Association (IDA),[38] the principal mandate of these agencies (which have a common staff and governing bodies) is to promote the economic development of their member countries, primarily by providing loans (called "credits" in the case of IDA) and guarantees for the financing of specific projects, including projects of technical assistance. From its early years of operation, the World Bank has recognized that political stability and sound economic management are basic prerequisites for economic development. Its Articles of Agreement, however, prohibit the Bank from: (a) being influenced by the "political character" of its member countries; (b) interfering in the political affairs of any member; and (c) allowing political factors or events to influence its decisions. Political considerations are therefore irrelevant to the Bank's work, unless it is established that they have direct and obvious economic effects relevant to its work, in which case such economic effects may be taken into account.[39] In the meantime, the Bank, as an exception to its main statutory activity, may under the Articles of Agreement finance activities other than specific projects as long as these would fall under its general mandate in assisting a member country to stabilize or revive its economy and thus enhance or facilitate investment for productive purposes in its territory. Lending for other than specific projects has in fact expanded since 1980 and accounts at present for some 25% of total annual commitments, mostly in the form of structural or sectoral adjustment loans. These loans finance general, and often unspecified, imports by the borrower in the context of its implementation of reform programs agreed with the Bank.[40]

Activities such as civil service reform and legal reform have been found to be relevant to the maintenance of "good order" in the management of a country's resources through the introduction and implementation of appropriate rules and

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[38]In this paper the two institutions are together referred to as the "World Bank" or the "Bank" unless the context otherwise indicates.

[39]This conclusion was reached in a paper submitted by the author to the Bank's Executive Directors in December 1990. For a detailed discussion of this subject, see Governance Issues, supra note 8.

[40]See Memorandum of the Vice President and General Counsel, Authorized Purposes of Loans Made or Guaranteed by the Bank, dated May 10, 1988 (SecM88-517).

institutions, and were therefore distinguished from the typical exercise of political power to manage the country's affairs generally which falls beyond the Bank's mandate. As General Counsel to the Bank, I had no difficulty in reaching the conclusion that the Bank may favorably respond to a country's request for assistance in the field of legal reform, including judicial reform, if it finds it relevant to the country's economic development and to the success of the Bank's lending strategy for the country.[41] Such a response may take place in the context of a specific project loan or as part of the reform measures to be implemented under an adjustment loan. In either situation, the Bank's involvement can only take place at the request of the country concerned.

Consistent with this view and recognizing the constraints faced by several of its borrowing countries in the administration of justice and the relevance of this matter to their economic and social development, the World Bank has, in recent years, responded favorably to requests by countries for financial assistance in this field. In practice, such activities have increased considerably as several borrowing countries embarked on private sector development programs aimed at improving the enabling environment, as in many Latin American and African countries, or at transforming the very nature of their economies, as in Eastern European and former Soviet republics. In this context, the Bank's Legal Department emphasized at an early stage the importance of having a sound legal framework, properly administered and enforced, for creating an environment conducive to business development.[42] The various activities financed by the Bank in this context in the last two years have involved many of the elements of judicial reform discussed earlier in this paper.

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[41]Governance Issues, supra note 8, at 89. This conclusion was reached after maintaining that "[l]egal reform requires profound knowledge of the economic and social situation in the country involved and can only be useful if it is done by the country itself in response to its own felt needs." The Bank's role in this area was thus described as assisting the country in its reform efforts.

[42]See The World Bank, Legal Department, The Role of Law in Private Sector Development: Implications for the Bank's PSD Action Program (discussion paper) (1989), summarized in Private Sector Development, supra note 4 at 225-230.

The Bangladesh: Financial Sector Adjustment Credit[43] financed activities to enhance the independence of the judiciary. The court system in Bangladesh used to take an average of 10 to 15 years to dispose of suits brought by financial institutions against defaulting borrowers. As a result, the transaction costs were extremely high and collection rates were very low. With the assistance of the Bank and the International Monetary Fund, Bangladesh enacted a Financial Loan Courts Act in 1990 which established special commercial courts in the major economic centers of Bangladesh, whereby financial institutions could bring actions against defaulting borrowers and the loans could be adjudicated. Progress, which to date has been positive, is being monitored under the project and has involved the establishment of courts, the appointment of judges and the disposal of cases.

In the same vein, the credit made by IDA for the Guinea Private Sector Promotion Credit[44] supported the preparation and implementation of a legal reform program to strengthen the legal system, including training of members of the legal profession, and in particular members of the judiciary. In this connection, the deficient functioning of the judicial system and the legal void on commercial bank sureties were identified as major constraints for banking activity in the country. Banks were found to be unable to enforce their rights as creditors through foreclosures or other court-approved actions, due in particular to debtor-judge collusion and rampant corruption. This operation was a modest attempt at addressing these problems and is meant to be followed by training of the judiciary and other members of the legal profession in banking and commercial matters and by improvements in the material working conditions of the courts.

In addition to the above-mentioned projects, the Bank recently has made a grant from its Institutional Development Fund (IDF)[45] to Argentina to assist in the

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[43]Development Credit Agreement dated June 18, 1990 (Credit No. 2152 BD).

[44]Development Credit Agreement dated September 28, 1990 (Credit No. 2148 GUI).

[45]The Institutional Development Fund was established by the Bank as a grant facility, effective as of July 1, 1992, designed to fill gaps in the Bank's instruments for financing technical assistance associated with policy reform measures undertaken by its borrowing countries.

financing of a diagnostic review of the judicial system of Argentina. This review will focus on the role of the federal courts and the national courts in Buenos Aires and will deal with issues relating to the operation of these courts, including court procedures, case management, the efficacy of the procedural codes and other procedural rules as well as alternative dispute resolution methods, including arbitration, mediation, conciliation and small claims courts. On the basis of the recommendations emanating from the diagnostic review, the second phase of the program will be prepared. This will consist of a legal education program for judges, lawyers and the public and a training plan for court personnel in modern court management practices. Upon completion of these two phases, a comprehensive report will be prepared for the consideration of the Argentine Government.

Apart from these projects, the Bank has provided financing to cover the comprehensive strengthening of the judiciary, including the upgrading of institutional facilities, such as court houses and buildings, and the acquisition of equipment and improvement of libraries. A number of recent operations approved by the Bank are noteworthy in this respect. A landmark operation is the Venezuela: Judicial Infrastructure Project,[46] approved by the Bank's Executive Directors on August 7, 1992, which is described below in some detail. Although it by no means covered all or most of the elements of judicial reform listed earlier in this paper, it was the first operation where the World Bank made a loan exclusively for the purpose of judicial reform.

The objectives of this project are: to assist Venezuela in reducing the private and social costs of the administration of justice and to improve the enabling environment for private sector development in Venezuela. This will be done by: (a) improving efficiency in the allocation of resources within the judiciary; (b) increasing courtroom productivity and efficiency; (c) strengthening the institutional capabilities of the institution in charge of the management of the judiciary, i.e., the Consejo de la Judicatura (the Consejo) to perform its functions; (d) strengthening the institutional capabilities of the Consejo's institute, known as the Escuela de la Judicatura (Escuela), to perform its functions; (e) strengthening the capabilities of the judiciary personnel to perform their respective functions; and (f) improving the physical condition of the courts.

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[46]Proposed Loan Agreement (Loan No. 3514 VE).

The components of the project financed by the Bank include the hiring of consultants and the carrying out of studies on: (a) the necessary level of budgetary allocations required for operational supplies of the Venezuelan courts; (b) the adequacy of salaries of the judicial personnel in general, including job descriptions, classifications, salary entry levels, and recommendations on criteria for recruitment, promotion and salary increases; (c) budgeting and strengthening of financial management of the judicial system; (d) the development of court performance indicators; (e) the development of an inventory of court buildings and equipment, of standard models of courtroom design, and long-term investment plan for future physical infrastructure requirements, of a pilot court system and an analysis of training needs of the Consejo staff; (f) policy and technological changes for storing court records and current policies and regulations in respect of court fees and judicial deposits; (g) the design and installation of communication networks within the Consejo; (h) the strengthening of administrative capacity of Consejo staff in the regional offices; (i) the identification and evaluation of, and recommendation on, the existing alternative dispute resolution methods; (j) an alternative means to improve access to the courts for the poorest segment of the Venezuelan society; (k) the private costs of litigation; (l) alternative computerized data base on statutory and case law; (m) priority areas identified in procedural law related to the project objectives; and (n) other technical assistance, including studies, related to the objectives of the project.

Training will also be financed with the proceeds of this Bank loan to Venezuela, inter alia, for: (a) Directorates of the Consejo dealing with financial management and policy analysis; (b) statistics (c) administration; (d) personnel; (e) auditing; (f) record keeping; (g) the Inspectorate Directorate staff in monitoring the reliability of court statistics; and (h) court management and supervision. Financing will also be provided for the acquisition of vehicles and office equipment required for the management information system, statistical analysis, communication networks within the Consejo and for supervision of the courts by the Consejo. Technical assistance will also be provided to: (a) determine training needs of judicial personnel; (b) develop course curricula for in-service training of judicial personnel; (c) organize training programs for potential instructors among judicial personnel to improve their teaching capacity; (d) develop an evaluation methodology for in-service training courses; (e) deliver and evaluate pilot courses; (f) develop a long-term in-service training plan; (g) study tours for staff members of the Judicial Advisory Commission and potential instructors; and (h) organize regional and

national conferences for judicial personnel. The judicial personnel in Venezuela will also receive training in management and selected substantive and procedural legal subjects.

The Venezuela project also includes a program to modernize the system of court administration consisting of (1) the design and implementation of organization models in selected courts and public defender's offices; (2) the provision of legal reference materials, (including procedural legislation and case law) and office equipment; (3) the provision of technical assistance to review all laws, decrees, Consejo's regulations and other pertinent norms regarding court administration for purposes of developing a consolidated manual to be utilized by judicial personnel; (4) the provision of training in software and hardware by court personnel.

In addition, the Venezuelan project includes a program to improve the physical condition and availability of court buildings consisting of: (1) physical improvements in selected courts and public defender offices; (2) the construction of two hundred and fifty courts in various states in Venezuela; and (3) the upgrading of approximately three hundred and fifty courts throughout Venezuela (primarily to enhance privacy in court operations, improve security spaces for records and equipment and upgrade electrical connections for computers).

The credit for the Tanzania: Financial and Legal Upgrading Project[47] is another recent example of the financing of judicial reform by IDA. In addition to financing activities relating to the strengthening of the Tanzanian Attorney General's Office and Tanzania's Law Reform Commission the credit will also finance activities designed to strengthen the judiciary in the area of commercial law developments and to streamline procedures to ensure the speedy disposal of cases. These activities include training of High Court judges, resident and district magistrates, registry assistants and registrars of the Court of Appeal and High Court. The proceeds of the credit will also be used to upgrade the High Court's library including the streamlining of procedures, acquisition of books, legal journals and material and training of library assistants. In addition, typewriters and computers will be acquired for use by magistrates and the High Court registries in

[47]Development Credit Agreement dated September 4, 1992 (Credit No. 2413 TA).

Dar-es-Salaam and eleven zonal centers. Funds will also be provided to assist in the publication of the Tanzania Law Reports.

As is the case with the Tanzanian project, a credit has recently been approved to provide assistance to Mozambique to support a comprehensive list of legal institutions in that country. The Mozambique: Capacity Building, Public Sector and Legal Institutions Development Project[48] includes several of the elements described in Section II of this paper, including the training of judges and court staff, provision of financing to improve institutional facilities (including legal information systems), acquisition of books for law libraries as well as support for a new Center for Judicial Studies.

A few projects which involve the establishment or the improvement of arbitration facilities have also been financed or are in the process of being prepared for financing by the Bank.

In the context of Côte d'Ivoire's Financial Sector Adjustment Loan,[49] it was agreed that the introduction of arbitration as a means to directly settle insurance claims would be another alternative for handling disputes, and contribute to an expeditious settlement of them. In view of this, the Government of the Côte d'Ivoire agreed to promulgate a law on arbitration to respond to this concern. This law, however, extends beyond insurance issues and covers all disputes arising out of general commercial transactions. The law has now been prepared, commented on by the Bank's Legal Department, approved by the Government and is about to be adopted by the Parliament. Further, at the request of the Government, a technical assistance operation is now under preparation which would include a component to provide logistical support and services in the establishment of a commercial arbitration center in Abidjan.

The IDA has also been requested to provide assistance to the judiciary in the course of the preparation of a private sector development project in Senegal. This project has a component regarding the preparation of arbitration rules and the establishment of a center in support of its existing arbitration legislation. In this

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[48]Proposed Development Credit Agreement (Credit No. 2437 MOZ).

[49]Loan Agreement dated October 4, 1991 (Loan No. 3408 IVC).

connection, the Bar Association and the Chamber of Commerce are jointly working on the establishment of an arbitration court in Dakar, the institutional framework of which may be supported by the proposed IDA operation.

Finally, the Government of Bolivia, with the assistance of the Bank, presently is preparing a proposed public enterprise and privatization project which will include studies on Bolivia's administrative law (contencioso administrativo) and enforcement of arbitration awards.

2. Other Relevant Bank Activities

In connection with its private sector assessments in its borrowing countries, the Bank normally carries out a review of the legal and institutional framework in areas of law relevant to that sector. These studies are being undertaken in the newly created democracies of Eastern Europe which are in the process of transforming their economies from command to market systems. A good example of this is the review carried out recently in Moldova where many of the problems indicated in Section II of this paper may be discerned. The recommendations emanating from that review indicate that, in order to ensure proper application of new laws which need to be promulgated, Moldova will have to take measures which will ensure the independence of its judiciary, provide the courts with clear and final authority to meaningfully resolve commercial disputes, provide training for its judges so that they can deal competently and efficiently with complex commercial disputes common in market economies, and institute systematic publication and wide dissemination of judicial decisions and legislative acts and regulations. Studies of this nature have also been undertaken in Armenia, Azerbaijan Republic and the Philippines.

In Guinea, the Bank has recently assisted the Government in the organization and execution of a seminar designed to review the legal system of Guinea and to determine actions which ought to be taken to improve the administration of justice in that country. This highly appreciated seminar led to a request by the President of Guinea to IDA for assistance in the design and possible financing of a legal sector development project. A similar seminar has been undertaken in the Central African Republic and a legal sector development project is at the initial stages of project preparation.

3. Available Instruments of Bank Support to Judicial Reform

As is clear from the examples cited above, the Bank's response to the needs of its borrowing countries to reform their judicial systems has not only had varying components but has taken place by virtue of different instruments. These included:

(i) a free standing loan for judicial reform as a self-contained project, the only example so far being that of the loan to Venezuela;

(ii) project loans of a broader scope (normally of an institutional development character) which include judicial reform as a component of the project, such as the credits to Guinea, Mozambique and Tanzania;

(iii) components of the measures to be implemented under an adjustment loan, such as the sectoral adjustment credits to Bangladesh and Cote d'Ivoire;

(iv) studies and pilot projects financed by a grant from the recently established Fund for Institutional Development, such as the recent grant to Argentina; and

(v) other studies, seminars and conferences organized in the normal course of preparation for Bank operations such as the recent review for Moldova and the seminars in the Central African Republic and Guinea.

The choice among these instruments is normally based on practical considerations relevant to the overall Bank lending program to the country and the timeliness and convenience of the forms of support available to it.

Like in other instances of financing technical assistance and reform programs, borrowers are not advised to embark on borrowing for such purposes unless they are seriously committed to following through with the implementation of the reform programs. Adding further studies to dusty shelves is obviously a waste of scarce resources. It may also be noted that institutional reforms require for the most part the financing of local costs which may also be of a recurrent nature. External development finance agencies normally have certain limitations on

the financing of such costs. Recurrent costs in particular cannot be financed in perpetuity from external sources. The Bank's readiness to be involved in the financing of judicial reform programs, whether directly or through counterpart local funds generated under adjustment loans, should not therefore be seen as a normal or permanent feature of its operations. Rather, it is a complementary measure to be considered for those countries which are keen to implement such reforms and lack the means to do so through their own resources.

It should also be noted that the Bank's readiness to assist in judicial reform and its actual involvement in this area since 1990 are limited by the Bank's mandate as defined in its Articles of Agreement. As explained earlier, such mandate is not so broad as to cover any reform in the Bank's member countries but is formulated mainly in terms of the financing of specific projects for productive purposes. Although this mandate has been interpreted to cover assistance in economic development in a broad sense, it cannot, in the view of this writer, be stretched so as to cover broader reform issues such as those of a clearly political character or those far removed from the facilitation of investment for productive purposes such as the efforts related to improving the conditions of prisons. The Bank therefore is not as free in the area of judicial reform as other agencies such as the United States Agency for International Development (USAID) which has actively pursued judicial reform for over ten years without necessarily limiting its activities to reforms related to economic development.[50]

IV. DISPUTES WITH FOREIGN INVESTORS

An area of conflict resolution which deserves special treatment in an overall review of the judicial system in a given country is the settlement of disputes that arise between the government and a private investor who is the national of another country. Typically, foreign investors in developing countries request that this type of dispute be settled through independent arbitration, preferably outside the host country concerned. The issue seldom arises in developed countries, where governments rarely enter into contractual relationships with foreign investors and

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[50]See, Agency for International Development, Bureau for Latin America and the Caribbean, Office of Democratic Initiatives, The Administration of Justice Program in Latin America and the Caribbean 1 (1992).

where the history of dispute resolution before national courts in this field has not been particularly controversial.

In developing countries, by contrast, the question has been fraught with problems and has often led to the espousal of the claims of many western investors by their governments. Such espousal, under the international law doctrine of diplomatic protection, has repeatedly ended in international adjudication or arbitration and, in times past, in the actual resort to force. Developments in Latin America in particular led to the evolution of a negative attitude towards international arbitration and to the emergence of the Calvo doctrine enshrined in many constitutions.

In this context, the Calvo doctrine requires that disputes between a government and foreign investors be settled by national courts according to national law. However, this principle does not deprive the governments of such investors from the right to espouse the claims of their nationals. Such espousal, which escalates the disputes to the arena of international law, is likely to remain a common practice unless the country of the investor waives it in advance, for instance in the context of an international mechanism for the settlement of disputes agreed upon by treaty.

The attitude of developing countries in general (and Latin American countries in particular) towards international arbitration is changing, however, especially as a result of the development of new mechanisms of arbitration which address the major concerns of these countries. I have in mind in particular the arbitration facilities of the International Centre for Settlement of Investment Disputes (ICSID).[51]

ICSID was established over 25 years ago under a multilateral Convention, prepared by the World Bank and known as the 1965 Washington Convention. In accordance with this Convention, ICSID provides facilities for the conciliation and

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[51]For an explanation of the ICSID system and its advantages over an insistence on the strict application of the Calvo doctrine see Ibrahim F.I. Shihata, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, in Shihata supra note 4, at 309 (also available as an ICSID publication in English and Spanish).

arbitration of legal disputes arising out of an investment between a member country of ICSID and a national of another member country. The World Bank sponsored the establishment of ICSID in the belief that the availability of a dispute settlement machinery of this kind could help to promote increased flows of international investment and would thus serve the interests of its developing member countries without undermining their rights.

The jurisdiction of ICSID tribunals is based on the mutual consent of the parties to the dispute. Membership of ICSID does not by itself imply acceptance by the state of such jurisdiction. Resort to ICSID deprives the state of the investor from exercising diplomatic protection in its favor. Furthermore, ICSID tribunals apply, in the absence of agreement by the parties an applicable law, the law of the host country (complemented by such rules of international law as may be applicable). And the host state may require the foreign investor, as a condition of the state's acceptance of ICSID's jurisdiction, to exhaust local remedies. The World Bank covers the cost of ICSID's Secretariat which charges the parties to a dispute only the actual cost of the proceedings including a fixed per diem for the arbitrators. There is hardly a mechanism for international arbitration that is more favorable to developing countries desiring to establish a hospitable environment for foreign investment.

Since it was opened for signature in 1965, over 120 countries have signed the ICSID Convention. Of these, 107 countries have also ratified the Convention and have thus become members of ICSID. The member countries include some 80 developing countries, few of which are Latin American countries. It is for this reason that I conclude this paper, which addresses judicial reform in developing countries, with particular emphasis on the Latin American region, by calling the ICSID system to the attention of those concerned with enhancing the attraction of their investment environment to foreign investors.