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African Regional Forum news

Newsletter of the International Bar Association Legal Practice Division

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CPD/CLE HOURS AVAILABLE

Mergers, Acquisitions and Inward Investment in Africa

6–8 November 2013 **Eko Hotel and Suites, Victoria Island, Lagos, Nigeria**

A conference co-presented by the IBA African Regional Forum and the IBA Corporate and M&A Law Committee

Topics include:

- Investing in Africa: Regulatory Developments and the Changing Market Structure; Investors' Protection and General Issues
- Corporate Governance; Global Depository Receipts (GDRs) and other transactional Issues in African Cross Border M&A
- Trends in Equity Capital Markets (ECM) in Africa
- Alternative Dispute Resolution in Africa
- Recent M&A Development in Oil and Gas
- Recent trends in Telecommunications
- Recent trends in Antitrust M&A concerns in Africa
- Chinese Investment in Africa

Who should attend:

Legal professionals, both private and in-house, business professionals, judges and investors based in or with an interest in the African region

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London São Paulo Seoul

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org

In this issue

Contributions are always welcome and should be sent to **fagbohun@elri-ng.org** and **abodley@sondhiwilliams.com**.

International Bar Association

4th floor, 10 St Bride Street
London EC4A 4AD
Tel: +44 (0)20 7849 0090
Fax: +44 (0)20 7849 0091
www.ibanet.org

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This newsletter is intended to provide general information regarding recent developments in Africa.
The views expressed are not necessarily those of the International Bar Association.

From the Co-Chairs

Olufunmi Oluyede
TRLP Law, Lagos
olufunmi@trlplaw.com

Barnabas Tumusingize
Sebalu & Lule Advocates, Kampala
brt@sebalulule.co.ug

These are exciting times for the IBA African Regional Forum! *Mounting up with wings as eagles*, our 2013–14 leadership has commenced work in earnest with the objective of enhancing the value of the Forum to all members. To facilitate this, committees have been set up under the auspices of accomplished Forum officers in each region of the continent. In conjunction with this is our Advisory Board – members are consulted regularly and involved in all Forum activities.

The Forum's primary goals for this period are as follows:

Editorial/Publications Committee

- To produce a book of global impact within the interests of the Forum.
- To maintain an informative and topical Forum newsletter, published quarterly.

Communications Committee

- To encourage the exchange of ideas between all members.
- To update the Forum webpage and improve communications via available IBA communication channels.

Membership/Outreach Committee

- To increase partisanship in every region of the continent.
- To encourage African lawyers to participate in the IBA.

Programmes Committee

- To offer a calendar of programmes with top-calibre speakers using innovative formats.
- To sponsor networking and general interest events, Forum dinners and other meetings with guest speakers.
- To support mentoring programmes via an IBA/African Regional Forum Young Lawyers' Steering Group throughout the continent.
- To provide training courses and CLE seminars in collaboration with local firms and bar associations.

Committee membership is open to all without charge – we welcome you to become actively engaged with at least one. No member can be left behind!

At this time, we proudly present your first Forum newsletter of 2013 – an exhilarating, didactic publication with first-rate articles on the theme of law and access to finance in Africa – a subject of particular interest to many readers about leveraging our small-scale industries for increased productivity, higher incomes, job creation and, ultimately, growth.

With our focus firmly on achieving these goals, the Forum is poised to soar as it advances the interests of the African lawyer globally. Happy reading!

Prof Olanrewaju Fagbohun

Nigerian Institute of Advanced Legal Studies, Lagos

fagbohun@elri-ng.org

Anne Bodley

Sondhi Williams, New York

abodley@sondhiwilliams.com

From the Editors

In this, our first 2013 newsletter, we are happy to introduce Professor Olanrewaju Fagbohun of the Nigerian Institute of Advanced Legal Studies, who will handle the group's larger publications. Professor Fagbohun holds currently the Chike Idigbe Distinguished Professorial Chair at The Nigerian Institute of Advanced Legal Studies.

Working with him, we also introduce Anne Bodley, who will oversee the newsletters that the Forum will produce this year. Anne is an Australian-born New York lawyer who spent nearly four years with the UN International Criminal Tribunal for Rwanda (UNICTR) in Arusha, Tanzania, and has travelled widely on the African continent. An active member of the IBA for more than ten years, in 2010 she founded the Lex:lead Group, which runs an annual essay competition open to the world's 49 least-developed countries – publishing the 2012 winners in this edition.

Each of the newsletters planned for this year will address specific issues. In this edition, we are featuring articles on law and access to finance in Africa. Finance is a key topic in discussing development in Africa, and what the law can do to expand its availability is catalytic. We are very pleased with the quality of submissions – including corporate social responsibility as an underpinning to improved access to finance and reducing gas flaring practices through finance. Access to finance was the topic for Lex:lead's 2012 essay competition and as such the essays featured discuss this issue from the perspectives of students at the universities of Addis Ababa, Ethiopia, and Dar es Salaam, Tanzania.

Our next edition will focus on tribunals and Africa; from international criminal tribunals to arbitral tribunals. What is their legacy and impact on Africa? What are the problems and how can these issues be addressed?

Lastly, as a finale for the year, we are looking to produce our final edition on the intertwined issues of law, sustainable development and good governance.

Our goal is to keep our readers informed of issues that have an impact on Africa without losing sight of issues unfolding around the world. We welcome submissions from all members.

Committee officers

Co-Chairs

Olufunmi Oluyede
TRLP LAW, Lagos
Tel: +234 (806) 655 3669
olufunmi@trlplaw.com

Barnabas Tumusingize
Sebalu & Lule Advocates, Kampala
Tel: +256 (41) 233 063
Fax: +256 (41) 230 521
brt@sebalulule.co.ug

Vice-Chairs

Ezra Davids
Bowman Gilfillan Inc, Johannesburg
Tel: +27 (11) 669 9320
Fax: +27 (11) 669 9001
e.davids@bowman.co.za

Frank W K Beecham
Bram-Larbi Beecham & Co, Accra
Tel: (+233) 0302222931
beecham1@4u.com.gh

Evans Monari
Daly & Figgis Advocates, Nairobi
Tel: (+254) 20 444 8904
Fax: (+254) 20 444 8907
monari.e@daly-figgis.co.ke

Secretary

Nechi Sylvia Ezeako
EL-Values Advisory, Lagos
nechi70ng@yahoo.com

Communications Officer

Ikeazor Akaraiwe
Akaraiwe & Associates , Enugu
ikeazor@gmail.com

Corporate Counsel Forum Liaison Officer

Nechi Sylvia Ezeako
EL-Values Advisory, Lagos
nechi70ng@yahoo.com

Young Lawyers Liaison Officer

Kimathi Kuenyehia
KIMATHI & PARTNERS, Accra
Tel: +233 (0)247960465
Fax: +233 (0)302766870
kimathi@kimathilegal.com

Membership Officers

Ogugua Ikpeze
Ikpeze & Ikpeze, Onitsha
diaikpeze@yahoo.com

Donald B. Kipkorir
KTK Advocates, Nairobi
dkipkorir@ktk.co.ke

Apollo Mboya
Law Society of Kenya, Nairobi
Tel: +254 20 2625391
lsk@lsk.or.ke

Samuel Batson Tembenu
Tembenu, Masumbu & Company, Limbe
Tel: (+265) 01 840 680
tembenu@malawi.net

Programme Officers

Yvonne A Fiadjoe
African Development Bank, Tunis Belvedère
Tel: (+216) 71 10 39 00
fiadjoe@hotmail.com

Nankunda Katangaza
Law Society of England and Wales, London
Tel: +44 (0) 20 7242 1222
nankunda.katangaza@lawsociety.org.uk

Samuel Batson Tembenu
Tembenu, Masumbu & Company, Limbe
Tel: (+265) 01 840 680
tembenu@malawi.net

Publications Officer

Olanrewaju Adigun Fagbohun
Nigerian Institute of Advanced Legal Studies, Lagos
Tel: (+234) 1 821223
Fax: (+234) 1 4976078
fagbohun@elri-ng.org

Bar Issues Commission Liaison Officer

Olufunke Adekoya
AELEX Legal Practitioners & Arbitrators, Lagos
Tel: (+234-1) 46173213
Fax: (+234-1) 4617092
oadekoya@aelex.com

Law Firm Management Liaison Officer

Jonathan U Ikiebe
Ikiebe & Co, Lagos
joe@ikiebeattorneys.com

BOSTON 2013
6–11 OCTOBER

ANNUAL CONFERENCE OF THE
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African Regional Forum sessions

Monday 0930 – 1230

The Boston Tea Party revisited: is it time for the United States to place greater limits on free expression? Or should other nations revisit their limitations?

Presented by the North American Regional Forum, supported by the African Regional Forum, the Arab Regional Forum, the Asia Pacific Regional Forum, the European Regional Forum and the Latin American Regional Forum

As far back as the Boston Tea Party, the United States has had a history of very broadly protecting the free expression of ideas. In a rapidly changing world where communications instantly cross borders and can offend the citizens of other countries, even inciting them to violence, is it appropriate for the United States to reconsider its broad protection of free speech? For example, Canada, its neighbour to the North, doesn't permit a citizen the 'free speech' to deny the existence of the Holocaust. France does not permit eBay to sell Nazi paraphernalia. Google substantially altered its search engine capability in its Chinese version, ostensibly to address China's national security concerns. Russia recently jailed pop stars who were critical of Vladimir Putin and has since amended its definition of high treason to include moves against Russia's territorial and state integrity and includes consultative assistance to a foreign state or an international organisation.

This session, supported by all of the IBA Regional Fora, will address 'expression' regimes globally to address how countries in other fora approach 'free speech' with limitations deemed appropriate for their regions.

The session will approach the subject in two formats. The first half will have leaders in the subject matter in the different regions discuss the varying approaches of

Continued overleaf

African Regional Forum sessions – continued

jurisdictions within their region to limit 'free speech' based on concerns which include the need to protect the reputation and privacy of citizens, to protect against speech which is contrary to accepted 'truth' and to protect against threats to national security. This portion of the session is expected to make full use of video examples, email and Twitter posts, and search engine results, ranging from the 'Pussy Riot' videos that led Russia to bring charges against band members, to the rogue video produced in the US that mocked Mohamed and led to riots against US interests in the Middle East.

After concluding the first part of the session, after the break, the last third of the session will follow on from a very successful North American Regional Forum session in Dublin, in which the attendees broke up into separate tables, with panellists joining different tables to lead discussions of topics addressed by the session in order to attempt to find consensus on what attendees believe should be the appropriate level of 'free speech' limits globally. Young lawyers will be the rapporteurs for each table and will report at the end of the session on what each of the tables had concluded in that regard.

Tuesday 0800 – 0930

Open committee business meeting and breakfast

Presented by the African Regional Forum

An open meeting of the African Regional Forum will be held to discuss matters of interest and future activities.

Tuesday 1430 – 1730

Oil and gas wealth in Africa: overcoming the jinx!

Presented by the African Regional Forum

Ab initio, the discovery of oil in such African countries as Nigeria, Angola, Libya and Equatorial Guinea was an exciting, welcome development – one widely-acclaimed as the long-awaited panacea to poverty, lack of infrastructure and general declining standards of living. However, this has not been the case, as these countries are still in dire economic straits – poverty and underdevelopment still looms large and the people have not significantly benefited from oil revenues.

In recent times, Uganda, Kenya and Ghana have also struck oil, while Tanzania has discovered large gas fields. What lessons can they learn from their predecessors? How does oil and gas discovery translate to productive economic development and an effective poverty alleviation mechanism within our oil-rich African States?

Wednesday 0930 – 1230

Who owns the land? Farming, mining and land rights in Africa

Presented by the African Regional Forum

Africa is notorious for its hospitality and warm welcome. But with increasing interest in Africa's arable land and its mineral resources, exploration, mining and ownership rights over African land have become a major flashpoint. In many parts of Africa, the extent of land rights are now subject to intense resource competition and competing claims from diverse groups, resulting from extensive demographic, economic, social and cultural changes. Heads of government versus foreign investors, State governments versus the indigenous settlers on the land, foreign agribusiness versus local farmers – all struggle to answer the same question: 'Who owns the land?'

A panel of speakers representing the foreign investment community, agribusiness, the mining industry, the energy industry and indigenous peoples will reflect on how the regulation of land rights have helped or hindered economic expansion in Africa.

Thursday 0930 – 1230

Off to the witch doctor! Regulating African traditional and indigenous medicine

Presented by the African Regional Forum and the Healthcare and Life Sciences Law Committee

In this mystical, exhilarating session, our panel of erudite, top-notch speakers will embark on an in-depth examination of effective, time-honoured, native medicinal therapies: their current and prospective roles in modern global healthcare systems; appropriate laws/regulations for their effective incorporation and utilisation; potential attendant business/industrial opportunities; and various other significant factors.

This all-important medical evaluation will be conducted with a view to an improved access to healthcare, which will productively cater to the dire medical needs of populations in Africa and enhance successful healthcare delivery services globally.

Gbolahan Gbadamosi
Osun State University, Osogbo
glahan@yahoo.com

An interview with Michael Reynolds, IBA President 2013–2014

Michael Reynolds, former Chair of the IBA Legal Practice Division and of the Antitrust and Trade Law Committee, was recently elected as IBA President. Further to a 30-year career at Magic Circle law firm Allen & Overy, he is a visiting professor of European Law at the University of Durham, and a director and founding member of the IBA Global Forum for Competition and Trade Policy. In an online interview with Gbolahan Gbadamosi, (a Research Fellow at Osun State University in Lagos, Nigeria), Reynolds spoke of his vision for global lawyers and the IBA's steps to engage with the legal profession worldwide.

Legal career and contributions to the IBA

Gbolahan Gbadamosi (GG): Congratulations on your election as IBA President. How and when did you become an IBA member?
Michael Reynolds (MR): Thank you, I am very much looking forward to my two-year tenure as president of the IBA. I have been a member of this global organisation for more than 30 years, which is almost as long as my career with Allen & Overy (A&O). When I began my career at A&O, a senior partner instructed me, simply because I could also speak French, to attend a conference being held by an international organisation that I had never heard of and I had no idea of what it did or how it was relevant to my work. That organisation was the IBA. Of course, I know better now!

Incoming IBA President's vision for global lawyers

GG: what is your vision and what are the challenges for this global legal association?
MR: Put simply, my vision is to continue to build the IBA and to increase and strengthen the ties of the legal profession across the globe. We are at a time in world development when connectivity is greater than it ever has been previously. This provides an opportunity for lawyers in all jurisdictions to contribute toward practical improvements in how the world works.

Nations have legal systems that can differ significantly, and cultural differences that can make business transactions and general interchanges between states difficult. The IBA is uniquely placed to help overcome these particular challenges, because it brings together legal practitioners from across the world to discuss and promote the harmonisation of laws across borders to ease transactions and increase understanding between people. Another important and constant challenge is ensuring that younger lawyers from across the globe develop their careers internationally, that they broaden their knowledge and meet their peers, particularly to exchange ideas and experiences and create international connections.

Strengthening IBA engagement with the legal profession around the world

GG: In your acceptance speech, you promised to strengthen IBA engagement with the legal profession around the world, including in Africa. Why have legal practitioners from North Africa not been active in the IBA?
MR: Part of the reason that North Africa's legal practitioners have not been particularly active in the IBA is probably due to a language barrier. The working language of the IBA is English, while the majority of North African countries are Arabic-speaking. However, more countries are recognising English as the language of international business, as are a number of lawyers from North Africa. In an ideal world, the IBA would be able to translate all literature into all of the world's languages, but unfortunately this is not feasible. That said, I would like to see the IBA become more culturally diverse and this is happening already with many of our materials being translated into other languages and conferences taking place in places like Japan, Russia and Brazil, where other languages are used as well as English.

Criteria for choosing a host country; African vision

GG: What are the criteria for choosing an IBA Annual Conference host country? IBA host countries have already been chosen up to 2016–2017. When will it be Africa's turn again to host the IBA, since it last did so in 2002?
MR: The criteria to be met by countries wanting to host the IBA Annual Conference, as you would expect, are high. International delegates attending the event have high-level expectations, and as a responsible event organiser, these must be kept at the forefront of considerations when deciding host venues. Any city is welcome to bid to host the event, but it is essential that the necessary infrastructure is in place, including a conference centre that can accommodate the thousands of international lawyers who will attend the conference, venues large enough to hold the opening and closing parties and law firm receptions throughout the week, good transportation links in terms of international flights and taxis, and a sufficient number of five-star hotels and restaurants. If a city believes it can meet the necessary criteria, then, along with other cities, it should bid. There are currently no bids received from African cities for the years ahead. The venues for 2019 and 2020 are open, and if an African jurisdiction wants to make a proposal, it would be welcome, but the criteria must be met.

The IBA Global Forum on Competition and Trade Policy and legal practitioners

GG: As director and founding member of the IBA Global Forum on Competition and Trade Policy, what is its relevance to legal practitioners?
MR: The IBA Global Forum for Competition and Trade Policy was founded in 1991 and consisted of a group of experts representing the interests of economists, lawyers, academics, practitioners and national and international policy-makers who had a commitment to expanding the global discussion of the ramifications of competition policy for global trade and investment. In 2001–2002, we launched a website resource – it was the first unique 'one-stop shop' for providing jurisdiction-wide access to the world's competition laws, and also direct links to national competition authorities and international organisations with antitrust interests. Over the years, together with an increasing global interest on competition law issues, the IBA Antitrust Committee and the IBA Trade and Customs Law Committee have enhanced the scope of the IBA Antitrust and Trade Law Section by engaging in several activities, including participating in policy-making legislations, public consultations and in spreading awareness through conference sessions and workshops and publications. I consider this vital for the knowledge and work of any informed legal practitioner in that field.

Continuing role of IBA Task Force on Anti-Terrorism

GG: In view of the growing threat of terrorism worldwide, what is the status of the IBA Task Force on Anti-Terrorism?
MR: Unfortunately, the threat of terrorism, like much else, has been altered by globalisation. Increased communication channels and fast-developing technology have made it an unpredictable phenomenon of the 21st century. The IBA's Task Force on International Terrorism has published two reports (in 2003 and 2011) where it was clear that the response to actual terrorism, and the threat of it, needs to be multi-faceted and flexible. The Task Force identified a delicate balancing act between responding to global terrorism, while protecting the fundamental rights and freedoms of people. Its aim was to contribute to the debates surrounding counter-terrorism and international law by providing authoritative conclusions and recommendations for states, inter-governmental and non-governmental institutions, the judiciary and policy-makers on how to respect the balance while protecting the global public from terrorist violence. While the principal work of the Task Force was to produce the second edition of *Terrorism and International Law,* which it has done, it now maintains a watching brief on the issue. Several members of the task force, such as Justice Richard Goldstone (who was the Chair of the Task Force) are on the IBA's Human Rights Institute (IBAHRI) Council and so have a continuing oversight of the related issues.

IBA to set up a task force on climate change

GG: Going back to your acceptance speech, you mentioned the issue of climate change. Former Irish President Mary Robinson, in delivering the 2012 George Seward Memorial Lecture in Dublin, warned of impending climatic change. How do you intend to address this important issue?

MR: It is undeniable that, regardless of our geographical position, we are all experiencing changing weather patterns. This new reality, according to some reports, is significant enough to threaten to reduce future economic output by 20 per cent, and to endanger food and water security for many. Through the IBA's global membership of gifted, internationally minded lawyers, we will address this via, among other things, a specially convened task force. We will examine how our lives are being destabilised, in particular the lives of the disadvantaged, and will focus on ways to enhance or preserve their access to justice as the international community works toward the new climate agreement to which it is committed by 2015.

Heather Irvine

Norton Rose, Johannesburg

heather.irvine@nortonrose.com

Merger review in the COMESA Competition Commission now a reality

The Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) has received its first merger filing, in relation to a proposed merger between global consumer electronics companies Philips and Funai. This new 'one-stop shop' merger regime signals a new era for competition law enforcement on the African continent.

The CCC is a regional competition authority created by treaty, tasked with the review of all mergers that have a regional dimension in COMESA countries (Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, the Republic of Seychelles, South Sudan, Sudan, Swaziland, Uganda, Zambia and Zimbabwe).

The CCC announced that it would begin merger reviews on 14 January 2013. If both or either of the acquiring firm and target firm operates in two or more COMESA member states, the CCC must be notified of the transaction. There is currently no financial threshold, so all mergers with a regional dimension must be notified, even if there is no risk to competition and even if the companies involved are relatively small. Filing fees are steep (a maximum of US$500,000), but it is hoped that the CCC will revise these monetary thresholds soon, so that only major transactions with a potentially significant impact in the region have to be notified.

Notifications to the CCC must be filed no later than 30 days after the parties decide to merge. Parties do not have to wait for clearance before they can implement their transaction, but there is the risk that the merger will need to be unscrambled if it is prohibited, or the parties may have to comply with any unanticipated conditions imposed on the merger by the CCC.

The intention is that the CCC is a 'one-stop-shop' for merger filings, like the European Commission – if a merger is filed with the CCC, it does not also have to notify competition regulators in any of the individual member states. This will avoid the cost and inconvenience associated with having to notify mergers in multiple jurisdictions by different authorities. However, some local counsel, particularly in Zambia and Kenya, have expressed concerns about whether, in the absence of an amendment to their local legislation, parties can avoid filing there if they have filed with the CCC. No fines have yet been imposed for failing to notify in any individual state when a CCC filing has been made. It is advisable for parties' counsel to communicate directly with regulators in each state where a filing might otherwise be necessary to confirm their position.

Some African states with developed competition law regimes, like South Africa and Namibia, are not part of COMESA. Accordingly, it may still be necessary to file with the CCC as well as in some other jurisdictions. This needs to be carefully coordinated by the competition law advisors leading the filing process and built into the transaction timetable.

Companies contemplating a cross-border merger transaction in Eastern and Southern Africa must carefully consider whether to notify the CCC of the deal. If they fail to do so, the merger will have no legal effect in the COMESA Common Market. What's more, companies may face fines of up to ten per cent of their annual turnover in the COMESA Common Market for the previous financial year, as well as significant legal costs and negative publicity.

Law and access to finance

Broadening access to finance through CSR: the *Guaranty Trust Bank Plc* case

Nojeem Amodu
University of Lagos, Lagos
nojeemlaw@yahoo.com

Finance is inevitably required to run any economy. The provision of different types of financial services by different financial institutions – including the provision of credit facilities, risk management, teaming up on large project implementation, the mobilisation of deposits from customers (individuals or corporations) and others – is essential to the overall growth and development of an economy. Effective and efficient financial systems thus naturally bring forth better investment opportunities and more even distributions of income and wealth. Consequently, there is a constant need to broaden access to finance. Widening the scope of financial inclusion remains key to development and the failure to improve access to financial services leads to persistent income inequality and zero development in the economy.

The construct of corporate social responsibility (CSR) on the other hand has ceased to simply represent the idea of 'giving back' to society. The CSR construct now transcends the notion of corporate charity in doing business; it has become an important tool in the hands of corporate policy-makers as an opportunity to fundamentally strengthen business operations and to be seen by prudent corporate managers and executives in the light of corporate social opportunity to succeed while contributing to society at the same time.

The significance of the CSR construct in the campaign for wider access to finance shall be demonstrated in the course of this paper. However, we begin with the meaning and analysis of the certain crucial concepts of the paper.

Access to finance/financial inclusion

Rigorous analysis has allowed for the conclusion that the flourishing of a financial sector that offers investment and credit according to sound financial principles, and that is undergirded by institutions that protect economic rights, is a crucial component of economic growth. Financial systems that function well also serve other vital purposes, including offering savings, payments and risk-management products to as large a set of participants as possible, and seeking out and financing good growth opportunities, wherever they may be. Without inclusive financial systems, poor individuals and small enterprises must rely on their personal wealth or internal resources to invest in their education, to become entrepreneurs or to take advantage of promising growth opportunities. Thus, modern development theories increasingly emphasise the key role of access to finance.[1]

Access to financial services – financial inclusion – implies an absence of obstacles to the use of these services, whether the obstacles are price or non-price barriers to finance. The authors of *Finance for All?* may best summarise this point:

> 'Financial inclusion, or broad access to financial services, implies an absence of price and non-price barriers in the use of financial services; it is difficult to define and measure because access has many dimensions. Services need to be available when and where desired, and products need to be tailored to specific needs. Services need to be affordable, taking into account the indirect costs incurred by the user, such as having to travel a long distance to a bank branch. Efforts to improve inclusion should also make business sense, translate into profits for the providers of these services, and therefore have a lasting effect.'[2]

However, it can be said that access to finance is not synonymous with the free and limitless opening of financial institutions' gates to financial services. Access to finance does not mean that all households and firms should be allowed to borrow unlimited amounts at prime lending rates or transmit funds across the world instantaneously for a fraction of one per cent of the amount. Even if service providers are keenly competitive and employ the best financial technology, prices and interest rates charged and the size of loans and insurance coverage on offer in a market economy will necessarily depend on the credit-worthiness of the customer.[3]

Differentiating between access to and actual use of financial services

In order to properly define the subject and measure access to finance, scholars have needed to differentiate between voluntary and involuntary financial exclusion. This is the difference between access to – the possibility to use – and actual use of financial services. Exclusion can be voluntary, where a person or business *has* access to services but no need to use them, or involuntary, where price barriers or discrimination, for example, bar access. A further illustration of the differences between the two concepts is given here:

To illustrate the differences between access and use, remember that even wealthy customers in advanced financial systems will choose not to use some financial services. Some moderately-prosperous customers, especially older individuals or households, may not have any wish to borrow money, even if offered a loan at a favourable interest rate. Still, almost all households need to use some financial services, such as payments services, to participate in a modern market economy, and in a few of the most advanced economies, use of at least some basic services from the formal financial sector is essentially universal.

Moreover, some specific financial products are not attractive to some customers on ethical or religious grounds; non-usage in this case cannot be attributed to lack of access – although access might be an issue here if acceptable alternatives are not being offered. The case of Sharia-compliant financial products can be relevant here.[4]

Obstacles to financial inclusion

It is almost generally accepted that it is important to measure access to finance before one can discuss improvements to it. However, in the course of and at the end of the measuring exercise, certain obstacles and barriers are established as preventing both individuals and corporations from having access to financial services. Identifying the barriers that prevent small firms and poor households in developing countries from using financial services not only helps researchers understand the reasons for financial exclusion, but also provides hints as to which policies could be helpful in removing these barriers and broadening access. Examples of established barriers especially in developing countries of Africa, and in Nigeria in particular, include those listed below.

Terrain

The physical terrain and geographic locations may constitute an obstacle to access to finance for some. Where, for instance, financial services cannot be reached, even using modern-day technology such as the internet or telephone, using the services of financial institutions becomes a serious challenge.

Poverty

It is probably obvious to say that the lack of financial resources is the greatest obstacle and barrier to access to finance. A poor man is a man with a lot of problems, regardless of how glossy or seemingly available the financial inclusion policy of the government may be. The poor, one way or the other, are often simply unable to reach the financial institutions or make use of their services.

Complex documentation

Access to finance is also hampered because of the barrage of documentation presented by financial institutions in order to use some simple services. An example of this applies to insurance companies in indemnity cases after incidences. This can bar potential clients from using such services in the first place.

Poor customer service

Some financial institutions have become so poor at customer service (such as crowd management) that they deter potential clients from using their services.

Minimum account balance requirements

The incidence of requiring potential clients to maintain a certain minimum account balance also constitutes a barrier to access to finance.

Other obstacles

The illiteracy of potential clients, the sharp practices of some financial institutions, bureaucracy and gender discrimination are all examples of other obstacles.

Overcoming the obstacles to increase access to finance

Researchers the world over have identified solutions to barriers of access to finance. Similarly, policies are drawn up by governments to broaden access to finance. Some of these include:

- developing the financial infrastructure to take advantage of technological advances;
- encouraging competition; and
- providing incentives.

Nonetheless, it is the author's submission that the values of the CSR construct, if properly harnessed, may be adopted to broaden access. How can this be done? It is pertinent to fully understand the concept of CSR.

Introducing the CSR construct

CSR is 'a concept whereby companies integrate social and environmental concerns in[to] their business operations and their interaction[s] with their stakeholders on a voluntary basis,' clarifying further that 'being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing "more" into human capital, the environment and [into] relations with stakeholders.'[5]

The Organisation for Economic Cooperation and Development (OECD), in its 'Guidelines for Multinational Enterprises', consistent with CSR, provided a set of 'voluntary principles and standards for responsible business conduct consistent with applicable laws.'[6]

Perhaps the best grasp of the CSR construct, especially in the business management literature, was by Professor Archie B Carroll in 1979, as modified by him in 2003. To him, a '…CSR firm should strive to make a profit, obey the law, be ethical and be a good corporate citizen.'[7] He listed components of CSR, including: economic responsibility; legal responsibility; ethical responsibility; and discretionary or philanthropic responsibility.[8]

Overall, CSR refers to the philosophy that business executives should consider not only the interest of the shareholders of the business, but that of other stakeholders, such as employees, suppliers, contractors, creditors and the environment where they operate in their daily business decisions.

At this juncture, it is perhaps critical that we state that CSR moved beyond the idea of 'giving back to society'. While CSR was basically seen as corporate charity or philanthropy[9] in the past, it is now seen as an all-encompassing, long-term strategic commitment to respond to social, ethical and stakeholder interests of the corporation.

A critique of CSR

CSR is both interdisciplinary and multi-disciplinary. A number of business executives and academics have continued to view CSR as just another source of undue public pressure, and that it constitutes a deflection and distraction from serious business. CSR makes the corporations deviate from their primary economic roles in doing business which is primarily that of profit maximisation for investors.[10] Managers and academics would retort that the 'business of business is business' and nothing extra. It has also been said that CSR has become a victim of its own popularity. Everybody is into CSR, whether genuinely or otherwise; while some are sheer 'window dressers,' forming part of the bandwagon, and paying lip-service to the CSR phenomenon,[11] many others are involved in the 'green-washing'.[12] Furthermore, CSR is criticised as having no value because it cannot be legally enforced. In a more subtle way, others state that without a regulatory approach, CSR will not have sufficient impact on solving the problems to the solution of which it is expected to contribute.[13] In other words, CSR is criticised for the belief that corporations have a direct responsibility for solutions to many problems that plague society, and that they have the ability, unilaterally, to solve them.[14]

Leveraging CSR values

Some pro-active executives approach CSR from a different perspective. CSR may be seen as a creative opportunity to fundamentally strengthen businesses while contributing to society at the same time; some view CSR as central to their overall strategies, helping them to creatively address key business issues.[15] Such proponents of CSR posit that corporate organisations stand to profit by spending on CSR projects.

Moreover, the recurring global financial crisis and ensuing recession appear to have whittled down arguments that CSR is a deflection from serious business. CSR has not only become the rhetoric of many business enterprises, especially those engaged in natural resource development, but also occupies a prominent position in boardroom discourse. Effective and efficient CSR strategies and initiatives have not only been linked to sustainable development in business, but also to mitigating social risks that have profound effect on the bankability of an enterprise and the rate of returns on its projects.[16]

CSR, in recent times, can also be discussed in terms of sustainability and sustainable development. CRS is one of the pillars upon which the concept of sustainable development must stand.[17] Sustainable development in summary terms means true, genuine and real development. It is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[18]

From the above, it is clear that true economic development only comes with little or no destruction to natural and human resources and there is a balance to the forces of nature. It is now widely understood that no nation or corporation, no matter how its economic growth may have blossomed, or how great its profit-maximisation achievements, will be said to have truly developed without the corresponding development and growth of other stakeholders' interests, both the natural and the human.

Summing up, CSR must be understood as not just a business executive's personal interest or as a 'saving the whales' initiative. Effective CSR has core values that must be embraced. These values include human rights, employee rights, environmental protection, community development, supplier relations, monitoring and other stakeholder factors. A corporation's CSR philosophy must be geared toward improving the corporation's image in relevant areas connected to its line of operations. If this simple line is not drawn, nonsense is made out of the entire CSR construct.

Broadening access to finance through CSR

From the above analysis, a good approach to CSR by a financial institution can actually promote the institution's reputation. For instance, Guaranty Trust Bank Plc, operating in the Nigerian banking sector, has not only shown an understanding of effective CSR, but has also adopted a positive approach. The bank's approach is summarised as follows:

> 'Sustainability is firmly embedded in the formation of the Guaranty Trust Bank. As a first-class financial services provider with an internal obligation to comply with international best practices, our Bank has always ensured that its lending activities comply with international performance standards as well as applicable national economic, environmental and social regulations. This has helped us [to] attract on-lending facilities from international finance institutions very early in our business.
>
> Guaranty Trust Bank continues to build internal capacity in managing the economical [sic], social and environmental aspects of its operations, guided by a comprehensive Project Sustainability Policy. We conduct environmental and social due diligence on major Credit requests, benchmarking against the performance standards of reputable international finance institutions. This process provides a firm foundation upon which we identify new opportunities to grow our businesses, and gain competitive advantage in the marketplace. These performance standards also ensure our conduct influences our customers and other stakeholders positively.

> As our corporate strategic aspirations grow, we remain proudly African with an international outlook. We are committed to the creation of long-term value for all our stakeholders by measuring not only the impact of our activities on the economies and communities where we operate but also the external environmental outcomes of transactions funded by our Bank. We will partner with our clients, customers, regulators and communities in analyzing our individual and collective economic, environmental and social risks with a view to avoiding or reducing adverse impacts.'[19]

This approach and an improvement in the ethical responsibilities[20] of the bank appear to have paid off. The approach has improved financial inclusion and many more clients reach out to the bank for its services. No wonder the bank has broken the record of the first and the only bank in Nigeria to cross the NGN100bn profit-before-tax milestone from continuing operations at both bank and group levels.[21]

Conclusion

The significance of finance in any economy makes access critical. Efforts are made the world over to promote financial inclusion. It is our submission that further research needs to be conducted to fashion solutions to the many obstacles limiting access. The author believes, however, as a starting point, that better CSR practices by financial institutions in terms of improved ethical responsibilities and a better reputation in society will increase the number of customers and clients interested in reaching the institutions to use their services.

Notes

1 Martínez, Monica Vivian, *The Political Economy of Increased Financial Access*, thesis submitted to the Faculty of the Graduate School of Arts and Sciences of Georgetown University in partial fulfilment of the requirements for the degree of Master of Public Policy, Washington, DC, 12 April 2011 at 4. See also, World Bank, *Finance for All? Policies and Pitfalls in Expanding Access*, A World Bank Policy Research Report, 2008 at 1.

2 Ibid, World Bank, at 22.

3 Ibid, World Bank, at 27.

4 Ibid, World Bank, at 28.

5 *Green Paper Promoting a European Framework for Corporate Social Responsibility*, Commission of the European Communities, Brussels (18 July 2001), COM (2001) 366 final, at 6, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf (last accessed 12 October 2010).

6 OECD Guidelines for Multinational Enterprises, 2011 Ed, OECD (2011) at 13, available at www.oecd.org/daf/inv/mne/48004323.pdf (last accessed 8 April 2013).

7 Carroll, Archie B, 'Corporate Social Responsibility: Evolution of a Definitional Construct', (1999) *Business and Society* 38(3) at 268–295 available at: http://bas.sagepub.com/content/38/3/268.full.pdf+html (last accessed 8 April 2013).

8 Carroll, Archie B, 'A Three-Dimensional Conceptual Model of Corporate Performance', (1979) 4(4) *The Academy of Management Review* 499, available at www.jstor.org/stable/257850?seq=1 (last accessed 8 April 2013).

9 Frederick, William C, 'Corporate Social Responsibility in the Reagan Era and Beyond', (1983) 25(3) *California Management Review* 149. It was said that corporate charity took different forms, including healthcare for the poor and needy, basic medical research on rare diseases, artistic activities in many fields, educational opportunities for youth, recreational programmes for the elderly, family support programmes and many more.

10 See, Wolf, Martin, 'Sleep-Walking with the Enemy: Corporate Social Responsibility Distorts the Market by Deflecting Business from its Primary Role of Profit Generation', *Financial Times,* 16 May 2001. See also, Owen, Geoffrey, 'Time to Promote Trust, Inside the Company and Out', *Financial Times,* 30 August 2002.

11 Nwete, Bede, 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: is Soft Law the Answer?' (2007) 8(4) *German Law Journal* [3] (paper presented at the International Bar Association SEERIL Conference, Lagos, Nigeria (2006)).

12 Friends of the Earth wrote: 'Oil companies – Shell, BP and Esso (Exxon Mobil) – swept the Greenwash Academy Awards beating biotech giants – Monsanto, Novartis and Aventis – in a glittering award ceremony,' Friends of the Earth, *23rd Aug: Greenwash Oscars*, 23 August 2002, available at www.foe.co.uk/news/earth_summit_23_august.html (last accessed 29 April 2013). The exposé was described by Rowina McGuiness of Metro World News on CorpWatch, writing that 'Paul de Clerk, Coordinator of the Corporate Campaign at Friends of the Earth International, describes greenwashing as "the practice of companies disingenuously spinning their products and policies as environmentally friendly,"' *WORLD: Friends of the Earth Fire Back at Corporate 'Greenwashing',* CorpWatch, 6 April 2010, available at: www.corpwatch.org/article.php?id=15563 (last accessed 29 April 2013).

13 De Villiers, C, *Enforcement of CSR Standards with Incentives or Sanctions?* (Paper presented at Hill Law of the Future Conference: Globalisation, the Nation-State and Private Actors: Rethinking Public-Private Cooperation in Shaping Law and Governance (The Hague, Netherlands, 8–9 October 2009)).

14 Sheikh, Saleem, *A Practical Approach to Corporate Governance* (Tottel Publishing, West Sussex, 2006), 299.

15 De Waal, Andre, and Orcotoma Escalante, Giovanna, *The Relation between Corporate Social Responsibility and the High Performance Organizations Framework: the Case of Mining Multinationals in Peru* (2007) Maastricht School of Management.

16 According to research conducted at the Canadian Centre for Social Performance and Ethics at the University of Toronto, over the long-term, companies that rate the highest on ethics and CSR are the most profitable. See www.cbsr.bc.ca/what_is_csr/index.cfm, cited in Kenneth Amaeshi, *Stakeholder Framework Analysis of the Meaning and Perception of Corporate Social Responsibility: A North-South Comparison* (2003) at 3. See also, note 14 above at 310.

17 WBCSD, *Corporate Social Responsibility: Making Good Business Sense*, Geneva, Switzerland (2000). The concept of sustainable development is said to have three fundamental and inseparable pillars, namely: the generation of economic wealth, environmental improvement and social responsibility.

18 The World Commission on Environment and Development, *Our Common Future* (London, 1987) at 43.

19 See, www.gtbank.com/corporate-citizenship/47-corporate-citizenship/csr/308-our-approach (last accessed 29 April 2013).

20 For instance, the bank launched a product called 'Seniors Account' through which, individuals over 70 years old are accorded special privileges in banking transactions. They are nearly allowed to bank for free. See www.vanguardngr.com/2012/07/gtbank-unveils-new-current-account-for-senior-citizens (last accessed 29 April 2013).

21 See, www.gtbank.com/media-centre/gtbank-in-the-news/49-media/gtbank-in-the-news/299-bank-performance-ranking-2012-how-they-stand (last accessed 29 April 2013).

Irekpitan Okukpon-Adesanya
Nigerian Institute of Advanced Legal Studies, Lagos
kpitanclaire@hotmail.com

Ona Osanakpo
Nigerian Institute of Advanced Legal Studies, Lagos
osanakpo@gmail.com

Access to CDM funding as a means for gas-flaring reduction in developing Nigeria: reality or mirage?

Global agricultural and industrial human activities have led to high emissions of polyatomic molecules into the atmosphere. These emissions have an adverse effect on the earth's climate and have become an issue of international concern in the past few decades. Atmospheric emissions take place at all stages of oil and gas industry activities.[1] The continuous flaring of gas[2] to eliminate oil-associated gas is a common practice worldwide, and more so in Africa.[3] The reasons why gas is flared include: limited access to international gas markets, as well as weak local markets to commercialise the gas; a lack of funding to put in place the necessary infrastructure to use the associated gas; and an undeveloped regulatory framework for using the gas.[4]

Gas flaring is a common practice in developing countries in Africa and a prevalent problem in Nigeria,[5] notwithstanding adverse effects on human health and the environment.[6] Gas flaring emits carbon dioxide (CO_2) and methane (CH_4). Such emissions increase the concentration of greenhouse gases in the atmosphere and contribute to global warming.[7] In a bid to combat the emission of greenhouse gases and climate change, the international community designed the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the associated Kyoto Protocol of 1997. Both instruments set out greenhouse gas emission reduction targets for developed countries within a specific period, from 1990–2000.[8] The Kyoto Protocol, which builds upon the framework of the UNFCCC, requires developed countries (who are principally responsible for more than 85 per cent of overall global greenhouse gas emissions) to, either individually or jointly, reduce their overall greenhouse emissions by at least 5.2 per cent below 1990 levels between 2008 and 2012.[9] As developing countries are not compelled to meet these emission-reduction targets, it behoves developed countries to utilise one of three cost-effective mechanisms under the Protocol to meet their targets. This mechanism is called the Clean Development Mechanism (CDM).

CDM is geared towards ensuring that developed countries meet their emission reduction targets by assisting them to implement any project activity regarding mitigation of climate change. Such countries can earn carbon credits for assisting these developing nations to achieve their goal under Article 3 of the Protocol.[10] From a layman's point of view, CDM envisages a situation where a developed country like Germany offers to assist a developing country like Nigeria, which has no specific emission reduction obligations under the Protocol, to reduce its gas flaring to a minimum. By offering to assist Nigeria to reduce their gas flaring vis-à-vis the reduction of greenhouse gas (GHG) emissions, it offers Nigeria the option of a cleaner, healthier environment for its citizens and aiding the country to achieve its sustainable development goals. At the same time, reducing greenhouse gases is a benefit to Germany through a Certified Emission Reduction (CER). Therefore, the concept of a CDM represents a win-win situation, as Annex I (developed) countries can obtain CERs; while host (developing) countries benefit from investment and technology transfers.[11] As at 2010, estimates indicated that foreign investment through CDM projects could reach US$475 million annually.[12] Figueres summarised the benefits of CDM to developing countries thus:

> 'The funding channelled through CDM should assist developing countries in reaching some of their economic, social, environmental and sustainable development objectives... in addition to catalyzing green investment priorities in developing countries, CDM offers an opportunity to make progress simultaneously on climate, development, and local environmental issues. For developing countries that might otherwise be preoccupied with immediate economic and social needs, the prospect of such benefits should provide a strong incentive to participate in CDM.'[13]

The questions that arise are manifold. What criteria are used to determine the eligibility or otherwise of a developing country be part of a CDM? Who funds these CDM projects? Who is responsible for managing the fund? If developed countries take advantage of CDM to assist developing countries, will developing countries have access to a/the common fund to assist them in achieving their obligations under the Protocol? These questions are answered during the course of this article.

CDM, the Global Environmental Facility, and Funding

The Marrakesh Accords set out the requirements necessary for any developing country wishing to benefit from the sustainable development prospects of CDM. They are referred to as 'participant eligibility requirements'.[14] The participant eligibility requirement for CDM project implementation stipulates that: both countries (developed and developing) should have ratified the Kyoto Protocol; participation in CDM projects should be voluntary; and the government should designate a national authority for CDM.[15] This means that only such countries that have ratified the Kyoto Protocol and the Framework Convention can take part in CDM implementation.[16]

To ratify and become party to the Kyoto Protocol, a country must have already ratified the UNFCCC and must deposit its official national statement of ratification with the UN Secretary-General. Being party to the Protocol is a commitment to comply with its provisions and, although ratification of the Protocol does not commit a country to participation in CDM, it is a prerequisite for hosting CDM projects. Thus, for any developing country to become eligible to host CDM project investments, it must have ratified both the UNFCCC and the Kyoto Protocol. Currently, about 150 developing countries have met this ratification requirement. They are classified and listed as Non-Annex I Parties under the Kyoto Protocol and are eligible to host CDM projects.[17]

In addition, Non-Annex I (developing) countries participating in CDM project activities are expected to designate a national authority (NA) provided they are parties to the Kyoto Protocol.[18] The executive board of the Conference of Parties to the Kyoto Protocol supervises CDM and any project must be registered by the board as a prerequisite for the issuance of CER.[19] Another prerequisite for registration of a CDM project is a written approval from the NA of both parties.[20]

CDM itself is expected to deliver around 300–400 million CERs annually between 2008 and 2012, corresponding to international carbon financial flows of several billion euro annually. This means that both CDM and the Joint Implementation (one of three mechanisms designed under the Protocol) combined are estimated to have generated annual investment of US$4.5–8.5bn, and leveraged ten times as much in overall investment from the private sector, so that overall investment stimulated by CDM and Joint Implementation is US$45–85bn.[21]

In view of the large amount of funding that could be readily available under CDM, Paragraph 7 of the Preamble to the Modalities and Procedures for a Clean Development Mechanism[22] emphasises that public funding for CDM projects from developed countries should not result in the diversion of official development assistance. This fund is to be separate from and not counted towards the financial obligations of the parties included in the Protocol. This means that CDM as an economic mechanism relies on market forces for its successful implementation.[23]

Consequently, the Kyoto Protocol expressly provides that the Conference of the Parties serving as the meeting of the parties to the Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses. It is also to assist developing country parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.[24] Thus, the share of proceeds shall be two per cent of the CERs issued for CDM project activity.[25] It should also be noted that the Adaptation Fund[26] set up under the Protocol is financed from the share of proceeds on CDM project activities and other sources of funding. These sources of funding include the Special Trust Fund, Least Developed Countries' Fund (LDCF) and the Special Climate Change Fund. They are all managed by the Global Environmental Facility (GEF).[27]

The GEF[28] is a mechanism for international cooperation that provides new and additional funding to meet the incremental costs of measures to achieve agreed global environmental benefits in focal areas, including climate change.[29] It came into being at the 13th Conference of the Parties (COP 13) to the UNFCCC in Bali, where the conference agreed that the GEF, under the authority of the Conference of the Parties/MOP, would manage funding of adaptation projects undertaken through the Kyoto Protocol's CDM.[30] The GEF is the main provider of environmental projects in developing countries, of which climate change claims make up 40 per cent of the yearly budget. Additionally, of the three funds mentioned above, the Trust Fund is accessible to all countries, the SCCF is accessible to Non-Annex I countries, and the LDCF is exclusively dedicated to the least-developed countries.[31]

From the above, it is apparent that CDM is a laudable initiative, appearing to favour developing countries and to assist them in meeting sustainable development goals reducing their greenhouse gas emissions to a minimum level. Similarly, the GEF appears to play a similar role with regard to funding environmental and climate change projects for developing countries. However, despite the funding available and accessible to developing countries toward greenhouse gas emission reduction projects, both have been criticised for being riddled with bureaucratic intertwines that affect project success. Arguably, CDM and GEF projects exist interdependently of each other and it appears there is no blueprint document that sets out procedures through which a developing country can have access to the funds available under the GEF and CDM. In view of this, CDM has been criticised for diverting funds and attention away from domestic emission reduction and attracts only resources for cheap mitigation options, leaving developing countries to undertake the more expensive options themselves.[32]

Additionally, there have been concerns regarding the environmental integrity of CDM due to a lack of emphasis on sustainability. The fulfilment of the sustainability requirement under Article 12(2) of the Protocol comes to a stop when the NA approves the project, as there is no further monitoring or procedure set out to verify the ongoing contribution to sustainable development. Furthermore, the sustainable development requirement is not defined in any CDM document of the UNFCCC but is left to the discretion of the host country's NA.[33]

Another major critique of CDM is that developed country investors see African countries as unattractive investment locations.[34] This is mainly because most African countries lack sound legal frameworks governing CDM investment, adequate institutional capacity and adequate environmental regulations, and have high rates of insecurity and typically have no specific legislation relating to climate change or greenhouse gas emission levels.[35] Also, the issue of technology transfer as envisaged by CDM is such that technology transfer laws in many African countries are either archaic or silent on the possibility of transferring clean technologies through CDM. The lack of legal backing for such technology transfer is undoubtedly a major disincentive to prospective CDM investors. For example, in Ghana, the absence of regulations on technology transfer has meant a lack of awareness on energy-efficient technologies that could be proliferated to the country through CDM.[36] This is also the case in Nigeria.[37] Moreover, the motivation to transfer cleaner technologies to Nigeria through CDM has been low, mainly due to the narrow scope of the NOTAP Act, which fails to set out procedures for the transfer of such technologies into Nigeria.[38]

Reducing GHG emissions in Nigeria through gas-flaring CDM projects

Despite the criticisms levelled at CDM, attempts have been made to commence various gas flaring-related CDM projects in Nigeria. As Nigeria is party to both the UNFCCC and the Kyoto Protocol,[39] the country is in a favourable position to participate in a CDM gas flaring project. Nigeria has a NA: the Presidential Implementation Committee on the Clean Development Mechanism.[40] It was inaugurated in January 2004 with one objective: to transform Nigeria into a hub for CER-earning CDM projects.[41]

To this end, Nigeria has identified several CDM projects geared toward conserving the gas flared indiscriminately in the country, but has only registered one, known as the Kwale Gas Project.[42] The Kwale Gas Project was registered by the executive board on 8 November 2006[43] and is the first CDM project currently hosted in Nigeria. The project is sponsored by Nigeria Agip Oil Company and the government of Italy.[44] It is the tenth largest registered project under CDM (out of more than 1,400 projects under review), and aims to reduce 15 million tonnes of CO_2 emissions over the next ten years.[45] The project is aimed at generating CERs that can be traded with developed countries, the refinement and sale of associated gas, the promotion of sustainable development in Nigeria and the transfer of technology to Nigeria.[46]

Nonetheless, various criticisms have arisen over the declaration of the Kwale Gas Project as a CDM in Nigeria. Critics argue that the adoption of CDM project is illegal in itself in that an embargo has been placed on flaring of gas in the Niger Delta since the case of *Gbemre v Shell* (2005).[47] They regard the designation of CDM project and its related carbon credits as 'a project that would result in oil companies being paid handsomely for reducing their gas flaring actions which were illegal in the first place.'[48] In the words of Peter Roderick: 'if CDM credits were to be granted in respect of [gas flaring] activities that are violations of human rights, this would also bring CDM process into disrepute.'[49]

Apart from the Kwale Gas Project, Nigeria is also part of the West African Gas Pipeline (WAGP) Project.[50] Unfortunately, WAGP too has been fraught with criticism. This is largely because, contrary to the requirements under CDM Modalities and Protocol, mentioned above, which require CDM projects to be able to reasonably demonstrate that the emission reductions from the project are additional to those that would have happened in its absence, the WAGP Project is not additional, as gas flaring is already prohibited in Nigeria.[51] The WAGP Project has also been criticised as incapable of meeting the requirements of eligibility of a CDM project as it fails to satisfy national laws and regulations requiring environmental and social impact assessment prior to project implementation. On the other hand it can be argued that the WAGP Project will be making valuable contributions to the reduction of dangerous emissions to the Nigerian environment and thus, can be termed a CDM project under the UNFCCC.[52]

With regard to GEF funding, although Nigeria is eligible for GEF funds to assist it in phasing out gas flaring, it must compete with other developing countries.[53] It should be noted that GEF funding can only be used for the incremental cost of changes to existing projects or planned (baseline) activities in order to make the revised activities benefit the global environment.[54] Nigeria was given a GEF grant of US$20m for the Escravos Gas Project in the mid-1990s.[55] This project was related to gas flaring and had passed all GEF criteria for approval at that time.[56] The grant passed the GEF criteria but was withdrawn after Ken Saro-Wiwa was convicted and executed.[57] This project however, would not have passed the current criteria for GEF grants[58] contained in the UNDP-GEF handbook, as it is more realistic with smaller projects in the gas value chain.[59] Since the phase out of gas flaring can be termed a full-scale or medium-sized project, GEF is unlikely to play any noticeable role for the market penetration of associated gas in Nigeria.[60]

It is indeed laudable that efforts have been made in Nigeria to designate the above as CDM projects in a bid to reduce gas flaring in the country and therefore achieve the two-fold objective of reducing greenhouse gas emissions in order to meet its obligations as a party to the UNFCCC and the Kyoto Protocol. Sadly, it appears that efforts to achieve this objective through CDM or the GEF funding have failed and the issue of gas flaring is still a major issue. Nigeria still remains Africa's largest gas-flaring nation despite deadlines set by the Nigerian government to stop gas flaring by 31 December 2012. Recently, the Nigerian government announced a new target for the country, stating that its goal is not to end total stoppage of flaring but, in the short term, to meet a 22 per cent gas flaring reduction by 2017.[61] In view of the inherent flaws present in CDMs and the lack of access to the finance set out under CDM and the GEF, how then can the 2017 target of gas flaring reduction be met?

Recommendations

Flowing from the perceived flaws inherent in CDM, the following recommendations are made in order to achieve the 2017 target of reducing gas flaring in Nigeria and thereby reduce the emission of greenhouse gases.

First, the introduction of favourable environmental tax regimes on gas flaring by oil companies. This is called a carbon tax.[62] The idea behind this taxation is that it will serve as an incentive for oil companies to invest heavily in technological facilities that will curb carbon emissions, thereby encouraging them to reduce the flaring of gas during oil production. This carbon tax is also favourable as it will serve as a ready source of revenue for the Nigerian government if implemented speedily and transparently. However, the loopholes inherent in this kind of tax would be the ability of the government to set up an environmental body in conjunction with a recognised financial institution to handle the revenue being generated. In view of the fact that corruption lurks within government institutions, a vice the Nigerian government is battling, one hopes that the imposition of a carbon tax on gas flaring activities will eventually come to light.

Secondly, there is the need to revisit CDM modalities and procedure. As Cameron Hepburn[63] suggests, any new or reformed CDM framework must seek to improve the current CDM performance. It must have environmental integrity and economic efficiency (in that the greater the political involvement in decision-making over the allocation of funds, the less likely economic efficiency will be achieved).

Thirdly, developing countries in Africa, like Nigeria, need to develop CDM laws that will effectively tackle all salient issues regarding the implementation of CDM in their countries. Such laws should set out provisions clearly defining the procedure for proposed CDM projects, the nature and duration of the proposed project, the establishment and functions of the NA to CDM project, contain clear definitions as to terms like CERs and set out the functions of other environmental bodies that can work in tandem with the NA in that country.

Finally, in order for Nigeria to become attractive to CDM investors, the Nigerian legislature must amend present laws on technology transfer, climate change and gas flaring to reflect international standards of other commonwealth jurisdictions.

Conclusion

CDM as a derivative of the Kyoto Protocol still leaves much to be desired in terms of access to CDM/GEF funding and its relevancy to the cessation of gas flaring and eventual reduction of CO_2 emissions in Nigeria. It is our sincere hope that Nigeria will soon become an attractive CDM investment hub and/or that the imposition of carbon tax will finally put an end to the scourge of gas flaring in the country.

Notes

1 Tayo A Yusuf, *Oil & Gas Industry Activity and the Niger Delta Environment: The Role of Environmental Law*, available at www.nigeriansinamerica.com/articles/3191/1/Oil-amp-Gas-Industry-Activity-and-the-Niger-Delta-Environment-The-Role-of-Environmental-Law/Page1.html (last accessed 29 April 2013).

2 Gas flaring refers to the routine burning of gas in oil fields during various petroleum industry operations as a means of disposing of flammable gases which are either unusable or uneconomical to recover. See *Flaring in the Petroleum Industry*, available at www.ec.gc.ca/cleanair.../flaring/flaring_general2e.htm (last accessed 20 June 2009).

3 In 2008, Africa's CO_2 emissions, predominantly from the energy and transport industries, amounted to approximately 650 million tonnes per annum. Nigeria, Angola, Gabon, Congo, Morocco, Ghana and Equatorial Guinea top the list of countries in Africa that flare gas periodically. See Barbara Unmüssig and Stefan Cramer, *Climate Change in Africa*, available at www.boell.de/worldwide/africa/organisation-3143.html (last accessed 29 April 2013).

4 *Global Gas Flaring Reduction Partnership: toward a World Free of Flares*, available at www.flaringreductionforum.org/downloads/GGFR_brochure.pdf (last accessed 29 April 2013).

5 Nigerian laws on gas flaring are obsolete and the only law directly regulating gas flaring is the Associated Gas Re-injection Act (AGRA) 1979. It was amended by the Associated Gas Re-injection (Continued Flaring of Gas) Regulations (AGRA Regulation) of 1984.

6 Emissions from the combustion of the associated gas in the open air produces by-products like sulphur dioxide, nitrogen oxide and other carcinogenic substances like benzene and dioxins, which are harmful to humans. Exposure to these substances can result in a spate of respiratory problems and a few of these have been reported amongst children in the Niger Delta region of Nigeria. See Safiya Yakubu, *Nigeria: Gas Flaring in the Niger Delta and its Health Hazards*, available at http://allafrica.com/stories/200803100319.html (last accessed 29 April 2013). See also, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity*, available at www.climatelaw.org/cases/country/nigeria/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdf (last

accessed 29 April 2013).

7 Alter Christiansen and Torlief Haugland, *Gas Flaring and Global Public Goods*, available at www.fni.no/doc&pdf/FNL-R2001.pdf (last accessed 12 August 2009).

8 See Article 4(2)(a) of the UNFCCC 1992.

9 See Patricia W Birnie and A E Boyle, *International Law and the Environment*, 2nd ed (2002) at 526.

10 See Article 12(2)(a)-(b).

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12 See J Nygard, G Guangshen, et al, 'Clean Development Mechanism in China: Taking a Sustainable and Proactive Approach', *Sino Sphere Journal* 2 (2005), available at www.climatefocus.com/documents/files/clean_development_mechanism_in_china.pdf (last accessed 29 April 2013).

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36 See above, note 14 at 294.

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38 See above, note 14 at 292.

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Access to finance and the 'multiple stresses' factor to climate change in Africa: perspectives from SADC and ECOWAS zones

Yemi Oke
University of Lagos, Lagos
yoke@unilag.edu.ng

The prospect of achieving a binding framework on global climate change is remote.[1] Failure to reach a global consensus on climate change governance has foisted a new thinking in Africa that regional, compared to global actions would meet the urgency of climate change governance in the region.[2] While this appears probable, the financial burden of achieving this would seem overwhelming for countries in the region. The burden of regulating global climate seems notionally shared among developed and developing countries. The preferred model is that developing countries, including Africa, should seek climate change adaptation and mitigation strategies through the intensification of local initiatives and concerted efforts at the regional level, while the developed countries and other high-emitter nations should provide financial support.

The moral and institutional duties imposed on the developed countries stem from the notion of 'differentiated responsibility' and 'polluter pays' principles, taking into consideration the respective contributions of countries to global environmental challenges.[3] As a normative doctrine of environmental law, the 'polluter pays' principle particularly provides justification for externalising the cost of mitigation by developing countries in Africa to their developed counterparts.[4] The principle stems from the proposition that those who generate pollution should bear the cost of cleaning it up.[5]

The argument that developed countries should continue to bear the financial burden of climate change initiatives is flawed, as certain environmental challenges of the developing countries might be a matter of deliberate economic choices.[6] The presumption that the burden of cleaning up the global environment should be borne by developed countries leaves certain questions unanswered. Even if conceded that the developed countries should bear the financial burden for purposes of climate change mitigation and related environmental challenges, it is hardly ever certain that the funds will yield the desired results in the region for several reasons. It is critical to first deal with factors that tend to undermine the efficacy of funding support to developing countries in Africa before deploying financial interventions. This article seeks to rethink access to climate change financing in Africa using countries in the Southern African Economic Development Community (SADC) and the Economic Community of West African States (ECOWAS) zones in Africa as analytical bases. It examines access, sources and effects of climate change financing on adaptive capabilities of countries in the SADC and ECOWAS zones. It observes that despite their seemingly remarkable initiatives and policies on climate change, not much has been achieved by countries in the zones, largely due to financial, partly other logistical constraints, all of which constitute 'multiple stresses' factors militating against effective climate change governance in the region.[7] Based on its findings, the paper offers suggestions on how best to negate the adverse effect access of constraints or misapplication of climate change funding by the SADC, ECOWAS and other countries in Africa. Due to its focus, the article avoids going into detailed arguments or analyses on the merits or otherwise of climate change initiatives and policies adopted by SADC and ECOWAS zones.

Funding constraints as a 'multiple stress' factor

Contemporary sources of financing climate change and other environmental challenges in Africa are multilateral development institutions through global institutions like the World Bank, the International Finance

Corporation (IFC) and regional banks like the African Development Bank (AfDB). Some countries in Africa have adopted or domesticated environmental initiatives through access to funding assistance from some international institutions. Financial support for some of these initiatives also comes in various ways, either directly from the UN or its agencies.[8]

Generally, financing techniques have evolved rapidly to meet climate or environmental challenges of countries in Africa.[9] Access to or effectiveness of channelling of funds is often hindered by certain socio-political factors at the local level.[10] One such factor is host community hostility,[11] including the deliberate lowering of environmental standards and regulation in the quest for foreign investment, which Johnston aptly referred to as 'environmental lawlessness'.[12] All of these constitute multiple stresses factors to climate change challenges in the region.

Funding constraints has been identified as one of the 'multiple stresses' factors in climate change in the SADC and ECOWAS zones, as well as the entire region of Africa.[13] The Climate Change Impacts, Adaptation and Vulnerability Report of IPCC indicates that by 2020 between 75 and 250 million people of the region will suffer the devastating effects of catastrophic climate change, further compounded by the 'multiple stresses' factor, including a lack of institutional and funding capacities.[14] According to the report, though some adaptation to current climate vulnerability of the region is taking place, this may be insufficient for future changes in climate due to multiple stresses.[15]

Mitigating climate change impacts in Africa would entail 'mitigating multiple stresses' factors in the region. While mobilising resources to finance the incremental costs of low-carbon technologies is crucial; much more vital is the need to ensure that financial flows address concerns in climate hotspots in Africa. According to experts, financial mechanisms of the Clean Development Mechanism (CDM), the Global Environment Facility (GEF) and other models of development assistance for climate-based challenges have so far been limited and geographically unequally distributed against climate hot beds like Africa where climate change impacts are much more complicated due to varying factors.[16]

The role of funding cannot be ignored in climate change governance in Africa. Adaptation and mitigation strategies of countries in the region would appear unrealistic without funding. One of the factors militating against the SADC initiatives on climate change is funding.[17] Funding constraints are also apparent in the ECOWAS initiatives, as in SADC and other zones in Africa. The demand of African leaders on the African Development Bank to establish an 'African Green Fund' to receive and channel part of climate finance to Africa is a step in the right direction in climate change governance in the region.[18] An African Green Fund is desirable to create easier access to funding to bridge the gap of institutional funding capacities on climate change in the region. However, recourse to the above fund would appear to be a matter of regional imperative at the level of the AU, as against sub-regional matters under the SADC or ECOWAS.[19] Regardless of the source, equally vital is the need to manage such funds effectively to ensure effective implementation of climate change initiatives in the region.

In Africa, the experience of SADC and ECOWAS countries in attracting funds for climate change initiatives shows that international funding tends to be more effective than regional funding in terms of quantity and efficiency of monitoring. Several international climate-designated funds have been assigned to addressing climate change in developing countries. Some funding undertakings were also made at Copenhagen to provide up to US$30bn in fast-start finance from industrialised countries to support climate actions in the developing world between 2010 and 2012.[20] An agreement was also reached at the Conference of Parties 16 (COP 16) in Cancun, Mexico, in December 2010, to establish a Green Climate Fund to support projects, programmes, policies and other activities in developing countries related to mitigation, adaptation, capacity building and technology development and transfer.[21]

It is never in doubt that adaptation to climate change comes at relatively higher costs to developing countries in Africa; but what is doubtful is whether social and institutional challenges that make a significant number of public or governmental institutions in the region vulnerable to abuse and corruption are sufficiently anticipated.[22] These local challenges also constitute stress factors militating against effective climate change governance in Africa.

A potentially negative factor capable of undermining efforts of African regional institutions like ECOWAS and SADC is what is termed 'multiple stresses' factors.[23] These factors negatively impact on the effectiveness of climate change adaptation strategies and initiatives in Africa. According to Ruppel, one major weakness of SADC framework in respect of climate change issues is weak institutions as well as funding, which, more than any other factor(s), makes it impossible to be as responsive as they need to be.[24]

The report of the Intergovernmental Panel on Climate Change (IPCC) is more revealing. It amplifies how institutional, logistical and funding constraints hamper climate change governance in Africa. In its findings, the IPCC asserts:

> 'Africa is one of the most vulnerable continents to climate change and climate vulnerability, a situation aggravated by the interaction of "multiple stresses", occurring at various levels, and low adaptive capacity. Africa's major economic sectors are vulnerable to current climate sensitivity, with huge economic impacts, and this vulnerability is exacerbated by existing developmental challenges such endemic poverty, complex governance and institutional dimensions, *limited access to capital*, including markets, infrastructure and technology; ecosystem degradation, and complex disasters and conflicts. These in turn have contributed to Africa's weak adaptive capacity, increasing the continent's vulnerability to projected climate change.' (emphasis added)[25]

The IPCC's findings quoted above particularised 'limited access to capital' as one of the 'multiple stresses' factors undermining climate change governance in the SADC, ECOWAS and other zones in Africa. The region has always been predicted to be the continent that will be hardest hit by the scourge of global warming and climate change.[26] 'Multiple stresses' factors are not limited to the manifestation on climate, but also include social factors and other environmental forces that make adaptation needlessly difficult, though not impossible, for countries in Africa. For example, since June 2011, at least 20 African countries have experienced floods and drowning, leading to the death and internal displacement of millions of people. Specifically, Ethiopia, Kenya, Sudan and Uganda have recorded the loss of hundreds of lives, while Ghana[27] and, lately, Nigeria[28] have likewise experienced unprecedented flooding beyond national capacities, largely due to multiple stresses factors. Each new rainy season brings new levels of anxiety in Africa due to the lack of funds, the inadequacy or inability to access funding even when available, or the misapplication of such funds.

Why Africa needs better access to climate financing

Access to climate-change funding should not be perceived from the restrictive perspective of availability. Access to funding for the purposes of countries in the region should include access in the right quality, based on the need of the region and its vulnerability to climate change as well as the time, usage and application of such funds as part of an holistic approach to achieve effective climate-change mitigation or adaptation strategies in Africa. Access to funding in the manner prescribed above is required for international as well as for regional or sub-regional funding in Africa. Complementing international funding with regional or sub-regional funding would go a long way in redressing an apparent funding gap in climate change governance in Africa.

Climate change is not a problem peculiar to the SADC and ECOWAS zones. As a regional body, the African Union had articulated a common position for the African region to ensure effective funding of climate change challenges in the region by fostering regional synergies on climate change issues. For example, the African Union's common position at the Copenhagen summit was hinged on the provision of special help and preferential treatment for Africa and other highly vulnerable countries, particularly in the area of institutional mechanism and financial support. The African Union's monetary expectations were for hundreds of billions of dollars per annum in monetary compensation and aid by the year 2020.[29] Regrettably, these expectations were dashed, and the Copenhagen summit ended on a rather negative note with no definitive deal agreed for either developing or developed countries.[30]

Like the African Union, ECOWAS had also attempted to bridge funding gaps in the 2009 when it brokered a five-country climate change adaption initiative by launching a sub-regional project on adaptation to climate change. The project is aimed at developing a range of effective mechanisms to reduce the devastating impacts of climate-induced coastal erosion. The project is funded by the GEF, with counterpart funding from governments of the participating countries: Gambia, Cape Verde, Guinea Bissau, Mauritania and Senegal.[31] ECOWAS states often work closely with the United Nations Economic Commission for Africa (UNECA) and other international and regional institutions to evaluate the level of progress achieved in the West African sub-region.[32] This collaboration often enables ECOWAS countries to tap into technical and financial support through UNECA, the AfDB and others.

Conclusion

Despite their far-reaching initiatives and policies, not much has been achieved in terms of the effectiveness of climate change governance in the SADC and ECOWAS zones. This is because mitigating climate-change impacts in Africa would entail mitigating multiple-stresses factors in the region, including funding constraints as identified in the IPCC report.[33] While mobilising financing is crucial, even more vital is the need to ensure that financial supports are channelled to address concerns in climate hot-spots in Africa. Therefore, it is imperative to consider the issue of access to climate change funding from a broader perspective. Access to international, regional, sub-regional and other sources of funding for climate change initiatives in Africa should encompass access in the right quality, time, usage and application to ensure effective climate-change governance in Africa.

Notes

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3 See article 3(1) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 31 ILM 849 (1992).

4 See Principle 16, Rio Declaration, the UN Conference on Environment and Development 1992 (Rio) A/CONF.151/26 Vol I), 8:31 ILM 874 (1992).

5 See J R Nash, 'Too Much Market? Conflict between Tradable Pollution Allowances and the 'Polluter Pays' Principle', (2000) 24 *Harvard Environmental Law Review*, 465 at 466.

6 See, for example, World Bank, *Nigeria: Poverty-Environmental Linkages in the Natural Resources Sector, Empirical-Evidence from Nigerian Case Studies with Policy Implementations and Recommendations*, African Environmental and Social Development Unit, World Bank Institute, Report No 25972-UNI, June 2003.

7 For detailed analysis on climate change initiatives and policies in the SADC and ECOWAS zones, see Yemi Oke, 'Sub-Saharan Africa and Climate Change: Revisiting the "Multiple Stresses" Factor and Adaptation Strategies of ECOWAS and SADC Zones' (forthcoming) *SADC Law Journal*.

8 For example, the GEF, the designated fund for conservation of biological diversity under Article 21 of the CBD, is said to have funded over 140 developing countries including Nigeria and other African countries since its inception in 1991, totalling about US$4bn. See www.gefweb.org (last accessed 30 April 2013).

9 See Christopher Carr and Flavia Rosembuj, 'Structuring and Financing Projects' in Paul Q Watchman (ed) *Climate Change: A Guide to Carbon Law and Practice* (London, Globe Publishing Limited; 2008) at 39.

10 M A Mohamed Salih, *Environmental Politics and Liberation in Contemporary Africa* (Dordrecht: Kluwer, 1999) at 1.

11 George S Akpan, 'Host Community Hostility to Mining Projects: A New Generation of Risk?' in E Bastiba, T Walde, and J Warden-Fernandez, (Eds) *International and Comparative Mineral Law and Policy: Trends and Prospects* (The Hague: Kluwer Law International, 2005) at 311.

12 See Todd Johnston, 'The Role of Intergenerational Equity in a Sustainable Future: The Continuing Problem of Third World Debt and Development' (1998) 6 *Buffalo Environmental Law Journal* at 58–59. See also Madeline Cohen, 'A Menu for the Hard-Rock Café: International Mining Ventures and Environmental Cooperation in Developing Countries' (1996) 15 *Stanford Environmental Law Journal* 130 at 154.

13 Socio-scientific dimensions of 'multiple stresses' factors on climate change adaptation and mitigation in Africa is well-documented. See, for example, H Paeth, 'Human Activity and Climate Change in Africa' in Stefan Bronnimann, et al (eds) *Climate Change and Extremes During the Past 100 Years – Advances in Global Change Research* 33 (Springer, New York/Heidelberg: 2008) at 209–17.

14 See M L Parry, O F Canziani, J P Palutikof, P J van der Linden and C E Hanson (eds), 'Summary for Policymakers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) at 13.

15 Ibid.

16 IPCC, 'Summary for Policymakers' in *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (B Metz, O R Davidson, P R Bosch, R Dave, L A Meyer (eds)), (2007) Cambridge University Press, Cambridge and New York, 30 at 21, available at http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-spm.pdf (last accessed 30 April 2013).

17 See above, note 2 at 28.

18 Uloma Uzoamaka Nwamarah, 'The Road to Rio +20: Challenges and Opportunities for Africa' *African Development Bank Group*, at www.afdb.org/en/news-and-events/article/the-road-to-rio-20-challenges-and-opportunities-for-africa-9252 (last accessed 25 June 2012).

19 For instance, regional institutions like the African Development Bank had designed a Climate Change Action Plan (CCAP) for 2011–2015 to support its Regional Member Countries (RMCs) like SADC and ECOWAS through institutional funding. See, 'Climate Change Action Plan 2011-2015' at www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Climate%20

Change%20Action%20Plan%20%28CCAP%29%202011-2015.pdf (last accessed 14 November 2012).

20 See the 15th session of the Conference of the Parties to the UNFCCC and the 5th session of the Conference of the Parties held at Denmark in December 2009. Developed countries promised to fund actions to reduce greenhouse gas emissions and to adapt to the inevitable effects of climate change in developing countries. Developed parties promised US$30bn for the period 2010–2012, and to mobilise long-term finance of a further US$100bn a year by 2020 from a variety of sources. See Copenhagen Climate Change Conference, December 2009, at http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php (last accessed 30 April 2013).

21 See above, note 19 at 2.

22 Yemi Oke, 'Adapting to Climate Change: Sustainable Mitigation Options for Developing Countries in Sub-Saharan Africa' (2011) 1 *NIALS Journal of Environmental Law* at 61.

23 See above, note 14.

24 See above, note 2, at 28.

25 Ibid.

26 See Kempton Victor, 'The Menace that is Global Warming: The African Experience' (2007) *Energy Policy* at 412. See also Obonye Jonas, 'A Human Right Approach to Climate Change in Africa: Challenges and Prospects' (2012) 2:1 *SADC Law Journal* at 79.

27 Ibid, Obonye Jonas.

28 See John Alechenu, 'Climate Change, Poor Planning Caused Flooding', *Punch Newspaper*, 2 October 2012, at: www.punchng.com/news/climate-change-poor-planning-caused-flooding (last accessed 30 April 2013). Similarly, the Office for the Coordination of Humanitarian Affairs (OCHA) and UNICEF have raised the alarm as to the number of causalities and the risk of water-borne and water-related diseases like diarrhea and malaria among children, women, aged and other vulnerable groups. See also Francis Obinor, '2m Nigerian Flood Victims Need N6b', the *Guardian Nigeria*, 11 November 2012, available at www.ngrguardiannews.com/index.php?option=com_content&view=article&id=104530:2m-nigerian-flood-victims-need-n6b-&catid=1:national&Itemid=559 (last accessed 30 April 2013).

29 C C Ohurogu and G E Okwezuzu, 'Copenhagen Summit: Expectations, Outcomes and Imperatives' (2011) 1 *NIALS Journal of Environmental Law*, at 38. See also, 'Nigeria: UN Climate Conference – What Developing Nations Expect', *Africa News*, 4 December 2009.

30 See, 'Nigeria: The story of a Failed Summit – From "Hopenhagen" to "Hopelesshagen"', *Africa News*, 13 January 2010. See also, Tristan Edis, *Climate Spectator: Ignore Rio, Copenhagen and Kyoto*, Business Spectator, at www.businessspectator.com.au/bs.nsf/Article/Why-you-should-ignore-Rio-Copenhagen-and-KyotoPerp-pd20120622-VH3AC?OpenDocument&emcontent_spectators&src=rot, (last accessed 30 April 2013).

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32 This follows the Malabo decision of the African Union General Assembly of Heads of State and Government on Africa's preparations for the 2012 United Nations Conference on Sustainable Development at Rio de Janeiro. See Malabo Decision of the African Union General Assembly of Heads of State and Government on Africa's preparations for the United Nations (Assembly/AU/Dec.381 (XVII).

33 IPCC findings quoted by M L Parry, et al, see above note 14.

Lex:lead Group scholarship competition 2012

The following articles were winning submissions in the 2012 Lex:lead Group annual scholarship competition and discuss the role of law in encouraging access to finance. The Lex:lead Group annual scholarship competition is open to a majority of the world's 49 least-developed countries and is judged by a selection of distinguished judges, lawyers and academics. For more information, please visit **www.lex-lead.org**.

Rediet Zegeye Yigezu
Addis Ababa University, Addis Ababa
zegeye.rediet@gmail.com

Essay 1: How can law enhance access to finance in developing countries to reduce poverty?

In developing countries, where poverty is the order of the day for a great part of the population, the means of earning a living are limited. Employment rates are low, but engaging in enterprise can be beyond reach for reasons of financial shortage, among others.

Even the employed often do not make progress as many support not only themselves but also family members – immediate and extended – with whom they share the small amount they earn. Although this sustains the lives of those supported, it is not an escape from poverty. The money earned is used solely for subsistence without margin for savings or investments.

The lack of employment is often due, among other reasons, to low education levels and limited opportunities in the country's economy. Nonetheless, the unemployed have the potential to contribute productively to society. With improved access to appropriate levels of finance, more people can become self-employed and thus improve their livelihoods. An improved legal and institutional infrastructure can facilitate greater access to finance, and can support an availability of credit once established.

Instances where nations have fostered an improved financial environment exist, with impressive results. Greater access to finance has been shown to be effective in reducing poverty. One successful example is that of the increased availability of micro-finance and micro-credit that has achieved success in past decades, notably by the Grameen Bank of Bangladesh.

The aim of this article is to look into the role that law can play in making access to financial services easier, thus reducing poverty. As a strong legal framework is a necessary (though not a sole) condition to achieving any objective, framing the appropriate laws and creating a suitable legal, as well as institutional, environment is a good place to start this discussion about reducing poverty.

This article is divided into three sections:

- the current situation vis-à-vis the inability of the poor to gain access to financial services;
- a look into the potential of law to remedy the problem; and
- potential positive outcomes.

The current situation as to the inability of the poor to gain access to financial services

The formal sector – particularly banks – is the best-established institution in the realm of finance. Banks are however largely inaccessible to the poor, who cannot, for instance, obtain loans from such sources. Although the fact that the poor are poor is a fundamental reason for their exclusion here – their lack of assets typically renders them a high credit risk for a bank engaged in the business of making loans, coupled with the fact that the high administrative costs of managing multiple smaller loans is often not cost-effective for a bank – the reasons may also be due to a lack of legal and enforcement mechanisms, and a lack of awareness on the part of the public about available mechanisms.

Barriers to entry on the side of the applicant are severe too. The poor are often largely illiterate, or equipped with only a partial primary education, which typically does not extend to an understanding of the formal financial sector. Coupled with the inability to provide collateral for loans or fees to offset the costs in maintaining a deposit account, low levels of literacy hinder an applicant's use of such services and aggravate the fear of the sophisticated environment in which banks are typically found.

Assuming nonetheless that a large section of society wishes to make use of financial services, what can be done to extend such services to the poor? Beyond improving education levels, expanding the legal and institutional framework to improve access to finance for the poor that they can afford can help the wider economy of a country. Expanding the availability of services that don't require the posting of collateral, for instance, but look to other guarantees of repayment, such as community contracts, can be one way to improve access to finance. Improved education, specifically in the use and obligations of financial services, is another, both to non-traditional sectors such as microfinance, as well as (in some instances) to formal banking structures.

A look into the law's potential to remedy the problem

Through the implementation of law, positive change can be realised. As such, law may be structured to respond to the needs of society and to lay down a foundation for practical results. For this to be achieved, the particular problems to be solved and a path to their resolution should first be identified. We start by looking at the defining parameters of access to finance, namely that it is the extent to which people are able to gain access to and make use of financial services including microcredits, deposits, payment services, insurance and the like. How, then, do we implement law that improves the extent to which people are able to make use of such services?

To tackle poverty and create an environment for widespread economic development, we need laws that bring about effective change. Having access to financial services has been shown to have a positive impact in generating income and supporting one's self and one's family, thus achieving self-sufficiency. With different forms of financing possible, the lawmaker's task is also to look to the range of options and decide which may be best suited to existing conditions in the country. While some countries have had considerable recent success, for instance with mobile phone banking and transfers, in very poor, rural, communities these telephonic networks may still be beyond practical reach. Improving access to small (micro) loans, however, may be at a more accessible scale, particularly with small groups that can form enterprises and work toward a common end.

Once the issue at hand (improving access to finance), the ongoing problem (the inaccessibility of the formal sector) and the solution (expanding use of the above-mentioned alternatives) are identified, laws can be formulated in a way that addresses the problem and leads to solutions.

Nonetheless, laws that facilitate access to financial services cannot reduce poverty by themselves; follow-up mechanisms also need to be created to ensure their implementation and to smooth out institutional hurdles that remain. Law itself should be simple, accessible and understandable so that target groups can be aware of their rights and duties and are able to speak up when deviation from the goals of the law is seen.

Law should be transparent and a system designed where the officials entrusted with its implementation can be held accountable. It should be applied even-handedly to every target group. Discrimination should be avoided as it hampers both the effectiveness of the law and the aims of poverty reduction.

In addition, implementation of the law should be consistent with the country's constitutional principles, so as to avoid abuses of power, deviations from the rule of law, corruption and the like.

Potential positive outcomes

With the situation assessed, solutions identified and laws drafted and implemented that are consistent with these objectives, success may be within reach. Through improved access to appropriate levels of finance, the poor may, for example, take out loans and engage in different businesses that generate sufficient money to both pay back their loans and (importantly, to my mind) to improve upon their standard of living. Coupled with a legal framework, however, for such success to materialise, people will likely also need to be provided with basic educational training for the management of their businesses and the ways the system that is crafted for their needs can function.

By enabling the poor to gain access to financial services and to become productively self-employed, dependency rates will decrease and self-sufficiency become viable. The family's life will be improved. Children who were previously unable to get even free primary education (where, for instance, they had to generate all the money they could just to sustain their family) now stand a chance to attend school and the promise of a brighter future.

Heads of families, particularly women, can be empowered as they see their efforts turn from struggling to survive to actual development and changes in their lifestyle. And as the life of many families may change, the number of poor households may decrease and the society's lifestyle change. Eventually the lives of all poor citizens may be improved, hopefully to the point of eradicating poverty in its entirety.

Improving access to finance to achieve poverty reduction may seem far-fetched; yet prominent authors such as Muhammad Yunus disagree.[1] To me (and, I would suggest, to Muhammad Yunus) the essence of development is changing the quality of life of the bottom tiers of the population. And that quality is not to be defined just by the size of the consumption basket: it must also include an enabling environment that lets individuals explore their own creative potential. This, to my mind, is more important than any mere measure of income or consumption.[2]

Conclusion

To see our world with a low, possibly zero, degree of poverty is a goal shared by much of humankind. However, as we are trying to reduce poverty by half by 2015, the progress made so far is not to the desired level. I believe this is attributable to, among others factors, a lack of appropriate laws aimed at reducing poverty, the inaccessibility of adequate levels of finance to the poor, a misuse of the system, too-high levels of corruption and instances of maladministration. But at this juncture, once strong laws are formulated, what is left is its proper management in a manner that does not leave space for bottlenecks in poverty reduction and efforts at development.

Though formulating appropriate laws is not the only solution towards poverty reduction, it is an important step. Law that aims to increase access to finance should be formulated to respond to the problems of the poor by including the previously mentioned mechanisms. Once this is accomplished, the success rate of the law may increase and a well-drafted, responsive, law can bring change if its implementation is further coupled with effective follow-up mechanisms.

Notes

1 See Muhammad Yunus and Karl Weber, *Creating a World Without Poverty: Social Business and the Future of Capitalism* (2007).

2 Ibid at 56.

Ms Rediet Zegeye Yigezu is a law student at Addis Ababa University, Addis Ababa, Ethiopia. Her article was one of the highest-ranked essays in the Lex:lead Group's 2012 annual scholarship competition, as decided by a panel of international judges, lawyers and academics, judged independently. Ms Rediet Zegeye Yigezu's award was made in honour of John H Morrison OBE. For more information, please visit www.lex-lead.org (last accessed 30 April 2013).

Essay 2: How can law enhance access to finance in developing countries to reduce poverty?

Samrawit Getaneh Damtew
Addis Ababa University, Addis Ababa
samrawit.getaneh@aisec.net

To many, financial systems and institutions are poorly understood, yet their operations are taken for granted. This dichotomy is worse in developing countries, where education levels are low and access to financial institutions is, for many people, limited. Nonetheless, access to finance directly affects development. A sound structure and implementation of financial systems can increase access to finance, which in turn can lead people out of poverty, while its denial helps to further entrench it.

International law has conferred the right to development on people. This right is inherent in international human rights instruments, such as the International Covenant on Economic Social and Cultural Rights and the African Charter on Human and Peoples' Rights. This right to development, regardless of how controversial its implementation, at least impliedly incorporates a right of access to finance, as the two are strongly interlinked. Empirical evidence shows that a financial system that functions well will typically lead to increased economic growth and reduced poverty.[1]

It may be posited that upholding this right to development is fundamental to the realisation of other socio-economic as well as civil and political rights. Taking into account that the right has been incorporated into international instruments, adopted by states (including many least-developed countries), and upheld by international financial institutions (such as the IMF and World Bank – each subjects of international law), each of the foregoing should take an active role in the realisation of the right to development.

With regard specifically to access to finance, a number of factors contribute to its realisation. The term refers to 'the possibility that individuals or enterprises can access financial services, including credit, deposit, payment, insurance and other risk-management services.'[2]

Besides the legal framework of a country, a number of factors affect access to finance, including the country's general level of economic development and its government structure. The role of law can be significant in leveraging these attributes and increasing access. The factors are interlinked and the success of improving access to finance interdependent.

The banking system is of key importance in this arena, providing banking and other services to individuals and entities. Banks are powerful players in finance, paying interest on deposit accounts and making loans, both of which can foster growth and leverage a client's existing resources to do so. Banks are chartered and administered through legal acts, and the scope of such laws gives immense powers – and/or obligations – to banks in a country's financial system.

Factors that hinder access to finance can be broadly classified into internal and external factors. Internal factors are those that we attribute to the individual or the enterprise; external factors are those attributable to the state and other external bodies.

Internal factors that hinder access to finance

Documentation requirements

Financial institutions typically require extensive documentation from an individual in order to extend loans. Notwithstanding the importance of adequate documentation for the bank's protection, when it comes to the least-developed countries, where most individuals are poor and enterprises small-scale with limited financial histories, documentation requirements can prove to be overwhelming and may be able to be simplified or assistance may be provided in navigating their terms.

Cultural or religious reasons

People may voluntarily limit themselves from using financial institutions for cultural reasons or religious reasons.

Unwillingness

This may result from a lack of education in some parts of society, resulting in a deep mistrust of financial institutions.

Lack of information or access

Rural societies may not be aware of the existence and operations of financial institutions, or the financial institutions may be inaccessible to them due to long distances and other economic and geographic barriers.

External factors that hinder access to finance

Legal impediments

This is related to procedural hurdles that may hinder access to finance, such as fees to financial services, transaction costs, the requirements to be a beneficiary, high interest rates, the existence of discrimination and other reasons.

Overarching state power

In certain countries, states exercise great control over the activities of private enterprises and businesses. This power sometimes extends as far as the arbitrary confiscation of businesses, which, in turn, de-motivates individuals or enterprises to gain access to finance and to enter into business due to the high risk posed.

What can law do to improve access to finance?

Incorporate traditional financial institutions into the legal framework

Traditional financial institutions exist in developing countries and are commonly used by the poorer parts of society. These institutions may be widely accepted and preferred due to their greater availability and relative simplicity of use, among other factors. As such, incorporating these institutions into the legal framework of a country and providing them with protection, without distorting the factors that make them preferable to some segments of society, will contribute to increasing the effectiveness of financial institutions and enhance access to finance.

Incorporating these institutions into the legal framework of a country should be for more than just providing protection; it should also be directed at increasing the scale of operation of these institutions, identifying their weaknesses and finding solutions.

Provide equal opportunity

This is related to the legal framework of the country that directly and indirectly affects access to finance, through both procedural and substantive rules. The underpinnings of a country's legal system should have the rights of individuals, and the growth and economic development of those citizens, on an equal footing, aiming at a common good. If these basic considerations are not at the heart of a legal system, then in financial systems, as with other elements, it will be difficult to ensure equal opportunity to people at later stages.

Financial institutions must not be structured in a way that the system can only operate in favour of some at the expense of the masses. From access to financial institutions, to their manner of usage, they should be able to be accessed by all without discrimination.

Build an all-inclusive system

Law should help the process of opening the financial system to small enterprises and poor households. Additionally, there should be efforts from the legal side to encourage the creation of and to aid the viability of small and micro institutions. Transition costs should be small and affordable by the majority. Developing mechanisms to address the high costs of small loans so that poorer members of society can have access – such as shared obligations or guarantees – can have wide-reaching benefits.

Be transparent

The financial system must operate in a transparent manner and its manner of operation should be clear to all. There is a great deal that may be done in terms of awareness-creation, expanding an understanding of the use and benefits of financial institutions.

Provide security

Laws should provide security and recourse for small enterprises and households from abuses by financial institutions, and from arbitrary governmental intervention.

Facilitate a competitive environment

An environment based on fair and open competition will enhance productivity, increase efficiency and facilitate the flow of finance. This will aid the process of development.

What can international law do to improve access to finance?

The role of international financial institutions

International law can play a significant role in poverty reduction in developing countries through monitoring and controlling international financial institutions and making sure they adhere to their objectives as subjects of international law. International financial institutions, including the World Bank (with its five institutions), the International Monetary Fund and regional development banks, have been concerned about poverty reduction and development for more than 50 years. The common goal of international financial institutions is to reduce poverty and improve peoples' living conditions and standards, to support sustainable economic, social and institutional development, and to promote regional cooperation and integration.[3]

Institutions such as the World Bank have important mandates, such as fighting poverty through development assistance to middle and low-income-generating countries, giving loans and training. The World Bank provides low-interest loans, interest-free credits and grants to developing countries.

These objectives and the services of the World Bank can only create the desired effect of poverty reduction if they are implemented effectively. Hence their manner of implementation should not be overlooked. In addition to this, developing countries have to create the requisite legal infrastructure for their citizens to benefit from opportunities provided by international financial institutions and to improve awareness of such.

Conclusion

From policy-making to coming up with specific rules of law that have a direct or indirect impact on access to finance, the legislature should take into account the long-term and short-term effects of such legislation on access to finance specifically and on development generally. In addition, the legislature needs to be progressive and innovative to continually improve access to finance. Improved legislation cannot bring about complete change on its own; laws also need to be effectively executed. As such, the executive also has an active role to play in this process. Both international law and national legislation have a major role to play in enhancing access to finance, directly through legislation and indirectly through national and international financial institutions. International financial institutions should effectively implement their mandates to achieve their goals in poverty reduction.

Notes

1 See, 'Finance for All? Policies and Pitfalls in Expanding Access', Chapter 1, *Access to Finance and Development: Theory and Measurement,* World Bank 2008, available at: http://siteresources.worldbank.org/INTFINFORALL/Resources/40995831194373512632/FFA_ch01.pdf (last accessed 30 April 2013).

2 See, 'Access to Finance', *Wikipedia*, available at http://en.wikipedia.org/wiki/Access_to_finance (last accessed 30 April 2013).

3 See, Naina Gupta, *Role of International Financial Institutions on Indian Economy*, power-point presentation available at www.slideshare.net/nainagupta/ppt-on-role-of-international-financial-institutions (last accessed 30 April 2013).

Ms Samrawit Getaneh Damtew is a law student at Addis Ababa University, Addis Ababa, Ethiopia. Her article was one of the highest-ranked essays in the Lex:lead Group's 2012 annual scholarship competition as decided by a panel of international judges, lawyers and academics, judged independently. Samrawit Getaneh Damtew's award was funded by a grant to the Lex:lead Group from Allen & Overy. For more information, please visit www.lex-lead.org.

Redeat Kassahun Seifu
Addis Ababa University, Addis Ababa
redilw44@gmail.com

Essay 3: How can law enhance access to finance in developing countries to reduce poverty?

As a citizen of one of the least-developed countries, poverty has always been a big part of my life. The number of things I want but can't afford to do outnumber the things I can.

Money is key to reducing poverty, although I would argue that money is not the only limitation for the impoverished. The path out of poverty is also about changing mindsets and attitudes. In most poor countries, there is limited access to education. The population may therefore be largely uneducated and dependent, with limited opportunities for work. Neither the government nor other institutions can afford to give everyone a job; there is typically a shortage of schools, healthcare and other important facilities. Women are often not given equal access to study or to work and children may be unschooled because of traditions and cultures that limit the opportunities that are available. Corruption may be rife; periods of famine are a further test to the system in place.

At the root of all these problems, however, is finance: the lack of adequate monetary resources. If the world's least-developed countries had the money to build infrastructure, schools, medical facilities and the like, its problems would be fewer. There is an imbalance in the availability of resources. To paraphrase Mahatma Gandhi: 'the world's resources are more than enough for the people in it, but insufficient for the greedy ones'.[1] It is well known that there is a great economic gap between first and third world countries. That there is enough in the world but disparity of resources is particularly true in Africa. The continent of Africa remains the poorest and least-developed region of the world, notwithstanding its abundant resources – human and natural – and large potential markets.

All countries have the means to generate income from both internal and external sources. Thus we can look at how law can upgrade access to finance in these two scenarios. Looking first to internal sources, it may be said that for a country to engender economic development, there must be cooperation of sorts between its government and its people. After all, in democratic countries, it is the voices of the people that brought the government to power and have entrusted it with making decisions for the country. There must therefore be a sense of working together for which communication is crucial. A fundamental communication between the government and its people is the law. The government enacts laws regulating how its citizens may act, what they can and cannot do. Laws provide for the rights and obligations of people. In the same manner, what the government wishes can be found in its legislation. Thus we can only imagine how much the quality of laws can affect the economic, social and political status of a given country. It can either break or build a nation.

For income to be generated from internal sources, countries must create a domestic environment conducive to growth through the adoption and implementation of economic policy reforms. Countries need laws that can bring about the desired development goal.

Behind this, to function properly and to provide such services, governments, like people, need money. The most important source of governmental income in most countries is from taxation. A country's citizens contribute prescribed amounts to the government as taxes from business, personal and other sources of income. To form a robust foundation, tax laws must be sound. They should apply fairly to all members of society. They must be achievable and considerate. If taxes are too high, incentives are created to avoid paying them. The government will not be able to collect the taxes, or thereby to pay for the services and infrastructure intended. Expanding the diversity of taxes (rather than simply raising tax rates) may be able to increase the tax base in ways that citizens can pay. A country with various resources must enact laws that entail their prudent and efficient management so as to add to the progress of growth.

When a person or institution imports goods, tax is paid on those imported goods. If laws impose a sufficiently low tax, imports will be encouraged and foreign currency exchange reserves increased.

Income – for the government as well as for individuals – can also be derived from investment. Laws touching on investment can encourage external investment in that country, including through low tax rates or full tax exemptions. If the legal environment and costs are sufficiently attractive, both foreign investors and diaspora communities will be interested in investing in a country, which in turn stands to increase the inflow of cash into the country. The investment laws of a country serve both internal and external investors ie, both categories of income sources for the sake of this essay.

Tourism is another example of an industry that may be benefited by law. There are many extraordinary tourist sites in these countries but not much is done in this regard. Rules and regulations must be drawn up to facilitate the improvement of such places and be suitable for people coming from abroad to visit these sites. So law plays a great role in enhancing the way in for finance.

Secondly, we look to income from external sources. Countries that have access to coastal waters and have ports and airlines can derive income by leasing those ports and airlines. Improving trade relationships generally through treaties, conventions and regional and international economic cooperation or trade organisations brings economic benefit and development. As a corresponding obligation, the state must generally also submit to customary or conventional international law and treaties, either through express ratification and formally adopting them as part of its national law, or through adopting these practices.

In the same manner with imports, the export of raw materials – such as agricultural or finished products – must be supported by law. Tax is collected on exported goods to strengthen the government's financial base, which may be devoted to poverty reduction and other development programmes. Such taxes may be used to prevent or reduce the corresponding importation of goods, serving as a trade barrier. When a state wishes to ban or reduce importations into its territory, it will often impose a high tariff – sometimes as high as 100 per cent of the value of the import. The imposition of high tariffs is an effective means of discouraging imports and is the subject of much discussion in international trade law. Such protective measures can help protect infant domestic industries from competing – sometimes subsidised – products from foreign companies and importers. Domestic law may be harmonised with international laws and treaties looking to regulate trade in these areas.

Promisingly, recent studies have pointed to economic growth in Africa, although this has not yet translated into any meaningful reduction in poverty levels. Law has an important role to play in making sure the poor also benefit from economic growth. It can guarantee the rights of those who are weak, either physically or socially. Empowering women and other marginalised sectors of society can be effective in reducing poverty. Women in many of the least-developed countries suffer discrimination and are ascribed close to zero value in contributing anything to the country's development. Recently, however, some women have managed to break with tradition and prove the naysayers wrong. This is just the beginning; a lot is expected in the future. For this to be fully realised, the role of law is vital. Of course some may say that awareness-creation and a change in the attitudes towards women must be done first. A country's laws must promote women's participation in the process of development. Women, and all marginalised sectors of society, must be granted equal opportunity to get an education and job opportunities that increase their capacity for productive employment and fair income, so as to be independent and competitive in the marketplace. Coming from one of the world's least-developed countries, I personally doubt we can afford to exclude even one person, let alone millions, in our mutual fight against poverty. Consequently, when legislation is passed, I believe it should take into consideration the position of women and include affirmative action clauses to put women on an equal footing with men.

Similarly, laws must also be protective of people with disabilities. Be the impairment that of hearing, a physical ailment, a visual limitation or otherwise, such people can nonetheless contribute to the economic and social advancement of a nation. Therefore, since poverty is heavily concentrated among the disadvantaged groups, law must be proactive in addressing the needs and encouraging the potential of these groups. Their participation in political endeavours and leadership activities must also be encouraged.

The above touches on a few sources of government income and similarly what a country's laws may look like. So far we have also talked about the role of law in improving access to finance. As mentioned at the start of my essay, law is an instrument; it's a means to an end rather than an end in and of itself. However great the rules and regulations of country may be, they don't necessarily grant the goals of the legislation to be achieved. As important as substantive laws that provide for the financial improvement of a state are, procedural laws are also important. Provisions of the law are just words, unless put into practical effect. Thus, in addition to strong laws, we need effective mechanisms to implement those laws.

There are also other problems. Assuming certain laws were correctly implemented and able to bring about the desired goal, which is to grant better access to finance, a follow-on question is to ask where the money should go. We see instances where in some countries there is a lot of foreign aid, through loans or donations. Yet in spite of sizeable contributions of foreign aid, poverty persists. No one dares ask where it went. Accountability and transparency seem to be lacking, fostering corruption. A Nigerian lawyer and politician, Chief Obafemi Awolowo, once said: 'It will, I believe, be generally agreed that eradication of corruption from any society is not just a difficult task: it is without dispute, an impossible objective.'[2] It may seem to be easier said than done but I believe it's possible if done one step at a time. It is just as with any evil in our society; and it all comes down to knocking out substantive laws and their implementation. Anti-corruption laws must be tight and non-discriminatory between government officials and people. They must also provide for strict penalties so that they serve the purpose of deterrence. But again, as I have said earlier, laws don't suffice. Enforcement mechanisms and the institution responsible for such tasks must also be available. If rightly applied, I don't see why we can't tackle the problem.

Lastly, an important factor in improving growth or reducing poverty is effective governance. All that has been said will amount to nothing if there is no political stability in a country. Adherence to the principles of democracy, equality and the rule of law are undeniably essential. No organ of a government can function well in an unfavourable environment. No legislation will be implemented or even executed for that matter. And, in return, this diminishes the chances of robust and sustainable development.

Notes

1 'Earth provides enough to satisfy every man's needs, but not every man's greed', Mahatma Gandhi, available at www.goodreads.com/quotes/tag/environment (accessed 3 April 2013).

2 See *Journalism vs 'Brown Envelopes'*, The Media Project, Thursday 4 August 2011, available at: http://themediaproject.org/article/nigerian-journalism-culture-brown-envelopes?page=0,3 (accessed 7 April 2013).

Ms Redeat Kassahun Seifu is a law student at Addis Ababa University, Addis Ababa, Ethiopia. Her article was one of the highest-ranked essays in the Lex:lead Group's 2012 annual scholarship competition as decided by a panel of international judges, lawyers and academics, judged independently. Redeat Kassahun Seifu's award was funded by a grant to the Lex:lead Group from the Claude Moore Charitable Foundation. For more information, please visit www.lex-lead.org.

Essay 4: How can law enhance access to finance in developing countries to reduce poverty?

Hilina Berhanu Degefa
Addis Ababa University, Addis Ababa
hellybd@gmail.com

Access to finance as a concept should be distinguished from the use of financial services, because the non-use of finance can be either voluntary or involuntary.[1] Usually the focus of access to finance as an area of research is on those who involuntarily only have limited or no access to financial services. These groups are referred to as the 'under-banked' and 'unbanked', respectively. Such individuals may be ineligible for or unable to take out loans from formal credit-providing financial institutions. Their only access to finance may be at usurious rates through the informal (and unregulated) sector; or they may have no access at all.

Communities with very limited financial resources may be provided an opportunity to gain access to lines of credit to start projects or develop existing ones. In countries like Ethiopia that have severe financial constraints, microfinance institutions play a significant role. They provide small amounts of financial help and track the use of the credit provided. They also encourage savings. As part of their services, these institutions improve financial literacy by giving guidance on financial decision-making. In developing countries, financial decisions made by individuals usually affect a wide circle of people. So, with the current financial and institutional complexities comes the responsibility of making a well-founded decision. The basic goal of access to finance can be facilitated by improved financial literacy; access can be improved. Improved access provides the means to encourage innovation and the entrepreneurial skills of the poor.

Financial limitation is the greatest challenge faced by potential entrepreneurs (especially locals) in either starting up a project or expanding an already-existing enterprise. The lack of money undercuts job opportunities and the country's potential productiveness, especially when a local investor wants to engage in an investment similar to the one formerly established by foreign investors – the above limitation can be of great influence. Foreign investment in a developing country is introduced on the rationale that the investor would import capital to the host state and introduce new skills. So competing with foreign investors would be impractical for local up-and-coming investors and entrepreneurs.

One basic rationale behind having a legal system and designing laws is to maintain fairness and equality among individuals governed by it. Laws are designed for the good of the communal interest. So providing a regulatory framework would benefit all and get rid of imbalances created from different levels of social and economic status. Laws also fill the gap of uncertainty in financial transactions.

States usually have three layers of legislative responsibility when it comes to taking active measures – international, regional and national. The International Covenant on Economic, Social and Cultural Rights (ICCPR) at Article 2 talks about how individual states should take measures of an economic and technical nature with a view to progressively achieving the full realisation of the right. Legislative measures are particularly listed. Another relevant article is ICCPR Article 4, which talks about enjoyment of the right and legal limitations. This can be applied when financial institutions nominate beneficiaries; it should be according to the legal requirements provided by the law of the land. The provisions for this legislation should also be made with the purpose of promoting the general welfare of the society. Regional and national obligations usually reinforce what is set out under the international conventions.

From a human rights' perspective, effective access to finance contributes to better education, food and employment standards. Improving financial rights requires a more robust and responsive legal system. This right should be respected, protected, promoted and facilitated by the States Parties that assumed treaty obligations. Vulnerable groups particularly, like children, women and ethnic minorities, should have sufficient access to finance and production-related resources.

An imbalance in the making: the 'who' question

> 'In the medium to long run, if microfinance is to be fully integrated within the formal financial sector, and if the needs of poor households and enterprises are to be met completely and sustainably, supportive legal and regulatory frameworks are ultimately necessary.'[2]

This necessity goes with internationally accepted principles and obligations assumed by states. States have sworn to work against poverty and to feed 9.5 billion people by the year 2050. Now the real question is: are we planning on feeding those already rich, or is this a promise to the underfed?

This question can only be answered in the priorities designed by the policy of different states and further pursued in the legislative framework.

When we talk about access to finance or microfinance institutions, one name that comes to mind is Muhammad Yunus, for having created a feasible plan to support the poor. Although people like Muhammad Yunus choose to cater for the poor, governments usually cater for the needs of the rich under a pretext of feeding the poor. The national laws of developing states on banking and insurance exhibit this same nature. This has been challenged by different advocacy institutions. Because of the high opposition from the majority, the governments of developing countries are in a dilemma over designing a social protection scheme to address the needs of the poor. These social protection measures would give citizens direct or indirect access to finance as a legal right. The concerns of government authorities usually demand the contribution of deeper pockets. The rich are considered a means of capital and income so that whatever they demand is fulfilled. This demand includes access to finance from formal financial institutions. Due to this, the institutions set regulatory measures that are distant from the reaches of the poor. Here, designing a more feasible law could play a very significant role in shaping the expectation and priorities of sates.

As laws are instruments of social change and progress, if designed carefully, they can adequately address the 'who' question. Laws could also deal with the apportionment of finances on a more transparent and efficient basis. At a national level, laws are crafted by representatives of the people so their agendas are presumed to address the concerns of the same.

Deeper pockets should be regulated

Financial services are usually provided by commercial banks, credit unions and national or international non-governmental organisations (NGOs). These are institutions that are recognised by the state and laws. On the other hand, individuals unable to measure up to those standards or regulations entailing access to finance resort to an illicit way of acquiring it. When we talk about the illicit nature of the practice, it mainly focuses on an interest rate. We have regulations in banking, and national banks of states usually dedicate a particular department to ensure its enforcement in practice.

Rich individuals take advantage of the informal lending mechanism through the imposition of high-interest rates. This practice is usually scrutinised by particular agencies established under the national finance structure. Such agencies are guided by a set of laws having procedural remedies. Such laws are crafted based on policy considerations for the benefit of the majority. The rationale behind having these laws is social interest protection and governance of access to finance. Finally, grass-roots NGOs could play a significant role in catering for the needs of the community and paying closer attention to specific social constraints.

Conclusion

In order to have a more feasible and efficient financial set-up, we need to design a comprehensive legal framework. Laws regulate social behaviour and operational standards with mechanisms of enforcement. When we talk about finance and poverty reduction, an overriding interest of the state is involved. Hence, the state should protect it at any cost. States should be able to regulate illicit financial practices and take the financially weak into consideration. Policy objectives should be drowning on an inclusive basis and discrimination on access should be eliminated. Finally, financial laws should be able to facilitate for the reduction of poverty and provide poor entrepreneurs with the chance to grow.

Notes

1 A Demirgüç-Kunt, T Beck and P Honohan (2008) *Finance for All?: Policies and Pitfalls in Expanding Access.* Washington, DC, The World Bank. Retrieved 21 March 2008 from http://siteresources.worldbank.org/INTFINFORALL/Resources/4099583-1194373512632/FFA_book.pdf (last accessed 30 April 2013).

2 Kate Druschel, Thierry van Bastelaer, and Patrick Meagher of the IRIS Center with Chemonics International, *Legal and Regulatory Reform for Access to Finance: a Policy and Programming Tool,* December 2005 at 3, at: http://pdf.usaid.gov/pdf_docs/PNADF316.pdf (last accessed 7 April 2013).

Ms Hilina Berhanu Degefa is a law student at Addis Ababa University, Addis Ababa, Ethiopia. Her article was one of the highest-ranked essays in the Lex:lead Group's 2012 annual scholarship competition as decided by a panel of international judges, lawyers and academics, judged independently. Hilina Berhanu Degefa's award was funded by a grant to the Lex:lead Group from the International Bar Association Foundation. For more information, please visit www.lex-lead.org.

Essay 5: How can law enhance access to finance in developing countries to reduce poverty?

Masalu Elias Luhula
University of Dar es Salaam, Dar es Salaam
mluhula@yahoo.com

Finance is defined as managing money especially by a government or commercial organisation, or to provide money for a project.[1] It may also involve how investors allocate assets over time under conditions of certainty and uncertainty. The practice of finance aims to price assets based on their risk levels and expected rates of return. There are three broad categories: public finance, corporate finance and personal finance.[2]

Conversely, 'developing country' is a term used in international development. Different criteria group countries as developed, developing or least-developed. The World Bank looks to per capital income as a basis of classification, while the United Nations uses a human development index to rate the development levels of countries.[3] It is generally agreed that developing countries are poor; but measuring *how* poor introduces complications.

Taking into account the fact that poverty is an inequality in the allocation of material goods, where income inequality is an indicator of poverty, the level of poverty is calculated according to the extent to which basic needs are met. Developing countries generally have poorly developed social services, and it is common to find high levels of aid in such countries that are unlikely to be accessed easily otherwise.

The literature provides both theoretical arguments and empirical evidence that a country's legal system fundamentally affects its ability to attract and use finance, as well as its overall economic growth. The directional impact goes from finance to growth; an important channel for the impact of finance on growth is the informational asymmetries and transaction costs.[4]

Prevailing practices in law align with dominant political interests,[5] and the choice of law has an impact on financial development. A failure to account for the political economy and its effect on the legal environment can lead to a misreading of the relationship between law, finance and growth,[6] leaving some sectors without an effective means of participating. As such, law can have a great impact on reducing poverty, by improving access to finance in different ways, directly or indirectly. The legal environment affects the ability of firms and other developmental organisations and institutions to raise internal and external financing and thus to overcome financial constraints.

The free movement of services and capital through trade and trade laws

Trade growth requires that trade be open as the only real option, especially for developing countries with small economies such that they may surmount the obstacles of the small size of their domestic market. International trade is therefore well-regulated by international convention and agreements, including the Hague Rules of 1924 and 1968, the Hamburg Rules of 1978, the Warsaw Convention of 1929, the Hague Protocol of 1955 and the Montreal Protocol of 1975. These instruments regulate states so that they do not affect trade through state actions, like economic consideration and protectionism. Cross-border trade helps in the distribution of resources that don't exist in other states, expand access to markets and employ means of financing like letters of credit. Through the free movement of people and services, greater income can be generated for the subjects of the trade, which further increases the per capita income of the individuals.

International relations and laws of development

Countries form either bilateral or multilateral organisations or corporations intending to solve their problems. Among the problems they tackle are economic problems. Examples of the organisations or corporations formed are the Economic Community of West African States (ECOWAS), the East African Community (EAC), the African Union (AU) and the United Nations (UN). Most of these were formed through signing treaties and they pass resolutions and conventions that bind the member states either automatically or through ratification. For example, in 2003, the AU passed a resolution in Maputo.[7] On reiteration, it committed to the principles and objectives set out in the Constitutive Act of the AU and the common conviction that sound economic policies are essential conditions for the sustainable socio-economic development of the African continent. It further re-emphasised the common resolve to eradicate poverty, confront under-development and arrest the marginalisation of the African continent. It further showed its mission by encouraging the NEPAD Heads of State and Government Implementation Committee to explore adequate funding mechanisms for sustainable financing of NEPAD programmes and projects, including the possibility of a NEPAD Trust Fund. It revealed its true preposition that law need not be neglected once it comes to development of the country.

Law, economic innovation and investment in economic growth

Law and innovation are inseparable. For democratic countries, the rule of law is one among the constitutional principles. 'It is widely understood that the "rule of law" is essential for economies to grow, and thus for living standards of their populations to advance. In turn, it also is widely recognised that growth is best achieved through continued innovation: the development of new products, new services, and new ways of doing things that make a society more productive.'[8]

Individuals will not save and firms will not invest without clear property rights, enforced if necessary by an impartial judicial system, in the interest of profits they earn on these investments.

Companies cannot attract outside investors and thus may not be able to grow unless the liability of shareholders is limited to the size of their stockholdings.

Similarly, individuals and institutions are more likely to invest in financial instruments that can be easily and are readily traded. Exchange must exist to facilitate such trading, as must investor-relevant rules requiring disclosure of accurate and timely information.

These are just a few of the legal propositions that are now widely understood to foster economic progress. Laws and legal institutions best promote innovation and growth.[9]

This takes us to the crucial fact of introduction of M-Pesa in East African countries. M-Pesa is a mobile phone-based money transfer (Pesa is a Swahili word meaning money) and micro-financing (Safaricom for Kenya and Vodacom Tanzania) in partnership with Vodafone Group. It is an innovative money-transfer solution that enables customers to send money directly, even internationally, to the receiver of an M-Pesa account. This was launched in Tanzania in 2000[10] and was introduced in Kenya in 2007.[11] M-Pesa has shown that leveraging mobile technology is a promising vehicle for extending financial services. In Kenya, the money transferred each year equates to 11 per cent of the gross domestic product (GDP).[12] The legal framework (policies) has been flexible to allow rapid introduction of mobile transfers throughout the country, while at the same time regulations and control process needed to provide security have kept risk largely contained.

Tax law and public financing

Taxation is a central part of modern public finance. Its significance arises not only from the fact that it is by far the most important of all revenue, but also because of the gravity of the problems created by the present day tax burden. The main objective of taxation is to raise revenue. A high level of taxation is necessary in a welfare state to fulfil its obligations. Taxation is used as an instrument of attaining social objectives, that is, as a means of redistribution of wealth and thereby reducing inequalities. Taxation is also used to draw away money that would otherwise go into consumption and cause inflation to rise.

In general, the legal framework calls for taxation according to the rule of law. The fundamentals of this framework are that tax can be levied only if a statute lawfully enacted so provides.[13] Taxation is a handmaid for raising revenue to meet governmental expenditure. Imperatively, the government has to provide social services and ensure defence and hoarder of other undertaking, which the free market or the state feels is better provided by itself.[14]

Conclusion

As noted thereof, the Romans might never have arrived at developing the early type of corporation without their advancement of legal environment. Disregard to law and any point of sleep to make law match with time and circumstance changes is as good as having a car with no key. Law moves the economy of the country and also directs to the future. In no way the country's economy can take step ahead. It is essential to keep eye on the legal framework of the country so that it protects the sustainable use of natural resources, has clear constraints against free flow and supply of services and transfer of technology, unless otherwise the name that is sometime faked to countries with poor social services and low per capital income as 'developing countries' will stand still to the Domesday.

Notes

1 S Wehmeier et al, (eds), *Oxford Advanced Learner's Dictionary*, 7th edition. (OUP 2006), available at http://oald8.oxfordlearnersdictionaries.com/dictionary/finance (last accessed 3 April 2013).
2 See, 'Finance', *Wikipedia*, available at http://en.wikipedia.org/wiki/Finance (last accessed 3 April 2013).
3 See, www.fundsforngos.org.
4 See, U Malmendier, 'Law and Finance at the Origin', *J Ec Lit*, December 2009, vol 47(4), pp 1076–1108.
5 Ibid.
6 Ibid.
7 Maputo Declaration, Second Ordinary sessions, 10–12 July 2003/Assembly/AU/Decl 8(II). Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD).
8 R E Litan, *Law and Economics 2.0: Understanding the Link between Law, Innovation and Growth*. Course description, available at www.kauffman.org/research-and-policy/law-and-economics-2-0.aspx (last accessed 30 April 2013).
9 Ibid.
10 See, www.vodacom.co.tz.
11 M Zephrin, Enhancing Financial Sector Surveillance in Low-income Countries, 16 April 2012.
12 N Fildes, 'Welcome to Africa the home of mobile banking – until the west catches up' *Business Times*, Wednesday 27 October 2010 at 48.
13 See, Luoga F D A Makinyika, *A Source Book of Income Tax Law in Tanzania*, Dar es Salaam (DUP) 1996.
14 Ibid.

Masalu Elias Luhula is a law student at the University of Dar es Salaam, Dar es Salaam, Tanzania. His article was one of the highest-ranked essays in the Lex:lead Group's 2012 annual scholarship competition as decided by a panel of international judges, lawyers and academics, judged independently. Masalu Luhula's award was funded by a grant to the Lex:lead Group from the International Bar Association Foundation. For more information, please visit www.lex-lead.org.