

**SYMPOSIUM "A STRATEGY FOR WATER RESOURCES CAPACITY BUILDING"**

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**THE NEED FOR EFFECTIVE LEGAL AND REGULATORY FRAMEWORKS**

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Laws, regulations, and institutions to administer them play a vital role in the development, use and conservation of water resources insofar as they promote social cohesion by forestalling disputes - or resolving them once they have arisen - in fair and predictable ways. They promote the predictability of individual and government behaviour, and of decisions individuals and governments constantly make with respect to the resource. They empower governments to do certain things and to undertake certain programmes. The need for effective water sector laws and regulations, and for an efficient governmental organization to administer and enforce them has been illustrated in innumerable governmental and non-governmental fora and need not be elaborated on further.

Also, a large body of literature exists illustrating country-specific and comparative water laws and institutions, discussing relevant issues, and outlining standard approaches to dealing with them. While it is not necessary to deal with this subject at any length, one point deserves emphasizing and bearing in mind in view of its weight on the focus of this Symposium, and of this paper in particular. The reference is to the widespread dichotomy which is found between the law and hydrologic realities, and between the imperatives of hydrology and the organizational setup of governmental responsibilities for the management of water resources. It is common knowledge not only among water lawyers that laws may perpetuate un-economical rigidities, or condone unjustified privileges, or artificially separate what is whole in nature (surface water and groundwater), or artificially divide complementary water management functions (water allocation and water pollution control). Similar patterns are mirrored in the governmental and para-governmental institutional setup for water management, where artificial divisions of responsibility drawn along end-use or type of resource or functional lines are commonplace.

This background plays a paramount role in assessing the need for capacity building at country level, and in designing a strategy to respond to the perceived needs of countries. Indeed, the perception that the Achilles' heel of External Support Agencies (ESA) programmes and projects of support to the water sector of recipient countries lies in the want of an institutional capability at country level is receiving growing recognition, and is indeed one of the leit-motifs of this very Symposium. The lack or inadequacy of institutional capacity

is decried virtually by all ESA operators as all have, at one time or another, experienced the well-known constraints at country level associated with inadequate numbers of sufficiently trained professionals, or with inadequate finances, or with inadequate equipment. But more and more they have also been experiencing other kinds of institutional inadequacies, i.e., those which stem from the policy vacuum in which ESA projects and programmes fall; from proliferation of governmental and para-governmental centres of decisionmaking in the water sector, and the resulting overlap, conflict and confusion, not to mention the difficulty of identifying a well-defined water constituency within any government structure to sponsor a programme approach; from too many, too few, or too old laws and regulations; from slack implementation and enforcement of existing laws and regulations, which breeds disrespect for the law as a whole; from ignorance of customary practices with regard in particular to land and water use among the traditional rural communities; from diffuse ignorance by the general public of just what their rights and obligations are with respect to freshwater use, let alone protection; and from ineffective or simply non-existent agreements to deal with "shared" water resources issues between concerned states.

Perhaps the most pervasive institutional inadequacies stem from too many, too few, too old, or simply obscure, conflicting and confusing laws and regulations. Besides, seldom are existing laws available in one place for consultation, let alone regularly updated and coordinated. It must be borne in mind in this regard that the field of water law is not homogeneous. Almost never does one find the entire body of laws pertaining to all manifold aspects of water resources management, from exploitation to pollution control, from irrigation use to use for hydropower generation, from waterworks construction to flood damage and erosion control, from regulation of surface water use to regulation of groundwater use, all consolidated in one statute. In all countries, developed and developing alike, water law is a composite body of rules resulting from the aggregate of many statutes and court decisions dealing not only with water resources, but also with other related natural resources - such as forests, cropland, rangeland, fisheries, wetlands, minerals - and with the environment.

The intricate web of laws and regulations bearing on the management of water resources, or the lack of laws result in uncertainties which may stifle

much needed development. Investment in the irrigation sector, for instance, may be stifled by (a) uncertainty as to the investor's rights in pre-development water, (b) uncertainty as to the beneficiaries' rights in post-development water, and as to their obligations to fellow users downstream; and (c) direct impediments to the recovery of costs from the beneficiaries as a result of water being legally regarded as a free good. Investment in wastewater reclamation and reuse may be stifled by uncertainties surrounding the investor's rights in the wastewater he/she has reclaimed, or his/her liability to the general public in terms of public health risks, and to downstream water users in terms of reduced return flows to a stream. Investment in improving the efficiency particularly of irrigation water use may be stifled by uncertainties surrounding the diligent irrigator's rights in the water he/she saves. Public investment in river training or flood control structures may be made difficult by the rights of the owners of riparian property in the beds and banks of streams.

Water laws also stifle development in other ways. Investment in the water supply sector may be made unattractive by the investor's inability to secure water rights which are vested in a third party. Investment in the water supply and sanitation sector may be foregone on account of unattractive legal requirements as to consumer rate structure and destination and handling of sector revenues.

More in general, in countries where the water rights of individuals have a strong private property connotation, radical needed changes in the laws governing water allocation and use may come under the threat of constitutional challenges under the clauses protecting property rights. The simple possibility of evoking massive compensation claims has the potential for deflecting any government's best intentions.

Paradoxically, pollution control is stifled by overly complicated or overly simplistic laws. The former place unrealistic burdens and goals on governments, and as a result implementation lags behind and the law remains dead letter. Overly simplistic laws condemn themselves to widespread disregard and quick obsolescence if they decree outright bans on polluting activities which are impossible to enforce.

Custom, as opposed to written laws, tends to play quite a prominent role in water use among traditional rural communities. Customary rights in both water and land may act as a constraint to water development - particularly irrigation development. If ignored outright or inadequately dealt with by legislation, serious post-development problems may arise, particularly as between customary rights holders and the holders of government-granted, statutory rights in developed land-cum-irrigation water.

Finally, the very special problems posed by development affecting the flow and/or the quality of a stream flowing into another country, or a boundary stream or lake should not be forgotten. While the need for pre-development agreement between the countries concerned is of immediate relevance in the case of boundary waterbodies, the evidence may be perceived by the concerned pro-development country to be less compelling in other cases, depending on the hydrology of the case and on political factors. The fact of the matter is that, regardless of a country's political agenda, to the extent that the ESA community is sensitive to the legal implications of development of, or along, a "shared" waterbody, will the lack or inadequacy of agreement between the countries involved will effectively stifle development.

I strongly believe that it is, among others, in all these unconventional areas of institutional inadequacy that the challenge of the 1990's and beyond lies, and that it is to remedying these inadequacies that the Strategy this Symposium will design and operationalize must address itself to. How can this be accomplished?

The objectives of the legal/institutional segment of a future Strategy should consist of building up target countries' institutional capacity in the following key domains:

a. policy analysis, with special regard for the legal ramifications of policy options and, wherever appropriate, for the implications of "shared" waterbody development options;

b. conceptual design of laws and regulations for the implementation of

policies, and the drafting of comprehensive legislation covering such basic aspects of water resources management as planning, water allocation and use, and pollution prevention and control;

c. design of governmental institutions, with particular emphasis on mechanisms to ensure consistency of direction and purpose in all aspects of water resources management;

d. implementation and enforcement of laws and regulations, with particular regard for the establishment of procedures for water sector planning, water rights administration, and control of polluting discharges;

e. where appropriate, systematic surveying of customary practices in the field of land and water use among rural populations;

f. compilation and dissemination of information concerning water laws and regulations, and awareness-raising of the citizenry to their rights and obligations with respect to water resources use and protection.

The attainment of these objectives by the ESA community within the framework of a coherent Strategy can be achieved by two complementary modes, i.e.:

1. by providing target countries with approaches, guidelines, concepts and ideas drawn from comparative experiences, with regard to items (b), (c) and (f);

2. by strengthening local capacities in the fields of (a), (d) and (e) through training and exposure to approaches and the experience of other countries.

One essential operational feature of a Strategy for institutional capacity-building at country level will be the early identification of a suitable supporting centre of authority in the governmental structure. This centre of authority should be able to muster the support needed at policy and operational level for a recipient country to fully and effectively avail itself of the

facilities provided by the Strategy, and for the legal and institutional component elements of the Strategy to make an impact. Given that policymaking and operational authority tends, as stated above, to be diffuse and multiple-centred, and with a view to avoiding "forum shopping" - i.e., going around to shop for the institution best suited to host and support the Strategy - one for the prerequisites for extending to a requesting country the facilities of the Strategy should be the setting up of a mechanism for effective consultation among all governmental and para-governmental water management operators, including representatives of the private sector. Such mechanism should be in place for so long as the Strategy is operational in the country. If the Strategy is successful on, among others, the legal and institutional plane, the consultative mechanism could become a permanent facilitator of institutional consistency of direction and purpose in managing the country's water resources.

**BALANCE SHEET OF WATER LAWS AND INSTITUTIONS****ON THE PLUS SIDE:**

1. Promote social cohesion through prevention and settlement of disputes
2. Promote predictability of individual and government behaviour

**ON THE MINUS SIDE:**

1. Dichotomy between laws and hydrology. This generates
  - un-economical rigidities
  - unjustified privileges
  - artificial separation of surface water from groundwater
  - artificial separation of water allocation from pollution control
  
2. Dichotomy between governmental setup and hydrological imperatives, resulting in split responsibilities along
  - end-use lines (irrigation, hydropower, water supply, etc.)
  - type of resource (surface water, groundwater)
  - functional lines (water allocation, pollution control)



**SOURCES OF INSTITUTIONAL INADEQUACIES**

1. LACK OF POLICY FRAMEWORK
2. PROLIFERATION OF GOVERNMENTAL CENTRES OF AUTHORITY
3. TOO MANY, TOO FEW, TOO OLD, UNWORKABLE LAWS AND REGULATIONS
4. SLACK IMPLEMENTATION AND ENFORCEMENT OF LAWS AND REGULATIONS
5. IGNORANCE OF CUSTOMARY PRACTICES
6. PUBLIC'S IGNORANCE OF RIGHTS AND OBLIGATIONS
7. LACK OF AGREEMENTS TO DEAL WITH INTERNATIONALLY SHARED WATER ISSUES

## EFFECTS OF INADEQUACY OF WATER LAWS AND REGULATIONS

### A. UNCERTAINTY

#### 1. IN IRRIGATION DEVELOPMENT

- as to investor's rights in pre-development water
- as to beneficiaries' rights in post-development water, and obligations to fellow users downstream
- as to irrigator's right in water saved through improvement in efficiency of use
- as to traditional users' post-development rights

#### 2. IN WASTEWATER RECLAMATION

- as to investor's rights in reclaimed wastewater
- as to investor's liability to general public re: public health risks
- as to investor's liability to downstream water users re: reduced return flows

### B. IMPEDIMENTS

#### 1. IN IRRIGATION DEVELOPMENT

- recovery of costs from beneficiaries impeded by legal status of water as a free good

#### 2. IN WATER SUPPLY & SANITATION DEVELOPMENT

- investor impeded by inability to secure financially viable water rights
- investor discouraged by legal requirements as to
  - rate structures
  - use of revenues

#### 3. IN WATER POLLUTION CONTROL

- un-implementability of ambitious goals and programmes
- un-enforceability of prohibitions and restrictions

#### 4. IN WATER LAW REFORM

- protection of vested rights

## ELEMENTS FOR INCLUSION IN CAPACITY-BUILDING STRATEGY

### OBJECTIVES

to build up institutional capacity at country level in six key areas

### KEY AREAS OF INTERVENTION

1. policy analysis
2. design and drafting of legislation
3. design of governmental institutions
4. implementation and enforcement
5. survey of customary practices
6. information gathering and dissemination, and awareness-raising

### MODES OF INTERVENTION

- a. provision of approaches, guidelines, concepts in Key Areas 2, 3, 6
- b. training in Key Areas 1, 4, 5