

ACBF Development Memoirs Series

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THE AFRICAN CAPACITY BUILDING FOUNDATION | FONDATION POUR LE RENFORCEMENT
DES CAPACITES EN AFRIQUE

*Building Sustainable Capacity for Poverty Reduction in Africa
Renforcer durablement les capacités pour réduire la pauvreté en Afrique*

The African Capacity Building Foundation: Rising to the Challenge of Capacity through a Unique and Innovative Framework

W. PAATII OFOSU-AMAAH

*Special Adviser to the President of the African
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THE ACBF DEVELOPMENT MEMOIRS SERIES

ACBF's Development Memoirs Series is a key instrument in the Foundation's knowledge management strategy aimed at harnessing the know-how and learned experiences of eminent senior policymakers and development managers. Central to the Series is the understanding that knowledge management tools and practices can be effectively employed to leverage both local and externally generated knowledge to bridge the knowledge gap between sub-Saharan Africa and the developed world.

The Series is generated through contributions from the ACBF Senior Policymakers and Development Managers Knowledge Sharing Program (SPM-KSP). It provides professional insights, reflections, skills, processes and experiences in the management of specific policies and programs, and offer case studies on processes, practices and experiences associated with specific policies and programs that have made measurable impact on the continent's development experience. The individual voices captured via the SPM-KSP collectively contribute to enhancing the effectiveness of the Foundation's operations, identifying learning and knowledge-sharing opportunities, and providing practitioners with guideposts to best practices in policymaking and development program management.

The Development Memoirs Series reflects the Foundation's vision and quest to actively embrace a diversity of knowledge sources including the ways gender, values, and culture influence the generation, sharing and application of knowledge. The Series speaks to ACBF's vision that the creation, sharing and deployment of cutting edge knowledge in an increasingly complex, competitive and changing world are imperative to Africa's current development efforts and future prospects.

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ABSTRACT

The birth of the African Capacity Building Foundation on February 9, 1991, was the culmination of intense efforts and groundbreaking commitment to capacity building in Africa by Africa Governors of the World Bank, the Bank itself and the co-founding Institutions – the African Development Bank and the United Nations Development Program, as well as numerous other individuals. The successes chalked by ACBF towards attainment of its objectives have vindicated those who held the view that establishing an indigenous African institution, with focus on and commitment to the course of Africa's development was the right course of action at the time. Twenty years on, ACBF has supported nearly 250 projects and programs in 44 African countries and committed more than US\$400 million to build capacity on the continent. Projects and programs supported by the Foundation have drawn synergy with and complemented countless other activities of various development institutions operating on the Continent. ACBF's support has been crucial in the building of development capacity in Africa, whether in ministries of finance and economic planning or central banks. For many among us who dedicated to this initiative and worked towards its realization, we remain humbled by the opportunity to witness the twentieth anniversary of ACBF.

Key Words: *Africa, capacity building, capacity deficit, Consultative Group, disbursements, experimental framework, funding agreement, headquarters agreement, institutional framework, legal architecture, memorandum of understanding, sponsoring agencies, sustainable growth.*

Acknowledgements: This paper is based on information primarily obtained courtesy of the Legal Vice Presidency of the World Bank as the World Bank was the lead promoter, in close collaboration with the African Development Bank and the United Nations Development Programme, in developing the ACBI. Some of the facts and information are based on notes taken by the writer and incidents recalled from memory. As such, the writer is responsible for any inaccuracies in the paper. The author is grateful for the constructive comments received from Mr. Philippe Benoit, Sector Manager in the World Bank who was the World Bank lawyer designated to work on ACBF matters after commencement of its operations. Ms. Frannie Léautier, Executive Secretary of ACBF, and her colleagues, Dr. Apollinaire Ndorukwigira, Mr. Dickson Antwi and Dr. Kobena Hanson also made useful comments which were taken into account in finalizing the paper. The views expressed in this paper do not necessarily reflect the views of the African Development Bank or the World Bank.

I. INTRODUCTION

The African Capacity Building Foundation (ACBF) through its Knowledge and Learning Department (K&L) is geared towards generating, sharing, disseminating and utilizing knowledge for capacity building and development management. The knowledge management program seeks to achieve four major objectives, amongst others. These are to:

- Enhance the performance of internal project and program operations based on best-practice methodologies, strategies and instruments;
- Foster the sharing of best practices in capacity building, in the design and execution of development policies and programs as well as in reform programs that are directed at strengthening the effectiveness of Africa's development process;
- Contribute to initiatives and mechanisms for extracting and sharing tacit knowledge for the benefit of Africa's development; and
- Enhance returns to, and the efficiency of, investments in capacity building.

One of the key instruments in the Foundation's knowledge management toolkit is the Senior Policymakers and Development Managers' Knowledge Sharing Program (SPM-KSP). The program provides a platform by which successful development practitioners (currently serving or on retirement, sabbatical, and leave of absence) who have made significant contributions to the development process in Africa or other developing regions – and are willing to document and share their memoirs – are targeted for extracting tacit knowledge for the benefit of future efforts at African development. SPM-KSP specifically targets very senior policymakers and development managers, including visiting academics and eminent guests to the Foundation. Participating policymakers and development managers are selectively drawn nationally, regionally,

continentally and globally from the public and private sectors; national, regional and continental institutions; international development agencies; civil society organizations; ACBF partner institutions; tertiary institutions of learning; research and specialized training institutes, among others.

In this edition, SPM-KSP features a special session with Mr. W. Paatii Ofosu-Amaah, Special Adviser to the President of the African Development Bank (AfDB), Tunis on the topic: **The African Capacity Building Foundation – Rising to the Challenge of Capacity through a Unique and Innovative Framework.**

II. PROFILE OF THE CONTRIBUTOR

Mr. W. Paatii OFOSU-AMAAH has been a Special Adviser to the President of the African Development Bank (AfDB) since September 2008.

Prior to joining AfDB, Mr. Ofosu-Amaah worked for 29 years at the World Bank leaving its service as Vice President and Corporate Secretary of the World Bank Group at the end of December 2007. Before joining the World Bank, he was an associate in the New York law firm of Davis Polk & Wardwell and worked as Legal Officer in the Food and Agriculture Organization of the United Nations.

During his 29 years at the World Bank, he held various senior positions, including, Legal Adviser, Environmental Affairs (1986-1991), Chief Counsel, Africa Division (1991-2000), Deputy General Counsel (2000-2003), and Acting Vice President and General Counsel (from January 2003). In August 2003, he was appointed Vice President and Corporate Secretary of the World Bank Group.

Mr. Ofosu-Amaah was the legal adviser of the task force that conceived of the African

Capacity Building Initiative. In that connection, he drafted and negotiated the Constitution of The African Capacity Building Foundation (ACBF), its Headquarters Agreement and all ancillary legal documentation. He was also the Temporary Secretary and Legal Counsel at ACBF's first Executive Board Meeting held in Sigtuna, Sweden.

He has published and written on a variety of subjects, including on legal aspects of combating corruption, project finance and privatization, governance-related issues, environment and natural resources management, capacity building, legal and judicial reform, particularly the experience in Africa and the role of developing countries in international negotiations. He was a Visiting Professor at Queen Mary College, London University (2004-2007).

He has law degrees from the University of Ghana and Harvard Law School.

III. THE ACBF STORY – A HISTORICAL PERSPECTIVE

On February 9, 2011, The African Capacity Building Foundation (ACBF) celebrated its 20th Anniversary in Kigali, Rwanda.

It has been a long journey from the late 1980s when there was an intense effort within the development financing institutions working in Africa, the bilateral agencies, foundations and most of all, African academics and intellectuals to establish a mechanism that would deal with one of the major impediments to Africa's development, namely, the paucity of capacity on the continent. Their deliberations led to the development of the African Capacity Building Initiative (ACBI),¹ a framework for collaboration between African countries and the

international development financing community. It also led to the establishment of a specialized institution, ACBF, as the main instrument for the implementation of the initiative. ACBF was charged, inter alia, with the responsibility of strengthening economic policy analysis and development management through technical and financial support for a variety of capacity-related areas.

Twenty years on, ACBF has supported nearly 250 projects and programs in 44 African countries and committed more than US\$400 million to build capacity on the continent.² Its projects and programs have complemented countless activities supported by a myriad of development assistance agencies and ACBF has leveraged its resources several fold. Its support has been crucial in the building of development capacity in Africa, whether in ministries of finance and economic planning or central banks. ACBF was also the first institution to provide guidance and support for the establishment of policy institutes and think tanks which now abound on the continent. Twenty years on, many of the tenets underlying the principles on which it was established still hold true. In particular, the centrality of capacity as a key factor in the development process in Africa continues unabated. It is still a severe binding constraint to development in Africa.

The purpose of this paper is to provide a historical perspective on the ACBI and the establishment of ACBF. The paper shares insights into the intricate and sometimes difficult deliberations surrounding its establishment and the role of various stakeholders. The paper therefore delves into the issues raised and analyzes the key, innovative and unique features of the framework and the legal architecture underlying the establishment of ACBF. It concludes with a short description of

¹The African Capacity Building Initiative: Towards Improved Policy Analysis and Development Management, The World Bank, January, 1991, hereinafter sometimes referred to as the "orange book ". See also, Meeting the Challenge: The African Capacity Building Initiative, edited by Alexander A. Kwabong and Barry Lesser, Report of a Roundtable, June 10-12, 1991.

²See ACBF website for details: www.acbf-pact.org.

some of the achievements of ACBF to date and the prospects for the future.

PUTTING CAPACITY BUILDING ON AFRICA'S DEVELOPMENT PARADIGM

At the end of the 1980s, a spate of intellectual analysis was carried out on how Africa's continuing economic crisis could be alleviated. These studies were carried out because inasmuch as development financing had been increasing over time, it had not translated into tangible economic progress across the continent. Indeed, most countries had faltered after an initial period of growth after independence in the 1960s and 1970s. As was noted by many scholars during this period, Africans were almost as poor as they were at the time of independence.

There were calls therefore on the continent, in multilateral institutions as well as the donor community at large, to identify what ailed the continent and what urgent measures were required to put Africa on the path to economic recovery and prosperity for its peoples. The seminal work during this period was the Report – Sub-Sahara Africa: From Crisis to Sustainable Growth – A Long-Term Perspective Study (LTPS)³ produced by the Africa Region of the World Bank.

The authoritativeness of the Report stemmed from the force of its conclusions and the highly consultative process that was followed in its

preparation, including discussions and seminars with scholars and experts on African development-related issues. The Report also took note of various other publications prepared and adopted by Africans at the time and during the period preceding its publication. These reports included declarations from African States, and equally authoritative analysis carried out by other international institutions, including, in particular, by the United Nations Economic Commission for Africa (UNECA) and the African Development Bank (AfDB).⁴

After distilling the lessons from the two decades after independence, the LTPS proposed a strategy for sustainable and equitable growth which had as its bedrock, two notions which have become important and commonplace in development dialogue for the last 20 years, namely, “governance” and “capacity building.”⁵ The LTPS suggested seven main interconnected themes to shape Africa's strategic agenda for the 1990s, building on the emerging consensus. These themes included, developing people and building capacity in all its facets of the economy– education and training particularly in higher education research, reform of state enterprises, supporting nongovernmental entities, overhauling public administration, strengthening government policy analysis and ownership of development programs and removing legal barriers to enhance the role of women in the development process.⁶

³ Published in November 1989.

⁴ See in this connection, the Lagos Plan of Action adopted by the African Governments in 1980, the African Program of Action presented by African countries to the United Nations in 1986, the Abuja Declaration in 1987, the Khartoum Declaration of 1988, and the equally authoritative analysis and publication of the United Nations Economic Commission for Africa- Africa Alternate Framework to Structural Adjustment Programmes - in 1989. The African Development Report published in the same year by the African Development Bank also contained analysis and recommendations on the way forward for Africa.

⁵ As part of the consultative process noted above, there were several seminars held across Africa by the LTPS team including a brainstorming session to exchange views on Africa's development problem in 1988. Sub-Saharan Africa's limited capacity for policy analysis and economic management was identified as a primary contributing factor to the region's inability to adjust to the economic dislocations of the 1970's in a focus group meeting in Kenya. It was emphasized that Africa needed to build the necessary capacity in order to develop. These observations fed into the LTPS. The LTPS also gave birth to the Global Coalition for Africa to facilitate dialogue and to provide a forum in which African leaders in all sectors whether public or private, intellectuals and the key partners and stakeholders, could agree on general strategies that would provide broad guidance for the design of appropriate country programs and action plans.

⁶ Ibid at pp. 189-192

In terms of capacity building, the LTPS underscored the need to substantially enhance the limited capacity for policy analysis and economic management and presented its crucial importance to Africa's development as follows:⁷

"An enabling environment creates the conditions for higher productivity, but growth rates will be raised and sustained only if African capacities are much enhanced. Capacity-building has three distinct elements:

- *Human development, especially the provision of basic health, education, nutrition and technical skills,*
- *The restructuring of many public and private institutions to create a context in which skilled workers can function effectively,*
- *Political leadership that understands that institutions are fragile entities, painstakingly built up, easily destroyed, and therefore requiring nurturing.*

Often African countries have been lacking in all three elements. Too frequently national institutions have become politicized and hence used for narrow sectional ends rather than to achieve national objectives."

In summing up the report in his foreword, Barber Conable, then President of the World Bank, wrote inter alia, as follows:

"A central theme of the report is that although sound macroeconomic policies and an efficient infrastructure are essential to provide an enabling environment for the productive use of resources, they are not sufficient to transform the structure of African economies. At the same time, major efforts are needed to build African capacities – to produce a better trained and

*more healthy populations and to greatly strengthen the institutional framework within which development can take place."*⁸

Thus, while all major economic and other works on Africa diagnosed the problems in Africa in a similar vein, it is perhaps accurate to write that the LTPS was one of the first to underscore the importance of capacity building and to introduce that notion into the lexicon of development practitioners.

This call for improving significantly policy analysis and technological and managerial leadership was also echoed by the Independent Group on Financial Flows to Developing Countries (also known as the Helmut Schmidt Group) which called for the establishment of a \$1 billion endowment for sustainable financing of improved African capacity. This call was also echoed in the conclusions of the African Development Bank's Committee of Ten.⁹

FROM CONCEPT TO REALITY: THE INITIAL CONSULTATIONS

With the acceptance of the importance of dealing with the issue of capacity building, the World Bank and a variety of stakeholders in the development business set in motion consultations on how this issue should be addressed.

In this connection, great interest in Africa's capacity deficit was also shown by the leading American Foundations which had invested time and funding in education across the continent during the post independence period. Chief among them was the Rockefeller Foundation¹⁰ which decided to take a leader-

⁷ LTPS, at p. 54.

⁸ LTPS, at p. xii.

⁹ Schmidt Group Report published in 1989; Committee of Ten Report published during the 25th Anniversary celebrations of AfDB in Abuja, Nigeria.

¹⁰ From 1961 through 1974, of the \$125 million the Foundation spent on the University Development Program (an equivalent of \$550 million), more than \$40 million was granted to Africa alone, and over 500 fellowships were awarded for Ph. D. studies across the continent. (Source: Rockefeller Foundation's web site).

ship role through organizing consultative meetings among African intellectuals and development managers, policy makers and staff of the international financial institutions working in Africa, to discuss the effectiveness and usefulness of the numerous investments which had been made in Africa since the early 1960s. A key meeting was held in New York in 1989. It was intended to share lessons of experience drawn from the assistance programs supported by the various foundations and other institutions to that date.

The major conclusion emanating from the meeting and subsequent discussions was that capacity building was a critical element in the development paradigm in Africa and a special initiative was required to deal with it.¹¹ Representatives of the World Bank's Africa Region participated in this meeting. Thereafter, they took the conclusions into account in their work towards the development of a special initiative which would translate into practical reality the elements required in a focused and consistent manner to deal with the capacity deficit on the continent.

Another important consultation which fed directly into the evolution of the initiative was convened at the Lester Pearson Institute of Dalhousie University, under the leadership of Professor Kwapong.¹² The underlying premise for this gathering was that:

"First, Africa itself must have a major role in the decisions that affect its future; solutions cannot be imposed unilaterally from outside. Second, important as it may be to respond to immediate

*problems (for example famine and drought) or to find a way to deal with balance of payment deficits and debt obligations in the short run, such responses did not represent permanent or long-term solutions."*¹³

The roundtable addressed five major issues of relevance to the development paradigm in Africa. These included economic management, policy making and analysis, universities and scientific research, the brain drain and utilization of human capital, the political environment and responsibilities of governments and international cooperation. More importantly, the roundtable examined the objectives, directions and strategies of an African capacity building initiative which was being explored jointly by the African Development Bank (AfDB), the United Nations Development Programme (UNDP) and the World Bank.¹⁴

In a presentation made during the roundtable by the late Dr. Dunstan Wai from the Africa Region of the Bank, he summarized the objectives of the initiative being conceived of as follows:¹⁵

- "1. To produce on a long-term basis a critical mass of professional Africans in policy analysis and development management;*
- 2. To ensure effective utilization of existing trained and skilled manpower;*
- 3. To strengthen, rehabilitate, existing institutes or establish new institutions (but if possible to focus on strengthening existing institutions) for capacity building."*

Edward "Kim" Jaycox, then Vice President of the Africa Region of the Bank, who also partici-

¹¹ Annual Report of Rockefeller Foundation, 1989.

¹² September 18-19, 1989 on "The Challenges of Capacity Building and Human Resource Development in Africa". This roundtable was attended by notable African scholars and academics, representatives of development financing institutions including, UNDP and bilateral institutions such as the Canadian International Development Agency. The Report of the meeting was published as "Capacity Building and Human Resource Development in Africa", edited by Alexander A. Kwapong and Barry Lesser, The Lester Pearson Institute for International Development, 1990.

¹³ Ibid. at p. ix (Foreword by Dr. Howard C. Clark, President and Vice Chancellor, Dalhousie University).

¹⁴ Ibid, Note 12.

¹⁵ Early version of a paper "Framework for Capacity Building in Policy Analysis and Economic Management in Sub-Saharan Africa" (Washington: World Bank Africa Region, May 1990).

pated in the roundtable, emphasized the critical importance of building a cadre of top policy analysts and economic managers to exert more control over economic events, a phenomenon which had served countries in Asia and Latin America well. He laid out the vision for the initiative as follows:

"The goal, the vision, can be stated relatively simply: 10, 15, or 20 years from now, every Sub-Saharan African country could have its own cadre of very good policy analysts and economic managers – and Africa could have a cluster of first-class training and management institutions. There will be much less need for technical assistance and expatriate advisers in these areas. More importantly, Sub-Saharan Africa will be in more control of its economic destiny, less vulnerable to external shocks and more competitive in the global market place... Africa must have its capacities. The initiative that we hope will emerge in the 1990s – and be fully supported by Africans and donors – might be seen as the first shout across the bow... Capacity building in Sub-Saharan Africa is the most urgent development challenge facing the region – and all friends of the Region. It is the challenge of the 1990s, the challenge of the decade."¹⁶

The conclusion of the roundtable was that the objectives presented and the main pillars and framework for the initiative were right on track and participants urged African Governments to follow up on the momentum being generated by all the consultations which had taken place to that date.¹⁷

These conclusions gave impetus to the African Governments to clamor for support and high priority to be given to the capacity building initiative which was being developed. Through the Africa Governors of the World Bank, they placed the issue and the need for an appropriate initiative high on the agenda of the regular

dialog between them and the President of the World Bank during the 1989 and 1990 World Bank/International Monetary Fund Annual Meetings.

The initiative, as outlined and found worthwhile to be pursued in Dalhousie, was also endorsed in a consultation held in Nairobi by the so-called Council of African Advisers in the Africa Region of the World Bank, a group of 16 distinguished African and non-African professionals with whom the Vice President for the Africa of the World Bank Region consulted from time to time on priority issues affecting the continent and on the feasibility and appropriateness of Bank-supported programs.

In addition to these consultations, various contacts were made by World Bank staff¹⁸ with the main donor organizations with principal interest and programs in Africa, including the DAC/OECD, the German Aid Agency (GTZ), the British Overseas Development Agency (ODA, now DFID), the Commonwealth Secretariat, and the French Ministry of Development and Cooperation. Further consultations were held throughout the period in Africa and all these consultations and those with the potential donors' yielded consensus on the importance of dealing with the capacity deficit in Africa.

MOMENTUM TOWARDS THE ACBI: SOME KEY MESSAGES AND ISSUES

The consultative processes brought to light various insights, messages, and issues which guided the evolution of the African capacity building initiative. These included the fact that:

- a strictly macro-economic focus for the initiative would be too narrow and high priority must be given to other key sectoral issues from an integrative and multidisciplinary perspective;

¹⁶ Ibid., Note 12, at pp. 115-116. This statement has been quoted in full because it gave the impetus for much of the work which was done in the World Bank on this issue at the time.

¹⁷ Ibid., Note 12 at p. 22.

¹⁸ Notes and memoranda issued by Ms. Myrna Alexander, Division Chief of the Technical Department of the Africa Region of the World Bank who led the team carrying out the consultations.

- an initiative with a potential range of beneficiaries, including policy units and private sector entities, would be too unwieldy;
- the support to be given under the initiative should be demand rather than supply driven;
- addressing the problems of the public sector management should be a high priority having regard to the structural adjustment programs being implemented in many African countries during this period;
- the initiative must promote coordination, collaboration and selectivity, among development partners;
- African governments must be in the driver's seat and their views should matter and be infused in the process to promote ownership; and
- the initiative should not be the one and only framework for dealing with this issue as some donor governments, such as the French, were considering an endowment fund, to support research for the social and economic development of Francophone Africa.¹⁹

An additional and key point made by many donors was that the World Bank itself should make a significant financial contribution to the initiative. Also, many donor representatives favored an institutional design which is based on the administrative framework and processes governing the much-tested Consultative Group on International Agricultural Research (CGIAR).

THE EVOLVING ACBI: DEBATES WITHIN THE WORLD BANK

The discussions within the World Bank deserve special mention in light of its lead role in the development of the initiative. Indeed, the views expressed within the Bank, whether on

substantive issues or on form, had a considerable impact on the objectives of the initiative and institutional framework which was eventually agreed. For instance, while there was broad consensus within the Bank on the need and usefulness of tackling the capacity building conundrum as a priority issue, including how best to utilize already existing technical assistance, there was a high degree of skepticism expressed in some quarters at the Bank as to whether this issue should be dealt with on a regional basis as proposed. This view was based on the fact that most of the problems encountered were country specific and therefore merited specific and targeted solutions. The promoters of the initiative, the Africa Region's task force, however countered that African economies and countries were by and large relatively small and thus, one needed to have critical mass and to develop institutions at the regional level which will cater to all the countries. In this connection, it was noted that there was no need to revitalize universities in all countries; rather, centers of excellence can be established in particular fields and disciplines to cater for specific sub regions.

How the proposed initiative would be financed and administered was also a major issue. The proposal at that time was to utilize the "consultative group" (CG) model which had been successful in agricultural research. This would have entailed an administrative structure within the World Bank to deal with fund raising and grant proposal review, with a governance body which would be responsible for approving project proposals presented to them by a secretariat within the Bank. The proposal to utilize the CG framework was questioned as some believed that it would not be cost-effective. It was also noted that a heavily-staffed secretariat would have to be established as the proposed initiative would involve reviews of a large number of grant proposals having regard to the regional dimension.

¹⁹ Notes from the author's files and internal memoranda.

There were also some doubts expressed about the establishment of a new institution. It was argued that a significant amount of money was being spent on technical assistance in Africa and what was most needed was better coordination among the development partners to ensure that the programs were effectively coordinated and the desired results achieved on the ground. It was noted that a new institution would have difficulty playing this coordination role especially, among entities which had longstanding and ongoing programs on the continent.

There was a discussion for the first time about conceiving the initiative in a manner which would ensure a significant role by Africans in decision making. This was based on the agreed principle flowing from the consultations that any initiative should have a strong African perspective and ownership. Associated with this view was that any institutional framework established under the initiative should be located in an African country. There was also a suggestion made regarding the location of the administrative structure for the initiative in Abidjan close to the African Development Bank. However, during the consultative process, several of the potential donors had indicated their unwillingness to make long-standing commitments to an initiative managed by AfDB in light of its own internal organizational issues at the time. The President of the World Bank, Barber Conable, who was increasingly supportive of the initiative, expressed the view that, AfDB could take a leading role but in a progressive manner and insisted that the World Bank staff should work closely with the AfDB staff in the further development of the initiative. It should also be noted that there were suggestions also made that the World Bank should not have a heavy presence in the

implementation of the initiative. Additionally, some argued that the initiative would be doomed if the World Bank did not make a substantial financial contribution to the proposed trust fund.²⁰

These discussions led to a series of drafting proposals for the initiative which eventually culminated in the so-called "orange book", the sourcebook for the African Capacity Building Initiative (ACBI).²¹

FINAL CONSENSUS ON THE ACBI

All through the process, the senior management of the World Bank emphasized the absolute necessity for intensive collaboration on the fast developing initiative with the other sponsoring agencies. Several meetings were therefore held with relevant staff of the AfDB and UNDP, to obtain buy-in and ownership of the proposed initiative. Each institution went through its own internal processes to obtain the required senior management approvals. For the World Bank, the proposed initiative as agreed with the AfDB and UNDP, was further reviewed during January, 1990 by its Operations Committee and President's Council. The proposed initiative, as endorsed by the Bank's senior management, was placed before the World Bank Executive Directors which approved it in April 1990.²²

Following further consultations with the AfDB and UNDP and the receipt of the required approval within those institutions, the World Bank, jointly with the AfDB and UNDP, convened a donor's meeting in Paris on June 5, 1990 in conjunction with a meeting of the Special Program for Africa (SPA).²³ This donors' meeting was intended to elicit support for the

²⁰ Notes from author's files, based on records and summaries of meetings at the World Bank during the period.

²¹ Ibid., Note 1.

²² Summary of discussions at the Meeting of the Executive Directors of the Bank and IDA, April, 26, 1990.

²³ The Special Program of Assistance for Africa (SPA) was established in 1987 as a response to the economic crises of the debt-distressed countries in Sub-Saharan Africa. An informal association of donors, the SPA was intended to support the countries' structural adjustment programs with the International Development Association and the International Monetary Fund.

initiative, obtain financial commitments and pledges to the proposed ACB Fund and to exchange views on the proposed program components and implementation arrangements. The documents placed before the meeting included a draft of the proposals for the ACBI as finally agreed by the three sponsoring agencies. It was accompanied by a draft funding agreement and a draft institutional framework.

The ACBI framework document reviewed the evolution of technical assistance in Africa and stated as its overarching and essential goal, the need to build professional policy analysis and development management skills and institutions and to enhance utilization of already existing resources. It also underscored the necessity for full and active participation of Africans in all dimensions of the framework dealing with the issue.

The salient point of the funding agreement was that the contributions received from donors will be placed in a proposed ACB Fund to be established and administered by the World Bank, acting as administrator. This was intended to give comfort to the potential donors who had indicated consistently throughout the consultative process that the funds must be held in trust and administered by the World Bank especially since the initiative would entail many novel administrative arrangements. Disbursements from the ACB Fund will then be made on the basis of written requests from the administrative agency charged with implementing the initiative. These would be carefully reviewed by the Bank. As potential donors had also indicated in advance that their contributions should finance programs rather than administrative costs, the document proposed that a separate account would be established to finance its administrative costs with UNDP's contribution used primarily for this purpose.

The institutional framework paper outlined a comprehensive work program for a Steering Committee proposed to be established after the pledging session. This Steering Committee was to be composed of representatives of those donors who made firm financial commitments to the proposed ACB Fund and the Sponsoring Agencies. The main responsibility of the Steering Committee was to deliberate further on the manner in which the initiative would be implemented. The Steering Committee was charged with determining the mandate, structure and operational framework of the entity which will implement the initiative. In light of the strong advice given during the consultations, it was agreed in principle that the entity should be autonomous and international in character and be located in an African country, subject to negotiations and agreement on an appropriate headquarters agreement.

The meeting broadly endorsed the initiative indicating that it was an "innovative, flexible and experimental framework." The donors and international institutions represented at the meeting noted that current efforts at capacity building had not yielded satisfactory results. It was therefore important to place emphasis on improved coordination among donors and to promote stronger African participation in the process. All recognized that human resource development and institution-building required efforts over the long-term. Donors requested further clarification and elaboration of various elements of the draft initiative, including, the level of demand by African governments and the modalities and organizational structure of the initiative. The pledging session at the meeting yielded an aggregate amount equivalent to US\$55 million from five countries (the United States, Sweden, Japan, Austria and Canada) and contributions from the Sponsoring Agencies. A few States indicated their willingness to pledge at a later date.

The United States and Sweden also agreed to co-finance the technical assistance programs with those of the ACBI entity when established, with as much as the equivalent of US\$40 million.²⁴

The meeting established a Steering Committee to prepare, inter alia, all the legal documentation required, including the ACB Fund Agreement, the constitution of the entity which would be given the responsibility of implementing the initiative, eligibility criteria for grants, and all other operating arrangements required for the implementation of the ACBI. A World Bank-wide task force was designated to serve as the Secretariat of the Steering Committee.

A NEW INSTITUTION OR NOT?

One of the key issues which was debated during the early consultations, including, the discussions at the World Bank, related to whether or not a new and specialized institution should be established to implement the ACBI. Indeed, there was great skepticism for the establishment of new institutions in the international scene during this period. New international institutions were created only when there were overwhelming reasons for doing so.

Reference was made in this connection to the example of the International Fund for Agricultural Development, one of the last specialized agencies established under the auspices of the United Nations. There were similar debates among the interested stakeholders before agreement was reached on its establishment. In that case, it was a strongly held position by several donor countries that a new institution to finance agricultural develop-

ment was not necessary since financial support to recipient countries could be given by the World Bank and the regional development banks, UNDP or the Food and Agricultural Organization of the United Nations (FAO) or a combination of them. Also, while the DAC/OECD countries were willing to pass monies through the World Bank taking into account their majority shareholding, the recipient developing countries preferred the UN system because of its one-country-one vote system. On the other hand, the newly-rich oil exporting countries belonging to the OPEC Group, which promised significant financial contributions towards investments in agriculture at the 1975 World Food Conference, proposed a new institution in order to obtain significant shareholding and influence in the entity.²⁵ The prospect of obtaining more financing therefore overcame any arguments advanced against the establishment of IFAD.

In the case of the ACBF, the considerations that swayed the thinking of the decision-makers on the necessity of a new institution stemmed from the following.

Principally, it was felt that past and current efforts aimed at capacity building in Africa had not produced the desired results even though this issue was of considerable importance in the development paradigm of Africa. It was also felt that the requirements of agencies supporting capacity building in Africa including the existing development finance institutions, did not offer the opportunity for the kind of effective and flexible partnership between Africans and donors that was necessary to deal appropriately and adequately with the critical issues surrounding capacity building. In these circumstances, placing the ACBI institution within the administrative structure of the World Bank or UNDP was ruled out. Finally,

²⁴ Press Release titled, "Donors Support Capacity Building in Africa", June 5, 1990, Paris. Countries and institutions represented at the meeting included: Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, Norway, Spain, Switzerland, the United States and African Development Bank, the Commission of European Communities, IFAD, IMF, UNDP and the World Bank.

²⁵ For an interesting discussion of the negotiations, see P. C. Szasz, 'Establishment of the International Fund for Agricultural Development in The World Bank, International Financial Institutions, and the Development of International Law,' Ed. E. B. Weiss, A. R. Sureda and I. Boisson de Chazournes.

even though the African Development Bank was considered perhaps more suitable because of its African ownership and location close to the countries, it had ongoing organizational issues.

The most persuasive argument was that a successful ACBI required as a prerequisite, an institutional framework which would involve strong African representation. More importantly, it should offer a fresh outlook that would rise above regional and international politics as well as institutional jealousies. Maximum African participation was viewed as a key sine qua non for the institutional arrangements. It was envisaged that strong African participation would help to ensure that donors and the institutions received continuous African input needed for the programs to be supported. This would assure substantial African ownership of the programs. Finally, a key precondition to success was that the institutional structure should be autonomous and independent, if it is to play a coordinating role and to become a platform for partnership among African countries, the donor community and the Sponsoring Agencies. None of the Sponsoring Agencies could meet these criteria.

These views coincided with those expressed by the African stakeholders who had been consulted during the process of developing the ACBI concept in Kenya, at the Annual Meetings of the World Bank and the IMF and in seminars in major universities across Africa. While recognizing the usefulness and assistance that would be provided by the Sponsoring Agencies, these senior African officials and experts emphasized throughout the consultative process that the institutional framework should be innovative, flexible and experimental. The framework should however be complementary to the programs supported by the

development financing institutions and the donor community. As such, only an independent and autonomous institution could ensure effective coordination that was required for the successful implementation of the initiative. Thus, even though a framework could be developed and operated within any of the three Sponsoring Agencies, it would not have these key characteristics. Their expressed and clear preference was therefore tilted towards the establishment of a new institution if consensus could be reached. They warned however that appropriate safeguards should be considered to protect the new entity from domination by the Sponsoring Agencies.

DOCUMENTATION REQUIRED FOR IMPLEMENTATION OF THE ACBI

Special documentation had to be prepared in light of the unique nature of the ACBI. It was one of the first times that the international community considered giving significant responsibility to Africans to manage an international institution which was supported in large part by donor resources. The Steering Committee had the challenge therefore of defining instruments which will permit donors and Africans to be full partners but with operational programs defined and implemented by Africans. The Committee met in two formal sessions in Washington and Paris.²⁶ In between, bilateral discussions were held with members of the Committee on the documents (prepared by its Secretariat, primarily staff drawn from the World Bank). The documents required included, an agreement or a memorandum of understanding establishing a trust fund (the funding agreement) and an agreement creating the proposed independent entity.

²⁶ October and December, 1990.

THE FUNDING AGREEMENT

First and foremost, there was need to establish a framework for receiving the donor funding and the contributions of the Sponsoring Agencies. This could be easily accomplished through the trust fund institutional arrangements which had become almost standard form in the World Bank by the end of the 1980s. The objective was to secure aggregate commitments in an amount sufficient for the initiative to begin meaningful operations over a proposed four year pilot phase.

The funding agreement, the Memorandum of Understanding²⁷ eventually dated December 7, 1990, was entered into among all the contributors to the ACB Fund. The contributions were made by States represented principally by their development aid agencies. As is the practice during resource mobilization efforts of development finance institutions, some of the contributors conditioned their pledges on legislative approval and the fulfillment of all necessary governmental requirements. In the case of the Sponsoring Agencies, approval had to be obtained from their relevant governing bodies. The Memorandum of Understanding followed the World Bank's standard form administration agreement except that, it contained three unusual provisions necessitated by the unique nature of the ACBI.

First, it provided that the UNDP contribution as contemplated in the earlier discussions, would be used exclusively to finance the administrative costs of the implementation of the initiative and would be processed through the usual

format of UNDP project implementation arrangements, with the World Bank as Executing Agency.²⁸ This was agreed in light of the fact that ACBF would be a new entity with no track record in project implementation. A more important practical and pragmatic consideration was that, having a UNDP Project enabled the initial staff of ACBF to be retained as consultants of the World Bank with fixed term contracts under policies and procedures which were well known. It also assisted in the reduction of the costs of ACBF's administration, a matter of great concern to the donors.²⁹

A second important provision related to disbursement of the monies from the ACB Fund by the World Bank, as administrator and trustee. Disbursements were to be made to, or on, the order of ACBF, on the basis of written applications by ACBF. A supplemental arrangement was subsequently entered into between the World Bank and ACBF whereby a revolving account procedure would be utilized based on annual budgets approved by the Executive Board of ACBF.³⁰

A third and most important provision is to be found in paragraph 18 of the Memorandum of Understanding which provides an express request to the Sponsoring Agencies for action with respect to the establishment of ACBF. This provision read as follows:

"The Donors (excluding the Sponsoring Agencies) request the Sponsoring Agencies, on behalf of themselves and the other Donors to take all action necessary for the establishment of an autonomous entity possessing full juridical

²⁷ Initially, the Memorandum of Understanding was drafted in the form of an agreement. Some donors however indicated that they would have a long parliamentary process to follow in light of their practices but had no issue with a memorandum of understanding which has been used consistently in funding agreements between aid agencies and States and had the same effect from a legal perspective. The essential difference as one State indicated is that with an MOU, "either party may withdraw at any time without penalty" (comments of ODA, 19 October, 1990).

²⁸ Para 11 (k) of the Memorandum of Understanding dated December 7, 1990.

²⁹ Preliminary activities for ACBF started as soon as the first meeting of the Executive Board in Sigtuna, Sweden in February, 1991, during which the Executive Board approved an implementation agreement between ACBF and the World Bank in September, 1991. This was followed up by a Memorandum of Understanding between ACBF and UNDP during 1992.

³⁰ Exchange of Letters dated April 12, 1991, on Disbursement of Proceeds from the African Capacity Building Fund.

personality to be known as International Foundation for Building African Capacities (IFBAC) [later changed to ACBF as explained below] that will have the primary responsibility for carrying out activities designed to achieve the objectives of the ACBI."

THE LEGAL ARCHITECTURE FOR ESTABLISHING ACBF

As the late Paul Szasz, the Legal Adviser of the Meeting of Interested Parties of the Plenipotentiary Conference on the Establishment of the International Fund for Agricultural Development (IFAD), its Preparatory Commission and the inaugural meeting of its Board of Governors and Executive Board, has stated:

*"The usual way in which international organizations are established is to start with a plan to do something, embody that plan in an institutional framework and then find some means to finance it. IFAD was started the other way around – with advance prospects of a medium-sized pot of money that could be spent only if an agreement was reached on establishing an appropriate institution..."*³¹

ACBF started in the usual way. It started with ideas which were debated over a two-year period focusing on how an issue of crucial importance to Africa's development could be addressed. Once broad consensus was reached on the four corners of a framework to deal with the issue, a fund raising campaign was initiated. The idea was to obtain critical and required seed money to jump-start the pilot phase of the initiative. Thereafter, following an evaluation of the programs implemented during the initial phase and the experi-

ence garnered, replenishments will be sought periodically. For the initiators, the task at hand was to devise a framework which would satisfy the initial prospective donors and also entice others who were reluctant about the establishment of a new institution.

Early in the preparation of the content of the initiative and in anticipation of its approval and support, some legal analysis and work was done just in case the initiative garnered the support of the international community. A legal consultant had even proposed a structure for the institution which would implement the initiative being considered. The structure involved a partnership between the World Bank and UNDP consisting of (i) a trust fund to be established within UNDP or the UN Secretariat (ii) a secretariat within the World Bank which would be autonomous in terms of management, policy formulation and operations, and dependent on the World Bank solely for administrative assistance and logistics; and (iii) a consortium of the donors to the trust fund meeting periodically for donor coordination, pledging and policy/programming. In addition, there could be a special council of advisers to allow non-donors to participate in the work and programs supported by the trust fund."³²

This earlier proposal was not much different from the legal frameworks for two existing World Bank programs which were reviewed during the consultations, in light of the expressed interest of all stakeholders that the selected mechanism should commence operations as soon as practicable. The first was the African Project Development Facility (APDF)³³ which is funded by several UN agencies and several bilateral aid agencies. The other frameworks were those related to the

³¹ P. Szasz, Establishment of the International Fund for Agricultural Development in the World Bank, International Financial Institutions, and the Development of International Law (A Symposium held in honor of Dr. Ibrahim F.I. Shihata) edited by E. Weiss, A. Rigo and L. Boisson de Chazowrnes (1999).

³² Report on Legal/Institutional Issues of the Building Capacities in Economic Management and Policy Analysis Report, Schott, Cooney, and Findakly, March 10, 1989.

³³ APDF is a UNDP technical assistance project with IFC as the executing Agency which has an Advisory Board consisting of representatives drawn from the private sector both from Africa, participating donor agencies as well as the sponsoring institutions. The Advisory Board provides a forum for the review of its programs and policies.

health programs for research sponsored by the World Bank, UNDP and WHO.³⁴

These three frameworks were discarded for various reasons mainly associated with the role that the Sponsoring Agencies would play in implementation. The consultant's proposal was deemed to be too complex. In addition, that proposal and the others as well, had a fatal drawback. Under those structures, the Sponsoring Agencies would play a direct and significant role in the programming and implementation activities. The donors as well as other stakeholders objected to this. The possible interference by the Sponsoring Agencies at both the strategic and implementation levels was found to be inconsistent with the unique character, flexibility, openness and innovation, notions that were agreed as almost immutable for the ACBI institutional framework. The legal advisers to the Secretariat therefore looked elsewhere for a framework which could be tailored to meet the requirements specified by the Steering Committee. One very clear advice and admonition from the Steering Committee was however that the entity should be established as expeditiously as possible and on a sound legal basis.

ATREATY OR NOT?

Generally speaking, international organizations are established by treaty entered into by sovereign states. While this is the case in respect of many international organizations, there have also been over the years growing treaty making activities leading to the establishment of institutions with international legal character by the UN, certain of its subsidiary organs, notably UNICEF, UNDP, and UNIDO. Its specialized agencies, such as FAO and the

World Bank have also had their share of treaty making. For instance, during the 1970s and 1980s, the World Bank and UNDP, under the umbrella of the CGIAR, entered into agreements which gave a few of the institutes operating under that framework, "international status." The *Centro Internacional de Mejoramiento de Maiz y Trigo*, (CIMMT) and the *Centro Internacional de Agricultura Tropical* (CIAT), formerly private non-profit organizations, were converted to institutions which were described by their respective constitutions as "non-profit autonomous international agencies," with clear understandings that the Co-Sponsors "shall not be liable, individually or collectively, for any debts, liabilities of obligations" of the two entities. These arrangements allowed the World Bank and UNDP to further their respective developmental objectives.

Also, well before the establishment of these institutions, the World Bank and FAO had in 1972 entered into an agreement establishing the International Crops Research Institute for the Semi-Arid Tropics (ICRISAT) and in 1976, those two institutions joined by the International Development Research Center had established the International Center for Agricultural Research in the Dry Areas (ICARDA). All these centers had an international character stemming from the nature of their functions and the sources of their funding.

In addition, other institutions such as the Inter-Parliamentary Union (IPU), which traces its origins as far back as 1894, and the International Red Cross claimed international recognition. The Statutes of the IPU characterize it as an international organization and it has achieved recognition by some States, namely, the United States and Switzerland as an

³⁴The Special Programme of Research, Development and Research Training in Human Reproduction and the Special Programme for Research and Training in tropical Diseases. In both cases and, in particular, the funds contributed for programs were deposited in a fund held in trust and administered by the World Bank with the World Health Organization (WHO) as the Executing Agency. Both also had administrative structures consisting of entities which could provide technical advice as well as approve the programs to be financed by the trust funds.

international organization.³⁵ Another point of reference was the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations which had been adopted in 1986.³⁶ This Convention, while not in force, was gaining acceptance as applicable law in treaty making power of international organizations. In particular, Article 6 of the Convention provided that "the capacity of an international organization to conclude treaties is governed by the rules of that organization." More importantly, the convention uses a functional approach and gives room to international organizations to develop their practices in pursuing their purposes and objectives.³⁷

A key consideration therefore for the legal team in conceiving the institutional structure for the ACBI, was whether the Sponsoring Agencies had the legal capacity to conclude treaties by virtue of the rules of their respective constituent instruments. The practice described above convinced the legal team that the proposed ACBI entity can be established and can act as a legitimate autonomous international organization without being created by treaties executed by States. It was also considered important and critical as part of the legal basis for this approach to obtain delegated authority from the donor States to carry out the ACBI, including taking all actions required for its implementation. Broad acceptance and endorsement of the decision to establish the new institution was an important component of this approach. This was the main purpose for inserting paragraph 18 into the Memorandum of Understanding and this was specifically called to the attention of donor representatives. Through its application, the donors

requested the Sponsoring agencies to take all action necessary to establish an entity possessing full juridical personality and being international in character, to implement the objectives of the ACBI. This provision is entirely consistent with the general definition of delegation which entails the grant of an authority from the principal to an agent that empowers the agent to act in accordance with the request. It also bears reminding that a special role had been created for the donor States to participate in decision making through their representation on the proposed Board of Governors and the selection of the members of the Executive Board.

CRUCIAL DISCUSSIONS WITH THE UNITED NATIONS LEGAL OFFICE

This express request in the Memorandum of Understanding became an important consideration in light of the position taken by the United Nations Legal Counsel late in the process of negotiations of the legal documentation. UNDP, in seeking legal advice and clearance to proceed with the finalization and signing of the Agreement to which would be attached the Constitution of ACBF submitted the drafts to the UN Legal Office. The UN Legal Office subsequently raised issues concerning the legality of the proposed legal architecture for the establishment of IFBAC, the then proposed name of the entity designated to implement the ACBI. The issues raised included, whether international organizations by themselves can establish an autonomous international institution and whether such an institution can have international legal personality. These questions coming as they did at the late hour, could

³⁵ See document from 186th Governing Council. It has had legal personality that has allowed it to act on the international plane. It has received grants, implements projects under formal agreements and has "Observer" Status at the United Nations. There are also a number of other entities which are accorded recognition as international institutions such as INTERPOL, and even the Red Cross.

³⁶ See Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, and 18 February-21 March 1986. While this Treaty was not yet in force, it contributed greatly to the scholarship on the power and ability of international organization to enter into treaties among themselves or with States.

³⁷ Note by Professor Karl Zemanek, University of Vienna providing the historical context, negotiating history and key provisions of the Convention in the Audiovisual Library of International Law on the Convention, at p.2.

potentially have dealt a serious blow to deliberations which had taken place over the previous eighteen months.

The issues surrounding the legal architecture were therefore debated fully at a meeting at the United Nations in New York and in a subsequent meeting at the World Bank in Washington D.C.³⁸ First and foremost, it was pointed out to the UN lawyers that this was not the first time international organizations were proposing by themselves to establish an entity having a separate legal personality. There were several examples in the international sphere.³⁹ Second, this approach had been proposed based on a specific request and, by implication, consent of States as indicated in the clear and unambiguous provision of the Memorandum of Understanding. Indeed, it was pointed out that, as the late Professor Schermers, then one of the world authorities on the law of international organizations had written, "normally, new subjects of international law can only be created by, or at least with the consent of States."⁴⁰ Implied consent had been received by the States as described above.

On whether the institution could attain international personality, it was explained that there were provisions in the draft Constitution requiring the entity to enter into a headquarters agreement with the State in which its headquarters will be located. Further, through its agreements with beneficiary countries, it would seek to be recognized as an international institution. This would be achieved primarily through specific provisions on recognition and privileges and immunities in such agreements. Other ancillary matters discussed included those relating to the weighted voting system proposed in the draft Constitution.

A few weeks after the meeting, the UN Legal Counsel in a memorandum to UNDP copied to the World Bank,⁴¹ concluded that UNDP could continue to participate in the conclusion of the Agreement with the two Sponsoring Agencies. The Legal Counsel stated that "we understand that negotiations are already at an advanced stage, and that a refusal by UNDP to participate in the establishment of IFBAC (ACBF) might mean that the project, of considerable benefit to Africa might have to be abandoned."⁴² Subject to some proposed amendments in the draft Agreement he cleared UNDP participation in the initiative. He noted that the agreement should reflect that IFBAC (ACBF) would not be an international intergovernmental institution and that concurrence from host governments should be obtained for operations of the Foundation. In so doing, the Legal Counsel underscored his contention that:

*"inter-governmental organizations, alone, through the conclusion of agreements with each other without express authorization by member States, do not have the capacity to create public entities having separate legal personalities under international law."*⁴³

If this interpretation had prevailed, the establishment of ACBF would have been achieved only through a lengthy negotiating process involving plenipotentiaries and at least another two years for ratification of the signed treaty. This would have been clearly contrary to the wishes of the donors which had given the express authorization required for ACBF to be established.

Notwithstanding the clear justification for the legal and constitutional process utilized for the establishment of ACBF, the legal team agreed

³⁸ October 26, 1990 and November 1, 1990.

³⁹ See previous section of this paper.

⁴⁰ International Institution Law, Henry G, Schermers, Sijthoff & Noordhoff, 1980, at p.11.

⁴¹ Memorandum dated November 7, 1990 from Carl-August Fleischhauer, Legal Counsel to Mr. Pierre-Claver Damiba, Assistant Administrator and Regional Director for Africa, copied to Mr. Ibrahim Shihata, Vice President and General Counsel of the World Bank.

⁴² Ibid., at p. 2.

⁴³ Ibid., at p. 2.

to accommodate the concerns raised by the UN Legal Counsel's Office. The most important but perhaps interesting result of the discussions with was to change the name of the entity from "International Foundation for Building African Capacities" to "The African Capacity Building Foundation." This new name was chosen in light of the concern raised about the use of the word "international" and by implication the establishment of an "international intergovernmental organization". The Agreement among the three Sponsoring Agencies, the AfDB, UNDP and the World Bank, to which was attached the Constitution of ACBF, was subsequently signed by their respective authorized representatives on February 9, 1991. Through this agreement, ACBF was established as a separate legal entity with full juridical personality.

More than eight years after the establishment of ACBF, the well known authority on international law, Professor Ian Brownlie of Oxford University and Professor Guy Goodwin-Gill issued a legal opinion which supports the proposition that not all inter-governmental organizations have to be established by Treaty entered into by States. In their statement of the law on international organizations in connection with a legal opinion on IPU,⁴⁴ they noted that:

"... not all "international organizations," that is entities having the capacity to bear rights and to act on the international plane, are necessarily "inter-governmental" in the strict sense. What counts is the degree of recognition and acceptance of such entities manifested by States in their dealings with them, which also goes to the measure of personality, the amount of which in turn depends upon a functional analysis of aims and purposes."

After examining the legal documentation and operations of the IPU, they concluded that IPU is "an entity, universal in character, having the task of realizing common goals, where participation and functional activities have the implicit consent of States and which are recognized by other international organizations."⁴⁵ If IPU's status is as described, then certainly ACBF can be characterized at the very least as enjoying international personality in light of the role that States and international organizations play in its activities and its unique mandate as an instrument by which States and other subjects of international law (the Sponsoring Agencies) achieve their specific and declared objectives for capacity building in Africa.

SOME SPECIAL FEATURES OF THE ACBF CONSTITUTION

The ACBF Constitution has several special features which makes it a unique organization.

The word "foundation" used in ACBF's name was not a fluke. In the early stages of deliberations on the ACBI concept, there was discussion about how one could establish a framework which could ensure sustainability of funding for capacity building, which had been characterized as a long-term development issue. Many participants recalled the proposals which had been made for an endowment for capacity building mentioned earlier.⁴⁶ However, it was agreed at the time that, establishment of an endowment was premature and unrealistic. It was the strongly held view that sustainability should be on the agenda when the framework delivered on its objectives and had received a positive evaluation after its four year pilot phase.

⁴⁴ Opinion dated 31 May, 1999 on the instructions of the Secretary General of the Inter-Parliamentary Union, Geneva.

⁴⁵ Ibid., at para. 70

⁴⁶ Ibid., Note 9.

Sustainability of funding was therefore established as a key pillar for the future. The Constitution therefore provided for continuous review of the adequacy of the resources at such intervals as the Executive Board should deem appropriate. In line with the agreement on a four year pilot phase of the ACBI, the first such review was to take place not later than three years after commencement of its operations.⁴⁷

Another interesting provision relates to the objectives and purposes of ACBF. On the basis that the scope of the initiative will surely broaden over time, the “purpose and activities” clause of the Constitution was drafted in a manner that would allow the entity to expand its horizons to take account of future developments. For instance, all through the consultation process, the focus had been on economic management and policy analysis. However, while this was the initial interest, other areas such as, institutional management, managerial and technical skills for the private sector, training capacity for the legal and accounting professions were frequently mentioned as possible areas of operation for ACBF. Article III⁴⁸ of the Constitution was therefore drafted to encompass the notion of “development management,” which it was believed, encompassed capacity-related activities in all sectors of an economy. Also, as is common practice in the drafting of statutes and constituent instruments, ACBF was given the power to carry out all such other activities as may advance its purposes. It was also envisioned that any interpretation of the Constitution would be made in a manner which is responsive to the needs of the institution so long as this does not conflict with the ordinary meaning of the terms used in the text. This purposive or teleological approach has been utilized in the

interpretation of the constituent instruments of international financial institutions and it was assumed that this would also be the case with ACBF.⁴⁹ Indeed, these provisions have been interpreted in a flexible manner to allow ACBF to expand its competencies. This was the case of ACBF’s assumption of responsibility for the implementation of the Partnership for Capacity Building (PACT) in September, 1999.⁵⁰

The provisions on the operational activities were largely drawn from the experience of the World Bank and other international financial institutions although an attempt was made to simplify the language. There was a major role given to the Executive Board which during the consultations and negotiations was intended to have the full responsibility and oversight for the operations of the institution.

The three tiers of the governance structure of ACBF, as indicated above, was intended to accommodate the views of the donors that a Governing Board was needed to enable those who were providing funding to, at the very least, determine the broad policy and strategic directions of the institution. While this is not unlike the case of most other international financing institutions, where all the powers of the institution reside with the Board of Governors which then delegates specific powers to the Executive Board, in the case ACBF, it was determined very early in discussions that reliance for its oversight should be placed exclusively in its Executive Board. More importantly, it was envisaged that the members should be drawn from a pool of experts with considerable credentials and experience in policy analysis and development management and with direct knowledge of African development issues. In light of the emphasis put on the African character of the initiative, it

⁴⁷ Article XI.3 of the Constitution.

⁴⁸ “Purposes and Activities”.

⁴⁹ For a short explanation of this approach, see Ibrahim F. I. Shihata, “The World Bank in a Changing World,” Volume II, at 12-19.

⁵⁰ The PACT was approved by the World Bank Board of Governors in Resolution 529, dated September 30, 1999. See also, “African Capacity Building Foundation, Helping Africa Claim the 21st Century: A New Horizon in Capacity Building: Strategic Medium Term Plan,” 2000-2006

was also agreed that four out of the eight individual members of the Board should be African. Service in personal capacities was emphasized even for appointed members to ensure that considerations other than professional and technical factors were paramount in decision making.⁵¹ This was a unique feature of the initiative taking into account the manner in which representatives in Boards of other international financial institutions are selected. In short, the Executive Board was the key instrument for ensuring the success of the initiative.

There was a lot of reflection on how an entity which had not been established by international treaty could obtain all the privileges and immunities required to facilitate the carrying out of its operations. ACBF, unlike other international financial institutions would not be raising resources from the financial markets of the world and did not require at least in its initial phase, the privileges and immunities which had been given to institutions such as the World Bank through its Articles of Agreement. What it required were agreements pursuant to which it would be granted privileges and immunities which would facilitate its operations. To that end, the necessary authorizing provisions were included in two sections of the Constitution.⁵²

First, ACBF was authorized to enter into a headquarters agreement in the host country selected pursuant to which members of its Boards, Management and staff would receive appropriate rights, privileges and immunities to facilitate its operations. An Agreement regarding the headquarters of ACBF was duly negotiated and signed with the Republic of Zimbabwe before the commencement of its operations.⁵³ More importantly, even though ACBF was not a United Nations Specialized Agency benefiting from the extensive provi-

sions of the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the UN General Assembly on 21 November, 1947, the Headquarters Agreement includes provisions which mirror the substantive elements included in the UN Convention. The Headquarters Agreement accorded to ACBF and to its staff all the courtesies, facilities, privileges and immunities which pertain to and facilitate the mission and operations of ACBF.

The second provision empowered ACBF, as part of its operations, to enter into appropriate agreements with beneficiaries including, countries. It was therefore expected that ACBF in its operations with countries would enter into separate agreements or include provisions in these agreements which would grant to ACBF, its Management and staff, comparable rights, privileges and immunities which would facilitate its operations in such countries.⁵⁴ For instance, it was expected that through these agreements, ACBF would receive exemption from taxes, appropriate financial facilities and visa exemption or exemption of payments for visas.

The Constitution also contains what may be viewed as unusual in a constituent instrument of a development finance institution. Article XIII.4 provides as follows:

"Neither the Sponsoring Agencies, individually or collectively, nor any other donor to the ACB Fund shall be liable for the acts or obligations of ACBF. In all the agreements referred to in this Article and all other significant contracts entered into by ACBF, provisions shall be included stating that ACBF possesses independent legal personality and neither the Sponsoring Agencies, individually or collectively, nor the other donors to the ACB Fund, shall be liable for any acts or obligations of ACBF."

⁵¹ Article VIII of the Constitution.

⁵² Articles XIII and XIV.

⁵³ Agreement between Republic of Zimbabwe and African Capacity Building Foundation dated May 22, 1991.

⁵⁴ Article XIV.2 of the Constitution.

This provision was included to insulate the Sponsoring Agencies and the other donors from any obligations arising from the operations of the ACBF.

THE ROLE OF THE SPONSORING AGENCIES IN ACBF

As indicated in other parts of this paper, there was significant skepticism about the role which the Sponsoring Agencies should play in the management and operations of ACBF. While from a financial management perspective, the potential donors were keen to have a role for them, some believed that they were equally to blame for the weaknesses and failures identified as major reasons for the ACBI. For instance, as Kim Jaycox had noted during the Dalhousie Roundtable, technical aid and external talent had proven to be counterproductive and donors, including the World Bank, could not go along “with their business-as-usual approaches.”⁵⁵

More importantly, even though there was significant support for the view that the administrative apparatus for the initiative should not be located in any of the Sponsoring Agencies, at the same time, they were needed to jump-start the initiative. The donors were also unwilling to finance the administrative costs required for the initiative. They indicated therefore that even though an account should be provided in the arrangements to receive funding for administrative expenses, they would not allocate any funding to it.⁵⁶ The donors however considered UNDP's agreement to finance the initial administrative costs as vital for the start up of the initiative. An additional benefit that accompanied that proposition was that, the initiative would become a UNDP project which would benefit from its extensive network and administrative capacity on the ground in Africa.

It was therefore agreed and provided in the funding memorandum of understanding that UNDP would provide the amounts required to support the secretariat of ACBF on the basis of a UNDP Project Document with the World Bank, as Executing Agency. This was supplemented by an Implementation Agreement⁵⁷ which provided for World Bank assistance to ACBF with respect to staff recruitment, preparation of work programs and criteria to govern its activities. These institutional arrangements enabled the Executive Secretary to be hired as soon as possible. It also facilitated the immediate recruitment of staff and consultants, all consistent with the UNDP and World Bank normal procedures. ACBF staff also held UN Laissez-Passers to facilitate their travel and the institution had an already made network of UNDP and World Bank offices in Africa to ease its entry into potential recipient countries.

It should be noted that this was very much an institutional framework based on pragmatism since all through the discussions and consultations, there were fears raised, including by African stakeholders, about the dominance of the Sponsoring Agencies. The appropriate balance agreed was based on safeguards included in the Constitution. Experts and experienced individuals on the Executive Board outnumbered the representatives of the Sponsoring Agencies and it was envisioned that these experts would deal appropriately with any undue influence exercised by the Sponsoring Agencies. Moreover they served in their individual capacities with no direct affiliation with the Agencies and could therefore exercise independence in the views they expressed in the decision making. In sum, the role given to the Sponsoring Agencies was a compromise between having a new institution which would hit the ground running with the required technical expertise and also the need to preserve integrity in the use of resources.

⁵⁵ Ibid., Note 12 at p. 15.

⁵⁶ Paragraph 11 of the Memorandum of Understanding.

⁵⁷ The Implementation Agreement was approved by the ACBF Executive Board and signed in September 1991.

Through 1994, the only amendment made to the Constitution was to decrease the frequency of the regular meetings of the Executive Board from three to two times.⁵⁸ Also, during the initial formative years covering the period 1991-1995, the World Bank provided support in setting up the administrative and financial management system, which enabled ACBF to develop capacity building operations and overcome challenges in the leadership of the Secretariat. From 1995-1999, ACBF leadership had stabilized and the Foundation continued to carry out its operations with due diligence and efficiency while obtaining results on the ground in Africa.

THE INTEGRATION OF THE PARTNERSHIP FOR CAPACITY BUILDING (PACT) INTO ACBF

The advent of Mr. James W. Wolfensohn as President of the World Bank brought an opportunity to deepen the work that ACBF was doing on capacity building in Africa. With his avowed interest and his declaration that Africa's development was one of the key priority areas of the World Bank, the African Governors of the World Bank seized on this opportunity to deepen and expand the operations of ACBF. The Governors, while appreciating the initial progress made in macroeconomic policy analysis and development management, pointed to the increasing need to broaden the scope of ACBF's operations as envisioned in its mandate. Thus, the African Governors who had been instrumental in the design of the ACBI in the first place and the establishment of ACBF engaged in a series of capacity building workshops across all the sub regions in Africa. They also commissioned the preparation of capacity needs assessments by 14 countries.

These consultations, needs assessments and systematic engagements with all stakeholders, including the donor community, culminated in the preparation of a Strategy and Business Plan which was discussed by representatives of stakeholders, including those from 22 African countries. The final outcome was another framework document - Partnership for Capacity Building (PACT)⁵⁹ - which expanded the core competencies embedded in the ACBI. The PACT was approved by the Board of Executive Directors of the World Bank⁶⁰ and the Bank approved transfers from its net income of FY1999, in support of the implementation of the PACT.⁶¹ The ACBF Board of Governors agreed to the integration of PACT into ACBF after a careful review of a study analyzing possible options.⁶²

It should be noted that the integration of PACT into ACBF did not alter ACBF's original governance structure and the Board agreed in coming into its decision that there were no legal or institutional impediments to the integration. The mandate of ACBF as set out in Article III of its Constitution was broad enough to encompass the objectives and the additional core competencies introduced by the PACT. What was needed were changes in the funding memorandum of understanding and assurance that donor contributions could be credited to a merged trust fund. An ACB/PACT Trust Fund was duly established at the World Bank, with the Bank continuing as administrator.⁶³

Effective June 26, 2003, amendments were made to Article VII of the Constitution to broaden participation in the Board of Governors to organizations other than States.⁶⁴ Organizations that contributed the required minimums as set forth in Article VII.1

⁵⁸ Article VIII.7, effective May 14, 1994.

⁵⁹ Memorandum and Recommendation of the President of the World Bank to the Executive Directors on a Proposed Partnership for Capacity Building in Africa (PACT), (Washington, DC, April 26, 1999).

⁶⁰ May 20, 1999,

⁶¹ IBRD, Resolution 529 of the Board of Governors dated September 30, 1999.

⁶² The Study was carried out by GRM and the Board of Governors gave its final endorsement on the integration of PACT on January 12, 2000.

⁶³ March 14, 2000.

⁶⁴ Amendment No. 2, effective 26 June, 2003.

may also appoint a representative to serve on the Board of Governors. In addition, the Constitution was amended to empower the Board of Governors to add a new category of members known as Honorary Members. The Africa Union is an Honorary Member. Honorary members can also change their status if they make financial contributions to the ACBF trust funds in the minimum amounts provided in Article VII.I.

IV. SOME NOTABLE ACHIEVEMENTS OF ACBF

In its early years, notwithstanding organizational challenges common to nascent institutions, ACBF did much to pursue its primary objectives. It accorded priority and importance to its key mandate of supporting policy analysis and development management in Africa. With a total financing of more than US\$13 million in its first 8 years, ACBF approved a total number of 42 projects in 23 countries. These included programs for education and research involving training of more than 25 doctoral degrees, more than 1000 masters' degrees and nearly 150 fellowships.⁶⁵ These training programs were carried out in collaboration with the Africa Economic Research Consortium.

As important, it began its support of policy units within governments, and independent think tanks, an area of emphasis which allowed countries and their general publics to obtain independent analysis of the state of the economy.⁶⁶ These policy units were also especially important as more and more coun-

tries embarked on democracy. Thus, by 2001, a critical mass of policy institutes had been established and supported in large part by ACBF, to enable such institutes to learn and share experiences to the benefit of economic analysis and policy development in Africa. To that end, an African Policy Institutes Forum was launched to foster cooperation, sharing of lessons of experiences and information among them.⁶⁷ More recently, the contributions being made by these policy think tanks have been recognized by the selection of seven of them (competing with more than 300 institutions worldwide) to benefit from research grants from the Think Tank Initiative announced by the Gates and Hewlett Foundations and International Research Center.⁶⁸

ACBF's contribution to the development by governments of their respective economic programs has made a major impact on growth rates achieved in many countries. One of the early beneficiaries of its assistance was Rwanda which implemented successfully, a comprehensive and integrated multi-donor approach to capacity building in all its economic management and training institutions.⁶⁹ These efforts have enabled the Government to manage its economy with due diligence and efficiency on the basis of sound policy analysis. As a result, Rwanda has been widely regarded as one of the best run economies in Africa.

ACBF has also been in the forefront of supporting the building of capacity to enable countries to develop home-grown strategies, including preparing national poverty reduction strate-

⁶⁵ See: Partnership for Capacity Building in Africa (PACT)-Mid-Term Evaluation, July 9, 2003.

⁶⁶ See: Partnership for Capacity Building in Africa (PACT)-Mid-Term Evaluation, July 9, 2003.

⁶⁷ See ACBF Newsletter, volume 2, No. 3 p.10.

⁶⁸ See, ACBF Annual Report, 2009, at p. 43.

⁶⁹ This program began with a grant from ACBF in 1999, followed by successive grants by ACBF and other donors to deepen its support for economic and financial management in Rwanda. The program continues unabated and is an example of the long term nature of capacity building.

gies under the Highly Indebted Poor Countries Initiative. It has collaborated with the World Bank and the IMF to bring countries together to share experiences and best practice in this area of work. To that end, these institutions have sponsored poverty reduction strategy forums which have been extremely useful to governments.⁷⁰

With the expansion of its areas of "core competencies" in 1999 as a result of the assumption by ACBF of responsibility for the implementation of PACT, ACBF has been deepening the "professionalization of the voices of the private sector and civil society in light of the evolution of democratic processes all over Africa." It has promoted the empowerment of civil society through the engagement with civil society organizations and assistance provided to small and medium business enterprises through their associations.⁷¹ It has also reached out to the legal profession to engage in the fight against poverty as part of its reaching out to civil society and the professions.⁷²

ACBF has been conscious of the important role that women play in economic development in Africa. To that end, it has supported projects designed to empower women over the years but, more notably, in an environment where the global financial crisis has had profound effects on women's lives and resources. In this connection, it supported the assembling of women leaders from around the world in Monrovia, Liberia, to share experiences and to learn from each other about how women can participate meaningfully in socio-economic and political activities.⁷³

A major contribution of ACBF to the development paradigm in Africa has been its role in keeping alive the issue of capacity building as a severe binding constraint for Africa's development. It has done so with its meager resources compared to the significant amount of funding for external technical assistance still being provided to African countries. An effort begun in 2001 in Bamako, the first Pan-African Capacity Building Forum brought home to the continent the need for increased well designed and well coordinated programs. Its efforts also has helped to underscore the importance of African ownership of programs and strong and effective partnership with the international community as well as stakeholders such as those in the private sector and civil society. This heightened awareness is now reflected in the African Union Declaration of the African Capacity Building Decade and the emerging New Partnership for African Development (NEPAD) Capacity Development Strategic Framework for Africa. This useful and critical role is evident by the mandate given to ACBF by the Heads of State and Government Implementation Committee of NEPAD to conduct a capacity needs survey of Africa's regional economic communities.⁷⁴

V. CONCLUSION

During this twenty year period, at least four external performance evaluations have been conducted on ACBF. All reached the conclusion that ACBF had been relatively successful in the carrying out of its mission.⁷⁵ One such performance evaluation noted that "ACBF has built

⁷⁰ E.g. Forums in Burkina Faso, June 2000, and in Dakar, September 2001. See ACBF Newsletter, Volume 2, No.3 2001.

⁷¹ See ACBF Annual Report, 2009 p.32.

⁷² See ACBF support of the launching of the International Lawyers and Economists Against Poverty, May 2002, in ACBF Newsletter Volume 3 no. 2, 2002.

⁷³ See ACBF Annual Report, 2009 at p.33.

⁷⁴ Ibid., at p. 35.

⁷⁵ Development Alternatives Associates: PriceWaterhouseCoopers, GRM and DFID. See *ibid* note 59 at p.2.

up an impressive portfolio of capacity building projects which has increased the level of commitments and project implementation substantially above what was achieved in the earlier years of its operation. The performance of ACBF's traditional macroeconomic policy and management projects compares favourably with the results of donor capacity building efforts."⁷⁶ More recently, in a closing speech by the Chair at the Board of Governors meeting,⁷⁷ he recognized the work being done to by the Executive Secretary to consolidate the gains made which will build on past successes. In short, ACBF is operating with renewed vigor and the flexible and unique framework built 20 years ago appears to be serving it well.

To that end, there should continue to be reflections on ACBF's mandate and areas of strategic focus as its Constitution provides it with the necessary flexibility to respond to new and emerging areas under the capacity building rubric. It must continue to follow the strategic prioritization which has served it well over the years and keep within its area of comparative advantage.

In this connection, we should not lose sight of the fact that the original vision stated forcefully by Kim Jaycox in 1990,⁷⁸ is yet a long way from being attained. Africa, for the most part, does not have an adequate amount of a cadre of very good policy analysts and economic managers. It does not have the bevy of first class training or managerial institutions envisioned in 1990. More importantly, technical assistance and expatriate experts abound

on the continent and while Africa has weathered the storm of the financial crisis through implementation of effective macroeconomic policies, much more needs to be done if Africa is to be in control of its economic destiny. In short, looking into the future, ACBF has a critical role to play on all these matters.

There have been discussions about the respective roles of the Executive Board and the Board of Governors with even suggestions made to merge the two.⁷⁹ The conclusion was that the institutional structure was serving its purpose. In the view of those surveyed, the Board of Governors provided the needed broad strategic direction and "an important service to ACBF in terms of maintaining and developing financial support,"⁸⁰ and the Executive Board, with its members chosen on the basis of professional expertise and knowledge of capacity building issues, provided the needed executive management and operational oversight. In short, the institutional structure is flexible to deal with any subsequent changes to ACBF's mandate and operations.

With the changed economic circumstances in Africa and its economies weathering the storm of the recent world financial and economic crisis, Africa is a continent on the move. Africa's long term growth prospects are bright, propelled by external trends in the global economy and internal changes in the continent's societies and economies.⁸¹ In these circumstances, African capacity to deliver matters a great deal. It will not advance with only capital investments: it needs human

⁷⁶ Performance Evaluation by Consultants for the Department for International Development (DFID), April, 2002.

⁷⁷ Closing Speech by Mr. Sten Rylander at the 19th Annual Meeting of the Board of Governors of ACBF, Paris, France, 1 October, 2010.

⁷⁸ See footnote 16.

⁷⁹ During the Mid-Term evaluation of the PACT in 2003, these issues were included in the questionnaire sent out to all stakeholders.

⁸⁰ Answer given by a Governor on a question included in the questionnaire for the mid-term evaluation.

⁸¹ McKinsey on Africa: A continent on the move, June 2010.

capital which has served to propel all advancing continents. As the President of the African Development Bank, Dr. Donald Kaberuka has said⁸²:

“No matter the amount of financial resources mobilized for Africa's development, such funds would yield only limited or modest results if countries do not have the human, organizational and institutional capacity to efficiently absorb the resources.”

If ACBF is to continue to be an engine for propelling and coordinating Africa's capacity, it must have the resources to do so and it must be made sustainable. This would enable its assistance to entities it supports to have a reliable partner. Time has therefore come for the issues relating to sustainability of funding to be seriously considered.

Chief among options should be the establishment of an endowment fund for ACBF, a

proposal which was considered in the early stages of the development of the ACBI. As indicated above, this proposal was deemed premature until ACBF has proven itself. It has proven itself after 20 years of operations and has much more to contribute. Periodic replenishments exercises have their costs not only in terms of the preparations required but also the sometimes negative effect on management and staff. They tend to divert the attention of staff and management from operational activities. It is also costly for donors. More importantly, the aggregate amounts are not necessarily assured as they are subject to the economic and financial circumstances which prevail at the time of replenishment or appropriations.

ACBF has leveraged its resources very well over its history and it is time for it to be endowed with the resources required by it to fulfill its laudable mandate.

⁸²Welcome Statement at the Heads of State High Level Panel Discussions on “Building Capacity in Post Conflict Countries in Africa”, 24 March 2010, Tunis, Tunisia.

The African Capacity Building Foundation

ACBF is Africa's premier institution in Capacity Building. Established in February 1991, ACBF is the outcome of collaboration between African governments and the international donor community. The major sponsoring agencies of the Foundation are the African Development Bank (AfDB), the United Nations Development Programme (UNDP) and the World Bank. The International Monetary Fund (IMF) became a member of ACBF in 2002. The African Union is an Honorary Member.

ACBF's mission is to build sustainable human and institutional capacity for sustainable growth, poverty reduction and good governance in Africa. The Foundation intervenes in six core competency areas, namely, economic policy analysis and management, financial management and accountability, strengthening and monitoring of national statistics, public administration and management, strengthening of the policy analysis capacity of national parliaments, professionalization of the voices of the private sector and civil society.

Besides intervening directly in the area of capacity development, ACBF also provides a platform for consultation, dialogue, cooperation as well as information and knowledge sharing amongst development stakeholders and partners across the African continent.

The Foundation is present in some 44 sub-Saharan African countries and has committed more than US\$350 million to interventions in capacity development since its inception.

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