

AFRICA ROAD FUNDS AND ROAD REPAIR/MAINTENANCE AGENCIES

BEST PRACTICES: ROAD SECTOR LEGAL FRAMEWORK

I. Introduction:

- Review of legislation in sub-Saharan Africa – World Bank SSATP
- Determination of desirable/best practices
- Country-by-country

II. Overview of various countries' legislation and practices – general overview; case studies; Anglophone and Francophone

- Roads
- Global context in-country

III. What are the underlying principles that must be kept in mind – good business practices

- Anti-corruption, as a general operating principle
- Transparency – to fight corruption and bring the citizens (the ultimate stakeholders) into the process
- General laws leading to transparency
 - freedom of information laws
 - whistleblower legislation
 - Laws for civil society to function openly without unreasonable constraints
 - Freedom of the press
- Accountability of the agencies/management
- Independent audit controls and oversight
- Internal policies re procurement and hiring
 - elimination of non-bid contracts
 - contracts in writing
 - written record of all exchanges of value: work, money, advantages, other
 - written receipts

IV. Applicability to road repair/maintenance agencies and road funds

- Autonomy of road repair/maintenance agencies and road funds
 - Separate agencies for funding and for repair/maintenance
- Autonomy of funding
 - Earmarked funds; direct and automatic line of payments into road funds: provided by statute; no diversions of earmarked funding
- Independence of management; relates to autonomy

- Management and direction must be independent – free from political pressures
- Independent board of directors which represents users – to be selected by private sector
- Chairman of board chosen by the directors themselves from among board
- Accountability
 - Agency actions and accounts reviewed by auditors
 - Board reports audited results on a periodic basis to parliamentary oversight committee
 - Top-level management; operational director chosen by board; responsible (answerable) to board
 - Personnel chosen by, and answerable to, management.
- Awarding of contracts – compete transparency required
 - Competitive, open bidding for contracts
 - Where contracts exceed certain amounts, open, public bidding required
 - Clear terms of written contracts, providing for quality control supervision and enforcement rights on the part of the Agency
 - Funding agency not to disburse without transparent mechanisms in place and written proof that contractors' work is done to established standards and inspection
 - Enforcement mechanisms in place: contractually, practical, accounting, payment, logistics
- Independent auditors/review of agency activities, agreements and payments
- Critical general principles to keep in mind
 - Freedom from interference from government ministries and agencies
 - Minimal number of oversight ministries dealing with policy

V. Objective in looking at best practices: maximizing money spent

- Quality control at the point of delivery and throughout the process – how is it achieved?
- Operating as a commercial entity, but an ethical entity
 - means taking all steps possible to eliminate corrupt practices
 - not reduce, eliminate.

VI. What are “corrupt practices”?

- Bribes
- Kickbacks

- Favors
- Any wrongful action that causes a dissipation of funds from their ultimate, primary goal
 - Primary goal in a business is to spend money in exchange for the work
 - The Road Funds Agency provides the funds.
 - The Road Repair/Maintenance Agency makes sure the work gets done correctly, on-time and on-budget
 - Secondary goal is to prevent the diversion of funds – every single centime must go for the work itself; not for getting the contract; not because of a position of power or patronage, and not into the pockets of those peddling influence
 - Transparency will prevent the diversion

VII. Open and competitive business climate is essential.

- Only in a competitive and open climate can the best decisions be made for a business.
- Operation as a business means maximum independence from government control.
- The government should be at arm's length, it is another user.
- As you will see, road funds and road agencies operated as businesses with a minimum of interference will function most efficiently and economically, thus giving more value to the country for the money spent.
- “Commercial” or “business” approach in a legal and ethical environment constitutes best practices.

PART TWO – BEST PRACTICES AND RULE OF LAW

VIII. Best practices require the right constitutional and legislative underpinnings.

- Corporate best practices; Corporate Social Responsibility (CSR)
- Grand themes - international agencies, corporations, law firms, NGO's
- Conceptual set of standards
- Legal and non-legal standards of practices
- Non-legal standards, codes of ethics, set up by corporations, associations, NGO's

IX. What are “best practices” in a constitutional or legal context?

- See constitution and historical background
- How are the laws passed and defined and implemented?
- Best practices applicable in a country which honors the rule of law.

- X. Rule of Law” – Relationship to Best practices
- XI. What does “rule of law” mean?
- When a country is governed by the “Rule of law”
 - NOT the “law of the ruler”.
 - Means any legal system, in any country must have written laws that are fair and apply to all persons uniformly.
 - Nobody is above the rule of law -- including the ruler
 - Ruler” includes the President, the ministers, the members of parliament, the rich, etc.
 - Everyone must be treated equally under the law
- XII. Rule of law applies across legal systems
- Francophone, Anglophone, Lusophone, etc.
- XIII. Rule of law means that the written laws provide for rights, responsibilities and remedies
- All interpreted and applied the same way to all members of society.
 - Where necessary, defined by neutral arbiter.
 - All members of society have the right to an impartial hearing
 - Impartial hearing needs the following:
 - Independent system of justice
 - Determine whether rights have been fairly protected
 - Determine whether the law has been fairly and consistently applied.
- XIV. Road Sector – applied to rule of law and best practices
- Problems with the road sector may be systemic
 - Does not mean that best practices should not be implemented into the legislation and applied to the institutions.
 - To the extent that the best practices can be defined and understood, applying them will facilitate maximization of benefits to the country’s road system.
 - Simultaneous application of best practices systemically is essential, and I will be happy to discuss this with anyone who is interested Ultimate objective of such practices?
- XV. Maximize benefits to society -- how?
- Economic effects that provide the maximum positive impact to the citizens, to the consumers, etc.
 - Efficiency and the delivery of quality goods and services.
 - Systems that work for efficiency also work against corruption

XVI. Government regulation; autonomy

- Generally, business and a business approach flourish best where there is a minimum of government regulation. I am not advocating business operating without any government supervision – certain areas do require oversight and guidance; regulation appropriate
- However, it is critical that businesses be operated with less, rather than more, supervision.

XVII. Legal standards will be examined in detail

- Non-legal: “moral” standards, where there is not yet applicable legislation
- Major industrialized society corporations: global operations
- NGO’s – global operations - For many non-government institutions (NGOs) and CSOs, corporate responsibility signifies conduct that rises above the minimum required by law but still constitutes a corporate duty to act rather than a more optional norm.
- Private sector prefers the flexibility of self designed voluntary standards.
- On-going debate on how much governments should intervene in this field.
- Environmental and labor standards enforced.
- UN Global Compact; OECD standards; private and civil society standards.
- World Bank, other institutions

XVIII. Best Practices in a Legal Context – Structuring society’s legal standards and rules.

- Constitutional and legislative bases generally
- Constitutional bases
- Statutory bases
- Provisions for independent administrative review – generally regulatory
- Right of independent judicial review; recourse
- Application and implementation; regulations; governmental organs’ operations
- Administrative review
- Right of independent judicial review
- Ethical conduct; *sine qua non*
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PART THREE - Anglophone or francophone approach -- Which is the best model?

XIX. Basic answer is that depends; basic approach;

- Before discussion of roads, view context of the laws in general

- Francophone approach based upon the concept that all power derives from the State, which then carves out certain rights for its citizens. The laws are then drafted in a general way, based upon the philosophical principles of that being granted to its citizens.
- The Anglo tradition - all power derives from the people, as individuals, who then grant powers to the State.
- In Francophone countries, everything is prohibited, except that which is specifically granted;
- In Anglophone countries, everything is permitted, except that which is specifically prohibited..
- This difference in approach manifests itself in the language of the laws themselves. It is also seen in the types of contracts, or agreements, that are entered into between parties. The detailed Anglophone agreement, contrasted with the more general Francophone agreement.
- The end result is the same.

XX. Although type of legal tradition provides some insight, it is not enough. All factors must be considered:

- Culture
- Historical influences (colonialism, socialism, capitalism, religion)
- Economics, languages
- Cultural issues; need to change the paradigm
- Geographical considerations
- Recent history: current events and political realities