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** Innovative Consulting Services*

**ASSESSMENT OF THE LEGAL AND REGULATORY ENVIRONMENT
AFFECTING THE GAMBIAN FINANCIAL SECTOR**

**PREPARED FOR
UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT
BANJUL, THE GAMBIA**

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REPORT TO USAID/GAMBIA

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EXECUTIVE SUMMARY

The development of an appropriate regulatory framework to govern and facilitate the development of a country's financial markets is in turn part of broader effort to provide an environment for private sector business growth.

The process involves not only the creation of the right enactments to balance public and private interests but as well the removal of legal impediments to the efficient clearing of transactions and contractual relationships.

The appropriate regulatory environment is an important point of departure in economic reform. It can however be defeated by poor administrators, cumbersome bureaucracies and political interference that is unpredictable and unaccountable.

This assessment looks at the regulatory framework of The Gambia with a focus on the enactments of particular application to the financial sector. It begins with a description of the sources of laws that bind Gambian decision-makers. The complexity of the legal system in The Gambia is unique and apparently, nowhere is it described in writing.

The approach taken in the assessment is to identify certain of the policy objectives and issues confronting Gambian decision-makers in economic reform and evaluate whatever legislation is in place or should be in place to accomplish the policy objective. In addition a review of the judicial process (the judiciary as well as the courts) and the administration of justice is included. These are the institutional components necessary to operationalize legislation. The policy issues that frame the assessment are:

- (i) the lack of long term debt financing instruments;
- (ii) the development of a capital market;
- (iii) competition in the banking industry;
- (iv) creditor's rights;
- (v) the investment climate; and
- (vi) small business incentives.

Within each of these broad policy areas, sub-themes are developed.

Overall, there is a need to take a long term approach and to look beyond ERP, current problems and the constraints of the small Gambian economy and to provide a policy framework to create the conditions to anticipate and facilitate broader and deeper economic growth.

PREFACE

The impact of the legal and regulatory framework within which structural adjustment and economic recovery occurs is increasingly recognized as a significant component of the growth of the financial markets and the private sector.

Beginning in 1985, the Government of The Gambia (GOTG) successfully undertook an Economic Recovery Program (ERP). Under the ERP, Gross Domestic Product has grown about 5% a year, inflation has been brought down to 8% from highs of 70% in the early 1980's and the Dalasi which was allowed to float has now stabilized. The challenge is now to move from recovery to growth. To do so, The Gambia will need to attract foreign investment, encourage and mobilize increased savings and investment and improve the allocation of capital resources.

USAID/Gambia's sectoral assistance programme is in a position to assist the growth of the financial sector and the private sector through the modernization and development of the mechanisms and financial vehicles necessary for a strong business sector.

The purpose of this assessment of the legal/regulatory framework of the Gambian financial sector is to identify legal constraints on the expansion and strengthening of the financial sector as well as assess the adequacy of the existing regulatory framework to support modern financial processes and to provide an operational framework of recommended reforms of practical use to guide GOTG and USAID policy planning.

SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

1. The Judiciary

(i) Create a Small Claims Court to relieve delays in the administration of civil claims in the Supreme Court and limit the rights of civil appeals to the Supreme Court below a certain amount. Alternatively, increase the monetary jurisdiction of First Class Magistrates to enable them to hear a wider number of civil claims.

(ii) Limit the original jurisdiction of the Supreme Court with respect to civil cases by a minimum monetary amount.

(iii) Fill the two vacancies on the Supreme Court so that it is brought up to its full complement.

(iv) Provide technical assistance in the form of equipment such as computers, equipment for court reporters and copiers to the Registrar of the Supreme Court who is responsible for preparing transcripts and other documentation for trial and for appeals. Technical assistance should also include short-term training for court reporters on new equipment. This will facilitate speedier handling of civil claims.

2. Legal Profession

(i) Provide technical assistance to the Ministry of Justice and the Law Reform Commission so that they can play a coordinating role in drafting the recommended amendments and new legislation recommended to improve the efficiency of the operations of the financial markets and the growth of the private sector. In part this represents (a) contribution simply in terms of new research materials and computers which are not currently available in either the Ministry of Justice or the Law Reform Commission. (b) Technical assistance to the legal profession should also take the form of technical advisors as well as training for members of the Bar in any new legislation introduced. In the absence of a legal academic community, external assistance is necessary to provide the profession with opportunities for advanced legal education and specialized training in law reform developments and innovations in commercial law areas.

3. Lack of Term Lending

(i) Undertake discussions with the Central Bank to encourage the creation of varying maturities for the paper it issues. In particular, the feasibility of 180 day Treasury Bills should

be examined.

(ii) Conduct a study into the modalities necessary to encourage the creation of a leasing industry as a longer term financing vehicle for business. This should include the enactment of appropriate hire-purchase/leasing legislation. In addition, amend the Financial Institutions Act to permit financial institutions to enter the leasing field.

4. Towards Capital Market Development

(i) Undertake a complete overhaul of the Companies Act to facilitate among other things a regulatory framework to govern the issuance of securities and the trade in securities. A new Act would provide meaningful protection to shareholders by way of full disclosure provisions and minority shareholders rights. This could form part of a new Corporations Act or a separate Securities Act. New legislation should govern not only the public issuance of shares but also anticipate the development of a private placement market.

(ii) Undertake the creation of a statutory body to govern accounting practices and in particular establish uniform accounting and auditing procedures.

(iii) As part of the privatization programme under the ERP and in the interest of encouraging a broad learning impact from privatization, USAID could develop a revolving loan fund and partial guarantee to support share purchases by small investors. Participants would include the shareholder, a commercial bank and USAID. The shareholder would pay 25% of the price and pledge the shares as collateral. AID and the Bank would share the remaining risk. The loan fund portion might contain a discount on interest below prime for a period to stimulate interest in equities.

(iv) Further encourage the wide distribution of shares in the privatization programme through regulations on share purchases that limit the percentage of individual holdings, that include wide distribution rules and that require stock splits before offering to reduce the price.

(v) On a 12-24 month pilot basis, assist NIB to provide a facility for the trade in available shares, that would provide a learning forum for both NIB and potential shareholders on the buying and selling of securities. The facility could consist of a large blackboard publicly displayed that listed offers to buy and sell at reserved prices. Trades would take place once a week in the form of an auction. The weekly auction could include 1-hour workshops on buying and selling securities, offered by lawyers, expatriates and others familiar with stock market issues. The pilot effort could be monito-

red to determine the level of activity and to identify the potential problems of a second stage, more sophisticated programme.

(vi) Investigate tax reform that would go beyond tax neutrality in the treatment of debt and equity holdings to a tax bias in favour of equities to encourage the development of a market in securities. Consideration could be given to capital gains exemptions on initial public offerings and differential tax treatment as between private and public companies.

5. Competition in the Banking Sector

(i) In considering applications under the Financial Institutions Act for licensing as a Bank, the Central Bank should include in its assessment, the applicants' plans for the provision of creative approaches to mobilize rural savings. USAID could assist a bank such as GCDB to introduce mobile banking to the rural areas on a pilot basis that tests the savings potential of three pre-determined areas.

(ii) In the absence of development banking type facilities, a partial and declining guarantee fund could be offered by the GOTG in partnership with the commercial banks to support financing to projects in priority sectors of the economy. The commercial aspects of the projects would be screened by the commercial banks to ensure decisions were based on project viability alone. The impact on the Treasury would be nominal.

(iii) Encourage the plans of the GOTG towards the provision of long term leases of 99 years and away from the 21 year lease to encourage bank acceptance of leases as adequate collateral. The proposed legislation is currently in draft Bill form. Technical assistance will be required to assist with the development of an appropriate registry to ensure lender confidence in the leaseholds. Technical assistance should also be considered to take the opportunity offered by land reform to proactively go out and begin the registration process for all leasehold land. Incentives could be offered for voluntary registration by converting existing short term leases that are registered into long term leases.

(iv) Investigate expanding the role of SSHFC in mobilizing savings by enabling it to take term deposits with rights of withdrawal but not cheque writing privileges for its depositors.

6. Creditors' Rights

(i) Provide technical assistance to the Registrar General, Ministry of Justice, that would undertake a complete review and design of an efficiently operating and secure registry

system for all interests in real and personal property and intangibles. Included in the technical assistance would be a review of the required statutory amendments of the various pieces of legislation that governs commercial transactions in The Gambia. This should be undertaken at the same time as the review of the Companies Act and the proposed Commercial Code.

(ii) Provide technical assistance to the Sheriff's office in the form of computers to create a register of Writs of FiFa that would permit a tracking system on efforts at returning the Writ and that would provide a tickler system for follow-up. The technical assistance should include professional training for the two bailiffs in judicial process and debt recovery.

7. Investment Climate

(i) Encourage a change in tone in the Development Act from one of registering, screening, monitoring and enforcement to one of investment promotion. This could be accomplished by streamlining the process, by ministerial policy directives and by bringing full responsibility for the Act under the Ministry of Finance to eliminate conflicting and duplicative efforts.

(ii) Create a fast track process in the Development Act for small investors (under D1 million) that would allow the final decision to be in the Minister on the recommendation of staff. Confidence in the process would be maintained through a reporting requirement on the Minister to Cabinet and publication of approvals in the Gazette.

(iii) Clarify the statutory authority of the Minister of Finance for duty waivers and temporary duty waivers under the Customs Act.

(iv) At the end of 1990 when more experience has been gained with the Sales Act, review the language and practice under the Customs Act, Sales Act and Development Act for consistency of treatment for importers and domestic manufacturers. This will likely require amendments to the Sales Act to include Development Certificate holders under the Development Act.

(v) Undertake a study over the next 12-24 months on the investment benefits that have accrued against losses in government revenue for incentives granted under the Development Act and the Finance Minister's grant of duty waivers under the Customs Act.

(vi) Encourage the passage of "Good Government" legislation that would comprise a Code of Conduct for civil servants, backed up by sanctions that would be posted in all public places and government offices. The Good Government package

could include over time disclosure of assets by Ministers. While not expected to be a perfect record, it would encourage the development of a new culture of what constitutes acceptable behaviour by government officials.

(vii) Review the Industrial Property Act and in particular encourage amendments to: (a) provide for the confidentiality of the registration process; (b) ensure the security of the owner's right in the technology safe from Ministerial discretion to expropriate in the national interest; (c) eliminate any right of the Minister to interfere in the normal bounds of freedom of the Party's to contractually arrange their relationship in the licensing agreement; (d) provide the licensor the right to have any dispute with government submitted to arbitration domestically or internationally.

8. Small Business Incentive Policy

(i) Encourage amendments to the Tax Act that would provide for tax incentives for small businesses in the first three years of operation. This will foster small business development and encourage the formalization of business operations.

9. Other Legislative Issues

(i) Provide assistance to the Central Bank to assist in their efforts now underway to review and update the provisions of the Financial Institutions Act (F.I.A.) and in particular the Central Bank's supervisory jurisdiction, licensing requirements for entry of new Banks and its prudential jurisdiction over existing banks. Reform of the F.I.A. should also anticipate and encourage banks to enter into a wider range of financial activities such as factoring and leasing.

(ii) Provide technical assistance to the Ministry of Justice to undertake drafting of a Bankruptcy Act that would clearly delineate creditors priorities in the event of bankruptcy.

CHAPTER 1 - INTRODUCTION

1. The purpose of this legal assessment is to develop a meaningful framework to assist in the analysis of the role the legal system can play in supporting and facilitating the modernization, expansion and deepening of the financial sector in The Gambia.

2. This Report is based on a review of relevant materials on The Gambia written by the International Monetary Fund, World Bank and other specialists in addition to secondary works written by African specialists and international organizations. (Annex 1 - Selected Bibliography) Legislation affecting the workings of the financial sector was reviewed and discussed with Gambians. (Annex 2 - List of Legislation Reviewed) Interviews were conducted in Washington, Toronto and Ottawa prior to the field mission. Interviews in The Gambia were conducted with a wide spectrum of individuals and organizations. (Annex 3 - List of Persons Consulted)

3. Rather than duplicate other efforts that have been contracted by USAID and others who have examined issues concerning the Development Act, the Business Registration Act, the sale of securities, etc. this Assessment focuses on issues not yet considered and provides additional perspectives and supplementary suggestions for regulatory reform in those areas where studies have been undertaken. This Report is also designed to complement the work of the three person Deloitte & Touche team of consultants who focused on the banking sector and taxation issues. (See Report of May, 1990 by Deloitte & Touche)

4. The contents of the Report include:

(a) an economic overview with a particular focus on the indigenous small business sector;

(b) an overview of the legal and judicial system including the various sources of Gambian law and the court system;

(c) a discussion of issues identified that lend themselves to regulatory solutions;

(d) an identification of policy options available for USAID to encourage the growth of the financial sector.

5. While there are many areas of Gambian law that are in need of reform, the focus was limited to those aspects of particular significance to the financial markets and the growth of the private sector.

6. Certain assumptions underlie the focus and the approach taken in preparing this Assessment:

(i) Grant support from external donors is currently budgeted at 9% of GDP (1989-90). Grant programmes and Official Development Assistance in general are either declining or at least not keeping pace with inflation. It is essential that The Gambia positions itself to compete successfully for foreign direct investment.

(ii) In the face of continued high real interest rates, the availability of term lending in The Gambia will continue to be a problem without supporting measures to minimize lender and borrower risk.

(iii) A healthy financial sector requires a variety of financial products for both savings and financing. The Gambia lacks both institutional financial intermediaries as well as financial mechanisms to move national savings into investments.

(iv) All of the productive forces of The Gambia need to be fully mobilized and utilized. This means freeing up and liberalizing the productive potential of Gambian women and rural dwellers in general, who have not had adequate access to credit and training in representative numbers.

(v) Policy initiatives encouraged and supported by USAID must be consistent with the general thrust of the Economic Recovery Programme (ERP) and in particular continue the non-interventionist role in the market of the GOTG.

CHAPTER 2 - ECONOMIC OVERVIEW

A. Macroeconomic Characteristics

7. While The Gambia has enjoyed annual growth in Gross Domestic Product(GDP) over the last three years of over 5%, average population growth per annum has continued at 3.4% per annum, allowing for only modest increases in per capita GDP. The Economic Recovery Programme (ERP) has been successful in stabilizing the Dalasi, moving inflation down to a manageable level of 8% from 70% and generally with setting the stage for a shift in focus from recovery to a forward strategy of growth. The challenges facing private sector development in The Gambia however, remain significant.

8. With a population of approximately 800,000 and per capita income of US\$230, The Gambia is one of the smallest and poorest countries in Africa. With no known mineral resources* and a limited production base, the principal manufacturing activity is groundnut production. Fishing resources are under-exploited and processing is limited. About two-thirds of the population are engaged in agriculture (mainly groundnuts, millet, sorghum and rice) and livestock raising which together constitute about 30% of GDP. About one-third of the country's food is imported, all of its fuel and capital goods and most other manufactured products. Exports include small amounts of fish, skins, cotton, fruits and vegetables and ground nuts which alone account for over 85-90% of domestic exports. It is against this formidable background that planning for the growth of the financial markets must take place.

B. Small-Medium Enterprise Sector**

9. Small - Medium Enterprises (SME'S) dominate the private sector and account for 50% of GDP. (SME is here meant to include enterprises with net assets less than U.S. \$400,000.) As such they represent a strong opportunity for future contributions to private sector growth within the appropriate regulatory environment. While data on the SME sector is poor, it is estimated that there are 9,400 formal sector SME's with between 5-50 employees in the manufacturing(especially food processing), horticulture,poultry, tourist, construction, trucking, trade and services sector. Manufacturing SME's

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* In fact it has been reported that Petro Canada International Development Corporation has found commercially productive reserves in The Gambia.

**A fuller description of the SME sector can be found in the Staff Appraisal Report on The Gambian Enterprise Development Project of the World Bank.(1988)

contribute about 7% to GDP. About 500 SME (wholesale and retail) establishments employ 2,000 workers and contributed 20% to GDP in 1986, while repair, personal and bus services made up another 20%. The growth of the tourism industry represents important backward linkages for SME's particularly in the food processing and artisanal sector. SME's handle about 60% of the total fish catch in The Gambia with the balance controlled by 8 industrial fishing companies. Employment surveys indicate that SME's account for over 32% of formal sector employment. (The informal sector accounts for about 15% of the labour force in urban areas).

10. Women are strongly represented in the informal sector and in particular in sub-sectors of the formal SME sector. Women dominate in fish processing, batik making, weaving, grain milling as well as services. Almost half of the population active in agriculture are women and about 60% of rural women are farmers in their own right. Two out of the three commercial banks have indicated that women make up less than 10% of their borrowers.

11. While various inputs are required to assist the SME sector, their transition to full formal sector participation will be facilitated through simplification of the regulations governing business formation and registration and through the provision of an incentive framework targeted at the SME sector. (para.78)

CHAPTER 3 - OVERVIEW OF THE LEGAL SYSTEM IN THE GAMBIA

A. Background

12. A former British colony, internal self-government was attained in 1963 and independence in 1965 as a parliamentary democracy . In 1970 The Gambia became a multi-party Republic while maintaining its Commonwealth membership and linkages. As a result of a variety of factors The Gambian legal system has evolved into a relatively complex judicial system. It should be noted that because of the lack of any legal academic community in The Gambia there has been nothing written on the Gambian judicial system and this overview was prepared from conversations with the legal bar in The Gambia following a review of the statutes.

13. There exist in The Gambia at least three systems of law: the received English law contained in the Law of England (Application) Act, laws enacted by the Gambian Parliament post independence and Islamic Law which is given limited subject matter jurisdiction under the Mohammedan Law Recognition Act. In addition customary law is given statutory recognition. The system is further complicated by the retention of rights of appeal to the Judicial Committee of the Privy Council in the U.K. An appeal as of right lies to the Privy Council in any civil or criminal case, where for example, the matter in dispute has a value of D5,000 or more. Other grounds of appeal also exist. (About 5 cases a year are appealed from the Gambian Court of Appeal to the Privy Council.)

14. In order to understand the legal system that impacts the domestic and foreign investor attempting to establish a business, enter into commercial transactions, acquire land, secure interests, or collect debts, it is necessary to understand the relative precedent of the various legal systems that govern business activity.

(1) The Constitution of the Republic of the Gambia (1970)

118. Subject to the provisions of this Chapter, the Act of Parliament of the United Kingdom entitled The Gambia Independence Act, 1964 and The Gambia Independence Order, 1965 (hereinafter referred to as "the existing Order") are hereby repealed.

119. (1) The existing laws shall continue to be the law of The Gambia

...

(5) For the purposes of this section, the expression "existing law" means any Act, law, rule regulation, order or other instrument made in pursuance of (or continuing in operation under) the existing Order and having effect as part of the law of The Gambia or of any part thereof immediately before the commencement of this Constitution or any Act of the Parliament of the United Kingdom or Order of her Majesty in Council so having effect.

While s.118 repeals The Gambia Independence Act, 1964, chapter 93 and The Gambia Independence Order, 1965, No. 135, a 1981 publication of the Ministry of Justice listing statutes in force lists both of these statutes. It is incumbent on the legal practitioner to examine these statutes due to s.119 which effectively sustains the applicability of their provisions. The effect of s.119 is to bring forward the provisions of all of the following as part of the legislative system of The Gambia. They in turn incorporate by reference numerous statutory provisions both those of the U.K. pre-1888 and those enacted by the U.K. government during the Colonial period as well as the prevailing common law, principles of equity and judicial precedent. Two Acts in particular are significant:

(a) Law of England (Application) Act, CAP.104, An Act to declare how far the law of England shall be in force in The Gambia and how to reform the Common Law so applied in certain respects.

LAW OF ENGLAND (APPLICATION) ACT

2. Subject to the provisions of this and any other Ordinance, the common law, the doctrines of equity, and the statutes of general application in force in England on the 1st November, 1888, shall be in force in the Gambia.

3. (1) All Acts of Parliament declared to extend or apply to the Gambia shall be in force so far only as the limits of the local jurisdiction and local circumstances permit and subject to any existing or future local Ordinance.

(2) For the purpose of facilitating the application of the said Acts of Parliament, they shall be read with such formal alterations, as to names, localities, courts, offices, persons,

moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

5. (1) Nothing in this Ordinance shall deprive the Courts of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any native law or custom existing in the Gambia, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any law for the time being in force.

(2) Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives, and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.

(3) No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law or that such transaction is a transaction unknown to native law and custom.

(4) In case where no express rule is applicable to any matter in controversy the court shall be governed by the principles of justice, equity and good conscience.

While seemingly arcane, an example of one of the immediate effects of s.2 is its application to the law of mortgages and foreclosure procedures in The Gambia, which by reason of s.2 is governed by the English Property Act of 1881. There has been no Mortgages Act enacted in The Gambia. Partnership law is also governed by old, pre-1888 UK law.

Notwithstanding Independence, many Acts of The Gambia contain references to U.K. Acts. The extent of their application in any situation as part of the law of The Gambia is a matter for

decision by the courts. There are significant Acts of the U.K. which are still clearly part of the law of The Gambia but which need to be brought up to date in content and enacted as laws of The Gambia. (para.39)

(b) Mohammedan Law Recognition Act, CAP.124, An Act to recognize Mohammedan Law for Certain Purposes and Make Provision for the Establishment of Mohammedan Courts at Bathurst and in the Kombo Saint Mary Division. Section 7 of the Act gives Mohammedan courts jurisdiction over Mohammedan Africans, relating to civil status, marriage, succession, donations, testaments and guardianship; section 9 allows appeals to the Supreme Court and provides for a Tasmir to sit as an assessor to the Chief Justice for advisory purposes.

15. The practical effect of these various sources of law is that one needs to look not only to duly enacted statutes of The Gambian Parliament and their regulations but also to statutes of the British Parliament prior to 1888 as well as to laws brought into force in The Gambia before Independence by the colonial government and not explicitly repealed. In addition, the effect of these provisions is to bind The Gambia to international treaties of the U.K. entered into prior to Independence and that have not been explicitly repealed. Lack of resources has prevented the Ministry of Justice from reviewing this inherited legislation for appropriateness in the modern Gambian context. Some necessary legislation does not exist at all, although in the U.K. such legislative gaps have been filled to meet modern economic conditions. In addition, the effect of these provisions is to have "frozen" the legislation as it existed in the U.K. prior to 1888, although the U.K. Parliament would have amended it over the years to adapt to changing conditions. There is nowhere a list of U.K. statutes applicable to The Gambia or a list of the Treaties which The Gambia is conceivably bound to honour. One lawyer thought there was only one double taxation treaty, with the U.K. in existence. Another knew of approximately 12 that pre-dated Independence and had never been repealed.

B. The Judicial Process

Court Structure

15. The structure and jurisdiction of the court hierarchy reflects the sources of laws already described. The jurisdiction of the different courts is explicitly set out in various pieces of legislation. The Constitution in Chapter VII (The Judicature) provides for the establishment of the Supreme Court and the Court of Appeal. (ss.88.89) In addition, the Constitution authorizes Parliament to establish subordinate courts and does not limit the jurisdiction and authority that Parliament can confer on them.(s.94) Parliament has exercised its jurisdiction to establish additional courts through the

Courts Act, CAP.36 and the Subordinate Courts (Civil Proceedings) Act CAP.177. and the District Tribunal Courts Act (CAP.-52). District Tribunals are also known as the customary courts.

The Judiciary

16. The Chief Justice is appointed in the sole discretion of the President while the Justices of Appeal and the puisne judges are appointed by the President acting on the advice of the Judicial Service Commission. The Subordinate Courts are staffed with Magistrates whose jurisdiction varies according to the class of Magistrate. A First Class Magistrate is generally legally trained and has the authority to impose higher fines and sentences. There are also second and third class Magistrates who are generally not formally, legally trained. For civil matters the jurisdiction of all Magistrates is claims of less than D 5,000. The District Tribunals are staffed by lay persons generally and lawyers can not appear. The District Tribunals only have jurisdiction over "Africans, resident or within the area of the jurisdiction of the District."

Jurisdiction

17. A major problem of the Court system is that the Supreme Court has unlimited original jurisdiction as well as virtually unrestricted rights of appeal from the subordinate courts. The effect is to overburden the Supreme Court with small claims that could be well serviced by a subordinate court alone. It was estimated that the civil cases alone that originate in the Supreme Court each year number more than 300. The Court is also responsible for criminal cases at trial as well as appeals in both civil and criminal matters.

18. Consideration should be given to limiting the original civil jurisdiction of the Supreme Court to D.10,000. This could be complemented by creating a small claims court in the urban areas whose rules of procedure would be simplified and which might also exclude lawyers from attending so that debtors and creditors could quickly pursue actions on their own. This is effectively the role played by the District Tribunals in the rural areas. Appeals to the Supreme Court could be limited according to the size of the claim and to questions of law.

19. Section 95 of the Constitution sets out the original and appellate jurisdiction of the Supreme Court and the Court of Appeal. In addition, the Mohammedan Law Recognition Act provides for the jurisdiction of the Mohammedan Courts. The Constitution provides for appeals to the Supreme Court or the Court of Appeal from the District Courts or the Mohammedan Courts. The Supreme Court judges will normally sit with an Assessor from the area who will advise him on the customary

laws and practices relevant to the case or in the case of appeals from the Mohammedan Courts a Tamsir or other knowledgeable person will advise on Sharia Law.

20. Together with the excessively broad jurisdiction of the Supreme Court which causes too much of its time to be spent on minor matters, the Court has not been operating with its full complement of five judges. Currently, there are only three Supreme Court judges. Two other judges have not been replaced to bring the Court up to its full complement. The Court of Appeal consists of four judges, the Chief Justice and three non-Gambians from Nigeria, Ghana and Sierra Leone who sit infrequently. This affects the ability of the Court to render decisions quickly in more complicated civil cases involving property claims in dispute. Lenders in the community resist lending on security since the delays in getting enforceable judgments raise their risk and their costs.

C. Legal Research in The Gambia

21. In addition to the complexity of the various sources of law that must be considered when attempting to discern one's legal position in The Gambia, the complexity is compounded by a lack of law resources with which to research statutory authority for various actions of Government. The last consolidation of statutes in The Gambia was in 1965 in the year following Independence. Subsequent legislation is contained in periodic volumes up to 1975. The next effort at listing the laws in force is a paperback booklet prepared by the Ministry of Justice in 1982 which is simply a listing of statutes and an indication of whether amendments had been passed since the consolidation. In order to determine amendments after this date requires enquiries at the Ministry of Justice and retrieval at the Government Printer.

22. This problem will be solved in part this year. A consultant has been provided by the Commonwealth Fund for Technical Cooperation for the past five years to undertake a 1990 consolidation of the statutes of The Gambia. She finished her work last month. The drafts are now being printed in the U.K. with funding support by the British Government and they will be published in The Gambia by the Government Printer. The 1990 Revised Statutes of The Gambia are expected to be available by October, 1990. The nature of a consolidation exercise is limited to a technical update of the legislation with all current amendments, the deletion of statutes or sections that have been repealed and matters of form for technical consistency. A consolidation does not examine substantive issues of statutory reform such as substantive inconsistencies between statutes, as this would require amendments through the legislative process. A consolidation also applies only to statutory enactments of The Gambian Parliament and would not include

those statutes of the U.K. that are applicable to The Gambia.

23. There is a Law Reform Commission in The Gambia. It is badly under-budgeted and under staffed and working without the benefit of access to adequate research materials. The current Chairman of the Law Reform Commission is a Justice of the Court of Appeal. There is no full time legal researcher at present. A V.S.O. trained lawyer assigned to the Commission left in 1987. By all accounts he was instrumental in getting many of the recent initiatives of the Commission in place. Consideration should be given to providing technical assistance to the Commission to enable it to be part of the close examination and consultations required to modernize the regulations governing the financial markets. Much of the recommendations in this Report are dependent on support and contribution by the Law Reform Commission and the office of the Chief Legislative Draftman in the Attorney General's office. To be able to undertake the tasks, technical assistance in the form of foreign expertise will be required as appropriate, according to the subject matter of the recommended reform. Infrastructural support by way of computers and the provision of legal materials would also be an important component in the successful reform of the corporate-commercial laws of The Gambia.

CHAPTER 4 - POLICY ISSUES THAT LEND THEMSELVES TO REGULATORY REFORM

24. There are a variety of ways to analyze the sufficiency of regulatory enactments: fairness, simplicity, consistency, absence of ambiguity, administration, enforceability and incidence of evasion. In this section, an issues approach is taken and the relevant statutory instruments applied to the potential resolution of the issue. Where statutory provisions are absent, recommendations for enactment are made as appropriate.

A. Lack of Long Term Debt Financing Instruments

25. This shortcoming in financing is the result of several influences including: GOTG policy under the ERP; a conservative, risk-adverse and relatively uncompetitive banking sector; and undeveloped financial market mechanisms. As long as credit ceilings are considered necessary, government debt securities continue to be the dominant fiscal and monetary instrument of government, and the health and future of the development arm of Gambia Commercial and Development Bank (GCDB) remains unclear, there is very little that can be done to encourage term lending by way of regulation that will not run counter to ERP policy objectives to move Government away from interference in the financial markets.

26. Constraints on Availability of Long Term Debt Instruments. Since GCDB discontinued term lending in 1982, there has been no institutional source of term loans. The commercial banks lack any incentive to engage in long term lending. Their capacity to provide term loans are constrained by the short term nature of their deposits. The risks inherent in long term investment lending cannot compete with highly profitable and substantially lower risk, short term lending. The Banks have neither the tradition, the confidence or the training to appraise long term investment projects. In addition, the Government is currently using 90 day Treasury Bills to raise capital and to soak up liquidity at interest rates of 15-20%.

27. It is difficult to find returns on investment that could match the high and safe returns on Treasury Bills which are a major source of commercial bank holdings. One result is that money is drawn out of the private financial market which could otherwise be used to finance business growth. In Kenya, in response to a lack of term lending for business in the commercial sector the Government of Kenya began to offer 180 day Treasury Bills in the mid-1980's to allow for some variety in maturities. While not a perfect solution, it provided one more outlet that was designed to encourage the banks in turn

to commit their funds for longer periods to borrowers. Discussions should be held with the Central Bank (CB) to determine the feasibility of offering Treasury Bills with longer maturities or at a minimum of varying maturities. There is currently no secondary market in Treasury Bills which are mostly held by institutional lenders, although the Central Bank will provide rediscounting facilities at a premium.

28. Sources of Long Term Funds. There is no question but that there are large pools of underutilized capital in The Gambia seeking profitable domestic investment outlets. Excess liquidity in recent years has resulted in large portions being invested in fixed term deposits. The Social Security and Housing Finance Corporation (SSHFC) has consolidated investments totalling D73.7 million of which almost 60% is invested in government securities. In addition there is every reason to believe that the four insurance companies will experience continued steady growth. They will contribute to a steady increase in long term funding available in the economy. In addition, the savings potential of rural Gambia has not been tapped or ever systematically explored. There is a need to provide a framework that will allow these funds to be channelled into productive investments.

29. From the perspective of The Gambian business person trying to start a business, financing needs cannot be met by the present financial system. With the constraints of credit ceilings and other ERP measures including high interest rates on all borrowing, policy instruments to change the short term look-out of the traditional banking sector is limited. The dominance of short-term financing is not prudent for The Gambian who wishes to acquire equipment and other capital assets which necessitate long-term financing over the life of the asset. Businesspersons and bankers agree that business failure is inevitable if one is financing ten-year equipment with demand loans, roll-overs of 90-day T-Bills or overdraft facilities. At the same time interviews with the banks revealed that even with the World Bank's Enterprise Development Project's Apex Facility which is designed to inject term lending into the system, that in its first year of operation no funds have been disbursed. The banks argue that the concessional rate at which funds are on-lent to them is insufficient since they are taking all of the risk. They also argue that they cannot encourage loan applicants to borrow at the current long term rates for start-up business activities where monthly interest payments would take all of their working capital. Notwithstanding the inherent problems of term lending in The Gambia, it is possible to facilitate the development of alternative financial mechanisms through a supportive regulatory framework. Given these constraints however it is necessary to look outside of the traditional debt instruments to other mechanisms that can be encouraged but do not run contrary to

current Central Bank monetary policy.

30. Leasing/Hire-Purchase. In developed countries as well as neighbouring West African countries, the growth of the leasing industry in recent years has been significant. Especially in countries where other forms of medium and long term financing have not yet developed adequately, leasing can play an important role in encouraging capital formation by small and medium scale enterprises. The World Bank has supported the development and growth of the equipment leasing sector in both of its Small- Medium Enterprise Projects in Ghana and Nigeria. Hire-Purchase and leasing are generally used interchangeably, with U.K. influenced countries more often referring to hire-purchase arrangements. The primary advantage of leasing is that ownership of the asset remains with the lessor (lender). Therefore, lease financing is typically unrelated to the size of the lessee's (borrower's) capital base, and relies principally on the lessee's cash flow to service lease payments. Further, the schedule and size of lease payments can be tailored to the specific needs of lessees. The effect is that enterprises with insufficient asset and capital bases to meet the high collateral requirements of most other forms of long-term financing, get greater access to capital and more flexible repayment arrangements.

31. There is no legislation in The Gambia governing transactions with hire-purchase characteristics. At the same time this is clearly an area of growing interest and a service sector industry of great potential. There are currently in The Gambia several entities engaged in some form of equipment leasing/ hire-purchase. They are running their business on purely private contractual terms that attempt to capture the intent of the parties. In most cases the financing is provided to facilitate equipment sales. In at least one case of an individual who ran a successful hire-purchase company in England, there are medium term plans to start a stand-alone Hire-Purchase Company.*

32. The risk of operating in The Gambia on contractual agreements without a statutory framework is that in the event of a dispute the agreement will be interpreted on the basis of centuries of complicated common law. While the hire-purchase agreement is a relatively modern development of commercial life, it is actually a variation of the old notion of bailment. The result is considerable confusion in case law as to whether the parties intended a bailment, a purchase by instalments, an option to purchase that involved no obligation to

 * The company in business in The Gambia for 18 months has about US\$1 million in equipment that they lease, primarily to the construction and transportation industries. Their equipment is fully let most of the time.

complete a purchase, or simply a lease.

33. A true hire-purchase applies to contracts by which the hirer is granted an option to buy, but is not as is a buyer in a contract of sale, under a legal obligation to buy. In more recent developments of hire-purchase, the transaction is generally financed by a third party such as a finance company. There are a variety of arrangements for third party involvement. For example, a third party can purchase the owners interest in the equipment and let it out on hire to the hirer under a hire-purchase agreement. Payments of the hirer can be guaranteed by a surety either by separate agreement or by guarantee endorsed on the hire-purchase agreement. For Gambians willing to undertake equipment leasing, a critical source of finance for productive enterprises, the risks are currently unnecessarily quite high. The characterization of the contract affects the nature of the security interest they have in the property, their obligation for equipment failure, their rights if the equipment is converted by the borrower and their rights to self-help remedies to enforce the contract.

34. The result of this uncertainty is that (i) knowledge and confidence in the concept remains quite limited. (Legislation has a strong educational role to play in a market in developing familiarity with new concepts); (ii) those engaged in hire-purchase arrangements limit their involvement to facilitating sales of their equipment without pursuing hire-purchase as a profitable end in itself; (iii) those engaged in it currently limit their customers to people they know well or who are already profitable and well-known to limit their risk. The leases are also kept to short terms. The small business person attempting to get started would not typically get access to this vehicle under current conditions. One leasing equipment company indicated that increasingly smaller Gambian enterprises are coming to them for equipment for agro-crops, food processing technologies and the housing construction industry. These would not get access to the financing offered under the current conditions of uncertainty affecting hire-purchase/leasing arrangements.

35. To encourage the slow and careful development of this financing mechanism, a study should be conducted that would analyze the potential market, likely participants in the market and the components of modern leasing legislation. In addition, the participation of the commercial banks in the industry should be examined. Under the definition of "banking business" in the Financial Institutions Act, it is unlikely that a Bank could engage in leasing without stretching the current definition. One Bank that investigated setting up a leasing arm received a legal opinion from a Gambian lawyer that the Bank could not engage in the business of lease financing. A Central Bank manager confirmed this interpretation.

At this early stage of the development of the leasing industry there is a need to develop an appropriate regulatory framework to ensure sound industry standards and practices and to provide sufficiently attractive incentives to encourage and foster its development. A study of the leasing industry would focus on the development of an appropriate regulatory and policy framework for leasing, the legal and contractual rights and remedies of both lessees and lessors, matters such as registration of interests, tax incentives (e.g. depreciation schedules) and their implications. In addition, the study would assess the need for commercial banks, currently precluded from leasing, to be authorized to undertake lease financing.

B. Towards Capital Market Development

36. The feasibility of a stock market in The Gambia has been analyzed in several studies. While there are any number of reasons to argue that The Gambia is economically unsuited to the development of a stock market at this time, economic planning should be concerned with creating the conditions in which economic growth can occur. In The Gambian context this means providing the framework in which the increased private sector activities envisioned by the GOTG can operate more efficiently. A strong financial market to support the business sector needs a balance between debt and equity financing instruments.

37. In the LDC's, several factors contribute to the inadequate equity financing available. While the lack of disposable income is a factor, other reasons contribute to the lack of general public participation in equity financing. All of these are relatively easy to address and certainly within the current policy framework of The Gambia. These include:

- (i) a lack of public education in investment practices;
- (ii) the inability to buy shares in small quantities;
- (iii) a lack of integrity in the stock market;
- (iv) unfavourable tax regulations;
- (v) administrative red tape and rapid changes in government policies;
- (vi) a lack of disclosure concerning securities transfers and ownership.

38. The three public offerings to date can not be deemed to have been successful. (See, pp.9-10 USAID Report-Stock Market Feasibility in The Gambia) The reasons for the lack of investor enthusiasm have been articulated by others. The question remains however, in the absence of term lending in the market how can the private sector be developed? If the planned privatization efforts of the GOTG are to be successful and if the private sector thrust of government policy is to have some content, some preliminary conditions need to be developed that will lead over time to a genuine market in equities.

39. Corporate Securities Law. The current regulatory framework governing the offering of securities to the public is wholly inadequate. The entire statutory authority governing shares, the issuance of corporate securities, shareholder and public disclosure provisions, corporate governance, sanctions, etc., is contained in the Companies Act of 1955 which has remained virtually untouched from its original enactment. While it is modeled on the old U.K. companies law, that legislation has changed dramatically to reflect modern economies and business conditions. The Gambian legislation has remained frozen in time. It governs not only corporations but also appears to encompass almost every other type of business organization for profit and not for profit. A careful review of the Act leads to the conclusion that simple amendments would not be adequate. Assistance should be provided to the Ministry of Justice to undertake comprehensive drafting of a modern companies law drawing on the experiences of other countries which have gone through the process of updating corporate governance in recent years. Other types of statutory enactments currently needed and others that would be needed to complement the reform of the Companies Act are discussed Infra.*

40. The effect of enacting an appropriate framework to govern the trading in shares is to encourage public awareness in the benefits of shareholdings and to encourage confidence in the market. Disclosure provisions that are full and clear are a critical component of encouraging investor confidence and in particular the confidence of the small shareholder. A review of two of the prospectuses for The Gambian public offerings reveals little that would assist a potential buyer to make an informed investment decision. In the beginning stages of equity market development, regulations should err on the side of "fuller" disclosure. In a country like The Gambia, transparency in transactions and especially those involving government are essential. (Para.74 discusses the possibility of "Good Government" legislation)

41. In addition, with the exception of an antiquated section of the Companies Act, there is no meaningful legislation to protect the interests of minority shareholders. One of the important objectives of privatization efforts in The Gambia should be to facilitate a wide distribution of shares among Gambians. While most developed countries would have separate

* In particular, legislative initiatives to create an efficient corporate and commercial legal framework should receive the highest priority and be undertaken concurrently.

legislation to handle the trading of securities, at this stage of development these issues could all be handled within the context of a targeted chapter in a new Companies Act.

42. The Accounting and Auditing Profession. Proper reporting and disclosure of information by security issuers requires professional and independent accountants and auditors. The accounting profession in The Gambia was discussed in the Deloitte & Touche Report. To this should be added consideration to be given to the creation of a statutory, professional body of accountants and auditors to develop uniform principles and standards and to license and regulate professionals. A professional body is needed to supervise the training of local accountants and to establish uniform accounting standards and higher levels of accounting disclosure. The legal profession initiated a similar law for itself in 1988 which brought together the Bar, Bench, the Law Reform Commission, the Attorney General and the Minister of Justice to share views on the issues respecting self governing professional bodies. The Legal Practitioners Act was passed by Parliament and assented to by the President on 30 December, 1988. Currently, there is no requirement for uniform, Gambian-wide, accounting and auditing principles. Under the Companies Act, accountants and auditors may choose any standard method acceptable. The effect is that financial statements prepared by different accountants cannot be easily compared by investors. Uniform accounting and auditing procedures are central to the efficiency and effectiveness of resource mobilization through the financial markets to inspire investor and lender confidence.

43. Private Placements. Another component of equity financing is the private placement mechanism which has been the source of most start-up financing in developed countries. The private placement is a private offering of shares to small groups of sophisticated investors. The disclosure requirements are less onerous than for a true "public" offering since the buyers are deemed to be knowledgeable enough to protect themselves. There is likely an informal private placement market operating in The Gambia that is confined to families and friends providing funds in return for a piece of the business already. The private placement facility brings together people with money and people with business potential through brokers etc. in an arms length negotiation. Regulations are designed to protect both the investor and the owner. Even if not yet likely to be widely used in The Gambian economy, the private placement should be anticipated in any reform of the Companies Act.

44. Financing Share Purchases. The financing of share purchases by the small investor brings together the limitations of

the debt and equity markets in The Gambia. If privatization leads to further concentrations of wealth in The Gambia, resolving one problem will contribute to another longer term problem. The market is still too small to consider mechanisms such as unit trusts or mutual funds. However, as the quality of the public offerings improve, institutions such as SSHFC which represents the small investor through its funds, should be encouraged to deepen its equity portfolio. (At the same time a ceiling on the percentage of equities held in the investment portfolios such as SSHFC should be included to protect the funds' beneficiaries). In addition, consideration should be given by a donor to providing a revolving loan fund backed by a partial guarantee through the banks to support share purchases by small investors during the privatization program. Regulations governing the sales of shares in parastatals could include low-cost stock requirements (for example, a stock split to bring down the price of the stock), wide share distribution rules and ceilings on the percentage ownership permitted by one individual.

45. An Exchange Mechanism. One other constraint on the development of a market in shares that will also constrain the success of the privatization efforts is the lack of a mechanism to facilitate a secondary market in shares. Conversations with lawyers, accountants and bankers indicated that they all received informal enquiries about the availability of shares. The enquiries are enough to warrant a mechanism where buyers and sellers could trade.

46. Since the National Investment Board (NIB) is responsible for the privatization of parastatals among other things, it would be low cost and relatively administratively easy to let it be known that one morning a week, NIB would operate a trading meeting in public shares. The only infrastructural requirement would be a large blackboard and someone with training to host the meeting. Even countries with very shallow, inactive markets have some forum and intermediation mechanism for transferring securities. In some Caribbean countries the stock exchanges are open for a few hours a week. In Nairobi, there is no physical trading floor, but brokers meet daily to set a securities roll call to match demand and supply and set transaction prices. People could be encouraged to attend the trading session if NIB could offer weekly or monthly short lectures on various aspects of investment by bankers, lawyers and others with specific knowledge. As an exceedingly simple first step in trying to provide a market place for the buying and selling of shares in the few publicly traded companies, NIB may begin to play the role of encouraging a brokerage industry to emerge which would be market makers. If a private sector thrust is preferred a "securities window" could be authorized in one of the commercial banks, similar to the foreign exchange window already operating where buyers and

sellers could tender at an agreed price for a fixed commission.

47. Tax Incentives to Encourage An Equity Market. Other regulatory issues governing the differential tax treatment of debt and equity holdings are discussed in the Deloitte & Touche Report. To this might be added investigation into tax measures to encourage capital market development. For example, if current GOTG policy prevents the abolition of capital gains tax, a partial measure might be to exempt capital gains from the sale of listed shares by original owners to the public, since such a tax provides a disincentive to owners to go public. (This assumes that the capital gains tax applies to a sale of shares. The interpretation of this is in question at present.) In addition, to encourage companies to go public a differential corporate tax rate could be applied. There are a range of tax measures available that can create a pro-equity bias. These would need to be reviewed in detail if a decision to aggressively develop a market for equities was taken. Any tax incentive offered, to be effective, is premised on a tax system that can enforce compliance of tax owing in the first place.

C. Competition in The Banking Industry

48. The Gambia's financial system has serious shortcomings. The commercial banking system, while sound and profitable, is not entrepreneurial and provides few long-term resources to fund investments. With only three banks (and one in serious financial condition) competition is low, and the quality of service is poor. In short, it is a lender's market. Lack of financial outlets for long-term contractual savers are scarce and this blocks investments by these savers in agriculture and industry. In sum, The Gambia's financial system now plays a limited role in intermediating maturities and risks as well as the intersectoral mediation of funds. From the experience of other countries, it is very likely that The Gambia's present situation of excess funds will in retrospect appear to have been an aberration from more normal conditions of relatively scarce financial resources and limited foreign exchange. There is a need to continue to encourage savings.*

* Notwithstanding current high liquidity, Gambians have relatively low rates of savings, 6-8% as compared to 13% in Kenya and 14-16% in the newly industrializing countries of the ASEAN region.

49. An efficient financial sector is one structured to evolve with the economy and which has incentives to offer a better and broader range of services over a wider range of activities. While financial reform itself will not suddenly transform business opportunities in the short run (other impediments constrain rapid development) in the longer run the gains from financial reform can be substantial in supporting the growth of an indigenous private sector.

50. Effectively, Gambians are currently served by only two banks - Standard Charter Bank (SCB) and Bank International for Commerce and Industry (BICI), both locally incorporated, although with majority shareholding by overseas interests. Commercial bank profitability is high by international standards but this is balanced by a relatively small base reflecting the size of The Gambian economy. The traditional commercial banking practices of the two banks reflect their history which emphasizes working capital and overdraft financing rather than development or project financing. The issue of competition in the banking sector is likely a short term problem that will be alleviated in part when the status and future role of GCDB is resolved. In addition the Central Bank is reviewing applications for licensing under the Financial Institutions Act. In assessing the current applications, it is important to ensure that any new bank would provide a range of services and be an effective competitor at mobilizing new sources of funds and not simply transfer business from the existing banks. Creative approaches to mobilizing rural savings, a completely untapped market at present should also be considered in evaluating applications for new banking facilities.

51. Financial Institutions Act. The commercial banks are regulated under the Financial Institutions Act by the Central Bank, which in turn is governed by the Central Bank Of The Gambia Act. (There is separate statutory authority for the GCDB under the Gambia Commercial and Development Act, 1972, which is not considered here since its restructuring will include substantial amendments to its governing statutory instrument.) Under the Financial Institutions Act, a financial institution includes both "banks" and "credit institutions". A bank is defined as a financial institution whose operations include the acceptance of deposits subject to withdrawal or transfer by cheque. A credit institution is defined as any financial institution other than a bank and a financial institution is defined as any person doing "banking business". Banking business is defined very broadly with the intention of bringing most businesses involved in the exchange of credit within the Act. This is quite typical of banking legislation and in particular in U.K. influenced jurisdictions.

52. The Financial Institutions Act is outdated for governing modern financial institutions. Its definition section, regulatory and oversight functions, licensing authority and reserve requirements need to be reviewed. This effort has been begun through internal efforts in the Bank's Supervision Department. They lack the resources to do it efficiently or within a reasonable time frame. Technical assistance in the form of a legal expert in banking law should be provided to work with the Central Bank in redrafting the legislation. This is particularly important in light of the re-entry of GCDB as a commercial bank which should now be regulated under the same statutory measures as its competitors. Statutory reform should also be completed before any new bank is licensed. In addition, commercial banks should by policy directive or statutory amendment if necessary, be given a clear signal that through subsidiary operations, they can enter into new financial product markets such as factoring and hire purchasing.

53. Prudential Supervision of the Banks. Section 32 of the Financial Institutions Act provides that every financial institution maintain a special reserve deposit account, reserved exclusively for the purpose of making good any loss resulting from the negligence or dishonesty of any of its directors, officers or employees, or requires it to ensure itself against such loss, to an amount the Central Bank deems adequate with an insurer the Bank deems acceptable. (s.32) In Kenya deposit insurance of approximately U.S. \$7,000 is required on each account per depositor. It was not possible to determine The Gambian requirement from the Central Bank. The prudential supervision of Gambian financial institutions by the Central Bank was discussed in the Deloitte & Touche paper. This discussion focuses on the competitive aspects of the financial sector with a view to encouraging increased mobilization and intermediation of savings into investment.

54. Mobilizing Savings. One important macro-economic effect of lack of competition in the financial sector is lack of interest in the two existing banks to encourage new deposit taking. This has two results (1) it constrains the development of a banking "culture" among a wider circle of Gambians who lack access to banking facilities. Access here can mean physical access in terms of the proximity to bank branches and lack of access in the sense of all of the implicit and explicit signals that you are not welcomed. (2) It fails to mobilize new and as yet untapped sources of national savings that will be needed for productive investment in The Gambia, when the current and unusual high levels of liquidity are gone.

55. USAID could assist in a savings mobilization effort through technical assistance for a pilot project with GCDB or

BICI to test mobile banking in 2/3 targeted rural areas: mobile banking has been successful in other areas. It has a slow start until people never before reached by banking, develop confidence in banking and banking habits. In part the most significant impact of widening access to the formal financial sector, is to begin the process whereby individuals for whom wealth has always meant "possessions" (cows, houses, land, jewellery, etc.) gain confidence in the "value" represented by paper and paper transactions as forms of wealth holdings.

56. Deposit Taking for Non-Banking Institutions. Increased competition in the financial sector can also be encouraged by allowing SSHFC to become a deposit taker for term deposit accounts, that permitted withdrawals but not cheque writing privileges. Since SSHFC represents small holders across a broad range of The Gambia, it is in a significant position to play a role not only in encouraging longer term savings that can in turn be mobilized for investment but that will also attract a new clientele into the banking system. Amendments to the Act governing SSHFC and the Financial Institutions Act should be considered to allow for a deposit taking role.

57. New Banks. Financial development is a partner of macroeconomic policy. The ERP has introduced dramatic policy and structural adjustments into the economy over a relatively short period of time. The effects of these changes will continue to be felt for some time. The learning curve for government and the private sector as to what the changes mean and how to respond to them is steep. The IMF can only make educated guesses as to how the economy will respond and their projections have been wrong in the past. In the face of such uncertainty, it is difficult to plan with confidence the type and number of institutional players that will be necessary for an efficient and competitive financial sector. The uncertainty is compounded until it is clear that GCDB will emerge as a competitive player. Prudence would dictate a staged approach to introducing a new player into the market until after GCDB has re-entered the market as a competitive player.

58. Applicants for licensing as a bank under the Financial Institutions Act should receive a final decision on the approval or rejection of their application within 120 days after the receipt of the completed application and if refused, the grounds of refusal. S.4(4) If the decision on the application is based on the grant of license not being in the public interest of The Gambia, no other reason need be given. The delay in processing the current applications reflects the uncertain nature of the direction the GOTG will take in structuring financial market development in the face of current economic conditions.

59. Project Financing. In the meantime, steps can be taken to reduce the impact the lack of competition has on the availability of term lending. While criticism of the role of development finance institutions in recent years has taken on an ideological flavour among donors, the focus on their failure begs the question as to who will play the role they were originally designed to play in project and development financing. Commercial banks alone will not step into fill this gap in the financial markets. The Gambia faces the problem of all largely single commodity economies, the long term issue of economic diversification.

60. In the absence of such a facility geared to long term development financing in the near term in The Gambia, consideration should be given to the role that could be played by the GOTG in sharing risks with the commercial banks for project lending. The banking system would act as a commercial screen for the projects while the GOTG could provide a system of guarantees on designated loans to the priority sectors identified in the Development Act. Government would absorb a partial and declining share of credit risk over the life of the loan. The quality of the lending would be assured by the participation of the commercial banking sector in both appraising the credit application and in sharing the commercial risk. The facility could provide an important training role for the commercial banks in undertaking project lending. It would also provide access to commercial credit to a wider range of borrowers thereby deepening the financial markets. The expected budgetary cost of the guarantees would be quite small. The willingness of the banks to take on different lending is reflected in SCB's willingness to participate with Gambian Women's Finance Trust (GWFT) in providing loans to small, female borrowers. SCB in this case is only at risk for the final 25% of any unpaid balance. The primary risk is borne by GWFT in conjunction with an international guarantee fund for affiliates such as GWFT, of Women's World Banking operating by way of a letter of credit to the commercial banking partner.

61. Land Tenure. One other issue that is conducive to regulatory reform and that affects the commercial banks' willingness to lend long term is the lack of adequate sources of traditional collateral and in particular land. As a result of colonization, there exists at least three systems of land tenure - customary law, the received English common law and Gambian statutory law. In the rural areas customary law prevails for the most part. In general, customary law and practice in the rural areas does not permit the alienation of land. The *alkalo*, the legal head of the village administers and allocates the land through a grant of a usufructuary right in the land. In the more urbanized areas and in particular in Banjul, there are estates in fee simple. The balance of the land is owned by the government which lets the land out on certain

conditions by way of leases. Historically the leases have had varying terms.

62. Recent proposals to reform the land system are attempting to provide for a uniform system of 99 year leases. The policy is in draft Bill form. Presently the leaseholds are granted for a period of 21 years only. Long term leases will go a long way to satisfying bank needs for secure forms of collateral but the situation still needs to be clarified and perfected. In addition, the reform of the land system will require a comprehensive effort at land registration. The encouragement or requirement to register land will clear up cloudy titles and set the stage for a more efficiently operating system in which the lending institutions can have confidence.

63. The GOTG should be encouraged to move quickly to a system of 99 year leases. Technical assistance could be provided to assist with the creation of a proper register for newly granted leases. Existing short term leaseholders could be encouraged to come forward and register by offering to convert their lease to the longer term on registration. This would assist the GOTG to rationalize the administration and use of this increasingly scarce resource.

D. Creditors Rights

64. A recurring theme in all of the discussions concerning lending transactions was the problem of perfecting a security interest in either real or personal property that could be easily enforced in the event of default.

65. Security in Real Property. The problem of land tenure (already noted) impacts very heavily on the willingness of lenders to provide credit. Mortgages are a principal way to raise cash to start a business. The GOTG is addressing the problem in part through the granting of long term leases that will be registered on issuance. The Law Reform Commission has two projects underway that specifically focus on the land reform question. Its largest project launched in 1987 is research into and codification of the customary laws of The Gambia. In particular their Report when complete will document for the first time the variety of practices under customary law governing ownership in land, inter vivos transfers of land, succession, rules governing vacant land and women's rights in land, etc.

66. In addition the Law Reform Commission at the request of the Attorney General has drafted a Conveyancing Bill which was submitted in 1989 for consideration. The Bill seeks to simplify and modernize conveyancing forms, reproduce in one place the law relating to conveyances in customary lands, and to develop registries to handle the recording of customary inter-

ests in customary land. Registers in Subordinate Courts would be established for transfers and would be a condition of validity. In addition the Ministry for Local Government has initiated action on a Draft State Lands Bill. All of these initiatives are at various stages of implementation and consideration. The problem of the confusing state of land tenure is recognized. The solutions are more difficult to operationalize without adequate resources.

67. Registering Interests. The Registry system for both real and personal property is not designed to inspire confidence in the security of any interest one registers. Located in the Ministry of Justice Building there are at least nine Registers that are kept. All entries are by hand and cross-referencing would be nearly impossible. Neither are the Registers secured in any way, so that tampering with the registries could be easily accomplished. The Registers identified included: (i) a Deeds Register for mortgages, assignments, agreements, power of attorneys, partnership deeds and personal property leases. The Register is about 400 pages in length; (ii) a Bills of Sale Register for cars, refrigerators and all other types of moveables. This Register is about 200 pages long; (iii) a Leases Register for leases of land. This Register is about 400 pages long; (iv) a Register of Companies; (v) a Patents Register; (vi) a Trade-Marks Register; (vii) a Copyrights Register (viii) a Business Register for all businesses; (ix) a Register for Provincial Leases.

68. The system works on the basis of the first to register taking priority. However, different types of interests could be taken in the same property. In addition, the system could not cope with refinements such as floating charges. There are several individual pieces of legislation governing commercial transactions: Bills of Sale Act, Companies Act, Insolvency Act, etc., which are based on old U.K. common law and which have not been amended. More typically in modern economies today is to have all of the various paper, governing commercial transactions handled under one statutory enactment that clearly establishes rules of priority, methods of "perfecting" an interest in personal property, registration procedures and the nature of a registration. In the U.S. these are comprised in the Uniform Commercial Code. In Canada, these are contained in the Personal Property Security Act.

69. The initiative to modernize the commercial codes of these two countries was in response to the problems they faced as Gambia does today - antiquated and conflicting common law principles impeding the efficient workings of the financial markets. Consideration should be given to technical assistance that would work with the Ministry of Justice lawyers to undertake a consolidation and update of a commercial code that could streamline the system to encourage lenders to more will-

ingly look to personal property as a source of collateral and that would render commercial transactions more certain. This would need to be undertaken concurrently with drafting a corporations and securities code.

70. Without an efficiently operating system to register legal and equitable interests in real and personal property, the lenders' confidence in the available sources of collateral to support lending will be low. The lender compensates by only lending to large, established businesses, personal friends or by requiring excessive collateral. In The Gambia even the banks admit they want 100% coverage with no exposure. In practice, collateral requirements are even higher. Consideration should be given to providing technical assistance to the Registry office which would assist with devising a modern system of registering interests. This would involve not only the provision of computers and software but also a methodology to rationalize the system which would probably involve the necessity to amend the particular statutes governing the property, interest or transaction. In addition training would be required of the Registry office staff. They are in fact an extension of the judicial system and their status needs to be upgraded to impress on them the need for a professional and careful approach to their work. This becomes critical in the case where cross-checking across registries is required.

71. With the exception of the overly broad original jurisdiction of the Supreme Court in civil cases, which could be relieved by the creation of a Small Claims Court, the Court system works quite well. Complaints of extensive delays by aggrieved creditors are more likely the result of a debtor taking full advantage of his legal rights than of avoidable delays in Court administration. Where delays may be encountered in the administration due to a lack of resources is in the appeal process. The lack of even automatic typewriters means that the Court Reporter is not only having to write in short hand all of the proceedings of the trial, he is then obliged to type these on antiquated manual typewriters if an appeal is filed. The requirement of four copies of the transcript for an appeal becomes problematic since the Office of the Registrar of the Supreme Court who is responsible for preparing the documentation for appeals is without a photocopier. Technical assistance to the Registrar in the form of word processing equipment and the specialized equipment and training required of court reporters would clear any backlog in the system and allow for speedier processing of claims.

72. Execution of Judgments. The second area where creditors claims may be delayed is in the execution of judgments. A judgment creditor with an outstanding claim can apply to the Court for a Writ of FiFa. The writ is given to the Sheriff for execution. It was estimated that about 200 Writs of FiFa are

filed with the Sheriff each year. In The Gambia, the Sheriff is also the Inspector-General of Police who is assisted by two bailiffs. While it was thought that Commissioners can also serve as bailiffs in their divisions, in practice there are only two bailiffs employed by the Ministry of Justice who are responsible for the whole country. Delays in executions are significant. In order for a judgment creditor to realize on a judgment, he in fact has to locate the debtor's assets himself, drive the bailiff out to where they are located and point them out to the Bailiff and in general be part of the whole process. Creditors complain of a lack of effort on the part of the bailiff. Most also questioned the integrity of the system.

73. Because of the inadequacy of the infrastructure to realize on judgments, the banks respond by only accepting realty as security. As a rule, they do not take personal property and one banker said Bills of Sale are not worth the paper they are written on. The type of mortgage the banks insist upon is also a reflection of the difficulties of enforcement. There are two types of mortgages recognized in The Gambia: legal and equitable. In the case of a legal mortgage, the mortgage is assigned to the Bank who in effect is the owner of the land. In the event of default, the Bank has the power to sell, subject to a three month repayment opportunity allowed to the borrower. With an equitable mortgage, it is necessary to go through a legal proceeding, with its accompanying delays. The property is sold by the Sheriff after a further three months notice is given to the owner. The effect of the need to have realty as collateral for commercial lending is that rural dwellers and women are constrained in their ability to access credit.

74. Addressing the enforceability of judgments is difficult and there are limited policy tools: lack of manpower, problems of locating a debtor in a country like The Gambia for debtors not formally employed, problems of debtors leaving the country in a country where mobility is high and borders not demarcated, confusion arising in conflicting claims to the same assets when the practice of registering assets is only beginning and when rights to use are confused with alienable ownership rights, all contribute to the problem. Some inroads can be made by improving the registry system as noted. In addition some technical assistance to the Sheriff's office is warranted to develop a registry system for the Writs of FiFa that would have a "tickler" or "red flag" system that would alert the system to Writs that remain outstanding beyond a certain date. For example, one bank indicated that it had eight FiFas outstanding dating back to July, 1988. In addition, it is clear that some training of bailiffs is necessary. They are in fact officers of the Court and should understand both the scope and significance of their role.

E. The Investment Climate

75. The USAID Report on Investment Opportunities in The Gambia (September, 1989) sets out the general investment climate in The Gambia. As a result of ERP most of the measures that would normally form the basis for regulatory reform have been undertaken. It is too soon to judge their success. Issues such as the high level of corporate tax rates were addressed in the Deloitte & Touche Report. Five other areas warrant comment: The Development Act and its procedures; The Business Registration Act; The Companies Act; The Industrial Property Act; and dispute settlement legislation.

76. The Development Act. Several studies have been conducted on the Development Act that express differing viewpoints on its operations. Rather than repeating or qualifying conclusions in those Reports, a few additional comments are made:

(i) The Development Act combines elements of both promotion and regulation. While the Act purports to be promotional, the promotional aspects are in fact not as significant a part of the tone and content of the Act as are the screening process, the monitoring process and the performance requirements to qualify for the incentives.

(ii) A simple reading of the Act raises questions as to its procedures which seem unnecessarily cumbersome. The administration of the Act is under the Ministry of Economic Planning and Industrial Development (MEPID). However, the National Investment Board (NIB) established under the Office of the President is designed to be a one stop investment office. Its ability to be so with respect to the Act is limited because of the discretionary approval process involving numerous government institutions. The promotional component of the Act are the fiscal incentives. Any fiscal incentives under the Act must be approved by the Ministry of Finance and Trade. As well, various other Ministries must be consulted during the 90 day vetting process. Finally Cabinet can reject the recommendation of MEPID to approve the granting of a Development Certificate. And, even after Cabinet approval, objections can be lodged by the public on any grounds. While transparency in the system of granting incentives is important, the original purpose of the Act was to streamline the process of investment to attract investors and to overcome The Gambia's lack of natural competitive advantages through the use of incentives. Either MEPID or Finance should have responsibility for the Development Act but not both. Since the thrust of the Act is fiscal incentives, it is probably more practical to house it in Finance. In addition the Finance Ministry is generally the more powerful ministry in countries to move projects through the system. (In the Act, which Minister is responsible for

administering the Act is no where defined in the Act or the Regulations.)

(iii) Last year there were about 25 applications for Development Certificates. Of these about five were in the D 100,000 - 1 million range, about eight were in the D1 -10 million range and over D10 million in investment made up the balance. Given the limited resources of the Industrial Development Unit (IDU) who are charged with appraising and administering the applications in MEPID, consideration should be given to creating a "fast track" approval process for applicants whose investments are under D1 million. The grant of incentives could be made by the Minister. He would inform the Cabinet of any approvals made and all approvals would be announced in the Gazette. Except in the case of politically motivated decisions that were so challenged, the approval would be final. Transparency is preserved through the disclosure process but unnecessary delays are avoided. Again, the decision would first have to be made as to the most appropriate Ministry for administration of the Act.

(iv) The question of the availability of duty waivers presents some confusion that can be remedied by statutory amendment. In practice when an investor comes to IDU and wants to import equipment but is too small to meet the qualifications of a Development Certificate, he can apply for a duty waiver under the Customs Act from the Minister of Finance. The IDU staff will in the appropriate case make a recommendation to support the application of the importer to the Minister.

Secondly, where an applicant under the Development Act is of sufficient size that he is encouraged to proceed with his application, he can apply for a duty waiver that is generally referred to as a deferred duty payment or temporary duty waiver. This too is granted by the Minister of Finance. The authority for the Minister's discretion in both of these cases is apparently not under the Development Act or its regulations. Section 8(2) of the Development Act Regulations (1990) which provides for a deferral of payment for customs and excise duties on imported equipment, only applies to a holder of a development certificate, on a clear reading of the provision. There is some indication that the practice of granting duty waivers is one that was started under The Development Act of 1973, now repealed. Others suggest that the Minister is acting under his statutory authority under the Customs Act. However a reading of the Customs Act contains only one provision that on a strict reading appears to only apply to duty already paid and not to duty yet to be paid. Section 31 of the Customs Act provides that the Minister "may remit or authorize the refund in whole or in part of any Customs duty payable or paid by any person on any goods imported or exported if he is satisfied that it is just and equitable to do so."

(v) Section 5 of the Development Act provides the fiscal incentives available to investors under the Act. However, under the Objects and Reasons section that follows the enumerated sections of the Act, which purport to explain the corresponding section of the Act, it states that: "The exemption under the clause is not intended to be automatic. Application has to be made by a holder of a development certificate to the Minister for consideration. One might ask then what is the significance of being a holder of a Development Certificate at all if after going to the time and expense of the appraisal process, the investment incentives may still not be forthcoming. If this is not the intent, then language needs to be clarified.

(vi) Section 22 of the Act provides that the granting of a Development Certificate does not confer any special status to the holder under the Income Tax Act. However, s.5 provides that a total or partial exemption from payment of Company Tax may be granted. This is probably not a significant issue in practice, the inconsistency however does not contribute to investor certainty.

(vii) Concern was expressed about the interaction of the Development Act and the relatively new Sales Tax Act. As procedures are worked out under the two Acts inconsistencies will have to be monitored. In addition, with many of the changes introduced under the ERP, a review of the Customs Act and its interaction with the Development Act is warranted. This will be easier to undertake after the consolidation of statutes is published in October.

(viii) Investment promotion systems do not always follow even the intended simplified rules of the regulatory framework. Any number of internal regulations, guidelines and exercises of discretion and interpretation appear in the system. These have proved to be a critical deterrent to investment in many countries. In addition, all countries in the region are competing for the same investment funds and offering the same incentives. The International Finance Corporation and others who have surveyed investors and incentive regimes are convinced that investment incentives have little influence on investment decisions, but are costly to host country treasuries. This foregone revenue could more effectively attract investment if targeted at improving infrastructure and eliminating administrative bottlenecks. The impact of the Development Act both in affecting investment decisions and on revenue foregone should be critically assessed at regular intervals.

77. The Business Registration Act. A study of the procedures under the Business Registration Act was undertaken in recent

weeks by the Harvard Institute for International Development. It reaffirms the findings already discussed concerning the inadequacy of existing procedures and infrastructure at the office of the Register-General with respect to record keeping in general. The impact on investment decisions can be substantial. Notwithstanding good intentions expressed by NIB and IDU to encourage investment under the Development Act, these intentions can be defeated by lack of "soft" (people) infrastructure in other areas to which the investor is subjected. While the registration process in the Act is relatively simple and should not take more than a few days, in fact several accounts were given of processing delays of months and abuse of discretion on the part of the staff. These are difficult to document and substantiate, however there is generally a negative impression of the process among individuals attempting to do business.

78. There is not much scope to address this by way of specific regulatory reform, it does however go to the heart of many other "process" problems alluded to. In many countries in recent years governments are turning to well publicized codes of conduct to govern civil service and ministerial behaviour backed up by a few quick and highly visibly imposed sanctions such as dismissal. The effect is to change the culture of what constitutes acceptable behaviour very quickly. In some jurisdictions these are known as "Good Government" and "Clean Government" Acts and include disclosure provisions on assets and investments owned by Members of Parliament.

79. The Companies Act. The governing business law is also a major impediment to the efficient and orderly flow of investment funds. The problems of the Companies Act have already been discussed. A section by section reading of the Act leads to the conclusion that it is too far removed from the modern workings of business to have any redeeming value. In practice, is ignored by everyone. The complete overhaul of the statutory regime governing business operations in The Gambia should receive the highest priority. This would include at a minimum the following: a Corporations Code, a Securities Code, a Partnership Law and a Commercial Code. (The Partnership Act in force in The Gambia is a pre-1888 U.K. statute that has not been amended.)

80. Industrial Property Act, 1989. Protection of patents and trade-marks is a key component of a country's overall attractiveness to investment. The Gambia is a member of the African Regional Industrial Property Organization (ARIPO) and is a signatory to the ARIPO Protocol governing patents and designs within the framework of ARIPO. In addition legislation modelled on the draft legislation designed by the World Intellectual Property Organization was enacted as the Industrial Property Act in 1989.

With certain exceptions the legislation contains most of the protections expected. The exceptions are the following:

(i) Section 12 (6) provides that "where the public interest, in particular, national security, nutrition, health or the development of other vital sectors of the national economy so requires, the Minister may decide that, even without the agreement of the owner of the patent, a government agency or a third person designated by the Minister may exploit the invention subject to the payment of an equitable compensation to the said owner thereof". Section 12(7) provides that any owner dissatisfied with the amount of compensation may appeal to the Supreme Court.

This provision would certainly have a chilling effect on any investor bringing valuable technology into The Gambia. At a minimum the discretion in the Minister is overreaching in the extreme. It is difficult to contemplate technology that would not be encompassed in ss.6. The right of appeal to the Supreme Court of The Gambia is of little comfort. National courts are notorious for not second guessing Ministerial exercises of discretion in the "public interest" or on "national security" grounds. In addition, the Court could refuse an appeal since the grounds of appeal in the legislation do not purport to allow judicial review of the appropriateness of the Minister's decision. At a minimum, the legislation should be amended to provide the owner of the technology the right to put both the decision and separately the amount of the compensation to an independent arbitrator who both parties agree to.

(ii) Section 37(5) of the Act provides for the registration with the Register General of any license contract concerning patents, utility model certificates, registered industrial designs or registered marks. The problems of the Office of the Register General have already been identified. Failure to register the agreement can render it invalid. ss.5 provides that the Register General "shall keep the contents confidential but shall record it and publish a reference thereto". Subsection (6) then provides that "Where the Minister is of the opinion that any clause in a license contract or relating to such a contract imposes unjustified restrictions on the license, with the consequence that the contract, taken as a whole, is harmful to the economic interests of The Gambia" he can cause the parties to modify the contract and if they fail to do so, declare the clause null and void. One might reasonably ask how the Minister has authority to know the contents of a confidential document filed with the Register.

(iii) Section 37 (7) is a more significant issue. Subsection 7 goes on to identify 17 specific grounds that are "unjustified restrictions" in license agreements in addition

to the general provision of "harmful to the economic interests of The Gambia". Most of these grounds are unreasonable restrictions on freedom to contract. Section 37(7)(a), the first enumerated ground, prohibits any provision in the licensing agreement that would have the effect of "importing any technology from abroad when substantially or equivalent technology may be obtained on the same or more favourable conditions without any importation of the technology from abroad." Given the abolition of import licenses and the liberalization of foreign exchange under ERP, this provision is a significant interference in commercial decision-making.

Section 37(7)(i) disallows the licensor's right to impose restrictions on the licensee to export the products made under the license. This should be a matter of negotiations since the effect of licensing a Gambian under this Act would be to facilitate the licensee to become a trade competitor in a third country such as Senegal where the licensor may not yet have established himself. Territorial restrictions are a normal part of licensing arrangements which are reflected in the fees and royalty payments negotiated.

(iv) It is important that these issues be examined closely from the perspective of The Gambia's need for access to technology and investment for development and whether provisions such as those discussed are not investment disincentives that in no way can be compensated for by initiatives like the Development Act.

81. Settlement of Disputes. The Gambia is a member of the International Centre for Investment Disputes (ICSID) established under the auspices of the World Bank, which provides a forum for conciliation and arbitration of investment disputes between states and foreign investors. In addition, there is an Arbitration Act (CAP 5) that is essentially old U.K. law that allows parties to submit disputes to arbitration. The procedures are governed by the Supreme Court with respect to the appointment of an arbitrator in the event of the failure of the parties to agree on a choice and with respect to the enforcement of an arbitral award. Other international arbitral awards, such as under the International Chamber of Commerce Rules will be enforced in the Gambian Courts under common law principles.

F. Small Business Incentives

82. The size and importance of the small business sector has already been noted. There is no regulatory framework in place that promotes the expansion or deepening of the small business sector. Instead incentives designed to encourage larger businesses may put the small scale business at a disadvantage. For example, the incentives provided under the Development Act are

in practical effect not available to small scale enterprises who would not be able to meet the threshold requirements of local content and export percentages under the Act. The effect is to discriminate in favour of imports of large capital goods while no preference is provided to the types of small capital goods required by the small scale enterprise. The bureaucratic regulatory process already described impacts more severely on the small-scale entrepreneur for whom the time and rents expended in starting a business may absorb the scarce energy and cash flow needed to get the business operational. The problems of access to term credit in general in The Gambia, excludes the small-scale sector at all, since they will generally not have the credit history or the liquid assets and will certainly be unable to meet the heavy collateral requirements. Finally the provisions of the Tax Act make a provision for small companies engaged in a manufacturing activity and not otherwise eligible for concessionary treatment under the Development Act. The benefit however only commences in the third year and is limited where chargeable income exceeds D 5,000.

83. Consideration should be given to reducing corporate tax rates in the first three years of business start-up and up to a specified level of gross revenue. Most countries now recognize the critical role small business plays in employment generation and economic diversification. The start-up phase is the most difficult before marketing efforts and production schedules come together to create cash flow. A secondary effect of small business tax incentives is to encourage the formalization of businesses. However, tax incentives are only relevant in a system where tax compliance and enforcement are effective. The creation of a small business tax incentive should take place only in conjunction with the overall tax enforcement reform recommended in the Deloitte & Touche Report.

G. Miscellaneous Issues

84. Foreign Investment. The Gambia is in the early stages of exploring the possibility of both (i) developing a tax haven status for foreign registered companies. (Amendments to the Companies Act and the Business Registration Act have been prepared) and (ii) establishing an export processing zone. Both of these initiatives would require substantial regulatory changes. For example, the Labour Administration Act currently prohibits payment for piece work. The role for USAID in these exploratory efforts is to urge a careful, go-slow approach. The record of export processing zones is mixed, the competition is stiff and the government investment to establish these is very high. The zone in neighbouring Senegal is by all accounts a failure.

85. Bankruptcy. There is no bankruptcy law in The Gambia.

Bankruptcy provisions are of general significance to creditors. In The Gambia, where a receiver is appointed to distribute the assets of a company, the relative priority rights are determined by statutory provisions in various statutes and by common law. Wages rank first under the Labour Administration Act while taxes rank second under the Income Tax Act. Consideration should be given to drafting a Bankruptcy Act that clearly defines what will trigger bankruptcy proceedings, the priority of secured and unsecured interests, the respective right of the creditor and the debtor and the rights and protections of the Receiver in his role as receiver.

CONCLUSION

A competitive financial system for a country the size of The Gambia should be attempting to build, over a medium to long term of 15 years, towards a deeper and more sophisticated system that would reflect and support a correspondingly more developed economy. The components of this which should comprise a financial sector strategy would include: a competitive (but not over-banked) commercial banking system that reached into the rural areas; a developed money market building on the issue of public paper; a small stock market; several unit trusts; and a development finance component that would provide grants or equity finance in the appropriate case, subordinated and commercial loans and well conceived technical assistance for project support. Development finance need not be institutionalized. It can be in the form of mechanisms and programmes of existing facilities. The efficiency of the financial sector and the efficiency and growth of the non-financial (or real) sectors are mutually dependent. The Gambia requires banks and other financial institutions to both mobilize new levels of national savings and to adopt new attitudes and practices to investment. Start-up businesses need to be encouraged and facilitated. At the same time The Gambia will need to attract off-shore funds to assist in private sector investment.

The intent of good legislation can be defeated by uncooperative and badly trained administrators, cumbersome bureaucracies and political interference that is both unpredictable and unaccountable. The regulatory environment of The Gambia encompasses all of these - statutory provisions, administrative practices and bureaucratic attitudes. The appropriate regulatory environment is an important point of departure to provide both certainty and transparency. But it is only a point of departure on which good planning must be based.

OBJECTIVE	MEANS	ITEMS TO BE FINANCED (IF \$0 TO BE USED AS "CONDITIONALITIES" FOR OTHER ITEMS REQUIRING FINANCING)	ESTIMATED COSTS (FOR PLANNING PURPOSES ONLY) (IN U.S. \$'000)	CALENDAR OF EVENTS
<p>A. The Judiciary: Improve the efficiency of processing civil claims.</p>	<ol style="list-style-type: none"> 1. Create a Small Claims Court or designate a Magistrates Court as such and limit appeals to Supreme Court (statutory amendment) 2. Limit the original jurisdiction of Supreme Court in civil cases to a minimum monetary amount (statutory amendment). 3. Fill the vacancies on the Supreme Court. 4. Technical assistance to Registrar of Supreme Court. 	<p>Possibly training of Magistrates to supplement skills</p> <p>-</p> <p>-</p> <p>- equipment - computers, copiers, court reporter recorders/transcribers.</p> <p>- short term training (2 weeks) to Court Reporters. Contact Commonwealth Secretariat, Legal Division concerning programmes offered regionally.</p>	<p>25</p> <p>10</p>	<p>Immediate</p>
<p>B. The Legal Profession: Strengthen the local profession. Improve access to research materials and their understanding of new developments in corporate-financial-commercial law.</p>	<ol style="list-style-type: none"> 1. Technical assistance to the legislative drafting staff at the Ministry of Justice. 	<p>- equipment - computers and related word processing software.</p> <p>- 2-3 month training in modern commercial and corporate codes. Appropriate venues could be determined by Commonwealth Secretariat.</p> <p>- International Travel.</p>	<p>15</p> <p>10-15</p> <p>15</p>	<p>Medium-term after legislative reforms are in place.</p>
<p>C. To Promote Term Lending in the Market.</p>	<ol style="list-style-type: none"> 1. Encourage new T-Bills of varying maturities including a 180-day T-Bill. 2. Conduct a study into development of a leasing industry. 	<p>-</p> <p>- External Consultant(s) 1-2 months</p>	<p>-</p> <p>60</p>	<p>Immediate</p> <p>Immediate</p>

4/6

D. Capital Market Development

1. Assist Ministry of Justice to draft a set of corporate and commercial laws.	- External Consultants (2) 6-9 months	100	Immediate
2. Assist Ministry of Justice and Gambian Association of Accountants to create a statutory accounting body.	- Staff support	5	Immediate
3. Assess the feasibility for USAID to develop a share purchase guarantee fund for small investors.	- Consultants 1-2 months	50	Immediate
4. Assist Ministry of Justice and NIB to establish wide distribution rules for the privatization programme.	- Consultant (lawyer) 2 weeks	20	Will depend on progress of Privatization Programme.
5. Develop a facility for a trade in shares at NIB.	- Consultants - Training to NIB	Could be part of study of regulatory framework for corporate commercial code.	Immediate
6. Assist Ministry of Finance and Commissioner of Taxation to develop appropriate fiscal framework to encourage holdings in equities.	- Consultant 1 month	15-20	Depends on Progress of Privatization Programme

E. Competition in the Banking Sector

1. <u>Rural Banking</u> (a) Conduct a study to assist CBN to assess the potential of rural savings mobilization.	- Consultants 2 months	35-50	Short-term - following restructuring of GDP
(b) Assist GCDB to develop a pilot project in 2/3 areas to test mobile banking.	- Computers, software vehicles - Training of staff. Perhaps visit to rural mobile banking programme in other African countries - International Travel	100	Following the study in E(1) (a)

F. Creditors' Rights

2. (a) Assist CBN to develop a guarantee fund to back and encourage project financing activities of commercial banks, through a design study.	- Consultants	30	Immediate
(b) Offer training to participating commercial bank staff to strengthen staff capabilities in project appraisal, supervision and monitoring.	- Consultants 5 seminars (2 weeks each) in country and 5 follow-up case study workshops (one week each) focusing on projects financed under the scheme. - Training Materials/Aids	100	Would follow on study Would train about 40-50 CB and commercial bank staff
3. Assist GOTG with progress on grants of 99-year leases through assistance with public information and registration process.	- Consultant to assist to establish registration system and train registry office. - 2 vehicles to undertake registration.	25	Would follow GOTG programme on 99-year leases - could be used to encourage more rapid movement by GOTG.
1. Technical assistance to Registrar General to update and improve system of registering interests in real and personal property.	- Consultants (2) to work in Registry office for 6 months to design system, train staff and implement registry system. - Equipment - computers and related software.	75-100	Together with and following on reform of corporate and commercial codes.
2. Technical assistance to Sheriff's office to create registry system for Writs of FiFa and to train bailiffs.	- Consultant - 2 weeks to design system and train staff. - Equipment - 1 computer	20-30	Medium Term

G. Investment Climate

1. Development Act Initiatives.

(a) Improve appraisal process of Development Act, by placing responsibility under Ministry of Finance.

- Should form part of Terms of Reference for current AID consultants on the Development Act.

-

As part of second part of Consultancy on Development Act.

(b) Create a fast track process for small investors (CDI million)

same

-

(c) Clarify availability of duty waivers for investors.

same

-

(d) Review provisions of Sales Act, Customs Act and Development Act for consistency and equitable treatment.

- Consultant (lawyer)
3 weeks

25

18-24 months out

(e) Analyze cost of incentives against investment benefits under the Development Act.

- Consultants (2)
3-4 weeks

40-50

18-24 months out

2. Good Government Legislation

Long term

3. Review and amend the Industrial Property Act to ensure it does not detract investment and transfers of technology.

- Consultant (lawyer)
3 weeks - should be TOR's similar to those for review of Development Act.

30

Immediate

H. Small Business Incentive Policy

1. Develop small business tax incentive to provide fiscal incentives for 3 year start-up phase.

- Consultant (small business specialist)
2-3 weeks

25-30

Immediate

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I. Other Legislative Issues

- | | | | |
|--|------------------------------|-------|-----------|
| 1. Assistance to CB to review and amend key provisions of the Financial Institutions Act to broaden its supervisory role and to encourage under financing. | - Consultant(s)
6-8 weeks | 60-75 | Immediate |
| 2. Assistance to Ministry of Justice to draft a Bankruptcy Act. | - Consultant
4 weeks | 35-45 | Long Term |

- 50

ANNEX 1

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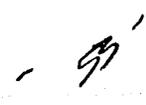
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CH

ANNEX 3

LIST OF PERSONS CONTACTED IN THE GAMBIA

- A. Ministry of Economic Planning and Industrial Development
 - 1. Abdul R. Cole, Industrial Development Unit.
 - 2. Mangu Sanyanag, Industrial Development Unit.
- B. Ministry of Finance and Trade
 - 1. Brendan Walsh, Financial Policy Analysis Project.
 - 2. Paul MacNamara, Financial Policy Analysis Project.
- C. Supreme Court of The Gambia
 - 1. Alhaji Pa Harley Cessay, Registrar and Magistrate.
- D. Ministry of Justice
 - 1. Mrs. A. Bensouda, Chief Legislative Draftsman.
 - 2. Mrs. Badjan, Register, Registrar General's Office.
- E. National Investment Board
 - 1. Mr. A.M. Tournay, Chief Executive.
 - 2. Mr. A.A. Njce, Deputy Chief Executive.
- F. Law Reform Commission
 - 1. Mr. Sowe, Secretary to the Commission.
- G. Gambian National Police
 - 1. Mr. Sydney Riley, Inspector General of Police and Sheriff.
- H. Central Bank of The Gambia
 - 1. Mrs. Haddy A. Njie
- I. Standard Charter Bank
 - 1. Mr. Ted Bell, General Manager.
- J. Scan Gambia Shrimp Ltd.
 - 1. H.W.J. Labee
- K. M.E. Services Ltd.
 - 1. Mr. Paul Gibbons, M.D.
 - 2. Mrs. Bennett
- L. Mr. Alpha J. Bak
 - 1. Small Scale Entrepreneur - Garment & Tailor (four employees)

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- M. Ghana National Insurance Corporation
1. Mr. Winston Able Thomas
- N. Janneh & Janneh - Solicitors
1. Mr. S.B. Janneh - Attorney
- O. Pannel, Kerr Foster
1. Mr. David Simpson
2. Mr. Peter Smith
- P. Gambia Chamber of Commerce
1. Mr. Pierre N'Jie, Executive Director.
- Q. IBRD
1. Mr. Kofu Amoye
Legal Advisor, West Africa, IBRD
2. Ms. Denise Williamson, Country Officer
The Gambia, IBRD
3. Ms. Bruna Vitaliano - Gambia - WID Officer
IBRD

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