



**Business Law Reform and
Alternative Dispute Resolution Development**

Under the USAID/Madagascar Legal, Regulatory and
Judicial Reform Activity
USAID contract No. 623-C-00-98-00029-00

**Madagascar Participation & Poverty (P&P) Project
Legal, Regulatory, Judicial Reform Activity**

Scope of Work No. 33

REPORT ON

- 1. RESULTS of drafted laws and decrees and other Contractor initiatives;**
- 2. ANALYSIS of use of legal reform texts;**
- 3. EFFORTS to increase public awareness of the reform process; and**
- 4. POTENTIAL areas for future support**

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**Madagascar Participation & Poverty (P&P) Project
Legal, Regulatory, Judicial Reform Activity**

**Commercial Law Reform and
Alternative Dispute Resolution Components**
Contract No. 623-C-00-98-00029-00

Scope of Work No. 33

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- “Réforme juridique et judiciaire: garantie pour les investisseurs” (LMJ novembre 1998)
- “Sécurisation et amélioration du cadre juridique” (LMJ, avril 2000)
- “Revue: Revue de Droit et de Jurisprudence” (LMJ, mars 2000)
- “Arbitrage et médiation” (LMJ, juin 2000)
- “Arbitrage: un instrument juridique rapide et efficace” (LMJ, janvier 1999)

Annex II: “Formation sur le futur droit des sociétés. Pour répondre aux exigences des pratiques commerciales actuelles” (L’Express de Madagascar, 14 septembre 2001) [hard copy only]

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INTRODUCTION

The international consultant under this Scope of Work, Professor Theodore Parnall (Consultant) visited Antananarivo from August 17 to September 19, 2001. In addition to meetings with USAID and other members of the donor community, he met with the leadership of the *Comité de Reforme de Droit des Affaires* (CRDA), Madagascar's Center for Arbitration and Mediation (CAMM) and representatives of the business community. Included in the latter meetings were members of organizations representing larger enterprises with substantial foreign interests (e.g., the G.E.M.), members of the Competition Council (C.R.C.), and members of organizations with a membership consisting mainly of local small and medium enterprises (such as FIV.MPA.MA). He also participated in a series of training sessions on the draft Companies Code, directed towards approximately one hundred and fifty (150) sitting and student magistrates, lawyers and business persons from both Antananarivo and several provincial cities. A description of these training sessions is set forth in a separate report, pursuant to Scope of Work #33 (bis).

This Report is directed to the following milestones of the Final Work Plan of the Contract:

- 1.3.13 Public, legal and business communities sensitized to business law reform (See Section 3 of this Report); and
- 1.3.14 Analysis of the use of legal reform texts and effects on private sector development (See Sections 1 and 2 of this Report).

The Report reflects work performed under Scope of Work #33. Section 4 summarizes several potential areas related to activities initiated under the Contract that may help increase the value of those activities. The Consultant organized some 20 meetings with a broad range of people in the legal community from both the public and private sectors and also in the wider business community in Antananarivo. Their help and assistance is gratefully acknowledged.

I. RESULTS OF ADOPTED AND DRAFTED LAWS AND DECREES AND OTHER CONTRACTOR INITIATIVES

A. General

There are at least two general categories of judicial and legal development support projects. One category of project focuses on reform in the texts of the laws. This type of project offers assistance in drafting or revising texts of e.g., commercial law, bankruptcy law, company law, intellectual property, secured transactions law. The other category of law development project focuses instead on the strengthening of law-related institutions by increasing the knowledge, skills, access to legal information and comparative background of the staff of those institutions that are central to a country's judicial/legal system.

The most significant aspects of the ARD/Checchi Contract (Contract) fell within the former category. While there were major activities scheduled and implemented for institutional strengthening, notably the creation of Madagascar's first national alternative dispute resolution center and training for its members, and increases in legal information communications capabilities by the production of the country's first word-searchable CD ROM compilation of Malagasy law, nearly two-thirds of the Contract's resources were devoted to drafting legal texts

affecting the business community and training initiatives in such reformed texts. Fully assessing the long-term results of such law development efforts involves decades of actual implementation of the new texts, however, not years. Moreover, in many instances the Contractor's consultants were faced with having to overcome the fact that Madagascar has been following the Romano-Germanic legal tradition, and the Contractor's counterparts were at best unfamiliar with (and at worst hostile to) concepts that they viewed as straying too far from the civil law tradition. Many of the draft laws under consideration by CRDA were heavily influenced by drafts prepared by the francophone African Organization for the Harmonization of Business Laws (OHADA). Despite this, productive collaboration was achieved, and progress was made toward a principled, transparent and participatory legal process, with the Contractor's international and local consultants working together to attempt to arrive at a practical blend of legal concepts.

If law were simply a set of rules that, once adopted, would be applied and implemented logically and systematically, the results of law development projects could be easily measured by the speed with which they facilitate the adoption of the rules. As it is, law development projects are frequently only the initial steps in a process that will, ideally, outlast the lifetimes of their designers. This reality indicates that projects such as those contemplated in the Contract should be sufficiently specific in their design (with respect to detailed drafting activities) to improve various aspects of the legal system by virtue of their being achieved, yet flexible enough to adapt to a constantly moving political/economic environment, thus allowing for major reform opportunities, such as the development of the CD ROM in Year Three.

Law is about who gets to make decisions, requiring changes in the behavioral patterns of thousands of decision-makers and new awareness of the new texts by hundreds of thousands of citizens. This changing legal process is therefore just as complex as Madagascar's existing networks of village, city, province and central level power-centers with the *de facto* authority to make decisions on issues involving, e.g., property, contracts and other business activity. Despite the general long-term aspects of the Contract's results, excellent USAID and high-level host country support, as demonstrated by counterparts of persons working under the Contract, were major factors in achieving several immediately apparent results. The consistent efforts of the Contractor in encouraging and developing this support, as well as the cooperation among the members of the management team, their consultants and their subcontractors, were essential to the achievement of the immediate results of the Contract discussed in this report.

B. Results of Laws and Decrees Relating to the Commercial and Company Registry

Four laws or decrees for which the Contractor provided international and/or local legal experts have had a direct impact on the Commercial and Company Registry:

1. Law on the Status of Merchants (*Statut du Commerçant*);
2. Law on the Transparency of Enterprises (*Loi sur la Transparence des Entreprises*);
3. Decree on Registration for Personal Property Mortgages (*Décret sur la Publicité du Crédit Mobilier*); and
4. Decree on the Commercial and Company Registry (*Décret sur le Registre du Commerce et des Sociétés*).

All of the above were adopted during 1999, Year Two of the Contract, and have already begun to have an impact on the practical use being made of the Commercial and Company registry. According to the Chief Registrar (Greffier en Chef) of the Registry in Antananarivo, there have been the following numbers of companies and merchants registered in the past two years:

1999:
Companies.....932
Merchants.....580

2000:
Companies.....744
Merchants.....440

The Chief Registrar and her staff confirmed to the Consultant that there are approximately FOUR TIMES the number of private sector requests for information during any single month as were made prior to the reforms provided by the laws and decrees. The Chief Registrar indicated that there are now approximately 70 requests for extracts of information per day, as compared to approximately 25% of that number prior to the reforms. She attributes this increased utilization of the Registry to the increased kind of practical information now required of registrants because of the reforms. According to both the Chief Registrar and several of the private sector representatives, this has generally increased the transparency of the business environment. (One example of such increased transparency cited is the marked decrease in the use of “dummy” companies.) The Chief Registrar also noted that the workload of the Registry has increased proportionately since the reforms.

In addition to the more practical information requirements of the laws and decrees, the Registry in Antananarivo has been computerized to a significant extent, with all new registrations now being entered into the Registry’s computers. Older registrations are required to renew their filings by 2002. Following computerization and updating in Antananarivo, similar modernizations are underway in Tamatave and Antsirabe.

C. Development of the “3rd Cycle” at the University of Antananarivo Law Faculty

In Year Three of the Contract, (December, 2000), the first group of 16 law students enrolled in the University of Antananarivo’s 18-month advanced-level (*Troisième Cycle*) program for the study of Business Law. The initiator of the program, Professor Ratiaray Ramarolanto, was one of ARD/Checchi’s local advisors; he designed the program of study to include several of the subjects dealt with under the Contract. The Contractor cooperated with the program to assure that the reports and contributions made by its international consultants are reflected in the program’s content. Moreover, Professor Ramarolanto has used the visiting consultants as guest lecturers, including the extensive use of the Contractor’s legal information consultant, which assured the immediate acceptance of the CD-ROM and contributed to its successful integration into the legal and business communities.

The drafting process encouraged by the Contractor in working with CRDA, as well as the comparative perspectives supported under the Contract yielded the **result** that the 3rd Cycle is

now a part of the long-term program of the University. The new program will therefore be an important means of sustaining the activities undertaken during the Contract.

D. The Arbitration Law and CAMM

For the Arbitration Law and the training efforts to be successful in the long term, Madagascar will need a viable ADR system, with qualified arbitrators and mediators and the means to deliver their services to the community when needed. In 1998, the Contractor worked to assist the preparation of a new Arbitration Law. In 1999 and 2000, the Contractor supported the development of dispute resolution committees in seven cities throughout the country. These committees were the initial units for creating a national mediation/arbitration center. This fledgling ADR institution, the Madagascar Center for Arbitration and Mediation (*Centre d'Arbitrage et de Médiation de Madagascar*, the CAMM) was formally created in June 2000, and now has an office located in Antananarivo, with associated chapters in six of the island's other major cities. The CAMM's initial activities included: the adoption of standardized rules for conducting arbitration and mediation, the development of a code of ethics, professional level training programs, creation of a national and international registry of qualified arbitrators and mediators, and the coordination and provision of technical services for dispute resolution.

As an initial concrete **result** of CAMM's organization, in addition to the creation of Madagascar's first full-scale arbitration and mediation body, the management of CAMM estimates that there are now in excess of 100 commercial or investment contracts that have utilized the CAMM model arbitration clause. These clauses involve Madagascar's banks, insurance companies and other industrial or trading companies. As CAMM's start-up activities were only very recently completed, no disputes have yet been addressed by CAMM's arbitration or mediation capabilities. There have however, been at least two disputes submitted to CAMM by local parties seeking resolution of their disputes with an international party. As these disputes do not arise under contracts containing a specific reference to CAMM, the international parties are not legally obligated to proceed. The fact that CAMM has been sought out so early in its young history is, nevertheless, a tribute to the initial actions of its organizers.

In addition to the actions of CAMM, the private sector representatives interviewed noted that another **result** of the new laws is that they have heard of several arbitrations that have taken place since the adoption of the reformed law in 1998.

E. A New Openness in Training for the Judiciary

Several of the persons interviewed (including economists and members of the business community) said that the single most significant need of Madagascar's legal system was a judiciary that could understand and resolve issues affecting business. They noted the importance of assuring that the National School for Judges and Registrars (*Ecole Nationale de la Magistrature et des Greffes*, the ENMG) is able to train a core of qualified magistrates and registrars who would be able to implement the improved laws and decrees that have been, and that will be, adopted. Reports on the Contractor's many training activities, including those in which the Consultant participated during his August/September, 2001 visit, are set forth in separate reports.

According to such persons, as well as was demonstrated by the actions of the ENMG itself, one very concrete **result** of the Contract is ENMG's markedly increased willingness and ability to provide sophisticated training in business law topics. It was unfortunate, however, that several of the training sessions on several draft laws were unable to be scheduled prior to the completion of the Contract. The ENMG had demonstrated significant interest in upgrading the awareness of the proposed reforms of three CRDA-sponsored laws for both sitting Magistrates as well as those in training.

F. An Historic Breakthrough in Legal Information Technology (LIT)

The Legal Information Technology component of the Contract may have had the most significant and immediate impact on Madagascar's legal system. The production of the word-searchable CD-ROM compilation of Madagascar's legal documents was the culmination of preliminary work by the MOJ initiated by USAID's legal compilation efforts. The CD-ROM contains the full text of legal documents, including laws adopted by the National Assembly and many of the most important decrees of the Government and its Ministries. The CD-ROM offers a means of quick access to Malagasy laws and regulations. Because it is capable of wide distribution, it provided, for the first time, an effective method of learning about, and having immediate access to, the various laws and decrees that have been adopted with respect to any particular subject area.

The purpose of providing the CD-ROM during the Contract was not just to provide a higher tech legal information product. Its fundamental objective was to further the legal community's ability to find and use the law. This strategy should have a continuing impact long after the original CD-ROM has been replaced by improved products. While the initial CD-ROM contained errors because of defective material supplied to the Contractor, the dramatic success of the distribution of the product has convinced the MOJ to continue with improved editions following the completion of the Contract. Before the CD-ROM, the law was an unknown quantity to many consumers of legal information in Madagascar, including, on occasion, the MOJ and the National Assembly itself. The Official Journal is an inadequate medium for the dissemination of the laws because the publication suffers from a number of deficiencies: limited coverage, inadequate indexing, often out-of-date, and not widely available in its print format back to its inception. The Journal's paper unfortunately suffers from early deterioration because of poor paper quality and storage conditions, even in those few institutions that do own a complete run.

Because the CD-ROM has a user-friendly interface that takes into account the particular structure of Malagasy legal documents (e.g., the numbering system, the importance of knowing the issuing agency), the demand for the product has been extraordinarily high. The original run of 1000 copies was virtually exhausted at the time of the Consultant's visit, and ***every interview conducted, including those with economists and the business community***, had positive things to say about the CD-ROM. According to many Malagasy legal scholars, the status of the legal information of the Madagascar's national legal institutions was characterized by:

1. Rapid change in legal documentation produced by the transformation to a more market-oriented economy;
2. Rapid increase in the numbers of legal documents, including both laws and decrees;
3. Domination by print materials as the primary format for distribution of legal information;

4. Slow and incomplete publication and distribution of legal material;
5. Inadequate and slow indexing of legal material;
6. Lack of access by magistrates and other officials to legal documentation;
7. Distribution, in limited quantities, of official publications, such as publications from the courts, from the National Assembly, and from the ministries.
8. Difficulties in the location of legal materials, both because they are not indexed and because they are distributed in formats, like small pamphlets, which are easily lost;
9. The physical overcrowding and potential for deterioration and loss of records caused by housing conditions for legal documents in provincial offices, without adequate backup copies of records in case of damage or loss.

During the final year of the Contract, the MOJ and the Contractor made a significant move in addressing these issues and significantly improved the transparency of Madagascar's legal system. For the first time, the new CD ROM product made legal research possible and practical. The Contractor, in coordination with the MOJ, prepared an original edition of a CD-ROM containing all of the laws and regulations compiled by the MOJ with earlier assistance from USAID, the World Bank and others. Distribution of 1,000 copies was made throughout Madagascar, to judges, prosecutors, law schools, and private law firms. The Contractor has produced an important tool for lawmakers and government agencies, as well as the legal community and all Madagascar's citizens.

The following *specific results* were noted in interviews as a result of the CD-ROM:

- ***The transparency of the “rule of law” in Madagascar*** has increased both internally and externally because of the accessibility of the information contained on the CD-ROM.
- ***Drafting quality should be enhanced.*** By using the CD-ROM to examine how legislation has actually been worded and implemented either well or badly, the National Assembly should be better able to draft better future legislation so that its intent is effectuated.
- ***Legal staff may be utilized more effectively.*** Time previously spent on laborious searching for paper legal documents can now be spent on more productive activities since the CD-ROM accomplishes the same task in minutes rather than hours. MOJ and other legal personnel can now train others in using the CD-ROM.
- ***Parliament will be able to better exercise its oversight capacity*** to ensure that government officials are properly implementing legislation.
- ***Legislative consistency and harmonization*** can now be more easily monitored by the MOJ, the National Assembly and other relevant government agencies. Personnel will be better able to identify conflicts and/or overlaps among national laws and between national laws and provincial laws because the consolidation of legal materials on the CD-ROM makes them easier to identify. This may ultimately make Madagascar's legal system more coherent and rational, especially as the newly autonomous provinces adopt provincial legislation.

G. An Improved Business Climate

A potential indicator of progress toward USAID's IRs # 1.1.1, 1.1.2, 1.1.3, and 1.2.1 was set forth in the Contractor's Monitoring and Reporting System as the “Increase in Business Activity”. While it would be incorrect to insist upon an unrealistically positive relationship between the business environment and the relatively few legal reforms that have been

implemented to date, it is certainly accurate to point out that what a country says it intends to do with its business laws can provide a signal of future trends. This statement can, in turn, send a strong, positive signal to the business community.

In this respect, several members of the private sector noted that the Government has cooperated with the CRDA, in accepting and reviewing draft laws and decrees that reflect a more market-oriented philosophy than the existing framework. This cooperation, by itself, has been a positive indication of future action and has contributed to the strength of the business climate. While several of the private sector persons interviewed expressed a certain degree of skepticism and a healthy reserve, pending realization of the draft laws and decrees potential, all also noted that the actions of CRDA have had a beneficial impact on Government/private sector relations. There was a significant difference in views expressed by representatives of the larger, more foreign-owned businesses and those of the purely Malagasy PMEs, with the latter expressing a more pessimistic view of the degree to which the Government can improve the still-burdensome interactions between its representatives and the private sector. Problems relating to improper actions by officials and improper requests for payment remain a key concern of both representatives of the private sector as well as members of the donor community.

The general nature of the improvement in the business climate is discussed in “Madagascar: Rise of a New Economic Dawn” in *African Business* (July/August 2001 Issue No. 267) describing the increasingly positive economic conditions since 1999, after decades of recession. The following remarkable, very specific statistical improvements in Madagascar’s business climate [sources: Foreign Direct Investment, Nos. 5 and 6, IFC 1997 and 1998, and interview with Mr. Dieu Donné Randuamanampisoa, principal economist, World Bank, Madagascar] are set forth as practical **results**, that, together with external factors such as the Africa Bill and the privatization process, the law reform process has helped produce:

Private Direct Investment:

1994: US\$ 7 Million

1995: US\$ 10 Million

2001 (estimated by World Bank): US\$100 Million (65 Million SDR)

Foreign Assets:

Deposit Money Banks:

1996: 604.4 (Billions of Francs)

April, 2001: 1,337.8 (Billions of Francs)

Monetary Survey:

1996: 861.4 (Billions of Francs)

April, 2001: 2180.7 (Billions of Francs)

Exports:

1990: US \$471 Million

1998: US \$829 Million

2001 (Est. WB) US \$1,003 Million (709.6 SDR)

II. ASSESSMENT OF THE USE OF DRAFT REFORM TEXTS AND CONTRACTOR'S ASSISTANCE

A. General

The D&EG Performance Data Table 2 (March 17, 2000), Result IR1.1, describes as a unit of measure the “number of laws modernized in major areas of business law”. The review of the work performed under the Contract during Years One and Two, together with an assessment of the manner in which the CRDA and the National Assembly has made use of this work, was set forth in the Annual Report for Year Two. That Report documented effective, productive activities during Years One and Two. During Year Three, the CRDA has continued to make extensive use of the draft legal reform texts and other technical assistance provided by the Contractor. The CRDA’s operating pace over the past three years has required close coordination of efforts in order to assure timely technical assistance from local and international specialists. The continuing efforts of local specialists have been critical to enabling the CRDA to meet its schedule. By providing international specialists to work with the local specialists, purely international aspects of the drafts with the CRDA have been raised for its members’ consideration. Technical input by the local and international specialists, such as draft texts, background reports, and discussions with CRDA members became a part of the work product (i.e., the final drafts themselves) of the CRDA. Thus, drafts submitted to the National Assembly are the result of the CRDA’s deliberative process in which the local and international specialists played their respective roles. The drafting, followed by the adoption of several CRDA-produced laws and decrees are positive developments, but even more impressive has been the nature of the deliberative drafting process developed by the CRDA. This process includes broad participation from economists, accountants, businesspersons and legal specialists from Madagascar and abroad. Encouraging the continued use of this process will be one a valuable means of assuring an ongoing strengthening of Madagascar’s business law framework and, in turn, a more favorable environment for economic development through increased business activity. A continuation of this process cannot be taken for granted, as several persons interviewed indicated the energy and time costs involved. A means of assuring that the CRDA efforts are encouraged after the Contract terminates should therefore be a priority concern for future support.

The sections that follow describe the status of the adoption and/or use of the fourteen (14) laws, decrees and drafts that were assisted under the Contract as of September 30, 2001:

1. Arbitration Law
2. Law No. 99-025 of August 19, 1999, on the Transparency of Enterprises
3. Decree Law No. 99-018 of August 2, 1999, on the Status of Merchants
4. No. 99-716 of September 8, 1999, on the Commercial and Company Registry
5. Decree No. 99-717 of September 8, 1999, on the Registration of Personal Property Security Interests.
6. General Partnership Law
7. Limited Partnership Law
8. Limited Liability Company Law
9. Corporations Law
10. Financial Leasing Law
11. Bankruptcy Law

12. Labor Law [non-CRDA]
13. Competition Law
14. Secured Transactions Law
15. Decree on the application of the Companies Code

B. Adopted Texts

The first law on which ARD/Checchi worked was drafted and adopted in Year One as Law No. 98-019 of December 12, 1998, on Arbitration; it appears at Part I, Book 4 of the Code of Civil Procedure (Articles 439-464). The Arbitration Law reflects sound international standards for dispute resolution. With Contractor urging and technical assistance, the law incorporates key UNCITRAL principles, including minimal intervention by the judiciary, and the mandatory nature of the agreement to arbitrate and the resulting arbitral award. The creation of the CAMM flows directly from the adoption of this law.

The following laws and decrees were drafted in Contract Year One and adopted in Year Two:

1. Law No. 99-025 of August 19, 1999, on the Transparency of Enterprises
2. Law No. 99-024 of August 19, 1999, on Legal Mortgages [no Contractor input]
3. Decree Law No. 99-018 of August 2, 1999, on the Status of Merchants
4. No. 99-716 of September 8, 1999, on the Commercial and Company Registry
5. Decree No. 99-717 of September 8, 1999, on the Registration of Personal Property Security Interests

These laws resulted from the CRDA's research and drafting efforts in Year One, and reflect, in part, the successful cooperation of ARD/Checchi's local and international specialists. As a result of these efforts, both the CRDA and the decision-makers of the National Assembly and the Government were exposed (either directly through an examination of the reports, or indirectly through discussions with the local specialists) to a significant comparative input prior to adopting the ultimate law or decree. (The sole exception to the forgoing is the Law on Legal Mortgages, for which no Contractor input was sought or provided.) As stated in the Annual Report for Year Two, these inputs resulted in: (i) a significant lessening of the tendency to criminalize business activities; (ii) simplified registration, organizational and other formal requirements; (iii) a consequent reduction in formal regulatory barriers; and (iv) increased practicality of the information in the registry now available to the business community. Other specific results of the adopted texts are described in Section 1.B of this Report.

C. Draft Texts from Year Two

The draft legislation developed with Contractor assistance in Year Two were:

1. General Partnership Law
2. Limited Partnership Law
3. Limited Liability Company Law
4. Corporations Law
5. Financial Leasing Law
6. Bankruptcy Law

7. Labor Law [non-CRDA]
8. Competition Law

The impacts and results of these draft texts were presented at length in the Annual Report for Year Two. The status of such laws at September 19, 2001 is as follows:

- The very comprehensive draft Companies Code, which includes 961 Articles covering General Partnership Law, Limited Partnership Law, Limited Liability Company Law, and Corporations Law, has been approved by the Council of Government and has been under review by the Council of Ministers since 2 February 2001. (The only substantial difference between the Council of Government and the Council of Ministers is that the President is the chair of the latter). CRDA leadership reports that they receive questions periodically from the Council, but that there are no major issues concerning the law. It is expected that the National Assembly in 2002 will adopt the Companies Code, following elections.
- The draft Bankruptcy Law has been under review by the Council of Government since October 2000. This draft was prepared by CRDA's *Cellule technique* substantially from the OHADA model, and reflects only modestly the concerns of the Contractor's international Bankruptcy consultant. The CRDA took its decision to act quickly on the law, reasoning that the reforms of the draft would better serve Madagascar than a draft that required an abrupt departure from what is relatively familiar to the Malagasy community. It is expected that this draft will be sent to the Council of Ministers, and then to the National Assembly in 2002.
- The draft Finance Leasing Law has been under review by the Ministry of Finance since April 2001. The Ministry is considering the clauses suggested by the Contractor's consultant on international leases and certain clauses assuring the possibility of three-party arrangements.
- The draft Labor Law is complete, with aspects of the draft reflecting several of the Contractor's consultants' suggestions, but further action has been suspended. The outstanding issues are said to relate to:
 - the specific language of the draft, because the ILO's consultant seeks to assure strict adherence to that consultant's recommendations, as opposed to suggestions of the Contractor's consultants.
 - the lack of dialog among labor, management and the Government, following the latter's appointment of a new governing board to manage the CNAPS (Social Health and Retirement Fund created from Labor and Management contributions). Labor and Management object to the Government's naming controlling members to the board.

According to the staff of the Ministry, the draft should be presented to the National Assembly for action before the end of 2001.

- The draft Competition Law is suspended with the Ministry of Commerce. In the case of this draft law, there is an issue as to the language of the draft, as the private sector representatives are resisting attempts to place what many consider to be an inappropriate amount of discretion in the Government to set prices.

D. Use of Texts Assisted by Contractor During Year Three (Through September 30, 2001)

1. Secured Transactions Law

In August 2000, the Contractor's local consultant, Professor Ratiaray Ramarolanto, completed a draft law on secured transactions (Loi sur les sûretés). The draft follows many of the Romano-Germanic influences of the OHADA model. Professor Ramarolanto had previously been provided with general background information and commentaries on the subject by the Contractor's law development advisor, Professor Theodore Parnall. The Contractor's secured transactions specialist, Mr. Martin Boodman, provided the CRDA with commentary on the draft law, together with extensive recommendations for revisions to make the draft conform to international best practices. The ultimate goal of a secured transactions law is to encourage commercial activity in Madagascar by facilitating access to credit through a clear and flexible legal regime for secured transactions. The Contractor's consultant's report provided comments and recommendations of a general nature and those based upon a detailed analysis of each provision of the draft law.

The consultant's primary general recommendation was for the adoption of conceptual, terminological and functional uniformity as to security mechanisms in Madagascar, recognizing that personal security devices such as suretyship should not form part of the regime for secured transactions that generally creates preferential real rights, i.e., rights enforceable against property by preference over non-secured creditors. Within the provisions governing real security, the Contractor's consultant recommended that the term "hypothèque" be used to designate all security mechanisms other than the right of retention, reservation of ownership, leasing ("crédit-bail") and legal security ("privilèges"). The consultant felt that there was unnecessary multiplicity of security devices described in the draft law related to property used in or arising from a commercial or professional activity. Modern regimes for secured transactions in North America expressly permit and regulate security upon future property that is particularly useful in relation to inventory and accounts receivable financing. The consultant recommended that the draft Secured Transactions Law of Madagascar be clarified as to its treatment of security on future property, and he recommended reorganising the rules related to real security so as to begin with the basic concept of the property of a debtor being the common pledge of its creditors and then to regulate privileges and real security.

The CRDA made a careful review of the Contractor's report, but chose to adhere closely to the OHADA model. The draft law is now under review with the Council of Government, most probably until sometime in 2002. While many of the consultant's suggestions were not accepted, the draft in several respects will provide a clearer regime for secured transactions and will be one further indicator that the country is serious and committed to modernisation of its financial and economic institutions.

2. Decree on the Application of the Companies Code

In March 2001, the Contractor was requested by the CRDA and its *Cellule technique* to support the drafting of a decree for the application of the Companies Code. The draft Companies Code makes many references to decrees of application, and without such a decree, the Companies

Code would have a very limited effectiveness. Because of this, and because the CRDA had received questions as to the probable content of any decree of application, a decision was taken by the CRDA to prepare a decree of application to accompany the draft Company Law. During June-September 2001, the Contractor's local consultant, Professor Ratiaray Ramarolanto, worked on this extensive, 100+ article draft decree.

During the Consultant's August/September visit, the draft decree formed a part of the content of the training sessions at the ENMG and for the private sector. The Consultant discussed the draft decree with Professor Ramarolanto and found it could resolve several issues that the draft leaves open. It addresses the articles of the draft law that require further action by the Government, provides a framework for shareholder voting and proxy regulation, establishes minimum capital amounts for both S.A.R.Ls and S.A.s, and gives a thorough description of the kinds of securities that a company may issue. The draft decree does not establish a stock exchange or securities trading mechanism, but leaves such items for a later decree by specialized finance authorities.

III. EFFORTS TO INCREASE PUBLIC AWARENESS OF THE REFORM PROCESS

A. Years One and Two

The efforts to sensitize the public, legal and business communities to the progress being made in the reform process during the first two years of the Contract are set forth in the Annual Report for Year Two.

B. Year Three (July 1, 2000-September 30, 2001)

Despite the delays by the Government in forwarding the draft texts to the National Assembly for action during Year Three, the Contractor has sought to continue efforts to increase public awareness of the reform process. There have been a number of public awareness initiatives in which the Contractor's consultants have participated, including the following:

- **Internet web site.** The CRDA's Cellule Technique at the MOJ has created a website, fully accessible to the local and international communities, that disseminates current information as to legal developments. The website is www.justice.gov.mg, and it contains subjects including the following:
 - Discussion of the new CD ROM;
 - Discussion of recent developments in Business Law;
 - Presentation of the Review of Madagascar Law and Case reports; and
 - Material on the ENMG.
- **Ministry of Justice Law Review.** The CRDA's Cellule Technique began publishing a journal, the *Revue de Droit et de Jurisprudence de Madagascar* (Madagascar Review of Law and Case Decisions), dealing with current issues affecting Madagascar's legal system, the vast majority of which has focused on laws, court decisions and regulations affecting the business community. Two issues of the journal have been published, in December 2000 and December 2001, with a third issue scheduled to be released in late September 2001. Local consultant Professor Ratiaray Ramarolanto contributed several significant articles on

business law reform to this journal, including a 30-page article on the role of the judiciary in the arbitration process, and another 30-page article on company law. These articles provide in-depth views of the 1998 Arbitration Law and the current status of company law, which will increase the public's and the legal community's understanding of the new laws.

- **CAMM pamphlets and brochures.** The CAMM has done significant promotional work both before and after its formal opening in January 2001. Included in its efforts are an official CAMM journal, the inaugural issue of which is scheduled for late September or early October 2001, and a brochure describing its services that has distributed widely in the business community. As indicated below, it has also been active at seminars and workshops. The promotional efforts have led to the insertion of the CAMM arbitration/mediation clause in what its management has estimated at more than 100 contracts.
- **JURECO articles on the reform process.** The regularly published journal on current affairs in Madagascar has had several articles describing law reform activities. Both the business and legal communities read these articles. (See Annex 1)
- **TV and media coverage of reform events and actions.** There has been significant coverage of the Contractor's law reform initiatives, from the creation of CAMM, the release of the CD ROM, to the holding of training sessions on the draft laws. As an example of the broad media coverage, note that the seminars on the draft company law presented in September 2001 was the subject of newspaper stories, as well as TV and radio reports on September 14, 2001. (See Annex 2).
- **Seminars and workshops.** As was the case in previous years, JURECO and other organizers of seminars and workshops (e.g., CAMM) sought to assure that, in addition to the particular subject of the seminar, each participant was made aware of the general nature of the CRDA business law reform efforts. Thus, in opening and closing speeches, and at appropriate points within the events, there was extensive coverage of law reform progress. A good example of this was the September 14, 2001 speech by Mr. Noel Rakotondramboa, the MOJ's coordinator of legal and judicial programs. In his speech to approximately 45 members of the business community, he described the full history and accomplishments of CRDA, and provided a written memorandum summarizing its USAID-assisted work. At yet another seminar, organized by ARD/Checchi/JURECO on September 13, 2001, and co-sponsored by CAMM and the Bar Association, there was additional dissemination of CRDA law reform efforts (See Annex 3). Moreover, at several of the seminars and workshops organized under the Contract, copies of both JURECO articles and pamphlets, copies of the draft laws, and the MOJ publications describing law reform activities were either described or made available to the participants.

IV. POTENTIAL AREAS OF FUTURE SUPPORT

The Consultant was asked to provide a summary of areas related to the Contract's objectives and activities that have the potential for increasing the value of such activities. The following items are suggested as having significant potential. They were discussed with several of the public and private sector persons interviewed, and were frequently raised as the most important factors for improvements in Madagascar's legal/judicial environment.

A. Improved Legal Information Network

As a complement to the very popular CD-ROM (for which support should be continued), a network of computers at the Ministry of Justice and all provincial courts could be developed to assure improved access to laws and judicial decisions. Such a network could be achieved with fewer than 50 computer stations, and initial access could be via a public internet facility rather than the more costly self contained intranet (as the latter would require special servers as well as trained network supervisors). The MOJ has indicated that the provincial courts are already equipped with adequate electricity and telephone service, so that as local Internet service providers (ISPs) develop the capacity, the courts could be linked to one another as well as to the MOJ. This improved legal information capacity could be accompanied by increased use of the CD ROM, and could also be made part of the judiciary's commitment to supply written decisions that would become a part of the legal information available to the public at large, thus substantially advancing the transparency of the courts.

B. Continued Support for the CAMM

The CAMM's potential as a mechanism to provide fair and efficient resolution of business disputes should not be underestimated; in a country seeking to rapidly expand its reliance on the private sector, there needs to be assurance that the judiciary is not overloaded with business disputes that may sometimes be beyond its capacity to resolve. The existence of an institution such as CAMM can be a major assistance to Madagascar's expanding economy. The CAMM will need continued financial support to reach its potential, however. The CAMM management estimates that it will be self-supporting with income from administrative fees from as few as eight to ten cases submitted per year, assuming an average amount in controversy of approximately US \$150,000. It is unrealistic, however, to think that CAMM can reach this degree of self-sufficiency within months of its opening. Further support, at least through the year 2002, as the CAMM begins to resolve disputes under the contracts that have already called for its services, would assure that its early promise is realized.

C. Continued Support for the CRDA

There should be continued availability of international legal expertise at the disposal of an organization such as the CRDA. The Malagasy business community has demonstrated its interest in the practical, business-oriented nature of many international legal concepts that originate in the Anglo-American system. The difficulty of introducing these concepts should not be underestimated, however, as much of the Malagasy legal culture has its origins in Romano-Germanic system, and many of Madagascar's lawyers and jurists are only slowly gaining familiarity with non-French concepts. The differences in the systems should not be overstated either, as globalization is requiring ever-greater harmonization of concepts. It should be noted that there is a very competent and gracious French magistrate at the MOJ, who has been a very good resource for several years, as law reform proceeds in Madagascar. The value of a U.S.-trained legal advisor could be an important complement to the work of the French advisor, and the combined long-term cooperative presence of such advisors could benefit Madagascar as it reforms its legal system. If long-term legal assistance is not possible, however, the Contract has showed the value that even short-term advisors can have.

D. Increased Training of Magistrates

Several of the persons interviewed held that the training of magistrates, and otherwise upgrading their capacities, is one of the highest priorities of any future law reform effort. The work done by ongoing and past law reform projects in strengthening of ENMG, and increasing its ability to produce well-trained magistrates, received praise especially from representatives of the private sector.

E. Fellowships and Internships

An important means of improving a country's legal system is to assure that there is a critical mass of well-trained lawyers who have an in-depth understanding of the use and value of an effective legal system. Providing fellowships for long-term legal study abroad (at US or Canadian law schools), while costly, can produce the kind of human resources that are capable of making significant contributions to the legal system. In addition to long-term law studies at the Masters level, a program of medium term (six month) internships at law firms, judicial chambers and attorney generals' offices could also help Malagasy lawyers, judges and legal professionals to better understand the value of a good legal system.

F. Continued Efforts to Inform Public, Legal and Business Communities

The Contractor's efforts, as well as those of others, have contributed to a growing awareness of the content of newly adopted laws and decrees and drafts of laws. Representatives of both the public and private sectors continue to stress the need to increase this awareness and to raise the level of understanding of how these laws can improve the business environment in Madagascar. Specialized teaching to legal professionals, and more general information distribution, will need to be increased during the coming years.

G. Improved Legal Framework Essential to Democratization and Good Governance

While several of the above suggestions are expressed as measures to improve the business environment, it should be made clear that such measures are also directly related to good governance. Many members of Madagascar's business community are very aware that improvements are part of an effort to improve the governance structure, and that, for example, an effective arbitration center, can focus attention on needs of the judiciary. Also, the participation of the business community in the process of drafting business laws is a good model for broader participation in the governance process; and putting judicial opinions into a computer network would support efforts to increase transparency and fairness in the courts. In this way, new programs aimed at democratization or good governance can continue to use and build upon the gains in purely business law reform programs, rather than being understood as separate and distinct initiatives.

ANNEXES
