Technical Assistance for Law Reform: Co-operative Strategies for Enhancing Quality and Impact

Russell B. Sunshine*

A. Introduction

As technical assistance (TA)[1] projects facilitating law reform become increasingly prominent, lawyers in government agencies and law firms who are newly engaged in TA design can benefit from awareness and application of design fundamentals often honoured more in the breach than the observance.

I.   The Emerging World-wide Prominence of TA for Law Reform

For the past 40 years, technical assistance has been widely respected and recognized as a powerful engine helping to propel and accelerate economic development. That contribution remains pivotal today. Technical assistance services encompass advisory and operational roles, training, and other channels for know-how transfer. Technical assistance resource flows from bilateral and multilateral donors exceed US $20 billion annually and are steadily increasing.

Moreover, merely quantifying these direct investments does not begin to capture the full contribution of technical assistance to the development process and its

---

*   The author is a lawyer and independent consultant in international development, based in Umbria, Italy. The ideas presented in this article draw upon concepts previously developed for his book, *Managing Technical Assistance: A Practitioner's Handbook* (East–West Center, 1995), and for a professional staff training workshop which he designed and conducted for the Office of the General Counsel of the Asian Development Bank in Manila in January 1998. The author acknowledges with genuine appreciation the substantive and editorial comments on preliminary drafts of the article which were contributed by Rita Parrilli, Donald Strombom and Nancy Swing.

[1]   For purposes of this article, 'technical assistance' (or TA) refers to consultancy services, especially law-related services, performed by firms and individuals within development-assistance projects and programmes. 'Technical assistance' is synonymous with 'technical co-operation', an alternative title introduced to emphasize the equal value of the resources brought to their working relationship by consultants and their host-agency counterparts.

parties. TA is a catalyst and insurance policy. It can help assure donors that large programme and sector loans can be absorbed and utilized as intended. It can help host governments to participate as well-informed clients,[2] shaping and supervising large capital projects. Through these and similar multiplier effects, technical assistance can produce developmental dividends far in excess of its costs.

What has not yet been so widely acknowledged is the rapidly emerging prominence of technical assistance for law reform. Perhaps most instrumental in enhancing the quantity, diversity and impact of law-related TA has been its role in contributing to international support for transition economies, especially those wrestling with the challenges of independence following the collapse of the former Soviet Union.

In this comparatively recent milieu, law-related TA is prominent in two parallel domains:

1. Programmes and projects facilitating *economic reforms* (e.g., privatization, commercial legal frameworks, foreign investment promotion, capital markets, etc.); and
2. Those facilitating *democratic reforms* (e.g., rule of law, judicial and legislative development, corruption control, good governance, NGO development, etc.).

The current vitality of legal TA is well-illustrated by the Asian Development Bank's compilation of law-related projects conducted in the Asia Pacific region. This portfolio is impressive by any standard. In the Bank's most recent inventory,[3] 330 national and regional law-related TA projects and project components are profiled. Twenty-eight donors are acknowledged, including bilateral, multilateral and NGO development-assistance providers. These investments' partial aggregate value (since project costs are not reported for all recorded entries) totals US$1.66 billion. And the sectoral span of these legal inputs extends across a broad economic and political spectrum. In the Asian Development Bank's typology, it embraces accounting and auditing, banking and finance, dispute resolution, economic law reform, energy and minerals, environment and natural resources, human rights, real property, private-sector development (including privatization and direct foreign investment), procurement, reform of governmental agencies, social services and public health, strengthening legal capacity, tax and customs.

A comparable dynamism can be traced in Africa, Latin America, the Middle East and throughout the former Soviet Union.

---

[2] In a strictly legal sense, the donor agency is most often TA consultants' contractual client. However, in an operational sense, the host government is the client of both the donor and the consultants. Unless otherwise specifically indicated, it is in the latter sense that the term 'client' is used throughout this article.

[3] Office of the General Counsel, Asian Development Bank, *Law and Development Bulletin*, vol. IV, no. 2 (November 1998).

II. *Mobilizing TA to Promote Institutional Development*

Technical assistance in general, and law-related TA in particular, can register its most potent, sustainable impact when focused on strengthening host-country institutions: the structures, systems and operations of governmental and non-governmental agencies; and the capacities, performance and professionalism of those agencies' local personnel. Whether the context is private-sector or public, whether the beneficiaries are advocates, legislators or judges, transferring and adapting international know-how empowers and equips host-country entities to function more competently in national, regional and global relationships.

The central role of institution-building in national and regional development and the crucial contribution which technical assistance can make to that building process is universally accepted by donors and clients. Accordingly, this recognition is reflected in TA resource allocations. The World Bank, for example, has estimated that a full two-thirds of all technical assistance which it finances is devoted to institutional development.[4] And as previously noted in the Asian Development Bank inventory, more than 90 per cent of the recorded law-related projects are explicitly focused on institutional strengthening and/or capacity-building.

III. *Debilitating TA Defects and Suggested Solutions*

Despite the sizable direct investments in technical assistance, its much larger catalytic dividends and its core contributions to institutional development, regrettably TA is falling far short of realizing its powerful potential, both in its law-reform applications and across the board. This reluctant assessment is endorsed by the author and numerous other senior development-assistance practitioners. It appears that this short-fall can largely be attributed to two connected clusters of problems:

1. Fundamental defects in the *design* of specific technical assistance assignments or projects; and
2. Broader *institutional constraints* among the principal TA parties – donors, clients and consultants – which aggravate the design defects and inhibit their avoidance or correction.

These problems form a pervasive pattern, spanning numerous donors (multilateral and bilateral), sectors, continents and countries. It is equally discouraging that several of the core design defects violate basic TA principles which have been researched and published for the past 40 years.

The problems have serious consequences. They substantially reduce TA's quality and impact. They sour crucial working relationships between project parties, at both institutional and individual levels. Just as, in a positive sense, technical assistance can have a powerful catalytic influence far beyond its direct inputs, so, in a negative

---

[4] World Bank, *Technical Assistance Handbook* (1993).

sense, can TA failures cast a pall over much larger capital projects and sectoral programmes. Especially in the central domain of institution-building, ineffective technical assistance can waste scarce host-country resources and squander timely, perhaps irretrievable, opportunities to facilitate vital know-how-transfer and attainment of local sustainability. And where the specific context is law reform, the victims of such ineffectiveness can include the rule of law, civil society, human rights, and transparent public administration.

Fortunately, practical solutions for these problems are at hand. Some have been known for a long time but not always applied. Others are emerging from current TA management practice. Almost all these successful responses are *collaborative*, drawing upon the complementary assets of projects' tripartite partners:

- Donors, bringing to the table broad (sectorally and geographically) development-assistance experience, 'big-picture' perspectives, and essential financial resources;
- Clients, contributing unique knowledge of host-country and host-agency needs, conditions and constraints; and
- Consultants, including law firms, with field-tested technical know-how and personnel.

Collaborative solutions are *synergistic* solutions. In a specific project, each party's demonstration of flexibility and empathy creates reciprocal opportunities for correcting concrete design defects. Correcting one defect often automatically corrects others. In broader country or regional programmes, relief of institutional constraints by the concerted action of donor and/or host-government management can reduce or remove those same defects on a portfolio-wide basis.

The rewards of reform can be dramatic. Unleashed to perform to its full potential, TA in general, and law-related TA in particular, can make developmental contributions of genuinely historic proportions. This is especially apparent in the current period of emergence and transition of former command economies. Courageous, ambitious but ill-equipped host-country professionals are eager for advice and assistance from foreign peers. Modest, respectful injections of technical assistance can make all the difference between inertia and momentum. There is no assurance that such windows of opportunity will remain open for long. To the contrary, reactionary reassertions combined with emigration of the best and the brightest may soon present far less receptive environments for change. In such climates and moments, all of us committed to development and law reform must do what we can to improve the quality and impact of technical assistance.

IV. The Article's Organization and Purpose

The two main sections of this article summarize two core clusters of TA problems – design defects, compounded by project parties' institutional constraints – and offer suggested solutions for both clusters. Concrete case studies are extracted from recent, law-related projects. A brief coda then proposes further steps for enhancing TA quality and impact.

Most of the discussion centres on technical assistance for institutional development (TA/ID). As noted above, TA/ID is accounting for a dominant share of technical assistance interventions, notably in the legal sector. Moreover, as a result of its complexity and inescapable human dimensions, TA/ID appears to present the greatest difficulty for technical assistance parties and principals. Simpler, briefer forms of technical assistance are also mentioned, but mostly for contrast. (Common examples include feasibility studies, concrete legal research or advice, project evaluations, etc. – technical services which host agencies or donors cannot perform or prefer to contract out.) Unsurprisingly, while both significant and valuable, those forms seem to prove less problematic.

This article cites TA problems neither to complain nor accuse. There should be no adversaries in technical assistance relationships, only co-workers. It cites solutions neither to preach nor dictate. There are no experts in technical assistance management, only fellow practitioners. Instead, the article's purpose is to help stimulate a best-practices TA design colloquy, engaging all interested parties – host-country clients, donors and consultants. The ultimate objective of such an exchange would be to formulate, implement and refine co-operative strategies for enhancing TA's quality and impact, and hence its positive contributions to development, transition and law reform.

B. Problems and Solutions: Common Defects in TA Design

Critical design defects commonly perceived in current technical assistance projects can be disaggregated into four components:

1. Excessive specificity of tasks and personnel prescribed in consultants' Terms of Reference (TOR);
2. Inadequate timeframes budgeted for effective TA performance;
3. A mismatch between project objectives and activities; and
4. Excessive reliance on, and expectations from, short-term training and training of trainers in capacity-building projects.

The following analysis summarizes each of these problems in turn, matching them, as it proceeds, with suggested measures for avoidance or correction.

I. *Excessive Specificity in Terms of Reference (TOR)*

1. *Number and Description of Required Tasks*

Problems. Under current conditions, it is increasingly common to read TOR which prescribe an extensive list of required TA tasks. The most extreme example encountered by the author recently was a 1997 project listing 43 detailed activities as contractual obligations of the consultants. It is almost impossible to reconcile such design demands with a serious, institution-building approach to technical assistance.

Consulting firms privately mock such requirements as 'Christmas trees', unrestrained project designs overburdened with donor (and sometimes also host-agency) wishes or ornaments. A firm which contractually agrees to be bound by such Terms will have little opportunity or option during project implementation to do more than plow through this checklist, ticking off deliverables as each survey is completed, issue analysed, or report filed. Inevitably in such cases, when the firm sets its project management priorities, mere completion of the myriad required tasks will take precedence over any attempt to ensure the quality or impact of those tasks. Such mechanical preoccupation ill serves the institution-building of the donor, the client and the project.

This problem is compounded when the wish list becomes disparate. In one recently encountered project for example, a core agenda of judicial reform activities had been diluted by additional requirements to address non-judicial elements of legal information systems, general improvements in legal education, initiatives to strengthen the legal profession, and economic law reform. Such diffusion of focus causes unavoidable practical problems for technical assistance implementation and effectiveness. It multiplies project constituencies, thwarting prospects for local consensus. It complicates team-member recruitment, almost certainly driving up personnel costs. Additionally, it strains the project manager's span of co-ordination and control.

Even if the number of required tasks remains realistic and those tasks all adhere to an integrated focus, TOR can nevertheless be detrimental if the degree of specificity in task *descriptions* is excessive. As illustrated by Case Study 1, prescribing too much detail in required tasks can prematurely foreclose project implementers' opportunities to explore and develop alternative design options during initial collaborative needs assessment. It can further inhibit their flexibility to respond affirmatively to additional promising opportunities which evolve downstream. Avoiding such constraints is particularly appropriate where, as is normally the case for larger TA projects, TOR will be drafted several months before implementation commences. In fluid local policy-making and institutional environments – not uncommon, for example, in transition economies – rigid task prescriptions can easily be overtaken by events before the consultants even arrive in the country.

Case Study 1: The Perils of Excessive Specificity

A project designed to develop an indigenous institution offering mid-career legal training specified in its TOR that, as soon as the new agency had been established with project assistance, it should conduct six three-month courses annually for its first two years of operation, each course enrolling 30–35 participants. Not only was so much elaboration unnecessary, it severely restricted the start-up flexibility of the new agency's local managers and consulting advisors. All of these prescribed training parameters were arguably ill-conceived. A workload of six courses per year might well prove overly ambitious for a greenfields institution, taking into account attendant responsibilities for course design, materials preparation and training of trainers. Two simultaneous training tracks would automatically be required to satisfy this quota (i.e., 18 months of instruction within 12 calendar months). A three-month course duration might prove inconvenient or even inaccessible for the new

agency's intended trainees, most of whom already had full-time jobs. Class sizes over 30 participants would virtually foreclose effective interactive training methodologies essential for continuing legal education. It would have been more fair and effective to delegate all of these detailed design decisions to the local authorities who would be held accountable for the new agency's success and survival, in working partnership with their project consultants who would be held accountable for transferring locally appropriate, institution-building know-how. Imposing so many arbitrary boundaries in the TOR tied those implementers' hands behind their backs before project implementation even began.

The point here is not that TOR should be vague or utterly open-ended. As illustrated in Case Study 2, detailed task lists and descriptions can be entirely appropriate and constructive, especially where assignments are narrow in scope, brief in duration and modest in staffing. Such specificity makes most sense where the purpose of the technical assistance is to produce concrete technical products like feasibility studies or engineering designs. (Even in those cases, however, too many tasks and divergent tasks should be avoided.) Excessive task specificity can be most detrimental in TOR for more organic, institutional development projects where client needs and absorptive capacities, and consequently client/consultant counterpart relationships, are best left to be collaboratively identified and served during project implementation.

Case Study 2: Tight Terms For Narrow Scope
An assignment to conduct a mid-term evaluation of a multi-year democratic transition project offered an appropriate context for a high degree of task specificity. The assignment's required activities were able to be succinctly delineated in the TOR:
(1) a desk review of project documents;
(2) structured interviews with key project parties (the sponsoring donor, host agency, consultants, beneficiaries, other comparable projects, etc.);
(3) an in-person debriefing of the project steering committee on the evaluator's chief findings and recommendations; and
(4) a written final report.
It was also feasible for the TOR to enumerate a minimum list of evaluation issues to be addressed: e.g.,
(a) a current (i.e., mid-term) assessment of the continuing validity of the project's original design (including objectives, conceptual approach, timing, staffing and budget), coupled with recommendations for any design modifications/improvements during implementation's second half;
(b) an assessment of the first-half implementation performance of the project's core parties (consultants, host agency and donor), again with appropriate modification recommendations; and
(c) a preliminary assessment of the merits of a possible project extension or sequel.
This evaluation assignment was concrete, concentrated and circumscribed: in short, a perfect candidate for a high degree of precision in articulating TOR tasks.

Solutions. One strategy for correcting the perceived TA design defect of excessive specificity in prescribing the number and description of TA tasks is not to prescribe tasks at all. Instead, Terms of Reference might articulate a project's objectives and available budget resources, but then leave it to the professional creativity of competing consulting firms to respond in their proposals with designs conforming to those indicated targets and constraints. To make the point another way, the client and donor should take key responsibility for *preliminary project planning*, but then the consultants should be placed chiefly in charge, subject to client and donor approval and supervision, of formulating and executing a *detailed design* to implement that plan. TA design is a means to an end, not an end in itself. The client should dictate required results, particularly in terms of enhanced institutional performance. The donor should signal budget parameters. To achieve those results within that budget, the consultants should then be authorized to select and mobilize the most favourable inputs.

This recommended allocation of TA management roles recognizes each project party's relative strengths and its comparative advantage. The donor is not in the business of co-ordinating or performing TA services, legal or otherwise. Nor is it contractually obligated to do so. Likewise the client is not qualified to do this necessary work, or at least chooses not to do so – that's the whole point of hiring consultants in the first place. If the project co-sponsors have agreed to engage expensive consultants, it makes sense to get the full benefit of that investment: by exploiting all of the firm's superior field experience and technical expertise, encouraging its creativity not shackling it. To dictate to the nth degree how the firm should do its job in effect reduces it to a supplier of exorbitant, imported day labour. This is neither prudent nor cost-effective by any reasonable standard.

By analogy, this allocation of technical assistance roles resembles the division of responsibilities when building a house: the donor is the banker, the host agency is the project owner or client, and the consulting firm is the architect and general contractor. The owner and banker indicate what structure they desire to build, what occupants and functions it must accommodate and support, and what costs they can afford. But they don't try to dictate to the professionals *how* to design or build the structure. To the contrary, they are willing to pay those professionals' considerable fees precisely in order to gain the benefit of their specialized technical know-how and field-proven experience.

To return to the context of technical assistance, consultants' implementation accountability can be enforced by pegging their instalment payments to agreed targets, e.g., in institution-building projects, host-agency counterparts' ability to demonstrate mastery of transferred know-how. Progress can be monitored via periodic reports. As in construction projects, superior or faster-than-anticipated progress can be rewarded with financial incentives. Reciprocally, inferior or delayed results can be sanctioned with payment suspensions or deductions. In short, the result of this suggested solution will not be to reduce consultants' responsibility but to bring authority and responsibility into balance, and not merely for the consultants but for all parties. In this way, fair and optimal

conditions can be created for the consultants to do their best work for the client, the donor and the project.

If dispensing entirely with TOR-specified tasks seems too bold a departure from a given donor's or client's current practice, at least the number of tasks should be reduced to permit in-depth concentration on a severely limited number of focal points. Narrowed substantive focus eases project management distractions and greatly improves prospects for development of the consultant/host counterpart relationships which are the crucibles for know-how transfer.

2. Number and Descriptions of Required Consultants

Problems. Just as too much TOR specificity with regard to required *tasks* can severely impede the quality of TA performance, the same is true with regard to required *personnel*. Current project designs frequently suffer from requiring the fielding of too many consulting team members and/or from describing in excessive detail individual members' required qualifications and project tenures.

As illustrated by Case Study 3, 'parachuting' a half-dozen foreign experts simultaneously into a small host-government agency can impose an overwhelming burden on the absorptive capacity of that institution and its local staff. Each expert will probably require the intensive, time-consuming co-operation of at least one host-agency professional as a counterpart, as well as considerable administrative assistance. And if that expert and his/her local clients and colleagues lack working command of a common language, additional interpretative and translation support for the visitor will be required.

Case Study 3: 'Too Many Cooks Spoil the Broth'
The TOR for a project designed to strengthen the operational capabilities of a host-government regulatory agency called for the fielding of six international consultants, each with a specified sub-sectoral specialty, within six calendar months of project implementation. The team leader position was designated as full-time, i.e., extending for the project's six-month duration. The other five positions were for one to three months each. At a glance, this sizable invasion within a very brief timespan could be anticipated to place severe burdens on the host agency's absorptive capacity as well as on the consulting team's own project management resources.

Where experts' deadlines are short. for completing their missions and producing contractually required technical outputs, experts' competition for local counterparts and support can frequently produce internal tensions within the consultants' team. Defusing those tensions, providing each expert with orientation, logistical backup and supervision, and co-ordinating the team's overall performance will be a formidable project management challenge for the consultants' team leader. Almost inevitably these choreographic preoccupations will deter or preclude the leader from effectively executing other technical tasks.

From a budgetary perspective, adding members to the consultants' team may not necessarily increase aggregate professional fees (e.g., if six total members work no more total person-months than five would). But at a minimum, each extra body will cost an expensive extra international airfare. Moreover, having to simultaneously field a sizable team can significantly complicate a firm's recruitment effort and attendant front-end overhead costs.

Again, the point here is that overloading a consulting team with too many players is not merely – or even primarily – dysfunctional for the firm. It is also counter-productive for the host institution and its own professional staff, for the donor and for the project. This is a lose/lose/lose TA project management strategy.

TORs' specification of the project designations or qualifications of individual team members can also cause unnecessary recruitment or implementation problems for a firm. For example, when consultants are required, not merely to field a three-member team to perform enumerated tasks in a difficult host-country environment and a tight time frame, but also to ensure that one of those members will be an '*education economist*', this additional descriptive constraint arbitrarily and significantly aggravates an already severe recruitment challenge. When confronted with such a TOR requirement, most responding firms will be forced to opt for one of two equally unattractive recruitment responses: either proposing some highly specialized, unusually expensive expert with whom they have never worked before; or distorting the qualifications of a preferred team candidate whom they do know and have confidence in. Neither response is likely to be optimal for the project or its co-sponsors. The former response will dilute the firm's command and control, one of the principal assets the co-sponsors are allegedly buying. The latter response will contribute to a climate of concealment and misrepresentation, the antithesis of the collaborative spirit the co-sponsors should be striving to instill at the outset of the project.

TOR can also impose unnecessary constraints by specifying which of several required team members shall serve as team-leader. Since project management is an art and skill too seldom found in technical specialists, all firms would prefer to have flexibility to assign the team-leader role to the most managerially qualified individual among their team candidates, rather than having that management responsibility attached in advance to a designated technical specialization or position. In no way does it conflict with the co-sponsors' self-interests to delegate this crucial design decision to the employing firms. All parties benefit from assigning the management function to the best-qualified professional available. And for different competing firms, the best managers will in all probability occupy different technical positions on the teams.

As a final entry in this brief catalogue of personnel-related TA design problems, it can be as deleterious for TOR to require too *few* positions as too many. To illustrate this false economizing, the TOR in one recent project called for a single 'legal advisor' to provide expert counsel and drafting on foreign investment policy and promotion, mortgages and land law, secured transactions and banking, corporation law and bankruptcy. In such cases, one of two types of consultants is likely to be fielded: either a specialist in one of the named disciplines who exaggerates his or her

other qualifications; or a general commercial lawyer lacking first-rate specialized expertise. For the project, its donor and its host-government client, neither result will be desirable. It would be more effective either to reduce the breadth of required tasks or to expand the number of performing specialists.

Solutions. TOR need not specify the number of members in a consulting firm's project team, nor the professional disciplines or tenures of involvement of individual team members. These input details are most appropriately left to the discretion and judgement of the firm. Authority should match responsibility. So long as agreed results are achieved within the client's available resources, *how* the firm achieves those results and with what personnel should be the firm's to determine.

If a totally open-ended approach to project staffing seems too liberal (or lax) for some donors and clients, a degree of personnel specificity could be prescribed in terms of desired *technical functions* or *capabilities* to be covered by the team, rather than in terms of a required number of team members, with job descriptions or tenures for each. There may be numerous alternative staffing strategies for mobilizing the total know-how needed. Moreover, those needs will vary markedly with the host agency's capabilities and constraints, as well as with the nature and scope of the TA services to be performed. For these reasons, specification of unnecessarily narrow or rigid individual qualifications should be avoided.

For TA/ID assignments in particular, with their incumbent demands for the consultants' personnel to form effective know-how-transfer relationships with host-agency counterparts, the project parties would be prudent to give at least as much weight to *development-process capabilities* as to *substantive expertise*. In the latter context, a myriad of project analyses confirm that the following process capabilities will be invaluable:

- Hands-on work experience in operational roles, not merely academic or advisory expertise;
- Field experience, preferably long-term, in prior development projects, not merely home-country expertise;
- A high tolerance for performing and persisting in difficult field conditions, without all the comforts or support of normal home-country environments;
- Acute cross-cultural sensitivity and genuine respect for host-agency counterparts, treating them as colleagues and clients, not mere assistants or trainees.
- Prior know-how transfer experience, including on-the-job coaching and classroom training.

The recommendation for retaining flexibility in prescribing consultants' qualifications can be illustrated by making reference to consultants' local-language capabilities. It will always be an asset for a foreign expert to be able to speak the host-country language. Such competence will permit direct communication with clients, counterparts and local support staff, not to mention smoother functioning in the local environment. It will exponentially accelerate the formation of counterpart relationships. That having been said, to make local-language competence a *required*

qualification for every member of the consultants' field team may be unnecessary and counterproductive. For some, especially short-term interventions – e.g., conducting a technical legal workshop – a foreign specialist should be able to communicate effectively through local interpreters, provided they have the appropriate technical vocabulary. In some counterpart relationships, the partners may be able to communicate through a third common language.

Certainly in the case of some local languages, requiring local-language competence would severely limit the pool of expatriate talent available for recruitment by the consulting firm. (Drawing on host-country emigrants could reduce this constraint, but that approach might not be welcomed by the client.) In such situations, for a given team position, the parties and the project might be better served by not imposing that constraint, especially if it appeared that local-language competence would be purchased at the expense of first-rate technical expertise. The desired qualifications for each TA assignment and each position within a TA team will have to be evaluated cautiously. But as a general rule, it will be more sound to specify local-language competence as a preference than as an absolute requirement.

Returning to the topic of the size of consultants' field teams, if a donor and client feel compelled to specify the number of consultant's team members in their TOR, then as a general rule small teams whose members have broader responsibilities and longer tenures are more effective than large teams of narrow specialists shuttling rapidly in and out of the host agency. Extra members require additional airfares, orientation briefings, host-agency counterparts and on-site logistical support. They can also increase the risk of internal tensions, duplications and overlaps. Their briefer tenures almost certainly reduce the prospects for any meaningful know-how transfers and consequent sustainability.

As previously recommended, the choice of team leader is also best left to the firm. This is another application of the comparative-advantage principle advocated above. The firm – not the donor or client – is best placed to know which of its technical experts will be best qualified to assume additional project management duties. Moreover, if, within the co-sponsors' budget, a firm is able to propose a staffing approach which covers all of the needed substantive functions and yet frees up its team leader to focus exclusively on project-management responsibilities without additional technical obligations, the firm should be permitted and even encouraged to do so.

Of course, to recommend that each firm be authorized to assign the team leader's function among its own team members is in no way meant to advocate that the co-sponsors should abdicate their own contractual responsibilities. It remains their duty to review each competing firm's candidates to ensure they have the requisite experience and expertise. And since the team leader role is pivotal, the relative strengths of competing firms' candidates for that position should weigh heavily in selection calculations. If possible, firms' leader candidates should be interviewed in person as part of that evaluation process. At a minimum, their past managerial competence should be verified through co-sponsor contacts with the firms' and candidates' prior clients.

II. Inadequate Timeframes

Time constraints have figured tangentially in much of the preceding discussion of excessively specific Terms of Reference. Let's now take a more focused look at the design defect of inadequate time, in three of its most harmful manifestations: time for performance of consultants' substantive tasks, for project management, and for facilitating the institutional development of host-country agencies.

1. Time For Performing Substantive Technical Tasks

Problems. For the reasons summarized above, excessively long lists of required technical assistance tasks are to be avoided in any Terms of Reference. But that design defect will be compounded if inadequate timeframes are budgeted for. In the cited example of the project prescribing performance of 43 detailed tasks,[5] only 13 person-months were allowed to complete that ambitious agenda. The author's own informal assessment estimated that 52 person-months would have been more realistic. Such gross under-budgeting deters serious consultants, promotes disrespect for the donors' design teams, and signals to the selected firm, correctly or otherwise, that only 'quick-and-dirty' performance is expected by the donor.

Performance time should be adequate even if the length of the task list is not excessive, and adequacy must be measured in calendar months, not merely in person-months. Some technical assistance processes require patience, especially know-how transfer and the forging of counterpart relationships for institutional development. Accordingly, effective time budgeting has an inescapable chronological dimension; it cannot be satisfied simply by cramming additional person-months into a too brief calendar by expanding a consulting team.

Moreover, effective TOR time estimates must be based on realistic assessments of resources available in-country for projects' local support. In a case where a donor's design team wrongly assumed, drawing on precedents in other borrower countries, that baseline statistics must previously have been compiled by the host government before the current project commenced (and hence would be available to the consultants on arrival), no consulting time was accordingly budgeted in the TOR for data collection or processing. When this assumption proved wholly invalid upon project startup, the consultants' implementing team was confronted with the unattractive, unanticipated choice of either failing to perform its contractually required data-based tasks or diverting precious analytical time and personnel to do baseline fieldwork.[6]

Solutions. This common design defect disappears if no tasks are specified in the TOR as recommended above. The larger challenge remains the prescribing of an

---

[5]   *See* part B.I.1, Problems, para. 1.
[6]   Since arduous contract budget negotiations had just been concluded, the firm was aware that petitioning the donor for additional funds was not a viable alternative.

adequate overall time limit for completion of project services. But even here, this parameter might best be left to competing consultants' creative judgements in their proposals. For example, if one firm presents a convincing case for scheduling intermittent services over the span of a calendar year, while another offers full-time services to be completed within six calendar months, then provided that both proposals are within the client's budget and delivery needs, both approaches should be welcomed and evaluated on the merits. Such open-ended evaluation should not impose an unreasonable burden on the donor's project officer since donors assign proposal-evaluation responsibility to committees containing diverse senior personnel.

As a variation on this first recommendation, if a client and donor feel compelled to specify an overall time limit in their TOR – for reasons of funding cycles, programme planning, etc. – this limit, along with project objectives, required results and the budget ceiling, should be made explicit. Competing firms can then propose alternative approaches to accomplishing the client's needs in conformity with the prescribed resource constraints. For prolonged, complex institution-building projects, the allocated timeframe should explicitly contain a margin for inevitable implementation delays and detours.

Even if it is necessary to specify tasks, their scope should determine the project's time budget, not vice versa. A design approach which begins with administratively determined project time and budget limits and then proceeds to cram that frame full of multiple tasks selected with little regard for feasibility is an approach almost certain to produce sub-optimal results and impact.

2. Time For Project Management

Problems. Too commonly, TOR and/or their time budgets are entirely silent with regard to project management. Where management responsibility *is* assigned, almost invariably it is treated in the TOR as an incidental, subordinate obligation of one member of the consultants' technical team whose priority duties are expected to be substantive. TOR time budgets rarely dedicate explicit time allowances to this management function and if they do they are rarely adequate. Yet especially where sizable teams are involved, and even more so where institutional development is the team's core mission, exercising effective field management can easily be a full-time job. In addition to supervising and supporting team members' performance, the team leader must guide and monitor execution of the work plan, disburse and track project budget expenditures, and nurture a crucial network of harmonious relationships within and without the project. The broad range of parties involved in the latter relationships might typically include the firm's home office, the sponsoring donor, the client host agency and its counterpart personnel, project constituents, other host-government institutions, and other donors and their relevant projects. Maintaining those contacts can pay huge practical dividends for a project's local acceptability and sustainability. But the *quid pro quo* is a commensurate management investment.

Case Study 4: 'Management-Free' Technical Assistance
A 1998 foreign investment reform project proposed to economize by engaging the services of four individual technical experts on a personal services basis, without contracting a co-ordinating firm. An investment promotion specialist, finance specialist, legal adviser and credit specialist were all to work independently and simultaneously, side by side. Several of their required tasks were explicitly complementary, if not overlapping. No team leader was designated; no time was budgeted for project management or co-ordination. For project co-sponsors, the possibility of avoiding costly project management expenditures (including overheads) by contracting individual experts without a co-ordinating firm can be tempting. But unless the donor or the client has the staff time and know-how to manage those individuals itself, that avoidance might be penny-wise and pound-foolish.

As a general rule, implementation time needed for project management will increase in direct correlation to the size of the team, the number of required tasks, and the expected degree of interaction with the donor and host agency. Shortchanging this management commitment risks severely diminishing the sensitivity, flexibility, responsiveness and impact of project implementation.

Solutions. Management can, and frequently does, make or break a project. Accordingly, prudent TA designs budget liberally and explicitly for project management. Effective project management takes time: for team supervision, administrative support, budgetary control, and crucial liaison with the host government and other projects. This is not a function to be performed at the margin, on nights and weekends, by a team member fully occupied during normal working hours with competing substantive tasks. The heavy management burden can be lightened by avoiding excessive reporting obligations and by keeping consulting teams lean. Effective project management helps ensure effective project implementation.

3. Time for Institutional Development

Problems. Grossly inadequate time budgeting for institutional development is probably one of the most chronic and crippling defects of current technical assistance design. While TA *objectives* which nominally highlight host agencies' institutional development are increasingly prevalent, TORs' corresponding time-frames are almost never congruent with this mandate. To appreciate the extent and gravity of this under-budgeting, the scope and complexity of the institutional development challenge needs to be fully grasped.

TA/ID necessarily entails a structured transfer of technical know-how. The consulting team's integrated responsibilities, in chronological order, are likely to encompass:

1. An on-arrival, collaborative assessment of the host-agency's institutional needs;

2. Formulation of an institutional-development and know-how-transfer action plan;
3. Importation and adaptation of foreign know-how (tangible and intangible);[7]
4. Transfer of that know-how to the host agency and its staff;[8]
5. Testing, confirmation and, if necessary, reinforcement of that transfer, to ensure local mastery and sustainability;
6. Trial operation, including fine-tuning, of the transferred know-how, culminating in disengagement and withdrawal of the consultants' on-site team; and
7. Intermittent downstream troubleshooting on an as-needed, call-back, basis.[9]

Clearly, it will take sustained TA/ID commitments to facilitate such a complex, integrated programme. Recommended timeframes are addressed under *Solutions*, just below. Just as clearly, currently prevailing timeframes are not commensurate with this ambitious scope of work. Project durations of two years are common, five or more years are highly unusual, and some six-month projects even claim to be contributing to host agencies' institutional development. Within such patently inadequate time limits, the problems are significantly compounded when TOR place priority emphasis on performance of short-term technical tasks. That incompatible agenda virtually assures that no meaningful transfer of know-how to host-agency counterparts will occur and that no sustainability of project impact will be engendered.

Solutions. Facilitating institutional development cannot be rushed. There are no reliable shortcuts. What is involved in such technical assistance projects is not merely modifying a host agency's structure and procedures – although that in itself would be a profound challenge. In fact what is being developed is the agency's entire approach to its operations and clientele – its *institutional culture, attitudes and behaviour*. This holds true whether the project's context is economic development or transition. It is emphatically the case for law reform.

Accordingly, as tracked in the preceding TA/ID checklist, adequate time is needed to design, implement, test and fine-tune an integrated know-how-transfer programme. Moreover, to the best-case timeframe needs to be added a generous

---

[7] Tangible know-how might typically comprise new managerial and operational tools for the host agency: e.g., structures, systems, procedures, documentation, equipment, hardware, software, etc. Intangible know-how, in turn, might encompass new managerial and operational knowledge, skills and attitudes.

[8] In the case of tangible know-how, through organizational development: phased introduction into the host agency's systems of the new managerial and operational tools. In the case of intangible know-how, through human resources development: counterpart relationships, on-the-job coaching, in-country and overseas classroom training, study tours, training of trainers, etc.

[9] For a detailed analysis of technical assistance as technology transfer, see Sunshine, *Managing Technical Assistance: A Practitioner's Handbook*, chapter 5, *see* note 1 above.

contingency allowance, to accommodate inevitable slippages, policy modifications, counterparts' attrition and *force majeure*.

On the basis of wide-ranging TA/ID experience, successful as well as unsuccessful, the following general guidelines can be offered for project timeframes. If a host agency is already fully functional but in need of modernization and upgrading, three to five years of technical assistance should suffice. If a new agency is to be created with project assistance, developed and left independently sustainable by project's end, then five to ten years of assistance will be more realistic. And for converting the culture of an entire sector of economic or governmental activity – e.g., small-scale private enterprises or the judiciary – ten to 15 years of advisory involvement would not be excessive.[10] In all of these categories, the recommended timeframes refer to overall project calendars. Within those parameters, some consultancy services can and should be intermittent, especially during know-how transfer's reinforcement, updating and troubleshooting near the end of, and then following, the consultants' residential services.

TA/ID timeframes will also obviously be affected by counterparts' working conditions. If pay standards are too low to attract and retain qualified professionals, if turnover is high, and/or if hiring and promotion are compromised by nepotism, the time needed for know-how transfer and local sustainability will markedly increase. If these constraints are sufficiently severe, institutional development may not be feasible in any time period.

Of major donors whose policies are familiar to the author, only GTZ (the German Government's bilateral development-assistance agency) consistently plans its TA/ID investments on the basis of realistic timeframes. GTZ commonly designs seven-year projects, with two projects linked, if necessary and appropriate, in sequential phases. The positive results are widely recognized and respected: by host governments, other donors and consulting firms.

III. A Mismatch Between Project Objectives and Activities

Problems. Terms of Reference commonly evidence a dysfunctional imbalance between stated project objectives, on the one hand, and required project inputs and outputs, on the other. Even where a project's sole purpose is to help a host government to establish and/or strengthen a regulatory agency, the Terms frequently make no reference to attracting local co-ownership of, and collaboration in, project planning, design, implementation and evaluation. Little or no reference is made to facilitation and confirmation of know-how transfer, to establishment and operation of counterpart relationships, or to preparing an action plan for the strengthened

---

[10] The World Bank has estimated, for example, that TA/ID to install public-sector financial management systems (embracing planning, cash management, budget and accounting functions) that are compatible, linked and sustainable will take ten to 15 years on the average.

institution's independent, post-project sustainability. Instead, the project parameters are typically confined by the TOR to importing highly specialized, short-term foreign technical experts – to unilaterally diagnose, draft and depart. Even where timeframes are not inadequate, such a 'products' agenda must be anticipated to work to the detriment of a 'process' impact.

Many projects *do* call for short-term training courses and study tours for host-agency counterparts. Case Study 5 offers a current representative example. But while, in principle, such activities have the potential to contribute to the execution of a collaborative, integrated, action plan for the host agency's institutional development, in practice often no plan seems to have been formulated. Instead, the activities seem to have been selected and assembled almost ad hoc. As such, the activities may well be gratifying for local participants, especially if they involve otherwise unaffordable foreign travel. But they are far less likely to enhance sustainability of the intended institutional improvements.

Case Study 5: Matching TA Activities to Objectives

A recent TA/ID project's objective was to strengthen host-country legislative and judicial systems in a transition economy. Yet the TOR limited project activities to delivery of short-term products: training courses and study tours for judges; upgrading of the national law faculty through library acquisitions and teachers' fellowships; and foreign experts' comments on specific draft statutes. The Terms imposed no requirement for the project consultants to analyze and address the institutional and operational constraints which might have been impeding legislative and judicial development. In similar jurisdictions, the crux of those impediments has often been found to lie in a fundamental and extreme imbalance of powers between the three governmental branches. In such environments, for example, the executive branch typically initiates and drafts most legislation, reducing the legislature to a rubber stamp. Frequently, recourse is had to presidential decrees which bypass legislative participation altogether. Similarly, the executive branch typically appoints and dismisses senior judges and controls the purse strings of the legislature and the judiciary. TA/ID can help to begin correcting such power imbalances: e.g., by helping a legislature to build in-house research, drafting and budget-oversight capabilities; and by nurturing the evolution of an independent judiciary (through control of appointments, professional standards and discipline, and through constitutional review of legislation, etc.). But the chief thrust and focus of that assistance must be on institutional strengthening, not merely or primarily on training of individuals. In other words, for effective TA impact, activities should be determined by objectives.

For institution-building viability, technical assistance activities must be grounded in an awareness of, and responsiveness to, relevant host-country conditions. For example, drafting new statutes closely modelled on precedents from foreign jurisdictions is unlikely to make a sustainable contribution to local legal or economic

reform unless an entire fabric of prerequisites is in place or being simultaneously crafted. Essential host-government threads for that fabric include, among others, top-level, executive-branch leadership unequivocally committed to reform, legislative momentum to adopt the drafted legislation, host-agency capability to promulgate and competently administer regulations to implement that legislation, and judicial or other credible mechanisms for resolving inevitable regulatory disputes. 'Off-the-shelf' foreign statutory models may be useful in consultative dialogues between consultants and counterparts as one source of comparative approaches to host-country problems. However, they will almost certainly not be locally relevant without comprehensive adaptation. Moreover, foreigners' comments on local drafts submitted from a distance without the benefit of such consultation are unlikely to be of much utility in strengthening that local fabric.

Solutions. It is equally valid to employ technical assistance to pursue short-term, concrete objectives and longer-term, institutional-development objectives. More-over, short-term *activities* can be validly employed to serve long-term as well as short-term objectives. But if a project is genuinely aimed at facilitating a host agency's institutional development, i.e., TA/ID, then all of its short-term activities should serve the longer-term action plan. And for TA/ID to be effective, short-term activities will not be sufficient.

Sound TA design lets the project's core purpose determine and drive all subordinate project components: e.g., the project's budget, timeframe, activities and staffing. If institutional development of the project's host agency is the purpose, that mission should control the project's design and implementation and the necessary long-term investments should deliberately be made. If, on the other hand, only discrete technical inputs are affordable and contemplated, this narrower agenda should be unapologetically declared. To mislabel the latter type of project as 'capacity-building' only introduces confusion and risks raising unrealistic expecta-tions. To attempt to sponsor *low-budget* institutional development by financing only short-term technical inputs – e.g., foreign drafts of local statutes or foreign comments on local drafts – in the absence of know-how transfer to local counterparts and attention to post-project sustainability, is futile and potentially demoralizing. Institutional know-how, like other technology, can only be transferred from mind to mind, not from shelf to shelf.

In some cases, of course, the parties may not be confident that all the prerequisites are locally in place to support a successful TA/ID investment. A common example would be the perceived absence of a critical mass of available, qualified and motivated local counterparts to receive the transferred know-how from the consultants' team. In such situations, however, a variety of strategic options are available. For example, one or more of the following approaches might be considered:

- At least in the project's initial phase, to accept the temporary counterparts shortfall as unavoidable and to place the consultants in operational, rather than, coaching roles.

- In place of full-fledged counterparts, to recruit a sizable pool of protégés for each foreign mentor, upgrading their capabilities over time. If host-agency management were agreeable, this net might extend into other agencies or even possibly the local private sector. The pool would be large enough to anticipate inevitable attrition.
- Where counterparts' motivation is a perceived constraint, to offer non-monetary incentives, e.g., specialized on-site technical or professional training, foreign study tours and scholarships, the opportunity to step into the consultants' shoes upon confirmation of successful know-how transfer, etc.
- Where counterparts' lack of interest or active resentment/resistance is anticipated, to organize a project-launch collaborative workshop to proactively address local concerns.
- In extreme cases, where low host-agency remuneration of desired counterparts is assessed as blocking TA/ID success, postponing or withholding the desired TA until that remuneration can be brought up to retainable levels.

As an alternative, perhaps bolder response when either or both project co-sponsors is not convinced at the outset of project planning that a long-term TA/ID investment can be justified, the initial project might be deliberately and explicitly structured as a *pilot*. In this experimental mode, the receptivity and absorptive capacity of several host agencies might be tested, as might the timeliness and effectiveness of a range of TA activities. Unlike conventional projects, uniform success across all tracks would not be expected or demanded. Instead, the joint venture would be approached as a form of developmental 'market research'. All participants (institutional and individual) would be informed that the co-sponsors were testing the waters. A follow-up, long-term TA/ID project would be contemplated, but not guaranteed. In all likelihood, that sequel would be limited to one or more host agencies revealed by the pilot project to be the best prospects for longer-term institutional development – in other words, a narrower but deeper, second-phase investment. And while conducting their pilot experiment, the parties could discover particular TA methodologies which seemed to work well under local conditions, thereby earning *prototype* dividends.

As a variation on the pilot theme, where available TA budget and time resources are severely constrained, a *bridging* strategy might be adopted. Case Study 6 illustrates that preliminary preparations for institution-building can be creatively designed into a project even where a full-scale TA/ID investment is not yet feasible. It is more transparent and effective to promise and deliver initial movement towards an institutional development objective than to promise and fail to deliver full attainment of that objective when only short-term activities are affordable.

Case Study 6: Building A Bridge
A project donor and client government wanted to strengthen the institutional capacities of a regulatory agency whose role was crucial for economic development. The parties lacked immediate resources to do more than sponsor a short-term team of four technical experts to render specialized substantive advice

during an overall time period of six calendar months. To bridge the acknowledged gap between the desired institutional-development impact and the immediately affordable short-term resources, the sponsors added an additional function to the team's original agenda. Titled 'facilitation of know-how transfer and sustainability', this function was to be staffed by adding three person-months to the tenure of the member of the original substantive team deemed to have the most training and institutional-development experience. (The decision was taken not to assign this extra role to a new, extra team member so as not to create likely tension between the original substantive experts and a newcomer facilitator.) The cost of these three added months of services was charged to the project budget's line item reserved for supplementary short-term inputs. This bridging function had three components:

(i)   to liaise actively with host-agency leaders and counterparts to ensure that all substantive activities and products of the team were adapted to local conditions and constraints;

(ii)   to encourage all substantive team members to devote attention and energy to counterpart relationships with host-agency professionals, and to transfer their know-how to those counterparts through on-the-job coaching and classroom training; and

(iii) to collaborate with host-agency leaders and counterparts on formulation of a sustainability action plan, to be presented to government and donor representatives at the team's pre-departure debriefing and then incorporated into the consultants' final report.

Action plan topics would include, at a minimum, recommended further steps for host-agency follow-through activities, recommended timing for those activities, estimated costs of those activities, and possible funding sources to support those activities. While insufficient by itself to convert a short-term technical intervention into bona fide institution-building, insertion of this bridging function in the consultants' scope of work was a practical triage strategy for shaping and mobilizing that intervention to constructively serve the sponsors' longer-term objective.

IV. Misuse of Specified Human Resource Development Activities in Capacity-building Projects

1. Short-term Training

Problems. Human resource development through short-term training can have a powerful role to play in law-related and other TA/ID projects. Classroom training can lift counterpart professionals out of their daily routines and introduce them to stimulating unfamiliar approaches to local problems. When interactive and highly participatory, training can let trainees practice necessary skills. When regional or

international, it can introduce them to foreign peers, building networks for facilitating the exchange of operational challenges and responses.

Despite these significant potential benefits, short-term training can become a problem rather than a solution in technical assistance design when it is misused, overloaded or under-supported. Training should not be manipulated, as in Case Study 7, to accomplish non-training technical assistance objectives.

Case Study 7: Where Training was the Wrong TA Tool
A technical assistance project was intended to persuade a host-country government to adopt international principles and practices of public procurement, with emphasis on international competitive bidding. The dual channels selected by the project design for this persuasion effort were:
(1) introducing the underlying policy assumptions and principles to high-level decision-makers; and
(2) demonstrating international procurement instruments and practices for mid-level administrators.
To execute this project mandate, the TOR called for a series of short-term training courses:
(a) a three-day policy seminar for 50 legislators charged with responsibility for promulgating national public procurement regulations;
(b) three one-day seminars, each for 170 'executors' responsible for monitoring and enforcing those new regulations;
(c) two two-week workshops, each for 25 procurement officers to be graduated as trained procurement trainers; and
(d) three one-week courses for an unspecified number of local entrepreneurs constituting potential joint-venture bidders under the new regulations.
There were two fundamental defects in this technical assistance design. First, the training activities were significantly overloaded, with courses too brief and class sizes too large to successfully convey highly technical foreign material. This becomes obvious when one considers that all classroom instruction was to be communicated through sequential interpretation, thereby slowing the normal pace by half. As a training vehicle, this project was almost certain to fail. Second, the training mechanism was being manipulated to accomplish a policy-reform persuasion objective. As such, it risked offending top-level officials by casting them as trainees. It utilized open fora and large groups not conducive to sensitive transition planning. And it solicited proposals from consulting firms and teams who may not have been well-qualified for sensitive policy advising.

Short-term training should not be expected to carry an entire capacity-building burden by itself. One week of classroom exposure cannot reasonably be expected to change host-agency counterparts' professional behaviour. Sustainable change requires reinforcement which is most effective when administered on an extended on-the-job basis. Seminars and workshops can introduce new concepts and practices. But those innovations are best imprinted in the counterparts' normal

workstations, using real materials, solving real problems. Classroom training should complement such on-the-job coaching but not stand alone. Training will have the best prospect for contributing to a host agency's integrated capacity-building campaign if the training content, methods and materials are all custom-tailored to suit the objectives of the campaign and the operational environment of the agency. Off-the-shelf packaged courses imported from another jurisdiction may possibly be less expensive, but almost certainly will not be locally appropriate and hence will not give good value for money.

Even where a project's mission is to establish an in-country training institution, the conduct of prototype demonstration courses for local trainees should not be the chief institution-building activity. The bulk of technical assistance resources should be reserved and budgeted for collaborative strategic planning, for development of local managers and trainers, for construction and equipping of an appropriate physical plant, for design and production of curricula and materials, and for fund-raising to cover the new institution's recurrent costs.

Solutions. Here the best advice is not to ask short-term training to perform what it cannot reasonably deliver. Classroom training *can* make valuable contributions to capacity-building technical assistance projects, especially if content and methods are custom-tailored to the needs and interests of host-agency participants. But the operative caveat is 'contributions'. Classroom training should be one, but only one, component in an integrated human-resource-development programme. It cannot stand alone. Training can effectively be employed early in project implementation to begin introducing counterpart personnel to (1) the foreign know-how to be imported, adapted and transferred, and (2) the corresponding changes which that transfer will imply for their employer-agency's structure and operations. Complementary study tours can help to reinforce that initial classroom learning by exposing the participants to analogous third-country institutions where similar know-how is being applied. On-the-job coaching can support them in practising lessons learned from the early courses and tours. Mid-stream refresher courses can then carry forward the operational learning, respond to encountered doubts and problems, and remind the participants how principles relate to practices. Reiteration, reinforcement, trial and error, supervised practice, performance testing – all of these elements and more are needed to patiently transfer foreign know-how and build independently sustainable local capabilities. Classroom training is essential but not exclusive – always necessary but never sufficient.

Mature TA/ID design must also shape project training in full awareness of local (and foreign) constraints. Training participants must include key host-agency professionals, at senior, middle and junior levels – not redundant personnel most easily spared from normal jobs, nor well-connected beneficiaries of nepotism. Participants must be fully conversant in the language of instruction, including specialized technical vocabularies. If not, preparatory learning and/or interpretive services must be built into plans and budgets. Corresponding foreign pitfalls to be avoided include instructors with substantive technical knowledge who lack training know-how; and training content and materials lifted off-the-shelf from other, largely irrelevant jurisdictions.

2. Training of Trainers

Problems. In principle, training of trainers constitutes an admirable technique for localizing professional training capacity. However, in practice, it is often oversold and under-budgeted in contemporary TA/ID project design.

Case Study 8: Training of Procurement Trainers
To return to the public procurement project cited in Case Study 7, these TOR called for two sessions of a two-week course for 50 government procurement officers, who were expected to emerge from the course as fully qualified professional procurement trainers. The stated intent was that this core group could then go forward to train additional trainers who, in turn, could then train the full nationwide cadre of government procurement officials. The TOR further specified that the two-week course's curriculum should cover an ambitious spectrum of nine clusters of substantive procurement topics, spanning policies, bidding and contractual documentation and procedures. No mention was made of parallel coverage of training-of-trainers topics: e.g., training theory, methodologies or practice. At first glance, this training-of-trainers design represented an appealing attempt to diffuse transferred know-how, broaden project impact and localize delivery of services. On closer inspection, it was so drastically under-budgeted, in time as well as funding, as to virtually nullify any prospects for effective implementation.

Two linked assumptions may contribute to this design defect. The first assumption is that training a trainer can be simple and swift. This is demonstrably false. It takes a sustained programme of classroom instruction plus supervised practice to develop a qualified trainer. A single workshop can serve to introduce fundamental concepts of training theory and methodologies. It can give participants a brief opportunity to practice training skills, with, for example, videotaping utilized for informative feedback. What a workshop cannot do, by itself, is produce a competent trainer. Effective training of trainers takes months and preferably years of steady skill-building, with numerous cycles for refinement and reinforcement.

   The related assumption is that any technical professional – including legal practitioners – can be transformed into a competent trainer. Again this is simply not true. Training is an art as well as a science, a vocation as well as a discipline. For optimal effectiveness, it requires not merely instruction and practice but also a nurturing, facilitating temperament. Many legal technicians do not have those interpersonal qualities. To the contrary, they may have been attracted to their own discipline or specialized practice by countervailing, solitary predispositions. This is not to say that lawyers might not play a valid training role. Some broadly gifted individuals might excel both as substantive experts and as trainers. Many others could perform effectively in the classroom as substantive resource persons (e.g., as advisers in simulation exercises), complementing the process skills of a lead trainer.

   But, where a TA project's institution-building agenda is to develop a critical mass of qualified local trainers, it would be imprudent, if not disingenuous, to attempt to

achieve that formidable objective merely by collecting 25 lawyers in a classroom for one or two weeks, introducing them to training methodologies, and then turning them loose as 'trainers'. Recruitment of candidates must be highly selective, just as conduct of the training process must be realistically sustained.

Solutions. Training of indigenous trainers can be an effective vehicle for sustaining and localizing the institution-building process. But its inherent difficulties should never be underestimated in technical assistance design. Local trainers need to master not only substantive technical topics but also training methodologies. For the host agency's investment in their education to be recouped, the trainers must be retained to perform for several years. Since considerable attrition is unavoidable – as a consequence of transfers and promotions within host agencies as well as 'defections' to the more remunerative, private sector – a surplus must be trained in order to retain a critical mass. Periodic updating of technical knowledge and skills will also be necessary, particularly in rapidly evolving disciplines. In summary, this is a job well worth doing but not one which can be done quickly or cavalierly. Case Study 9, while not specifically law-related, offers a telling, analogous illustration of the scale of the requisite investment.

Case Study 9: An Adequate Training-of-Trainers Investment
In order to produce a cadre of 20 trained financial-skills trainers to serve national and provincial government agencies, a project designed a capacity-building programme of three years' duration. To anticipate attrition, 30 candidates were selected. Candidates were drawn from the cities to which they would be returning, when graduated, so as to minimize placement disruption. Classroom training was provided in financial skills, computer skills, training methodology, and English-language competence. This multi-faceted curriculum was sustained through a planned sequence of periodic seminars and workshops, beginning with basic theory and principles, then moving through methods and techniques, and concluding with downstream reviews and troubleshooting. Early in this curriculum, foreign study tours were organized. Throughout this classroom programme, trainees were engaged in supervised practice of their new skills – first as protégés of expert consultants, then as co-trainers, and finally as lead trainers, with videotaped feedback at all stages. Simultaneously, the trainees served as consultants' counterparts in developing financial-skills course modules which they would later be presenting as trainers. All programme activities – including classroom training, supervised practice and modules development – was conducted in a modern physical plant upgraded and equipped for the host agency utilizing project resources Since engagement in this part-time three-year programme placed demanding extra burdens on the participants who were meanwhile retaining their regular jobs, modest but locally significant financial incentives were paid to the participants to recognize their extraordinary commitment. Those stipends had the additional practical virtue of making the trainees fully available for participation in this training-of-trainers programme. Otherwise they would have had to be frequently absent, 'moonlighting' in the local private sector in order to supplement their inadequate government salaries.

C. Problems and Solutions: Institutional Constraints

Thus far in this analysis we have been discussing the first of two clusters of perceived technical assistance problems and their suggested solutions: funda-mental defects in the design of specific TA assignments and projects. Now we should shift attention to the second cluster: broader institutional constraints among the principal TA parties which may both aggravate the design defects and inhibit their avoidance or correction. Again, problems will be paired with solutions, in this case for each of the TA parties: donor agencies, host-government clients and consulting firms.

I.   TA Donor Agencies

Problems. One partial explanation for the current raft of defective Terms of Reference may be that a new cast of characters is in charge. Particularly in donors' projects for smaller countries, a new generation of younger project officers is coming to the fore who may lack in-depth knowledge and field-tested experience of TA performance or management. This may be the situation especially where technical assistance is being ambitiously applied to new sectors or subsectors, like law and development, in which donors' project staffs have seldom previously been called upon to supervise technical assistance.

   A second contributing factor may be the donors' cumulative dissatisfaction with past consultants' performance. Where some expensive firms and experts have promised more than they delivered, wasting scarce resources and diminishing the reputations of supervising project staff, the donors' response may be to attempt to hold all consultants' feet to the fire, for example, by drafting 'iron-clad' Terms of Reference. Through such contractual mandates, donors may be seeking to enforce consultants' productivity and accountability. Highly detailed lists of required tasks and detailed descriptions of required team composition and qualifications may constitute examples of Terms provoked by such a retributive agenda.

   Perhaps most determinative may be the donors' internal decision-making procedures and staff incentives systems. As illustrated by Case Study 10, prevailing administrative procedures within donor organizations may militate against needs-determined strategic planning for effective technical assistance. Internal pressures may encourage short-term, 'productive' (i.e., output-generating) projects, with concrete, if modest, results. By contrast, necessarily protracted TA/ID projects will generally have a much harder time winning approval by donor management. Not only are extended funding commitments more difficult to secure; 'soft' capacity-building projects will also require more sophisticated, intensive and sustained donor-staff supervision. Their impacts will be relatively difficult to confirm, certainly in quantitative terms. Given these early risks and deferred returns, it is only reasonable that an ambitious project officer contemplating promotion or transfer every two or

three years might hesitate to invest professional capital in TA/ID. And even if he or she, without taking initiative, *does* receive lead responsibility for such a project, the bureaucratically safest response may be to copy an internally sanctioned model rather than to risk potentially controversial design innovations.

Case Study 10: One Project Officer's Path to Precarious Design

A project officer within a donor agency became aware that $500,000 was unexpectedly available for technical assistance expenditure within his department's annual programme budget for a small borrower country. The officer made an informal calculation of how many person-months of international consulting services might be procurable with that windfall. Since the funds had to be used or lost by the end of the annual funding cycle, he opted for a six-month project calendar. Turning from these preliminary impetuses to a consideration of what short-term technical assistance activities and products might be potentially valuable to a host-agency within his purview in the borrower government, the officer began to compile a 'wish list'. Seeking counsel and support from departmental colleagues, the officer saw this list steadily shift and expand as his proposal rapidly took shape and moved forward through the approval pipeline. Some addenda were insisted upon by powerful colleagues as conditions for their endorsement.

When the resulting technical assistance package was internally approved and then published with Terms of Reference, in an invitation for proposals, several short-listed consulting firms questioned the officer about the perceived imbalance between required activities and budgeted resources. Concerned over the internal consequences within his department if these protests should formally be conveyed to his superiors or if too few firms submitted proposals, the officer reassured the firms that, if they would defer their reservations and submit fully complying proposals, he would make his best efforts to address and correct the acknowledged imbalance during financial negotiations with the selected firm and again during project startup.

However, when the latter junctures arrived, the officer discovered to his chagrin that he had insufficient internal leverage to push through the pledged corrective adjustments. The selected firm was required to implement the project in strict conformity to the defective TOR. The results included a dissatisfied donor, a frustrated firm, a delayed instalment payment, a contractual dispute, and, most distressing, a wasted opportunity for vitally needed TA/ID.

Solutions. While acknowledging the subjective power of inhibiting perceptions, the author believes that considerable scope exists for courageous professionals in donor institutions to speak up for TA design reform. In his experience, enlightened department heads can be found in every donor organization, veteran leaders who welcome officers' innovativeness. Recommended breaks with design precedents must be convincingly defended; donor agencies are not engaged in hypothetical research

but in sponsoring bankable projects. Still, if an officer can couch proposed design innovations in terms of internal 'corporate' benefit – e.g., improved prospects for achieving TA/ID objectives, reduced risk of acrimonious conflicts with consulting firms during contract negotiation, implementation and evaluation, etc. – most department heads should be sufficiently astute and self-interested to give the requisite front-end approvals and continuing support.

II.   TA Clients

Problems. Rarely are host governments the initiating party when technical assistance is first contemplated, proposed and designed. Instead the hosts are more typically 'offered' the assistance by the donor, sometimes as a precondition for more substantial structural adjustment or sectoral funding. And often, in such circumstances, the government body accepting the offer is a central authority responsible for financial planning or aid co-ordination. The line agency (or agencies) designated to receive the proposed TA services and to host the consultants' team may not be actively engaged in the government's initial project-design negotiations with the donor.

In the absence of early host-agency involvement, the donor's preliminary design may therefore not be informed by the local institution best qualified to identify TA needs and constraints. Worse, if that agency's leadership perceives the assistance as an intrusion or threat, it may resort to passive non-support or covert resistance. In such environments, short-term TA projects may be tolerated and their products merely ignored. But longer-term TA/ID interventions seeking to fundamentally and permanently alter host-agency structures and power relationships may be actively, if subtly, thwarted, except for their ancillary equipment procurement. Case Study 11 is one recent example.

Case Study 11: Diverting the Train
A donor proposed a capacity-building project to a host government's line ministry. The reluctant ministry agreed to accept computers and printers but resisted on-the-job coaching of its professional staff in favour of a lecture series. On the rationale that weekdays were fully booked for routine duties, the ministry recommended that the lectures should be conducted only on weekends, with optional trainee participation. Despite its misgivings that the host-agency staff would lack the prior substantive knowledge or English-language competence considered essential to derive full benefit from this instruction, the donor accepted the client's modified design rather than provoke an awkward confrontation over a modest TA investment. With project activities thus redefined, the donor recruited a professor to deliver the lecture series, in place of engaging the on-the-job advisory services of a practitioner as originally contemplated.

Solutions. In the author's experience, many if not most donor agencies will *warmly welcome* early and active host-government interest and involvement in TA planning.

The best donor-agency project officers are painfully aware that their host-government counterparts permanently engaged in in-country work are far better qualified than themselves, who must rely, for their own insights, principally on hectic periodic visits, to identify local TA priorities and prospects. Those counterparts hold the relevant institutional memory, including critical evaluations of past technical assistance interventions, and so have the best historical context in which to fit possible new initiatives. As one senior TA practitioner recently observed, 'If they aren't in it at the beginning, they won't be at the end'.

At the organizational level, many donors are attempting to encourage host agencies' co-ownership of projects, e.g., through localizing the executing-agency function and/or stimulating formation of local steering committees to monitor and supervise project implementation, and sign off on all project expenditures above an agreed threshold.

But at the individual level as well, there is ample scope for a senior, experienced, assertive host-agency professional to request and even demand from a donor appropriate early involvement in TA planning and design. And certainly one legitimate thrust of that involvement should be to avoid and correct perceived design defects. If motivation is needed for such assertiveness, the host-agency representative may be certain that it will be his/her agency and the consultants, much more than the donor, who will bear the chief brunt of uncorrected defects during and after project implementation.

One effective application of these recommendations which the author recently observed was the appointment of a senior host-government official as national project adviser. This technically experienced, bilingual individual was respected by all project principals and participants. Reporting directly to the host-agency minister, who also chaired the local steering committee, he was able to significantly assist the donor and the consultants by facilitating local involvement in project implementation, and simultaneously to ensure that host-government interests in that implementation were served. In order to attract and retain the services of such a high-ranking representative, the adviser was paid out of the project budget, at a local rate but one commensurate with prevailing private-sector standards.

III. Consulting Firms

Problems. Consulting firms may reluctantly accept, or even actively contribute to, TA design defects, for a variety of reasons. All firms perceive the current technical assistance market to be highly competitive. The most successful firms report that, in most years, they can expect to win no more than one out of every three or four contracts for which they submit proposals. For most firms, the odds are much longer.

Within this 'buyers' market', both veteran firms and new entrants are well aware that donors occupy the overwhelmingly dominant position in the TA procurement process:

- They play the lead role in preliminary project planning and budgeting;
- They draft the consultants' TOR;
- They often compile shortlists explicitly limiting the field of competitors;

- They set the evaluation criteria and evaluate the submitted proposals;
- They chair the ensuing contract negotiations and normally sign the selected consultants' contract.

Moreover, the firms are equally aware that this dominant party may approach the selection process with a healthy scepticism for consultants' reliability and cost-efficiency. That scepticism is often embodied in a donor's TA design strictures, imposed, implicitly if not explicitly, in a concerted attempt to hold consultants strictly accountable and to anticipate and deter their possible non-performance.

Whether such donor attitudes and practices represent objective realities or merely consultants' subjective perceptions, those perceptions are powerful motivators. In this contentious climate, many firms tend to present two faces. In responding to an invitation to express formal interest in an assignment and then in submitting a proposal, a firm may stoically comply with the TOR, even if it is convinced that those Terms are fundamentally flawed and nearly impossible to implement. Then, if selected, the firm will struggle to win scope-of-work concessions during contractual negotiations and/or when submitting its work plan upon completion of project inception. If relief is not granted, the firm will try to make the best of a bad situation without jeopardizing its instalment payments. Simultaneously, within its own professional circle, this same firm may be complaining bitterly about donors' intransigence, exchanging horror stories and damage-control stratagems. Such cynicism and adversarial positioning do not lay a groundwork for consultants' co-operative participation in TA design.

In a substantial subset of technical assistance projects, including law-related projects, consulting firms are not merely consenting victims of design defects but active perpetrators. To cite one not atypical example, for contemplated larger projects donors often engage the services of a firm to do a preliminary needs assessment. And while typically labelled as feasibility studies to help a donor decide whether or not to finance a project, in practice these preliminary analyses can become project designs. In such cases, it is not unusual, under donors' prevailing procurement guidelines, for the designing firm to be permitted to remain eligible to bid on the contract for project implementation. (This crossover is especially characteristic of bilaterally funded technical assistance driven by tied-procurement policy considerations.) In which event, the TOR for the implementation project sometimes seem to closely match the technical specialties of the designing firm. (Common examples are academic or short-term training approaches to capacity-building projects.) At best, such design preferences may simply reflect the analysts' professional judgements as to what technical assistance mechanisms will prove most effective. However, even in the absence of an actual conflict of interest, one must question whether the designers' awareness of their firm's comparative advantage might not tacitly be shading their design recommendations.

In another more costly context – again, significantly law-related – many large firms bid, without hesitation, on TA/ID projects hastily conceived by donors following the unanticipated collapse of the Soviet Union. Whether set in Russia or other CIS

Republics, these designs were hugely ambitious in breadth of scope and expected impacts, to put it most diplomatically. Instead of exercising caution or voicing concern, firms rushed to cobble together consortia and teams, promising the donors whatever they asked. In many cases, the firms had little or no prior experience in Eastern bloc countries. In many cases, long-term 'experts' were selected primarily on the basis of their Russian-language competence and/or home-country professional backgrounds, with little or no TA/ID experience or expertise. In most cases, the results were predictably disappointing. In some, they were disastrous. In the process, precious opportunities were squandered for making modest, patient contributions to democratic and economic transition, as well as law reform. Fragile host-country expectations were rapidly dashed, not to be resurrected in the near future. This saga of overreaching and opportunism continues largely unabated today. With few exceptions, this record is not one that lawyers or other consultants can be proud of.

Solutions. The conventional wisdom among development consulting firms is that it is suicidal to criticize Terms of Reference, no matter how defective. Yet surely a case can be made for speaking up early and clearly, alerting a donor to perceived design defects *and suggesting constructive modifications.* Some donors' procurement guidelines explicitly encourage such feedback. If other firms can be encouraged to raise similar concerns, so much the better; there is often strength in numbers.[11] If a donor's project officer resists receptivity, for whatever reasons, often his/her more enlightened and/or experienced superiors will prove more responsive. And if concerns are sufficiently grave, they should be voiced again in proposals, in contract negotiations by the selected firm, and in inception reports and work plans following start-up needs assessments. At the latter juncture, potent supporting advocacy can be offered by the consultants' client and counterparts. In the worst cases, a firm should have the courage of its convictions and decline to bid on chronically defective TOR, alerting the donor unashamedly to its grounds for non-participation. This is not masochism but hard-nosed self-defence. If mired in infeasible contractual requirements, no firm will emerge with reputation or profits intact.

As for self-serving feasibility studies, they should be scrupulously avoided by ethical firms and not invited, even tacitly, by donors. Meanwhile in the CIS, chastened donors should rethink their initial hubris and previously compliant firms should exercise more prudent restraint the second time around.

---

[11] While information-sharing among competitors might seem unrealistic, in the author's experience where concerns are acute the more established firms are frequently willing to communicate.

D. Where Do We Go From Here?

The preceding discussion offered numerous suggestions for addressing both design defects and institutional constraints at the micro-level of specific TA projects. Ample TA management know-how is available and field-tested to be drawn upon for problem-solving by donors' project officers, host-government TA clients and consulting firms.

Still, many TA practitioners have expressed the view to the author that institutional constraints in particular are best addressed not on an ad hoc basis, within specific TA projects, but systematically, by authorities empowered to modify institutional policies and practices across the board.

This call for macro-level action is based on a recognition of the high stakes involved for all institutional parties to TA – and especially TA/ID – relationships. Inescapably, these are high-risk undertakings. For a host government, technical assistance is invariably disruptive and can be politically controversial, raising the specter of perpetuated dependency on foreign expertise. For a donor agency, in contrast with conventional loans or grants, technical assistance is relatively difficult to control and supervise, with a private firm interposed between the donor and its borrower/grantee. For a consulting firm, technical assistance is a problematic management commitment, often exercised in a difficult host-agency environment under tight budgetary and time constraints.

These perceived risks create a potentially tense working relationship among the three technical assistance parties. Especially where complicated, expensive institutional development is the agreed technical assistance objective, two tripartite commitments are necessary to convert this tension into a viable project:

- A fundamentally co-operative, win/win/win spirit, treating the other parties with basic trust as partners and project co-owners, rather than with suspicion as operational adversaries; and
- A shared awareness and acceptance of the sizable resource investments required to make successful institutional development a viable technical assistance result.

Fortunately, TA/ID's potential rewards are fully commensurate with its risks. For host governments and agencies, those benefits can include key institutions organically strengthened through organizational and human-resources development. For donors, TA can contribute uniquely effective, on-the-ground, expert facilitation of their development-assistance investments. For consulting firms, technical assistance is their stock in trade; if competently performed, it earns revenues, enhances professional reputations and promotes new corporate opportunities. To return this discussion full circle to where it began, whether the context is development, transition or law reform, TA can literally make or break the entire assistance process. Its catalytic impact is difficult to exaggerate.

For these reasons, TA design problems and their remedies are ripe for

international attention. To respond to that need and to stimulate the energies and enthusiasm of TA institutions for design reform and re-engineering, tripartite colloquies might be organized:

- In host-country forums, with initiatives being taken by host-government aid co-ordination ministries and/or UNDP, in its normal capacity as lead co-ordinator for donors;
- In regional forums, either under the auspices of a governmental association (like ASEAN or APEC), or less formally, at the initiative of one or more relevant NGOs; and
- In interested sectoral or professional forums, for instance, law-related TA assemblies hosted by bar associations, major law firms and/or donor agencies actively promoting law reform.

In summary, there appear to be multiple micro- and macro-level channels available to address technical assistance design defects. The defects are pervasive and significantly harmful. Techniques for their avoidance and correction are known and tested. Institutional constraints perceived to inhibit corrective action are not insurmountable. Under these conditions, is it not our professional duty – as technical assistance practitioners, lawyers and law reformers – to make every reasonable effort to improve the quality and impact of our chosen work?