The Road Legally Traveled: 
A Map to Results-Based Financing in Development

One of the biggest challenges for any Results-Based Financing model, from simple contracts to Social and Development Impact Bonds, are the legal barriers that exist in almost every jurisdiction. Bringing together different actors with different ways of doing things and challenging them to think outside the box in approaching the law needs dedication, expertise and effort. In all projects in which Instiglio has been involved, especially when working with the Government, the legal barriers are hard to tackle. Public procurement and public contracting laws are usually very strict, prioritizing execution of budget rather than effectiveness of funds. In a project where you pay for results, effectiveness is essentially to the success of the project. Over the past few years, Instiglio has learned many lessons around what the legal road map looks like in getting Results-Based Financing contracts off the ground, many of them learnt the hard way.

Governments have a hard time swallowing future financing. Committing budget in the present to pay in the future is a new concept for governments. Almost all of the government entities Instiglio has worked with have annually planned budget. RBF is planned for longer implementation than the one year budget cycle. There is the need to find a way where government can actually commit to a future budget or create a trust to set aside part of the current year budget.

Investors want a way to write off losses. Investors are worried about what happens to their investment if the project fails to achieve its outcome. They want to know if there a way of receiving a tax benefit out of a loss and how to file the proper paperwork to receive such benefit.

You need to pay attention to the political cycle. The legal challenge when you are not on the appropriate political cycle to implement a project is actually committing budget from a future administration that is not yet in office. Many jurisdictions restrict this practice to avoid the risk of leaving future periods with no budget to execute. In order to implement an RBF project you need to give the Investor the confidence of receiving its money back from the government Outcome Payer if the impact is achieved. If you are in the wrong political cycle and the government can’t commit, then you probably will not find an investor who is willing to take that risk.

As we have felt these challenges first-hand, we have been working to make the way forward easier for those who are looking to further the Pay for Success movement in developing countries. To do this, we have been working with partners on The Legal Road Map, which will be ready to be published in 2014. It is a document that provides everyone interested in SIBs/DIBs/RBs a great vision of the legal challenges that need to be addressed when trying to implement those kinds of mechanism. Innovating, especially within the public sector, from a legal perspective is a great challenge, but if you find the will and the correct advice you will find a way.