

SPECIAL STUDY

Annexes

Legal Transition Programme Review

June 2012

EBRD EVALUATION DEPARTMENT



European Bank
for Reconstruction and Development



The Evaluation department (EvD) produces thematic or sectoral level evaluation reports in the form of Special Studies. These provide valuable insights to strengthen operational outcomes and institutional performance; they focus on larger issues for which a transactions lens is unsuitable and generate more widely applicable findings for a wider audience. The larger scope of these studies facilitates the use of innovative and robust evaluation methods. This study forms one of eight such studies scheduled for EvD's 2012 Work Programme.

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Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
CIS	Commonwealth of Independent States
CIS-IPA	CIS Inter-Parliamentary Assembly
DAC	Development Assistance Committee
EBRD	European Bank for Reconstruction and Development
EITI	Extractive Industries Transparency Initiative
ERA	Energy Regulatory Authority (Mongolia)
ETCs	Early transition countries
EU	European Union
EUR	Euro currency unit
EvD	Evaluation department (EBRD)
FOLLIO	Framework of Local Laws in Operation
GFC	Global financial crisis
ICLG	Institute of Corporate Law and Governance
IDLO	International Development Law Organization
IFIs	International financial institutions
IOSCO	International Organization of Securities Commission
JTC	Judicial Training Centre (Kyrgyzstan)
LC2	Local Capital Markets and Local Currency Initiative (EBRD)
LFA	Logical Framework Analysis
LIS	Legal Indicator Survey
LTP	Legal Transition Programme
LTT	Legal Transition team
MDB	Multilateral Development Bank
MEI	Municipal and Environmental Infrastructure team (EBRD)
MSL	Model Securities Law
MTR	Mid-term review
OCE	Office of the Chief Economist (EBRD)
OECD	Organisation for Economic Co-Operation and Development
OGC	Office of the General Counsel (EBRD)
OL	Operation Leader (EBRD)
OpsCom	Operations Committee
PPP	Public-Private Partnership
RFCSM	Russian Federal Commission on the Securities Markets
RO	Resident Office (EBRD)

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SECO	Secretariat for Economic Affairs (Switzerland)
SEMED	Southern and Eastern Mediterranean region
SME	Small and medium-sized enterprises
TACIS	Technical aid to the Commonwealth of Independent States (EU)
TAM/BAS	Turn around management and business advisory services (EBRD)
TC	Technical cooperation
TCFP	Technical Cooperation Funds Programme (EBRD)
TI	Transition impact
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNIDROIT	International Institute for Unification of Private Law
USAID	United States Aid and Development Agency
WTO	World Trade Organization

Defined terms

the Bank	European Bank for Reconstruction and Development
the Evaluation team	Staff of the Evaluation department and the independent sector consultants who jointly carried out the evaluation

Preface

These annexes form part of the Legal Transition Programme Review, 2012, produced by the EBRD Evaluation department. For the full report please go to <http://www.ebrd.com/evaluation>.

Annex 1. Evaluation Methodology

1.1 Purpose

This evaluation (the “Review”) was aimed at evaluating the primary activities and interventions by the LTP during the 10-year period 2001 through 2010. Multifaceted in nature, the aims of the evaluation can be summarised as follows:

- To assess the LTP’s activities in light of the Bank’s operational objectives and structure and to examine the compatibility and cohesiveness between the Bank and the LTP.
- To assess the viability of the LTP as a whole, on its own merits and when weighed against other IFIs or development agencies.
- To evaluate the impact of LTP initiatives in specific country/sectors, to identify key lessons learned and to determine the suitability of its areas of focus.
- In reviewing a representative group of the LTP’s advisory service activities, to determine the level of success as weighed against the objectives articulated in the relevant action plan.
- To undertake “value-for-money” attainment analysis in terms of efficiency and effectiveness.
- To determine the EBRD’s capacity to expand the geographic scope of its operations.

1.2 Areas of difficulties and limitations

Resource limitations

The timeframe for completing this Review was eight months (June 2011 through February 2012). The Review called for an examination of a sample of five focus countries representing different stages of economic development: Russia, Hungary, Serbia, Armenia and Mongolia (the “sample countries”). It was further required that among the sample countries, 14-16 themes (on average 2 from each of the 8 core legal areas, 2-4 themes per each of the sample countries) be evaluated in

detail, including site visits and beneficiary/stakeholder interviews. The geographic logistics of the sample countries accentuates the time constraints when considering that the evaluation period covers a 10-year span. While country-specific information is important, due to time and cost constraints, the Consultants considered country-specific findings within the entire programme. The Review thus concentrated on the evolution of the programme itself, while taking into consideration a determination of specific countries.

Methodological limitations

There is no generally agreed quantitative model that measures the direct impact that narrowly defined (as in the case of the LTP) legal reform in specific areas,¹ has on economic or societal development. The absence of dedicated methodological tools that can produce relevant and reliable data on impact relevant to specific legal areas constitutes a limitation on the ability to fully capture the impact on the legal maturation, which could be specifically attributed to the LTP's projects or actions.

Diversity

The subjects of the work of the LTP are the EBRD's countries of operations. Some of these countries are EU Member States, some are members of the OECD and others are neither. The countries vary in terms of their legal traditions² and the development of their respective legal frameworks.³ By definition, all are "transition economies".⁴ Given this spectrum of countries from differing legal traditions at different stages of economic development, the Evaluation team expected to observe a variety of transitional adjustment problems.⁵

Against this background, the following sections address methodological options.

¹ Although there are number of indexes, they usually measure the general impact of legal reforms, through a set of indicators, which have little connection to the LTP's activities (for example, efficiency of criminal justice, proliferation of corruption, extent of governmental powers, access to civil justice, and so on). One such index is the World Justice Project's "Rule of Law Index", which was consulted in the process of this Review.

² See generally, Patrick Glenn, *Legal Traditions of the World*, 4th ed. (OUP, 2010).

³ This is a common theme in the various Legal Indicator Surveys carried out by the EBRD.

⁴ See Article 1, Agreement Establishing the EBRD.

⁵ We do not discuss the so-called "legal transplant" problem in this report.

1.3 Determining an effective evaluation model for law reform projects

While there is no globally accepted methodological approach for evaluating legal reform projects, the Logical Framework Approach (LFA), has been successfully utilised in such evaluations. It has been found to be particularly conducive to assessing complex, highly nuanced situations in the social sciences that are not necessarily subject to conclusive answers. Adopted in the 2001 MTR, both the EvD and the LTP have expressed satisfaction with this methodological approach.⁶ This Review follows a similar method. It should be noted however, that while the Consultant utilised this basic methodological approach, it was one of several evaluation tools that were applied. Due to the scope and depth of the Review, there were modifications to the LFA methodology, which the Consultant has made in addition to incorporating other evaluation tools such as priority-setting, consultation of external sources, which measure the impact of legal reform, relevant to the LTP's core legal areas (for example the World Justice Project's "Rule of Law Index", the World Bank's "Doing Business Index" and the World Economic Forum's "Global Competitiveness Report"). Most importantly, the Evaluation team used interviews with the LTP's projects beneficiaries and stakeholders in the sample countries, as well as EBRD staff in London, as a main source of information and to establish satisfaction of the LTP's client groups with its services.

1.4 Criteria for assessment

The Development Assistance Committee (DAC) and the Organisation of Economic Co-operation and Development (OECD) have espoused five major criteria by which development assistance is generally assessed.⁷ Although they have not been designed specifically for assessing legal reform programmes and must therefore be considered with caution, these five areas have become the accepted evaluation criterion that is typically used. They are as follows:

⁶ Supra note 4 at 5.

⁷ DAC, Evaluating Development Assistance, Organisation for Economic Co-operation and Development (OECD), available at: http://www.oecd.org/document/22/0,2340,en_2649_34435_2086550_1_1_1_1,00.html.

1.4.1 Relevance

A determination as to whether the needs of client countries have been correctly identified and constitute priorities of the countries in question. Further, that the efforts were properly coordinated with other multilateral or bilateral organisations that are active within the countries in question. The priorities of the EBRD have also been taken into account.

1.4.2 Effectiveness

Evaluation of the outputs and outcomes of the LTP's projects, as articulated by the goals contained in the action plans, or other formal documents.

1.4.3 Efficiency

Qualitatively and quantitatively, a measurement of the outputs in relation to the inputs, exemplified in this setting as measuring the degree that assistance is delivered utilising the least resources possible. Due to the absence of detailed financial data, efficiency in delivering assistance in the LTP's different core legal areas was measured in relative terms, by comparing the number of projects and number of countries covered in each core legal area, assuming the LTP had during the evaluation period one legal specialist at its disposal, covering each core legal area.

1.4.4 Impact

An evaluation of both positive and negative impacts brought about by LTP actions and initiatives. Areas of impact are both broadly and narrowly defined within a specific country's socio-economic climate, while the EBRD's seven Transition Impact Indicators were used to assess the impact.

1.4.5 Sustainability

An examination of the self-sufficiency and longevity of the initiatives following the withdrawal of formal support.

Other evaluation criteria have been also utilised as appropriate for any given activity, and included the following:

1.4.6 Additionality

The degree to which the Programme's contribution was necessary for achieving the legal transition impact that was envisioned, or whether alternative sources could make the necessary contribution and therefore achieve the same impact sought.

1.4.7 Capacity

Pertains to the resources (that is, funding and technical know-how) of the LTP that were available in meeting recipient country needs in a manner that allows effective implementation of the activity.

1.4.8 Consistency

Pertains to an even distribution of resources (policy interest, funding, technical know-how, and so on) throughout the life of the project.

1.4.9 Environmental effectiveness

Reflects the EBRD's commitment to sustained growth with minimum environmental impact.

1.4.10 Coordination

The degree to which the LTP and its LTP initiatives coordinated with both other operations and departments within the Bank and between other agencies (public, private, multilateral or bilateral) that provided similar or parallel services.

1.4.11 Participation

Measures the degree to which beneficiaries and/or recipients of the legal technical assistance, or the law reform activity, were involved in the various stages of the activity.

In considering the components of the LTP, the focus was on the “general test for fitness” in the areas of additionality, capacity, coordination, efficiency, effectiveness, environmental effectiveness, legal transition impact, participation, relevance and sustainability.

In considering the institutional aspects of the LTP, the general test for fitness is that of capacity, and measured the degree to which the organisational framework, the resources, (funding, and staffing expertise), and the formal mandate of the Bank, support the demands of a sound legal technical assistance programme.

1.5 Evaluation scope

While the 2001 mid-term review (MTR) covered all the operations of the LTP since its inception in 1995 until the end of December 2000, the scope of the Review was considerably more defined, in that specific representative country samples were weighed against focus/sector areas and activities.

The scope of this Review covers a representation taken from the eight core legal areas in which the LTP operates: concessions/PPPs; corporate governance; infrastructure regulatory reform and competition; secured transactions; insolvency; judicial capacity building; public procurement; and securities markets. These core legal areas cut across the LTP’s four activity fields:

Assessment of laws and practice

The use of specific analytical tools and the conducting of country case studies allows the EBRD, through its LTP initiatives, to monitor and weigh the status of legal transition in its countries of operations. With findings published in the Bank’s journal *Law in Transition* and on the Bank’s web site, the LTP seeks to assess how the relevant laws and regulations are implemented, and what drives or hinders reforms.

Standard setting

The Bank and the LTP pursue initiatives that promote the development and adherence to international standards as a means to ensure transparency and predictability of practice for transitioning countries. Standard setting, as a primary activity of the EBRD and the LTP, is advanced through the Bank’s own efforts, such as through the EBRD’s development and publication of a Model Law on Secured Transactions and Guiding Principles for the Development of a Charges Registry; as

well as cooperative measures with other international organisations such as the World Bank and the OECD.

Legal and institutional reform

The LTP develops and implements technical cooperation projects in the EBRD's countries of operations. Such projects are geared towards supporting local authorities in establishing legal systems that are deemed favourable for investors.

Outreach

Outreach pertains to the cooperation and communication between the LTP and other stakeholders, including aid providers, policy-makers in transitioning countries and the legal community in general. The Bank's *Law in Transition*, for example, seeks to share information, experiences and assessment results. The dissemination of information to stakeholders and the collaboration with other organisations such as the World Bank, the IMF, UNCITRAL, UNIDROIT and IDLO, are a necessary and desirable component for providing assistance to democratically orientated transitioning states that are pursuing market-oriented economies.

1.6 The sample

In consideration of the scope and depth of each LTP project, the Evaluation team weighed a representative sample of such projects (representative in terms of legal sector, country, coverage, funding, distribution, and other factors that may be relevant). The sample was subject to either in-depth study, or desk-study, or a combination of both. In-depth study entailed actual field visits to the particular country in question by consultant team members to attain first-hand information. Desk-study was in some cases utilised in support of in-country field visits, in addition to being the primary form of analysis when field visits were not practical. Desk-study entailed detailed analysis of LTP records and files pertaining to particular projects in the country in question, along with detailed discussion with LTP members concerning their experiences and views.

The sample selection took into account the various groupings of the countries of operations, the various sectors or focus areas, the source of funding and the size of the funding, in addition to recent relevant developments. The consultant team reviewed the following as a selected representation of countries from various stages of economic

development and degree of transition and area of focus, as outlined below.

Table 1. Incidence of the LTP's projects related to specific core legal area in the sample countries

Country	Concessions /PPPs	Corporate Governance	Infrastructure regulatory reform and competition	Insolvency	Judicial capacity-building	Procurement	Secured transactions	Securities Markets
Armenia		X	X					
Hungary	X						X	
Russia	X	X		X			X	X
Serbia		X	X	X			X	
Mongolia			X		X			

Regional examination included, focusing on a series of CIS model laws:⁸

- i) Model CIS Company Law
- ii) CIS Model Bankruptcy and Liquidation Law
- iii) CIS Model Investor Protection Law
- iv) CIS Model Securities Law

1.7 Data origination

The Evaluation team carried out fieldwork comprising wide-ranging interviews with EBRD personnel in London and Regional Offices and key external stakeholders in Budapest, Moscow, St Petersburg, Belgrade, Yerevan, Ulaanbaatar and Vienna. The interviewees outside the Bank included end-users of the Bank's services, consultants, legal experts from private practice and academia and international organisations cooperating with the LTP. The list of the individuals interviewed in the process of the Review is contained in Appendix 12.

In addition to carrying out interviews, the Evaluation team also reviewed the relevant legal literature, largely comprising EBRD publications, internal working papers, law review articles and legal texts and legislation (including draft legislation).

The evaluation of the selected projects relied on:

- i) review of the project documentation and the relevant literature
- ii) conducting interviews and/or distributing questionnaires.

⁸ The Commonwealth of Independent States (CIS) model laws reflect the efforts of harmonisation and rapprochement of legislations of the Commonwealth States. This work, as adopted by the Interparliamentary Assembly, seeks to create the legal basis for the creation and support of a viable free trade zone with CIS member States, and the transition into a market economy.

Documentation and relevant literature primarily included:

- projects' documentation
- the Bank's country and sector strategies and policy documents
- the LTP's three-year action plans
- the Bank's studies on the country or sector concerned
- scholarly work produced by the academia, other IFIs and relevant organisations.

Interviews: In-depth studies predominantly used interviews and/or questionnaires as the research instrument. Interviews/discussions were done with three separate groups:

Internal: constituted LTP management and member staff, project Ols and the designated counsels; EBRD's team Directors, Heads of Regional Offices, bankers, relevant staff of OCE and counsels assigned to relevant projects; external consultants; the Bank's counterparts in any entity acting in cooperation with the Bank in the implementation of its objectives.

Recipient governments: constituted the Bank's counterparts in the country of operations; other relative branches of the government.

Private beneficiaries and users: constituted counsel in the country of operations at both local and international levels, both directly and indirectly involved; local business community; foreign business with commercial interest and activity in the country of operations.

1.8 LTP overall evaluation

This level constitutes the primary goal of the Review, the evaluation of the Programme as a whole. Given the central aspect of the LTP's integrated approach to legal reform, the focus is therefore on the overall process as well as its components, including individual projects. To achieve this, the evaluation examines the component parts, that is, legal assessment activities, standard setting, legal and institutional reform, and outreach in turn in the following sections before developing an overall evaluation in the final section. In addition, this section examines the institutional level of the programme. Examination of the institutional capacity of the Programme as a whole is aimed at addressing the following issues:

- i) whether the operational culture of the Bank supports the effective implementation of the LTP

- ii) whether the institutional structure and resources of the LTP within the OGC are conducive to the effective implementation of its objective and long-term law reform
- iii) whether the LTP can benefit from more institutional coordination with other agencies providing similar legal technical cooperation and assistance.

By design, this Review has horizontal and vertical dimensions. The horizontal dimension is best illustrated by an overview of the work of the LTP that the Evaluation team gained in a series of interviews in London. The vertical dimension is illustrated by the country-specific fieldwork undertaken by the Evaluation team. An examination of the component parts are done as weighed by the various criteria as defined above.

1.9 Presentation

The evaluation report is structured by the four activity fields, within which the LTP works in each of the eight core legal areas. The LTP's performance in each core legal area within each activity field is briefly described. However only in the most important activity field – the legal and institutional reform, is each core legal area is rated separately (in respect of the remaining three activity fields, all core legal areas are rated in aggregate).

To limit the volume of this report and improve its “readability”, a substantial amount of evidence in support of the rating was presented in the appendixes (including sample country-specific performance in the legal reform area – Appendix 4). Some of the less critical appendixes have been presented in a separate volume, available on request.

Lastly, an important element of the evaluation approach was a self-evaluation questionnaire, which the LTP filled out prior to the Evaluation team's field work. This self-evaluation is presented in Appendix 13.

Although there are number of indexes, they usually measure the general impact of legal reforms, through a set of indicators, which have little connection to the LTP's activities (for example, efficiency of criminal justice, proliferation of corruption, extent of governmental powers, access to civil justice, and so on). One such index is the World Justice Project's “Rule of Law Index”, which was consulted in the process of this Review.

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The Commonwealth of Independent States (CIS) model laws reflect the efforts of harmonisation and rapprochement of legislations of the Commonwealth States. This work, as adopted by the

Interparliamentary Assembly, seeks to create the legal basis for the creation and support of a viable free trade zone with CIS member States, and the transition into a market economy.

Annex 2. Legal Assessments

A brief analysis of the three three-year action plans under which the LTP operated during the evaluation period, illustrates the evolution of the programme.

2.1 2004-2007 Action Plan

Under this action plan, the LTP focused on five core legal areas: capital markets and corporate governance; concessions; insolvency; secured transactions; and telecommunications regulatory reform.

Thus, by 2004, the two areas of financial markets and corporate governance had been merged into a single area: capital markets and corporate governance. Largely reflecting the recommendation of the MTR, the 2004-07 LTP strategy set three strategic objectives for the period:

- strengthening focus on its current areas and activities
- pursuing a series of specific developments in the various core legal areas – priorities for every area were briefly described, however their objectives were rather vaguely set;
- pursuing a series of actions in the various areas, specifically:
 - completing and maintaining the legal assessment framework
 - developing training activities in the context of country projects
 - getting involved in the Bank's CIS-7 initiative
 - deepening involvement in standard-setting activities
 - confirming a new format for its legal journal.

Overall, the LTP was to continue to focus on developing its overall methodology of using activity and focus areas as the major framework for its operations. The Activity Matrix, forming Appendix 1 of the plan, constituted an attempt to better define the plan's goals. This was useful as the matrix provided the list of countries on which the LTP's legal reform projects would be concentrating, key actions for standard setting and legal assessments, as well as an indicative budget for each Legal

Area and Activity Field. Nevertheless, the objectives, against which the implementation of this plan could be measured, remained unclear.

2.2 2007-09 Action Plan

For 2007-09, the LTP adjusted its focus on the following core legal areas: concessions/PPPs; corporate governance and securities markets; infrastructure regulation and competition; insolvency; judicial capacity and contract enforcement; secured transactions.

The LTP set out the following priorities for its 2007-09 operations:

- moving south and east
- expanding its range of activities
- strengthening evaluation mechanisms.

In terms of activities, the objective was to continue to develop an interlinked and systematic approach to promoting legal reform, based on legal assessments, standard setting and legal reform projects.

Legal assessment was to measure both the quality of laws on the books and the way these were implemented in practice, so as to be able to define the reform needs. Standard setting was to be used as a benchmark to assess the countries' legal transition status and as a reference for reform. Well-defined legal reform projects would follow. Lastly, the LTP would step up its efforts to disseminate the experience acquired through various external activities (legal journal, web site, conferences, and so on.) to encourage further reforms. This revised formulation of the LTP "integrated approach" continues to the present.

The resulting action plan contained the following elements:

- Development and dissemination of new legal standards for mortgage and mortgage securities law, insolvency office holders, corporate governance of banks, PPP guidelines, power sector regulation and a CIS model company law.
- Publication of new legal assessment data, including updates of the concessions, corporate governance, insolvency, securities markets and secured transactions.
- Development of legal reform projects, focusing on the Bank's strategic priorities east and south.
- Extensive outreach (publications, annual meeting seminars, dissemination of standards, interaction with academics, and enhancement of the LTP web site).

The tasks for 2007-09 were presented in the form of brief descriptions of existing and potential projects for all countries in which the LTP operated. This made the objectives for 2007-09 slightly more concrete and better defined than those of the previous plan. However, the use of such phrases as “*LTP will explore possibility*” or “*LTP intends to research further the feasibility of...*” made these objectives appear non-committal and weak.

2.3 2010-2012 action plan

Under its current action plan, the LTP set out a series of policy directions, including:

- strengthening assessment tools, focusing on improving the methodology
- widening comparative assessment work, to address a wider range of developing/emerging/transition economies, including China and Brazil
- deepening the linkage of LTP work to that of other Bank units
- highlighting the strategic importance of outreach work, focusing on expanding the awareness and impact of LTP work
- considering the unfinished reform agenda in central Europe, especially lessons resulting from financial crisis impacts
- implementing a new approach for legal reform efforts in Turkey
- introducing new sectoral expertise to LTP, in public procurement and judicial capacity
- working on new impact assessment methodologies.

As a result, the LTP’s core legal areas were expanded to comprise the following: concessions/ PPPs; corporate governance; infrastructure regulation and competition; secured transactions; insolvency; judicial capacity building; public procurement; securities markets (the “core legal areas”).

The 2010-12 action plan contained a section “Directions to guide the LTP’s actions in 2010-12”, which was another attempt to set LTP’s objectives. Again, these objectives were imprecisely set and lacked clarity, defined milestones and a timeframe for their implementation. Therefore they can be seen more as “guidelines” than objectives.

Annex 3. Relevance of the Legal Transition Programme's core legal areas

In examining the LTP's performance, this Review considers also the relevance of the eight core legal areas for the achievement of the Bank's broader transition mandate.

3.1 Concessions/PPPs

Strong and sufficiently robust concessions law aids in attracting foreign investors, which, in turn, greatly contributes to addressing the needs of a region's infrastructure.⁹ Such laws are vitally important to transition economies as they provide the underpinning for various types of public-private partnerships (PPPs). In addition, concession laws are critical in the establishment of a predictable and stable legal system. Under a concession arrangement a public entity delegates the management of a project to a private sector operator who assumes all or a portion of the risk.¹⁰ From a functional or commercial point of view, there is no distinction between the various terms used to describe such arrangements.¹¹ A sharp distinction must be drawn between civil-law jurisdictions and common law jurisdictions.¹² Although there are well-developed guidelines in some common law jurisdictions, PPPs are largely a matter of contract in these jurisdictions. By contrast, in some civil law jurisdictions, there is interplay between some specific concessions/PPP legislation and parts of the relevant Civil Code, which means that revision to the Code may be required. Such revisions are a major task and may take years. PPP, as viewed, in some ways, as a reinterpretation of procurement practices, is a challenging endeavour, in that transition economies have largely utilised basic traditional methods of procurement during their economic development. PPP, from a contractual formation basis alone, represents a substantial departure from such traditional practices. The economic incentives for the

⁹ Mona Hammami, Jean-Francois Ruhashyankiko and Etienne B. Yehoue, *Determinants of Public-Private Partnerships in Infrastructure*, IMF Working Paper 06/99 (2006), 1-37; See Akitoby et al, *op. cit.*, 8.

¹⁰ Alexei Zverev, Milica Zatezalo, *Concessions law in transition countries: the EBRD's assessment*, Law in Transition (2007) 7.

¹¹ See Christopher Clement-Davies, *Public-private partnerships in central and eastern Europe: structuring concession agreements*, Law in Transition 38, 39 (2007).

¹² "Many civil-law based jurisdictions place [concessions] in legal categories of their own, often within the area of public administrative law, with clear statutory definitions. Common law, by contrast, does not treat them as a separate species of contract, distinct from other forms of commercial agreement. Under English law, a concession is essentially just a contractual licence. It will entitle the concessionaire to make use of certain facilities ... and to develop and implement the infrastructure project during the life of the concession." *Ibid.* at 39.

repetition of past policy practices often overshadow innovative change. Further, difficulties between entities within the PPP may arise, resulting from differing or conflicting interest and objectives.¹³

The Bank's expertise in this arena remains highly sought after as transition economies have recognised the importance of a legal system for PPPs that utilises private capital (thus reducing public debt while strengthening a state's infrastructure). In turn, the EBRD has sought the LTP's assistance in the development of legal frameworks for attracting the private sector, particularly in the transport and regional (municipal infrastructure) sub-sectors in Russia.

Within the European market, the first semester value of PPP transactions totaled €9.7 billion,¹⁴ which indicated a highly robust environment within a concentrated area. Emerging and transitioning economies in Europe have contributed greatly to that robustness. The use of concessions/PPPs has increased dramatically throughout the Bank's region of operations, driven, in part, by strong economic growth and a focus on market-based reforms. The resulting environment continues to call for increasingly sophisticated legal solutions to assist in infrastructure development; solutions that may have significant positive influence over a country's productivity and, in turn, on its international competitiveness. A number of factors suggest that PPPs will continue to be utilised at an increasing rate. This is particularly evident by the general focus on the reduction in public borrowing, which is as much a reflection of the global economic climate as it is over concerns over European Union (EU) debt compliance for the Bank's central and eastern European clients. Additional factors include the general objective of the development of a broad range of infrastructure projects, which, by necessity, heavily utilise private sector knowledge and expertise that may be lacking in the authority's knowledge base. Cost effectiveness and maximisation of resources also positively influence the increased utilisation of PPPs.

A number of challenges have emerged in the evolution of infrastructure development in the EBRD's region of operations, although they are issues that plague even the most advanced economies with long-standing histories and knowledge of concessions/PPP concerns, such as Australia and the United Kingdom (which are still refining the process). Principal issues surround defining the actual agreement and also the complexity of the contractual arrangements in terms of the allocation of control over the underlying project, exposure and management of risk assumed by the involved parties and the protection of interests. Other underlying challenges are the legislative/legal structure that is already in

¹³ Christopher G. Bradley, *Partner Capture in Public International Organisations*, 44 AKRON LAW REVIEW 261 (2011).

¹⁴ European PPP Expertise Centre, *Review of the European PPP Market, First semester of 2011*, available at: <http://www.eib.org/epec/resources/epec-market-update-h1-2011.pdf> (2011).

place and the socio-political climate that may influence policy decisions. As such, a cautionary note as to the expectations for progress should be noted, in that the development and implementation of PPPs is a lengthy process, and, “it may take years for PPPs to become widely used and problem free in transitioning countries.”¹⁵

In light of the expected continued use of PPP in meeting infrastructure needs within emerging market economies, and the challenges of drafting concessions laws that reflect the idiosyncrasies of the projects and the environments themselves, the EBRD has endeavoured to position itself to assist in the development of innovative and creative legal tools. While substantial progress in establishing the legal framework for PPPs had been made¹⁶ (as seen by the EBRD’s involvement in the preparation of the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Privately Financed Projects¹⁷ and the United Nations Economic Commission for Europe (UNECE) Build Operate Transfer Group),¹⁸ the overall assessment was that the legal environment had scope for improvement.¹⁹

3.2 Corporate governance

Good corporate governance protocols are an essential aspect of a thriving business environment. Transcending any one sector, establishing sound corporate governance practices are an essential element for emerging transitioning economies. Such objectives exemplify transparency and predictability of practice, which, in turn, attracts both external capital and private sector investors, bolstered by confidence in a system that is based on an adherence to a rule of law.²⁰ In the absence of such transparency and predictability there exists the view that arbitrary applications of laws are predicated on special interests most often associated with efforts geared towards the retention and application of power and influence, not bounded by accountability or democratic rule, thus greatly undermining investor confidence.

¹⁵ Peter Snelson, *Public-private partnerships in transition countries*, LAW IN TRANSITION (2007) 30, 37.

¹⁶ See Craig Averch, Hsianmin Chen, Frédérique Dahan, Paul Moffatt and Alexei Zverev, *The EBRD’s legal reform work: Contributing to transition*, in LAW IN TRANSITION 37, 40 (Autumn 2002).

¹⁷ See Jose Faria, *International efforts to promote and harmonise concession law*, LAW IN TRANSITION (2001) 29.

¹⁸ Geoffrey Hamilton and Travis Coleman, *Public-private partnerships for infrastructure development: The next steps*, LAW IN TRANSITION 32 (2001).

¹⁹ Alexei Zverev and Milica Zatezalo, *Concessions laws in transition countries: the EBRD’s assessment*, LAW IN TRANSITION 1 (2007).

²⁰ See generally, The Bank for International Settlements, Basel Committee on Banking Supervision, CONSULTATIVE DOCUMENT, PRINCIPLES FOR ENHANCING CORPORATE GOVERNANCE, June 15, 2010, 4-7, available at: <http://www.bis.org/publ/bcbs168.pdf>.

First, the “gold standard” in the area of corporate governance is generally reckoned to be the OECD’s *Principles of Corporate Governance* (rev. ed, 1994). Five of the EBRD’s countries of operations are OECD countries (Czech Republic; Estonia; Hungary; Poland; Slovak Republic and Slovenia). Further, there are a number of EU Member States within the EBRD’s sphere of operations (Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia). Generally speaking, we would expect these countries to show a considerable degree of compliance with OECD or EU standards in the area of corporate governance. A similar point can be made in relation to countries seeking EU accession. Therefore the relevance of the LTP intervention is high only in those countries that are not members of the OECD or the EU or those not seeking EU accession.²¹

At the core of corporate governance is legal regulation by way of company legislation (“hard law”). Since company legislation catches (with some exceptions) all companies whether listed or not, enforceable corporate governance mechanisms within company legislation (such as rules relating to related party transactions or “significant” or “major” transactions) assume critical importance. In turn, this means that a key focus of corporate governance reform efforts should be on the company legislation of a given jurisdiction.²² At a second level, there is “hard soft law” such as Listing Rules that apply to listed companies. The key point to note about such law is that it can be enforced via company legislation or the relevant stock exchange. At a third level, there is “soft law” such as Codes of Conduct, Guidelines or Statements of Best Practice that are unenforceable.

Third, a sharp distinction is drawn between corporate governance in listed and unlisted companies. To be sure, corporate governance matters for all companies; however, it is most important where a company raises money from the public and this activity is usually (but not always) carried out by listed companies. The focus on corporate governance in listed companies that raise money from the public arises for two related reasons. The first and overarching reason is provided by the link between good corporate governance and investor protection. Indeed, investor protection and the prevention of fraud are the historical reasons for prospectus disclosure. The second reason is a modern restatement of the first reason. Thus, a key issue in the modern formulation of corporate governance is the protection of minority shareholders or, as the question is sometimes framed: how do the

²¹ See generally, EBRD, *Corporate governance: current and past projects*: available at <http://www.ebrd.com/pages/sector/legal/corporate/projects.shtml> (last visited 19 September 2011).

²² See here, for example, Reiner Kraakman et al, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (Oxford; OUP, 2004).

outside investors get a return on their investment and their money back?²³

Generally speaking, there are only two significant types of companies limited by shares – unlisted and listed companies. Because of the so-called “agency problem”, corporate governance issues always assume importance where there is a significant separation of ownership and control.²⁴ Such separation usually occurs in listed companies. By contrast, corporate governance issues are of little or no importance to a one shareholder/one director company where the director is the sole shareholder and there is no fund-raising from the public. The international data tells that the overwhelming majority (over 95 per cent) of all registered companies are small- or medium-sized enterprises. If there is any separation of ownership and control in such companies, then minority shareholders typically have the ability to stipulate the terms on which they will become shareholders and invest capital. Hence, an incoming minority shareholder can negotiate amendments to the company’s constitution and a shareholders’ agreement if he so desires. Following this logic, as far as corporate governance issues are concerned, listed companies pose the greatest challenges. Given this the LTP has been rightly focusing on corporate governance in listed companies. Here, however, it is pertinent to note the recent development by the LTP of a corporate governance assessment tool for use by the EBRD when contemplating investment in non-listed companies.

Establishing viable corporate governance practices are an essential element for emerging and transitioning economies. The transparency and predictability of practice associated with sound corporate governance practices attracts both external capital and private sector investors, bolstered by confidence in a system which is based on an adherence to a rule of law. The application of good corporate governance practices is a primary objective of the LTP, in that it directly impacts the viability of emerging and transitional economies. Establishing effective corporate governance legislation within the Bank’s countries of operations is a first and necessary step towards creating a health and robust investment climate.

²³ See Andrei Shleifer and Robert Vishny, *A Survey of Corporate Governance*, 52 *JOURNAL OF FINANCE* 737 (1997). This article views corporate governance from a straightforward agency perspective, with the key question being, “We want to know how investors get the managers to give them back their money.” at 738. For a literature review of this line of research up to 2002, see Gordon Walker, *Corporate Governance in East Asia: Prospects for Reform*, in Low Chee Keong (ed.), *CORPORATE GOVERNANCE: AN ASIA-PACIFIC CRITIQUE* (Hong Kong, Sweet and Maxwell Asia, 2002), 567 at 575ff.

²⁴ On the agency problem, see Michael Jensen, *A THEORY OF THE FIRM* (Cambridge, Harvard University Press, 2000) at 85-87.

3.3 Infrastructure regulatory reform and competition

Infrastructure development is a driver for economic growth as well as a means of maintaining state security. Under that idea, the most technologically advanced nations dedicate enormous resources to securing viable telecommunications and energy infrastructures. Emerging and transitioning economies often, however, face unique challenges in growing and stabilising these sectors to the degree where they can successfully attract investors. Private capital seeks an adequate regulatory framework that has the capability to legally protect its interest while clearly defining rights and obligations. Investors further seek the ability to predict the licensing procedures and regulatory requirements within their sectors of operation. With clearly stated and unambiguous guidelines pertaining to the decision-making criteria, and with confidence in a system backed by an adherence to a rule of law, private investors are more likely to view a business environment as being favourable, rather than as one being ruled by arbitrary and unpredictable special interests. The Bank, reflecting its mandate, has worked towards creating such a climate in its countries of operations, which can, indeed, attract the capital needed to build the networks (both physically and electronically) and refurbish and modernise facilities.

The LTP has been active in facilitating legal and regulatory reform to help its emerging client countries gain from the quickly evolving global communication and energy advances. In addition, the inflows of private investment are strongly predicated on the fostering of a climate that supports competition. It is an environment that is largely dependent on having a legal system in place that protects investors' rights and offers suitable recourse for egregious acts that compromise those rights and interests. The liberalisation of any given sector of an economy raises significant questions as to the management of competition. The introduction and sustainability of competition is directly linked to the legal structure that is in place and whether that structure sufficiently removes barriers to access and provides for the elimination of anti-competitive behavior. Adequate competition laws are vitally important to emerging and transitioning economies in that they provide market incentives and encourage efficiency, delivering increased options for the population.²⁵

²⁵ Maria Vagliasindi, Laura Campbell, *The EBRD: promoting transition through competition*, LAW IN TRANSITION 35-37 (2004).

3.4 Secured transactions

An effective secured transactions regime is a key component of the necessary commercial infrastructure. The ability of debtors to grant security interests in their existing and future collateral increases the debtors' access to capital (and at lower cost). A strong legal infrastructure capable of enforcing creditors' rights over mortgaged or pledged assets is imperative for economic growth and activity. The absence or inefficiency of such infrastructure often stymies economic growth or leads to economic contraction. Within the Bank's countries of operations, many states had inadequate secured transactions regimes, which offered little reassurance to lenders and increased their risk. Under the Bank's mandate of facilitating economic growth and stability within transitioning countries, the LTP has assisted in the creation or modernisation of many secured transaction and collateral laws.

Capital inflows are more likely where there are legal assurances that security over a borrower's assets can be had if needed. Thus, a strong legal structure capable of enforcing creditor's rights over a mortgaged or pledge asset is imperative for market growth and stability. In the absence of such guarantees market contraction or slow economic growth are likely as the risk of lending becomes prohibitively high, stymieing potential development. Under the Bank's mandate of facilitating economic growth and stability within transitioning countries, LTP has worked to assist in the creation or modernising of collateral laws to strengthen the legal certainty behind secured transactions.

An effective secured transactions regime is a key component of the necessary commercial infrastructure. The ability of debtors to grant security interests in their existing and future collateral increases the debtors' access to capital (and at lower cost). A strong legal infrastructure capable of enforcing creditors' rights over mortgaged or pledged assets is imperative for economic growth and activity. The absence or inefficiency of such infrastructure often stymies economic growth or leads to economic contraction. Within the Bank's countries of operations, many states had inadequate secured transactions regimes, which offered little reassurance to lenders and increased their risk. Under the Bank's mandate of facilitating economic growth and stability within transitioning countries, the LTP has assisted in the creation or modernisation of many secured transaction and collateral laws.

Since the 1990s, the LTP has established a long, well-documented history of activity in the area of secured transactions that includes legal assessment projects, standard setting, outreach activities, law reform activities and institution building activities. Secured transactions was the first sector that was subjected to formal evaluations within the Bank and

these evaluations produced significant information and data flows that have proved helpful in a variety of related areas such as pledges and mortgages. Within the Bank, the LTP's legal assessments within secured transactions stand as something of an internal model for developing long-term assessment strategies. The work done by the LTP in a number of countries has resulted in the Bank having accumulated significant knowledge and experience in this area. It is therefore the opinion of the evaluation team that the credibility gained by the LTP in this area through its long involvement in an extensive variety of secured transaction projects has established the LTP as a leader in law reform activities in this sector; has given the LTP an influential position from which to advise within the Bank's countries of operations; and, further, provides an excellent platform for the LTP to extend its activities to other socio-political areas.

3.5 Insolvency

As noted above, there are important connections between secured transaction and insolvency legal regimes. First of all, the true test of a security interest is its effectiveness when a debtor becomes insolvent. Second, where creditors are unable to enforce their security interests in a reasonable period of time, the creditors lose important leverage over their debtors and the debtors often begin to feel "judgment proof" and "bankruptcy proof."

In the aftermath of the recent financial crisis, most emerging and transitioning economies were especially hard hit by contracting markets and severe reductions in available credit. As corporate debtors became starved for investment dollars and the levels of non-performing loans (NPLs) increased in the financial sector, there has been a renewed focus on the need for insolvency law reforms. In light of the adverse impact of mortgage problems on consumers in many of the jurisdictions in which the Bank operates (for example, the use of Swiss franc-denominated loans), for the first time some countries are beginning to focus on the need for consumer debtor insolvency mechanisms.

In terms of insolvency issues, the current global recovery is largely predicated on the creation of legal frameworks that statutorily and contractually assign responsibilities and obligations for debtors and creditors, and to assist in the restructuring of viable business concerns and the liquidation/transferral of assets when enterprises fail. Many legal regimes are in the process of moving from a liquidation-based model to a restructuring-based model. The creation of such insolvency frameworks is not without significant challenges for emerging and transitioning economies, which often have archaic, burdensome laws

that are little used in practice and lack the supporting parts of an insolvency infrastructure (for example, effective and experienced judges, insolvency practitioners (both lawyers and accountants), insolvency administrators and regulators) necessary to ensure that the laws are effective in practice. The need for judges capable of handling insolvency cases ties into the LTP's interest in judicial capacity building.

There are important connections between secured transaction and insolvency legal regimes and, increasingly, these connections must be taken into account in the LTP's activities. In the aftermath of the recent financial crisis, most emerging and transitioning economies were especially hard hit by contracting markets and severe reductions in available credit. As corporate debtors became starved for investment dollars and the levels of non-performing loans (NPLs) increased in the financial sector, there has been a renewed focus on the need for insolvency law reforms. In light of the adverse impact of mortgage problems on consumers in many of the jurisdictions in which the Bank operates (for example, the use of Swiss franc-denominated loans), for the first time some countries are beginning to focus on the need for consumer debtor insolvency mechanisms.

3.6 Judicial capacity building

A primary objective of the LTP is improving the efficiency and capacity of the judicial system in the Bank's countries of operations. The domestic economic environment is largely determined by creditors' ability to find predictability and consistency in the enforcement of their legal rights and interests. While there have been significant advances in the development of black letter law in the Bank's states of operation, the implementation and enforcement of legal rights has often been weak and unpredictable, in great part due to limitations in judicial skills throughout the process. Further impediments such as lack of resources, corruption and a lack of an independent judiciary are often inherent in transitioning economies.²⁶

Many transition economies have a judicial system that lacks the organisational, administrative and technical skills to address the variety of commercial law matters that arise, especially during periods of law reform in which new commercial laws are enacted (for example, in the areas of secured transactions and insolvency). The slow evolution of legal structures typically results in judges and supporting judicial personnel who lack substantive knowledge and experience for dealing with these

²⁶ For a brief analysis of additional hindrances to effective judicial capacity see, Michel Nussbaumer, "Building judicial capacity in the commercial law sector of early transition countries", in *LAW IN TRANSITION* 39-40 (2005) 39-40.

issues. Further, many transition economies exist in a socio-political system wrought with inefficiencies and corruption where it is not unusual for the state or other powerful entities to intervene with the judiciary and try to typically determine, or at a minimum, influence the legal outcomes in accordance with a pre-prescribed state agenda. Within a transition state, such factors may hinder the establishment of an adequate judiciary that can support a free market economy. The evaluation team has found that the LTP's judicial capacity-building efforts have had a positive influence on enhancing the ability of the judiciary to support legal frameworks and strengthening the legal certainty and predictability of the legal process within the Bank's countries of operations. The LTP is directly assisting judges and court personnel in trying to ensure that judicial decision-making is free from undue political or external pressures.²⁷ In addition, the LTP is assisting supervisory bodies in becoming better qualified to assess judicial performance. While there is still room for considerable improvement among the Banks' emerging and transition economies, the LTP's activities have led slow, but sure, improvement in judicial capacity in selected countries in which the Bank operates.

3.7 Public procurement

Public procurement law is concerned with the contractual relationships within the public sector. A well-functioning public procurement regulatory regime is necessary to support the infrastructure development that is crucial to transition economies. In the absence of such a structure, growth is stymied and resources squandered and the governments' contracting process might well be faced with inefficiencies and corruption. The negative impact of mismanagement within the delivery of services process directly affects the well-being of a state's population by reducing consumer options and increasing the cost of services provided to households. An inadequate public procurement structure additionally places a burden on the state economically and frequently enriches a few at the expense of the many. A primary focus of establishing a viable public procurement sector is the development of transparent and effective practices when utilising and allocating public funds.

A strong public procurement regulatory regime is necessary to support the infrastructure development which is crucial to transition economies. In the absence of such a structure inefficiencies and corruption are

²⁷ As an example of an advance-staged long-term judicial capacity intervention within Central Asia see, Michel Nussbaumer and, Irina Rabinovich, "Raising the bar for judges in Central Asia: five years of judicial capacity building in the Kyrgyz Republic," in *LAW IN TRANSITION* 38-45 (2011) 38-45.

common and growth is stymied and resources squandered. An inadequate public procurement structure additionally burdens the state economically and frequently enriches a few over the benefits of the many. A primary focus of establishing a viable public procurement sector is the development of transparent and effective practices when utilising and allocating public funds.

Public procurement is heavily dependent on the legal frameworks and the influence of regulatory bodies, contracting entities and other stakeholders. Within the Bank's countries of operations, the EBRD has supported public procurement reform by providing technical assistance to states that are transitioning to free market economies. This has resulted in a heavy orientation towards promoting compliance with international public procurement standards to improve efficiency and introduce accountability into the process. In the opening of what have largely been monopolistic markets, the challenges are to create fair and equitable sectors where competition can flourish, utilising a public procurement regime that has both transparency and integrity.

3.8 Securities markets

The creation of strong capital markets is imperative for domestic growth and global integration. Supported by a sound regulatory and legal framework to oversee trading practices, a state's capital markets offer the means to raise debt capital to finance growth and development. For the purposes of this evaluation, a sharp distinction should be drawn between EU Member States, those seeking EU accession and those outside the EU. EU Member States are subject to the suite of 42 Directives introduced by the EU under its Financial Services Action Plan (FSAP). The relevance of the distinction is that legal reform in the area of securities markets in EU Member States has largely comprised conforming to the relevant EU Directives.²⁸ To this extent, one would not expect the LTP to be heavily involved in securities markets reform in EU Member States. The Directives mainly concern "regulated markets" authorised under the Market in Financial Instruments Directive (MiFID). (However, some European markets have a dual nature in that securities admitted to the regulated market will also be listed. Thus, the concept of listing exists alongside the concept of regulated markets.

One reason for the retention of the listing concept is that it enabled the imposition of so-called "super-equivalent" obligations such as rules on corporate governance on issuers.)²⁹ Lastly, a number of EBRD countries

²⁸ This point was confirmed during fieldwork in Hungary.

²⁹ See Raj Panasar and Philip Boeckman, eds., *EUROPEAN SECURITIES LAW* (Oxford: Oxford University Press, 2010), 9.

also have institutions that are ordinary members of IOSCO and seek to meet IOSCO standards.³⁰ While the LTP did make a contribution to this field so far, in the future, general securities markets law would be better left to other international agencies and stakeholders. The LTP has correctly identified securities markets as a low priority area for the foreseeable future. The LTP has correctly identified local currency markets as a priority in the current post-global financial crisis environment.

3.9 Core legal areas – assessment of relevance

The relevance of the LTP's eight core legal areas to the achievement of the EBRD's broader mandate of transition support is rated *High*. This rating reflects the critical importance of these eight areas to the transition process in general, as well as for the countries of operations and the EBRD. Going forward, some adjustments in the focus of some areas are recommended (see the end of this section).

The eight disciplines represent core knowledge areas where both the LTP and EBRD have accumulated extensive experience. Further, the current core areas exemplify areas that are relevant to the mandates of the Bank as it pursues its legal reform objectives. These core focus areas are distinct, yet interrelated areas which reflect the needs of transitional states in addition to reflecting the changing dynamics of the global markets. Like the core areas, LTP's activity areas reflect what LTP has seen as being the most relevant in terms of the technical needs of the transitional economies in which the Bank operates.³¹ In dividing the needs of emerging and transition economics across several focus areas, the Bank has been successful in identifying gaps within the larger legal structure. Segmentation, while avoiding an over-focus, has still allowed LTP to systemically address issues within the legal frameworks of transition economies.

Also the LTP's contribution to facilitating the achievement of the EBRD's operational objectives should not be overlooked. Internal and external stakeholders strongly appreciate the work of the LTP and it is seen as being "project enabling" with a high degree of transitional impact. If the work of LTP was initially seen as at the "fringe" it is now perceived as "mainstream" with a "flagship" presence in subject countries. This perception was very strong in Russia where one interviewee described the EBRD (via his experience with the LTP) as the "only player with the

³⁰ Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, FYR Macedonia, Hungary, Kazakhstan, Lithuania, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, Slovenia, Ukraine and Uzbekistan.

³¹ Activity areas being legal assessment; standard-setting; outreach and legal and institutional reform.

political and financial influence and confidence of the Russian state”.³² The same interviewee stated that it was “difficult to overestimate the influence” of the LTP presence in Moscow.³³

The LTP’s recommendations were largely accepted and incorporated into legislation. Drafts or commentaries on existing drafts, have acted to advance legal frameworks, with this being found to be true across sectors. Various codes or guidelines have additionally served as the basis for legislative enactments; often verbatim. What has emerged is the central theme that those states which seek EBRD intervention are generally strongly committed to the development of a more advanced and sophisticated legal system which can be internationally viewed as exemplifying the ideals of a rule of law. In seeking to be favourably viewed in the international arena these states are generally hospitable to the experience and expertise which LTP brings to the table.

³² Interview with Fedor Teselkin of Freshfields Bruckhaus Deringer in Moscow, 27 July 2011.

³³ *Ibid.*

Annex 4. Legal reform projects – the Legal Transition Programme’s sample countries specific performance

4.1 Concessions/PPPs

4.1.1 Russia

The LTP concessions/PPP specialist has been based in Moscow since March 2009 and is expected to remain there for another two years. This arrangement has been instrumental in facilitating the LTP’s close cooperation with key Russian counterparts, including:

- the Duma sub-committee on PPPs
- the Ministry of Economy Working Group (on municipal infrastructure)
- the Ministry of Transport Working Group (on transport PPPs)
- Vnesheconombank’s PPP Center.

The most significant results the LTP has attained in Russia in regard to concession law/PPPs have emanated from the LTP’s increasingly close relationship with its governmental counterparts, which has resulted in:

- the 2008 and 2010 amendments to the Russian Concessions Law
- the advice on formulation of, and substantial input into drafting, local PPP law in Perm Krai and to some extent also in St Petersburg
- input to the PPP strategy for toll road development.

While it is evident that the LTP has been influential in shaping/reshaping Russian concession law/PPP legislations, the practical impact of this work has not yet been fully tested, mainly because there have been very few PPPs in Russia so far. In terms of the legislation itself, the difficulty of reconciling regional political challenges is acknowledged, and it remains a significant obstacle to creating a harmonised legal framework system in a country as large and diverse as Russia. Any further impact of the LTP in this core area will be largely dependent on the political sentiment of both federal and regional authorities towards PPPs. The LTP has done solid work in trying to educate Russian decision-makers about the merits of PPPs (see below and section 6 on Outreach),

however this core legal area has proved to be particularly sensitive, due to continuing inequalities in Russian society. The key stumbling blocks to the further development of suitable concessions/PPP law in Russia include:

- the existing federal concessions law (which, despite several amendments, still suffers from many inconsistencies)
- the absence of a federal framework PPP law
- an unusual legislative process, in which those with the power to modify the law have not been involved in the process
- an inability to attract project finance from the private sector (due to the legal and accounting regulations).

The above obstacles and a degree of continuing confusion about the merits of private sector participation in the delivery of public services, contributed to a “dogmatic” approach at the federal level, which has resulted in the emphasis being placed on regional solutions. For instance, the EBRD has had a long-standing and fruitful relationship with the city of St Petersburg, going back to the early 1990s. This enabled it to develop the first ever PPP project in Russia – the St Petersburg South-West Waste Water Treatment Plant, signed in 2002. This project was legally feasible due to a “special law” enacted by the city specifically for this project. Following this experience and in view of more PPP projects (which are yet to materialise), St Petersburg has adopted its own framework PPP law because of deficiencies in the federal concession law and the absence of federal PPP law. The LTP played an advisory role at different stages of this law’s preparation and review.

This experience and the Bank’s increased focus on regional (MEI) projects in Russia, prompted the LTP to follow the Bank and concentrate on assisting in the preparation of PPP regional laws, which could benefit the Bank’s projects while making an important demonstration impact on other regions. This led to LTP’s involvement with the Perm Krai administration, where the Bank developed three municipal PPP projects. The LTP provided advice on formulating policy and had substantial input into drafting the law, which was accepted by the Perm Krai’s executive authorities after several drafts. However it is taking a long time for it to be adopted by the Krai’s legislative assembly and there is a concern that it might have fallen victim to “local political differences”.

As there is a general lack of finance for concessions/PPP projects in Russia, the EBRD’s involvement in such projects has been perceived by the Russian partners and international community as critical to the success of any PPP initiative in this country. This gives the EBRD and the LTP an opportunity to play an important role in advising on the drafting of

local laws, either directly or through experienced consultants. However due to the political limitations mentioned before, the use of this opportunity has been limited. Following the groundbreaking St Petersburg wastewater project, it has since proved very difficult for the EBRD to recreate that success. So far, only two more municipal PPPs have been signed in Russia, namely Novogor Prikamiye and Rosvodokanal, both in 2008, the latter being controversial due to the absence of competitive tender procedures when awarding the service contracts to the borrower (see Appendix 10 for the list of the Bank's PPPs). The LTP did not participate in these two projects, but if and when the Perm projects are finally approved and implemented, they could serve as a demonstration of PPPs' benefits for other Russian regions and also provide a base in Russia for the LTP to build on.

The Bank has also signed one very important PPP project in the transport sector in Russia, the St Petersburg Pulkovo Airport Concession, providing €100 million to support a €1.2 billion project, which is seen as the most advanced deal ever put together in Russia. The St Petersburg PPP law, to which the LTP made a contribution, provided the legal framework which made this project possible.

Moreover, the LTP has been working closely with the Vnesheconombank's PPP Centre in Moscow, which has been using the St Petersburg and Perm PPP laws as models for other cities and regions. However caution is advised in this respect as currently there are about 40 regional PPP laws in Russia, which have been adopted by the local authorities. These laws were simply copied from the model PPP law without a specific project in mind and to this extent their use has so far proved limited.

The LTP's participation in the Duma sub-committee on the PPP Experts' Council led to amendments to the concession law, making it more transparent and bankable.³⁴ Moreover, it also resulted in the publication of two books on PPPs³⁵ by the Experts' Council and the EBRD/LTP. Together with the organisation of regional conferences, it made an important contribution to raising the awareness of PPP issues in Russia.

4.1.2 Armenia

So far, the LTP has played a limited role with regard to concessions/PPP law in Armenia. The Armenian government developed its PPP policy with the assistance of UNDP and prepared the PPP law, which is now in place (largely derived from Chilean and Korean models). A White Paper on

³⁴ In 2007 a mandatory competitive tender was introduced for the transfer of public property to the private sector, while a 2010 amendment made it possible to use concessionaire's rights as debt security.

³⁵ "PPP – ways of improving the legislation", 2009; and "PPP – practice, problems, future", 2011.

concessions and proposed legislation has been promulgated. Therefore, unlike in Russia or Hungary, there has not been a dedicated LTP programme in this core legal area in Armenia but rather ad hoc assistance focused on the review of the existing law to enable EBRD financing for a concrete project, namely the Yerevan Airport PPP project.³⁶ Moreover, the LTP completed some legal review work in anticipation of potential future PPP projects, which could be financed by the EBRD, such as the North-South highway and the waste management/landfill project. The LTP's expertise may also be called on if the local authorities in Yerevan decide to pursue key infrastructure projects, such as a wastewater treatment plant and a metro system, as PPPs. It has been stressed that for the time being the local population still hasn't "bought into" PPPs and the city needs to do more to raise awareness and address the controversies that PPPs create. There may be a role for the LTP in this educational process as well.

4.1.3 Hungary

In 2007-09 the LTP was involved in reviewing and re-drafting a law on concessions to support the Bank's toll road investments in Hungary. Although the financing was provided³⁷ and a law was drafted, it has not been enacted so far. Moreover, while Hungary has historically made significant progress in terms of overall legal reform, there are worrying signs that the current government may try to backtrack on PPPs. Ideas of nationalising Hungary's motorways have been mooted, while the recent National Assembly elections have halted the process of adopting concessions/PPP law.

The previous government of Hungary highly valued the LTP's provision of technical assistance to the Ministry of Economy and Transport with regard to reviewing both the Concessions Law and the Procurement Law. It is expected that the current situation will change, as evidenced by the Bank's recent review of new potential PPP projects. It can be expected that LTP will continue to influence both legislation and practice. The Hungarian counterparts noted that the LTP's involvement provided "instant credibility" to the PPP legislation. Nearly half of EBRD transport sector PPP projects are in Hungary (all highways); see Appendix 10.

³⁶ Armenia International Airport, a €13.8 million loan signed in July 2006 and Phase II, a loan of €27 million was signed in December 2009.

³⁷ M6-M60 Motorway project, a €74.6 million loan was signed in May 2008.

4.2 Corporate governance

4.2.1 Armenia

The LTP's interventions in Armenia resulted in the formation and adoption of corporate governance guidelines. Assistance was (and is still being) provided to the Ministry of Economy of the Republic of Armenia in the development and implementation of a Corporate Governance Code. The Code is devised, in part, to provide "gap coverage", in that the Code works in conjunction with current legislation in addressing areas not specified by a company statute. As the Code's final draft was recently approved by the Armenian government, the Code is seen as a tool that is providing tangible results by initiating incentives for Armenian companies to adhere to governance protocols, which reflect international best practices.

The Code is well regarded by business leaders in Armenia (for example, from telecommunications and banking sectors), who see it as a key development in ensuring Armenian companies are being structured and run in accordance with the international practice. The LTP's corporate governance expert has been singled out by Armenian business leaders for his professionalism and strong personal commitment. In respect of the LTP's future work in Armenia, the demand for a "school for directors", based on the Russian model has been highlighted, especially given the requirement for more independent directors in Armenia.

4.2.2 Russia

The work of the LTP on corporate governance in Russia goes back to 1995 when, in response to a Russian request, an OGC unit (a front-runner of LTP) prepared a booklet on the principles of corporate governance. In 2000, the Russian authorities asked for assistance with the development of a Corporate Governance Code and, as a result, a voluntary Code for listed companies was proposed and endorsed in 2001. This was an important LTP achievement in the corporate governance law reform area, which had a strong impact and long-lasting repercussions for Russian business practices. The Code has been widely utilised as a central reference for issuers of securities. Endorsed by the Russian Federal Commission on the Securities Market (FCSM), the Russian Code provides guidance for improved corporate by-laws and operating procedures and has served as an important reference for governance assessment of Russian companies' compliance with international best practices. In addition, the practical impact of the

Bank's corporate governance work in Russia may be seen by the rating system developed in cooperation with the Institute of Corporate Law and Governance (ICLG). This joint venture, which produced a methodological system that provides investors with a guide as to how Russian companies compare with international best practices, has had a significant long-term impact. It has increased Russian companies' governance practices in an effort to attract potential investors. Further, the LTP's impact on the practical application of Russian corporate governance work is evidenced by the fact that the Ministry of Economic Development and Trade (MEDT) has followed the LTP's advice and its comparative best practice analysis in the process of drafting new legislation.

4.2.3 *Mongolia*

In 2002-04 the LTP assisted the Mongolian government to assess the adequacy of the existing legislation on corporate governance. This work resulted in the introduction of amendments to this legislation which brought Mongolia closer in line with international practice. Moreover, the LTP developed an action plan and priorities to improve corporate governance practice in the country.

4.3 Infrastructure regulation and competition

4.3.1 *Armenia*

Of the four LTP legal reform projects undertaken in Armenia during the evaluation period, three were related to telecommunications regulation:

- Telecommunication Regulatory Development
- Telecommunication Regulatory Training
- Telecommunication Regulatory Implementation Support.

The LTP's intervention in telecommunications regulation in Armenia is a good example of an "integrated approach", which proved to be the most effective strategy for legal reform support. First the LTP assisted in establishing regulatory entities with wide-ranging powers to oversee the growing sector. In addition to regulatory assistance, the LTP experts drafted regulatory legislation, which was ultimately adopted into law.

This was followed by comprehensive regulatory training which ensured that regulatory staff developed the specific skills required.

The most recent intervention (currently under way), involves practical support for the Public Services Regulatory Commission (PSRC) in the implementation of new sector policy and laws. The Armenian authorities view the LTP's involvement in this area as "indispensable and extremely helpful" and the LTP as a valuable partner in opening up the telecommunications market in Armenia. They would like to see the LTP involved also in the upcoming amendment of telecommunications law, providing guidelines on contract structure, and assisting in defining key regulatory notions (for example, a dominant company in an evolving market).

4.3.2 *Mongolia*

In Mongolia, the LTP went two steps farther than in Armenia. Integrated policy advice, legislature drafting, optimisation of the sector institutional structure, revision of primary legislation, modernisation of the licensing and tariff regime, as well as a comprehensive training programme, were all implemented for the telecommunications sector. Laws and regulations were drafted but never enacted, however the support for the training of the regulator, along with the support provided in developing regulatory guidelines, has played a central role in the development of the industry, resulting today in a country-wide competitive system.

In addition to the telecommunications sector, the LTP provided advice on renewable energy regulations in Mongolia, and embarked on the innovative, multi-phased Ulaanbaatar Clean Air project. In the former case, the LTP's consultants worked with the Energy Regulatory Authority of Mongolia (ERA), reviewing energy feed-in tariffs and proposed a mechanism to balance the effectiveness of the feed-in tariffs to attract investments to meet the national targets and economic affordability. The new tariff-setting mechanism was approved in 2007 as part of the Renewable Energy Law, setting forth feed-in tariff ranges for renewable energy, categorised by type. Under the framework established by this Law, ERA developed and approved the first long-term Power Purchase Agreement to be signed between the "Central Regional Electricity Transmission Network" (a state-owned company) and private investor "Newcom" Co. Ltd. Approval of this agreement was the first step towards encouraging private sector participation in the energy sector. Moreover, thanks to the adoption of the new tariff-setting mechanism, the EBRD

was able to prepare the first renewable energy project in Mongolia, which was approved in March 2012.³⁸

In the case of the Ulaanbaatar Clean Air project, the government asked LTP for assistance in addressing the chronic pollution besetting the Mongolian capital in winter caused by the population burning raw coal. The LTP's consultant proposed regulatory solutions comprising an introduction of a tax on raw coal to support the production of clean fuels and other initiatives aimed at improving air quality. An Independent Clean Air Fund was established to receive and distribute revenues from the tax. The legal solutions proposed by the LTP were largely accepted by the Mongolian government and implemented. The third phase of the project (currently under way) is focused on the practical implementation of the laws and other recommendations made as part of phase one and two.

Moreover, currently the LTP provides support to the Extractive Industries Transparency Initiative's (EITI), Mongolia Secretariat in the implementation of the EITI principles, with the aim of becoming EITI-compliant.

As mining is a key sector for the Mongolian economy, this initiative is seen as a priority in the government's efforts to improve the transparency of business relations and corporate governance standards in the country.

4.3.3 *Russia*

In 2001-02 the LTP advised the Russian Ministry of Communications on a draft amendment to the Russian Federal Telecommunications Law. In offering ongoing "hands-on" assistance throughout the draft amendment and approval process (for example, making presentations and answering queries from the deputies), the LTP was instrumental in seeing the amendments successfully passed into legislation. However another, more recent attempt by the LTP to address the implementation of reform in universal service, licensing and interconnection was less successful. The project started well but was later cancelled. The competing interests of major cities and regions within Russia (for example, St Petersburg versus Moscow) have made the development of uniform telecommunications infrastructures difficult.

³⁸ Salkhit Wind Farm Project – loan of US\$ 40 million to Clean Energy LLC to develop and operate a 50MW wind farm to be constructed near Ulaanbaatar (Board approved March 2012).

No attempts in respect of energy regulation reform have been undertaken by the LTP in Russia yet, however such assistance is being considered.

4.3.4 Serbia

The LTP worked with the Republic of Serbia Telecommunication Agency, developing a clear and concise legal framework by addressing such issues as licensing and tariff policy, along with contributing to the establishment of an independent regulatory authority. The practical results of this specific intervention may be seen in the legislation being applied, which enabled the stable expansion of the sector. Moreover, in 2010 the LTP and the Office of the Chief Economist (OCE) jointly organised a well-attended, high-profile conference in Belgrade that helped to promote competition principles across different infrastructure sectors.

4.4 Secured transactions

4.4.1 Hungary

In 1997 the LTP had already begun to assist the Hungarian government to implement a new law stipulating the registration of charges over moveable assets. Four years later, the LTP provided follow-up assistance and helped to establish a computerised registration system, monitored its functioning and resolved issues that arose during implementation. The LTP also advised the Ministry of Justice on amendments to Civil Code provisions, ensuring the revisions were made in 2000. In 2005, the LTP assisted the Ministry of Justice with the preparation of new decrees on registration and non-judicial enforcement that followed amendments to the Civil Code provisions on pledges. The LTP also made recommendations on the pledge registry's operation.

The representatives of the Hungarian authorities, who worked with the LTP on these projects, were of the opinion that the LTP's work was "groundbreaking", and as a result of it the country now has a relatively well-functioning law, a good register for pledges and mortgages, as well as many secured transactions practitioners trained by the LTP. However, some shortcomings still exist in the Hungarian secured transaction legislation and related legal practice. These issues include the effectiveness of enforcement of collateral, judicial capacity and still-budding credit bureaus. In terms of mortgage law, it was noted that it did

not prevent borrowing in Swiss francs (the currency favoured by Hungarians to lock in a lower rate than that offered for mortgages in forints). When the Swiss franc strengthened, many homeowners could no longer afford to repay their loans. A crisis developed and the courts were on the verge of becoming overwhelmed, which led the government to announce a temporary moratorium on the enforcement of mortgages.

The charge registry, established in Hungary with LTP's assistance was the first in the region. However the impact of this important development was diminished by some inconsistencies in the law that arose with the introduction of non-possessory charges over moveables. Moreover, without consulting the LTP, the Hungarian authorities tried to replicate this model elsewhere.³⁹ The LTP intervened, refusing to be associated with the new law until changes were made to address the problem related to notaries.

It has also been stressed that in practice, since disputes have frequently arisen as to which charged assets are covered, many banks prefer to use an enterprise charge (over all assets of a company). In general, slow enforcement and debt collection still limits the impact of the new legislation. The courts need more assistance in how to handle enforcement, while there is not enough prescriptive language in the legislation. In the absence of statutory guidance, there remains an important need for the development of more case law to provide assistance. Moreover, there is little evidence that the new law and procedures have helped SMEs to obtain as much funding as expected.

4.4.2 *Mongolia*

Commissioned by the Mongolian Ministry of Justice, the LTP implements a project to reform the secured transactions legal structure. This endeavour is currently under way and the anticipated outcome is that the new laws will enable charges over moveable property. Local counterparties of this project expressed the opinion that the LTP's continued engagement is essential for reforms to advance.

³⁹ The procedures were replicated in the land registry, implying the use of notaries, which made the system rigid and very expensive. It took many years before the necessary changes were made to the Civil Code, but reforms were again put on hold in 2009. A new law should soon address this problem and provide for internet-based registration with no need for the involvement of notaries.

4.4.3 *Russia*

The LTP's involvement with secured transactions in Russia dates back to 1998, when it reviewed the draft mortgage law and issued a report with recommendations. The law (incorporating recommendations) was enacted into force. However reforms related to other aspects of secured transactions legislation in Russia were subsequently stalled. Only in 2009 did the Ministry of Economic Development request the Bank's assistance in reforming secured transactions legislation. While the full scope and depth of the project is still being determined, it is envisioned that the intervention will yield significant returns by way of producing practical and usable legal provisions and implementing mechanisms.

There are other ongoing joint initiatives, aimed at recovering the time lost by Russia in this area. These include the warehouse receipt programme (see figure 2 below) and the implementation of the Cape Town Convention on Security Interests over Mobile Equipment and Aircraft Protocol. Under this latter project the LTP has been assisting the Russian government with accession and implementation of UNIDROIT Convention and Protocol, which provides the legal framework for aircraft financing. Successful implementation of this convention would facilitate several EBRD projects currently under development.

Figure 1: Post-harvest financing: an innovative solution

The Bank provided innovative financing to farmers in several advanced transition countries, securing its loans with the income expected from the future harvest. This type of financing is important as most farmers in the Bank's countries of operations do not own their land and their houses have little value.

This model of financing could be very beneficial for farmers in the ETCs and Russia, however there is no legislation to enable it.

Since 2010 the LTP has been helping the Russian Grain Union and the Ministry of Agriculture to prepare new legislation on Grain Warehouse Receipts. The LTP's Russian counterparts described the expected impact of this law as "revolutionary" for the country's farmers.

4.4.4 *Serbia*

The LTP has been assisting the Serbian government to create a more viable legal framework for security over moveable assets. Before this project, the existing legislation was weak and ambiguous, offering no assurances to the creditor, dampening the market and slowing growth. Legislation resulting from this project followed the LTP's recommendations for taking security over a variety of assets, and, in essence, mirrored the LTP's Core Principles on Secured Transactions.

This was an important success for the LTP and helped it to build a solid reputation in this core legal area in the Balkan region.

Serbia has recently been ranked as the top country for business reforms with its pledge registration system.⁴⁰ The registry is changing the commercial and business culture in Serbia. To date, over 97,000 pledges have been registered and the agency's web site gets over 50,000 hits per day. However, some imperfections still exist in the secure transaction legal structure, for example, the incoherence of various laws (the secured transaction and payment laws or tax laws).

4.4.5 Georgia

In addition to the sample countries review, a secured transactions reform project in Georgia was analysed, as its second phase was not entirely successful and can offer important lessons.

In 2005 the LTP provided advisory support to the Ministry of Justice in Georgia on the secured transactions law reform. This assistance was well received and the new Civil Code provisions were adopted in June 2005. Thereafter, the LTP and the Ministry of Justice agreed on a second phase of this project, which was to assist the Ministry in implementing the reforms and developing a charges registry, as well as promoting it to banks and other potential users. However, some significant differences of opinion arose between the LTP's consultants and USAID, which was also assisting with a similar project. In effect the LTP decided to withdraw from the project.

4.5 Insolvency

4.5.1 Hungary

The LTP was involved in insolvency issues in Hungary in the early 2000s as they related to a project on secured transactions (see section 5.4.1 above). The LTP has also helped Hungary to develop bankruptcy-related legislation to strengthen the enforceability of close-out netting for OTC contracts. The Hungarian counterparts who participated in these projects noted their usefulness but also stressed that Hungary was then (and still is) at the stage where the focus should be on simple advice,

⁴⁰ See Microsoft.NET, Microsoft Case study, Customer Solution Case Study, Serbia Ranked Top Country for Business Reforms with Company Registration System

such as providing education on the application of insolvency procedures. The interaction between bankruptcy law and fraudulent conveyance law was highlighted as one of the important issues to address. Bankruptcy crimes are a problem and the trustees/administrators often do not know how to proceed. Access to credit is a serious problem in Hungary but entities on the verge of bankruptcy do not want to petition and neither do creditors. There is not enough prescriptive language in the legislation or details in the regulations. In the absence of statutory guidance, there was an important need for the development of more case law to provide assistance.

Overall, it suggests that the impact of the LTP's intervention in insolvency legislation reforms in Hungary has been limited and it remains an important area where legal reforms have not been completed.⁴¹

4.5.2 *Russia*

Before the evaluation period, the LTP completed one insolvency project in Russia, reviewing a draft law, which was later adopted and forms the basis for current insolvency/bankruptcy proceedings. Then there was a decade when nothing was done in this area. Only recently, one project has been initiated: Insolvency Administrators' Capacity Building. Moreover, a project on investigation of insolvent debtors' assets is being considered.

The first of these two projects aims at strengthening the professional capability of insolvency administrators, as they have the largest impact on the efficiency and effectiveness of the insolvency regime. This ongoing project is achieving practical results from training administrators to a professional standard that can ensure the confidence of those using insolvency measures.

The LTP's counterparts from the Department of Innovation and Corporate Governance at the Ministry of Economic Development stressed that several bankruptcy law projects were under way, including corporate reorganisations and a bank bankruptcy draft law. The importance of training judges, administrators and arbitration managers, as well as the role that qualification exams could play in raising the standard of appointees, was stressed.

Despite these interventions, Russian law practitioners agree that the current law is highly imperfect. There are serious problems with

⁴¹ The LTP noted that although there was interest in improving the insolvency law of Hungary in 2004, it was a rare example of a project for which the LTP could not find funding.

fraudulent bankruptcies and with debtors trying to hide assets. A particular problem is posed by so-called “one night firms”, which are companies established to shift cash or assets and engage in the fraudulent transfer of corporate holdings. While legislation curbing this practice was enacted in 2002, uncertainty remains regarding the interpretation and operation of the insolvency process. The professionalism of insolvency personnel remains a major challenge in Russia. However, it has been highlighted during interviews that there are many people currently in positions of power who fear that reform will erode their power base and, therefore, prefer to maintain (and continue to profit from) the *status quo*. Another difficulty is related to finding qualified administrators to run bankruptcy cases, as well as the problems caused by the overlapping priorities in the pledge law, bankruptcy law and Civil Code.

4.5.3 Serbia

The LTP has a strong presence in Serbia because of its cooperation with the Serbian Bankruptcy Supervisory Agency (BSA). A 2009 project to build the capacity of the BSA in the areas of supervision, licensing and practitioner training, has led to increased efficiency and thoroughness within the insolvency process. Further work with the BSA involved an amendment of insolvency legislation to create a new legal structure more in harmony with international standards. Deliverables consisting of the National Standards and a Code of Ethics were approved in 2010 and have had practical implications in that they have created specific protocols throughout the Serbian insolvency process and are used extensively in practice today. The current focus on building insolvency capacity and the continued work in drafting additional commentaries on Serbian legislation speaks to the long-term practical impact of the LTP and the Bank.

The Republic of Serbia Bankruptcy Supervision Agency is very satisfied with the LTP’s work on their projects. The department wants to continue working with the LTP to train supervisors and bankruptcy administrators. However, opinions of Serbia’s insolvency law practitioners on the law’s effectiveness differ. It has been stressed that insolvency proceedings in Serbia are much longer than elsewhere in Europe, while corruption and vested interests remain a problem. It is generally agreed that the insolvency culture will take time to change and that judges do not want to yield any of their powers to the administrators.

4.5.4 Regional

Many of the LTP country-specific initiatives in the area of insolvency have been expanded to regional efforts after it was determined that the legal regimes in many of the Bank's countries of operations were still poor and were inadequate in addressing creditor/debtor issues. Inadequate legal regimes are a strong hindrance to trade and investment within developing and transition economies. Regional efforts are oriented towards increased dialogue and devising legal structures that take into consideration cross-border relationships and regional exchanges.

4.6 Judicial capacity building

4.6.1 Russia and other CIS countries

So far, the LTP has not been able to develop a dedicated judicial capacity building project in Russia due to the indifference of local counterparties. Special interest groups and regional customary practices (or outright bribery and corruption) often act as an impediment to the efficiency and independence of the judicial process in Russia. It also blocks any efforts to change the status quo. Moreover, there were concerns expressed by many in Russia that given the magnitude of the challenges that the country's judiciary faces today, education and training alone might prove insufficient. For example, there were opinions that while the Bank should "definitely" be engaged in judicial capacity building within commercial law, the Bank should take into account the huge differences between the judicial capacity at the city/regional and federal level. The threat posed by corruption as a pervasive part of the business climate in Russia, has also been stressed.⁴²

As Russian decision-makers were not receptive to the proposal that the LTP provide judicial capacity building training, the LTP focused on other CIS countries, notably the Kyrgyz Republic, Georgia, Moldova and Tajikistan. Although they are not part of the sample countries under this evaluation, the importance of the LTP's interventions there in this core legal area merits a brief analysis. In particular, judicial training in the Kyrgyz Republic has been given a high priority as it met with willing counterparts, who were keen to build on a pilot project implemented earlier by the USAID. During the first four phases of the Judicial Capacity Building project in the Kyrgyz Republic, the LTP worked with the

⁴² The Russian Chief Justice has recently publicly expressed his doubts whether Russia will ever be able to root out corruption. He also noted that Russian judges were overworked and that some courts "were like sausage factories".

International Development Law Organization (IDLO) towards the overall goal of enhancing the competence of judges in commercial law and to assist in creating the Judicial Training Center (JTC) in Bishkek. Under this project 270 judges were trained; two apprenticeship programmes were organised for Kyrgyz judges in Kazakhstan and Russia; the JTC was set up and staffed; and a commercial law library at the Supreme Court was equipped. This project was evaluated in 2009 by IDLO's Evaluation Unit⁴³ (see figure 2 below).

Figure 2: IDLO's evaluation: Kyrgyz Judicial Capacity Building Project (phases 1-3)

In 2009, the International Development Law Organization (IDLO) completed an independent evaluation of the first three phases of the Commercial Law Capacity Building project, jointly implemented by the LTP and IDLO in the Kyrgyz Republic.

The IDLO's evaluation does not assign any ratings to the project performance categories but concludes that the project was well resourced and largely well executed. It was based on a detailed assessment of judicial training needs and built on a previous USAID project. The evaluation stressed that the project achieved most of its objectives, however its sustainability had not yet been fully demonstrated. The fundamental problems related to the accountability of the Kyrgyz court system still remain. The JTC has suffered from high staff turnover and some changes to its original status. It has an approved training curriculum and a strategic plan. However it lacks internal capacity and ownership, which is the reason why it has been unable to organise high quality trainings on its own.

Insufficient follow-up on the recommendations of the IDLO/LTP consultants shows that the Center did not fully benefit from their expertise. Empowerment of the JTC staff and budgetary transparency could have been given higher priority.

The evaluation highlighted several lessons from this project:

- Capacity building and training delivery are different types of activities and require different skills and approaches.
- Training programmes need a solid mechanism to verify whether they indeed lead to comprehension of the material and improvements in judicial practice.
- Knowledge, skills and standards are interrelated parts of judicial competence and cannot be treated in isolation, rather they comprise an integrated package.
- The validity of the perspective of stakeholders in society outside the judiciary has to be acknowledged, even when such a perspective is not accepted at face value.
- Monitoring of outcomes needs to be tied up with judicial reform objectives and the evolution of a wider political and institutional context.

⁴³ Commercial Law Judicial Capacity Building project in the Kyrgyz Republic – Evaluation Report, April 2009, the IDLO Evaluation Unit, prepared by Anna Matveeva and Arianna Frascetti. (this is one of very few instances where an EBRD project has been evaluated by an external organisation).

Since the IDLO's evaluation, the fourth and the fifth phase of the Judicial Capacity Building project has been implemented in the Kyrgyz Republic. The lessons and recommendations from the evaluation of the earlier phases have been largely taken into account; the JTC has been staffed with more experienced professionals and in 2011 it organised training for 304 judges. Most importantly, following the arrival of a dedicated judicial capacity expert in late 2009, the LTP introduced judicial decision assessment measures, which verified a positive impact of the phase 5 of the Kyrgyz judicial training project.

Nevertheless the JTC in Bishkek requires the continued support of the LTP to ensure its success. Similar training projects have also been implemented in Tajikistan and in Mongolia and the LTP's pipeline in this area includes also projects in Albania, Bulgaria, Moldova and Bosnia and Herzegovina.

4.7 Public procurement

4.7.1 *Albania*

Albania proved to be fertile ground for the LTP to test its approach to public procurement law reform. The team had helped the Albanian authorities to prepare tender documents for the launch of a public tender to award a second GSM license in 2000, and advised on the tender evaluation criteria. So, when the LTP added public procurement to its core legal areas, the good relations that had been established with the Albanian procurement authorities prompted the LTP to start the first legal reform project in procurement there.

The project aims to strengthen the newly created Review Commission on Public Procurement, to enable it to efficiently resolve complaints. It comprises training on the core tribunal competencies essential to the fair and effective review of complaints. The LTP is also assisting the Public Procurement Authority of Albania (APP) to implement a comprehensive reform of the utilities procurement law, including the introduction of an eProcurement platform. Both projects are still under implementation.

4.7.2 *Ukraine*

In 2011 the LTP initiated two projects in Ukraine: Capacity Building of Public Procurement, and Public Procurement Policy Development and

Regulatory Capacity Building. They aim to develop a dedicated training curriculum and provide training directly to the Procurement Review Commission members. The latter project will assist in the development of national policy, meeting WTO GPA requirements and matching the principal standards of the EU 2004/18/EC Directive.

4.7.3 Regional

The most pointed example of the LTP's legal and institutional reform work in this area to date is its cooperation with UNCITRAL to assist CIS countries and Mongolia, to adopt procurement law largely based on the most recent (2011) UNCITRAL Public Procurement Model Law. UNICITRAL has significant budgetary and personnel limitations and has greatly benefited from LTP's expertise and resources, while the LTP has had the opportunity to take part in a wider range of public procurement projects. The LTP's work in this area is further evidenced by a joint project with the OECD/Sigma in Azerbaijan, which is focused on implementing best practices. With activity focused on efficiency and strengthening the structural integrity of the procurement process, the LTP is currently adding value to legal and institutional reform within the procurement process. These regional activities cut across standard setting and legal reform support categories (with legal assessment and outreach paradigms as well).

4.8 Securities markets

4.8.1 Armenia

The LTP did not develop any dedicated securities markets law reform projects in Armenia, however this country is a good example of the practical impact of the LTP's legal assessment and standard setting projects. Such an assessment was carried out in Armenia in 2007.⁴⁴ Gaps were identified and the amended law was based on a standard adopted earlier in Estonia.⁴⁵ It was passed into law in October 2007.

⁴⁴ See EBRD, *Securities Markets Legislation Assessment Project – 2007 Assessment* (EBRD 2007).

⁴⁵ See the Law of the Republic of Armenia, *On Securities Market*.

4.8.2 Hungary

The long-term practical impact of the Bank's legal assistance in the Hungarian securities markets may be seen from the cooperation with the Ministry of Finance to draft a new Securities and Investment Services Act. The Act helped to harmonise the Hungarian securities sector with international standards, in addition to meeting EU directives. The drafting, which was later adopted into law, represents the influence and impact that LTP has had within Hungary and within the region in this area.

4.8.3 Russia

An assessment of securities market legislation in Russia was carried out in 2007.⁴⁶ Subsequently, LTP has contributed to the drafting of investor protection legislation, which was passed into law. However, as noted in section 5.2, the LTP's key focus and impact in Russia has been in the area of corporate governance, which remains strongly related to securities markets.

The importance of this area has been recently stressed by Russian authorities, whose new strategy is to turn Moscow into a global financial hub. One of the steps to achieving this goal was the recent merger of two exchanges (Moscow Interbank Currency Exchange and Russian Trading Systems).⁴⁷ Part of the rationale was to address technical infrastructure problems that render trading on the Russian market less attractive. These problems, rather than legislation, are said to be part of the reason for Russian companies favouring London over Moscow for their listing.⁴⁸

⁴⁶ See EBRD, *Securities Markets Legislation Assessment Project – 2007 Assessment* (EBRD 2007). This assessment was carried out by Chadbourne & Parke LLP, Moscow.

⁴⁷ Rachel Morarjee, *Stock Exchange Merger creates market less prone to squabbling*, FINANCIAL TIMES, (3 October 2011).

⁴⁸ Michael Patterson, *Nervous Russians list in UK* *The Australian Financial Review* 15 (4 October 2011).

Annex 5. Ranking of the Bank's countries of operations in respect of the legal environment

(from independent, non-LTP sources)

Table A

Efficiency of legal framework in settling disputes		
Country ranking from The Global Competitiveness Report 2011		
RANK	COUNTRY	VALUE
1	Singapore	6.3
2	Sweden	6.0
3	Finland	5.8
27	Tunisia	4.8
40	Estonia	4.3
45	Montenegro	4.2
49	Jordan	4.1
56	Tajikistan	3.9
57	Morocco	3.9
60	Egypt	3.9
63	Albania	3.7
66	Turkey	3.7
81	Armenia	3.4
82	Georgia	3.4
83	Lithuania	3.4
87	Kazakhstan	3.4
91	Hungary	3.3
95	Azerbaijan	3.3
97	Poland	3.2
99	Macedonia, FYR	3.1
104	Latvia	3.1
106	Mongolia	3.0
108	Moldova	3.0
111	Slovenia	2.9
113	Czech Republic	2.9
119	Bosnia and Herzegovina	2.8
122	Romania	2.8
123	Russian Federation	2.8
126	Bulgaria	2.7
129	Croatia	2.7
132	Kyrgyz Republic	2.6
137	Serbia	2.5
138	Ukraine	2.3
139	Slovak Republic	2.2
140	Haiti	2.1
141	Yemen	2.0
142	Venezuela	1.9

Table B

Judicial Independence		
Country ranking from The Global Competitiveness Report 2011		
RANK	COUNTRY	VALUE
1	New Zealand	6.7
2	Denmark	6.6
3	Sweden	6.5
23	Estonia	5.5
41	Egypt	4.8
49	Jordan	4.4
53	Poland	4.3
56	Montenegro	4.2
58	Tunisia	4.1
64	Hungary	3.9
67	Latvia	3.8
68	Slovenia	3.8
72	Tajikistan	3.7
74	Czech Republic	3.7
80	Morocco	3.6
83	Azerbaijan	3.4
84	Lithuania	3.4
88	Turkey	3.3
91	Georgia	3.2
94	Romania	3.1
97	Bosnia and Herzegovina	3.1
99	Croatia	3.1
101	Albania	3.0
104	Bulgaria	2.9
105	Macedonia, FYR	2.9
108	Armenia	2.8
111	Kazakhstan	2.7
116	Slovak Republic	2.7
122	Mongolia	2.6
123	Russian Federation	2.6
128	Serbia	2.4
132	Moldova	2.2
134	Ukraine	2.1
135	Kyrgyz Republic	1.9
140	Haiti	1.7
141	Burundi	1.7
142	Venezuela	1.6

Published by World Economic Forum

Table C

Resolving Insolvency	
Country ranking from Doing Business 2011 - World Bank Group	
Country	Rank
Japan	1
Singapore	2
Canada	3
Kosovo	31
Latvia	32
Czech Republic	33
Slovak Republic	35
Tunisia	38
Slovenia	39
Lithuania	40
Montenegro	52
Kazakhstan	54
Macedonia, FYR	55
Russian Federation	60
Armenia	62
Albania	64
Hungary	66
Morocco	67
Tajikistan	68
Estonia	72
Bosnia and Herzegovina	80
Belarus	82
Poland	87
Bulgaria	90
Moldova	91
Croatia	94
Azerbaijan	95
Romania	97
Jordan	104
Georgia	109
Serbia	113
Uzbekistan	117
Turkey	120
Mongolia	124
Egypt, Arab Rep.	137
Kyrgyz Republic	150
Ukraine	156

Table D

Enforcing Contracts	
Country ranking from Doing Business 2011 - World Bank Group	
Country	Rank
Luxembourg	1
Korea	2
Island	3
Russian Federation	13
Belarus	14
Lithuania	15
Latvia	17
Hungary	19
Azerbaijan	25
Moldova	26
Kazakhstan	27
Estonia	29
Mongolia	33
Georgia	41
Tajikistan	42
Uzbekistan	43
Ukraine	44
Croatia	48
Kyrgyz Republic	48
Turkey	51
Romania	56
Slovenia	58
Macedonia, FYR	60
Poland	68
Slovak Republic	71
Tunisia	76
Czech Republic	78
Albania	85
Bulgaria	87
Morocco	89
Armenia	91
Serbia	104
Bosnia and Herzegovina	125
Jordan	130
Montenegro	133
Egypt, Arab Rep.	147
Kosovo	157

Published by the World
Bank Group

Table E

Effective Regulatory Enforcement		
Country ranking from		
The World Justice Project - Rule of Law Index 2011		
RANK	COUNTRY	VALUE
1	Sweden	0.90
2	Norway	0.86
3	New Zealand	0.82
10	Estonia	0.75
21	Jordan	0.63
22	Poland	0.59
31	Kazakhstan	0.54
36	Turkey	0.52
37	Croatia	0.52
38	Romania	0.52
45	Bulgaria	0.50
47	Morocco	0.49
48	Kyrgyzstan	0.47
49	Russia	0.47
51	Albania	0.46
64	Ukraine	0.30

Out of the total 66 countries

Published by: The World Justice Project.

Annex 6. Activities of other IFIs in legal reform field and coordination with the Legal Transition Programme

A number of IFIs and the EU are engaged in law reform activities in transition countries. Below is a brief description of the main current programmes, focusing on investment-related legislation. It relates primarily to the World Bank/IFC, the Asian Development Bank, the EU and the UN agencies. The EIB, the OECD and the IMF are not directly engaged in technical cooperation in the commercial law sector.

6.1 World Bank and IFC

The Investment Climate Department (CIC) – a joint World Bank (WB) Group (IFC, WB, MIGA) department – has recently launched a new insolvency technical assistance programme aimed at supporting the implementation of insolvency reforms and improvement of the insolvency systems in the WB Group’s client countries. The programme will focus on:

- modernisation of insolvency legislation
- implementing licensing, discipline, monitoring and regulatory schemes for insolvency administrators
- drafting principles and guidelines for out-of-court workouts and developing toolkits to assist debtors and creditors to implement such guidelines, to, *inter alia*, mitigate the expected increased burden on insolvency regimes during the current crisis and beyond.

As part of this initiative, CIC has established an Insolvency Technical Assistance Advisory Panel. The Advisory Panel will enhance cooperation with and draw on experiences of other multilateral institutions, NGOs, judges, academics, economists and practitioners working on insolvency-related matters. The LTP is a member of the Advisory Panel and commented extensively on a number of the CIC products (for example, IFC toolkit – *Secured Transactions Systems and Collateral Registers*, 2010).

The WB is financing projects on *Business Reform and Institutional Strengthening* in Albania (2006-11) and FYR Macedonia (2005-10) which aim to assist these countries to improve the quality of business regulation. Projects on *Legal and Judicial Support* are being implemented in Azerbaijan (2006-11), FYR Macedonia (2006-11), Romania (2005-11) and Russia (2007-12) to enhance ministerial and judicial capacity and infrastructure. Similarly, *Regulatory Impact Analysis* (2006-10) is being carried out in Serbia to improve legal institutions for a market economy. There are projects on *Real Property Registration and Cadastre* in Croatia and FYR Macedonia (to be completed in December 2009), the Kyrgyz Republic (2008-212), Montenegro (2008-14), Serbia (2004-10), Russia (2005-10) Tajikistan (2005-12) and Turkey (2008-13) aiming to improve land registration and integrated cadastre systems. In Moldova, there are ongoing projects on *Financial Sector Project Reform* (2009-11) and *Competitiveness Enhancement* (to be completed in December 2009).

The IFC is assisting Azerbaijan, Belarus, Bosnia and Herzegovina, the Kyrgyz Republic, Tajikistan and Ukraine in projects on *Business Enabling Environment* which are focused on various aspects of investment, including legal environment and regulations.

The IFC is working in partnership with the LTP on the Corporate Governance for Banks in South Eastern Europe project. Moreover, the LTP is a member of a working group on corporate governance standards, led by the IFC.

6.1.1 Asian Development Bank

The Asian Development Bank (ADB) is assisting Armenia, Azerbaijan and Georgia to adopt the international financial reporting standards for a regional project on *Enhancing Financial Disclosure Standards*.

The ADB is also cooperating with the UK government on the *Implementation Support for Private Sector Development Strategy Project* in Tajikistan to improve the investment climate by policy advice, capacity building, business development and investment promotion. In addition to these, a project on *Retraining of Legal Profession in a Market Economy in Mongolia* was approved in 2002.

6.1.2 *European Union*

The EU is supporting Member States through its Technical Assistance and Information Exchange Instrument (TAIEX) which provides centrally managed, short-term technical assistance in the field of approximation, application and enforcement of EU legislation. The EU and the OECD have started a joined initiative called Support for Improvement in Governance and Management (Sigma), principally financed by the EU. Sigma is supporting the Ministry of Finance in Croatia to apply the international standards on financial control and external audit systems, and also to provide assistance to enhance the public procurement system. In Bosnia and Herzegovina, FYR Macedonia and Serbia, there are ongoing projects of Sigma on public procurement to be completed in December 2009.

The EU is also carrying out Twinning Projects that involve the secondment of EU experts to the acceding, candidate and potential countries in order to implement specific areas of the *acquis*. There is an ongoing twinning project with the Austrian Ministry of Justice and this aims to support the reform of the Croatian judiciary by the establishment of an efficient case management system and computerisation of courts. In addition, a twinning project in Serbia (including Kosovo) provides training for legal officers working in ministries in EU law related issues. The project provides advice on setting a Regulatory Impact Assessment, training of lawyers of line ministries in drafting legislation and approximation techniques, and preparing a collation of all EU legislation.

Furthermore, EuropeAid has been implementing external aid programmes in Mongolia, Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan. One of the major components of EuropeAid assistance is administrative, legal and regulatory reforms linked mainly in trade and investment policies.

6.1.3 *UNCITRAL*

In 2000, UNCITRAL undertook the preparation of a Legislative Guide on Security Rights over Movable Property. The LTP made a significant contribution to this Guide, working closely with UNCITRAL between 2000 and 2003 at the conceptual stage when the structure and core messages of this document were being developed.

The LTP actively participated in the drafting of the Legislative Guide on Insolvency and on the Cross-Border Convention and has been following up on this work through the working group.

Furthermore, the LTP has been closely involved in the UNCITRAL's work on harmonisation of public procurement guidelines.

6.1.4 UNIDROIT

Over the years the LTP's cooperation with UNIDROIT has focused on the Cape Town Treaty. However, recently this cooperation has also expanded to work on the legislation for pre-harvest financing. The EBRD participated in the development of the Cape Town Treaty and has been promoting its ratification in a number of the Bank's countries of operations.

6.1.5 Means of the LTP's coordination with IFIs and other international organisations

LTP typically aims to optimise coordination with other aid providers by the following means:

- participation in aid-provider committees in the countries of operations, or other local forums aiming to coordinate international aid
- developing personal contacts between LTP specialists and counterparts in other aid-providing organisations
- formally asking beneficiaries (for example, governments) to confirm that the EBRD's aid is not duplicating other assistance they are receiving.

Annex 7. Looking ahead – the Legal Transition Programme’s challenges in the SEMED region

Following the so-called “Arab Spring” of 2011 the EBRD is due to expand its operation to several countries of the southern and eastern Mediterranean (SEMED) region.⁴⁹ The LTP has built an expertise that can contribute and add value to the Bank’s future projects along an expanded operational mandate. The current core areas and activity fields can serve as a starting point for intervention, although country-specific assessments will largely dictate practice and policy areas of concentration. The ability to accurately assess conditions cannot be overstated, as expanding the Bank’s mandate will be complicated by socio-economic structures that are not yet solidified, and where the understanding and adherence to rule of law and transparency issues are not yet strong. Other complicating factors are the probability that resources within these states may be minimal, that the executives may hinder development and that corruption may be a culturally embedded and acceptable practice in doing business (which is by no means unique to this region). The initial legal assessments in these new countries of operations will be critically important. The LTP has developed expertise in varying methods of such assessment, at times successfully utilising hybrid methodological approaches that can make it especially well suited to weighing nuanced issues in vastly distinctive socio-economical or political environments.

7.1 The “dual function” issue

The LTP provides *narrow* and *wide support* functions to the Bank’s operational units in the form of ad hoc advice and country legal assessments, as well as undertaking more traditional *law reform* activities. It is expected that the first contact in the region will be transaction-driven and LTP may be tasked with the provision of advice (narrow support function) on particular initial transactions in the new

⁴⁹ At the time of writing this report the SMED region countries where EBRD was to operate included: Egypt (subject to Board approval), Morocco, Tunisia and Jordan.

region. However, it would be preferable if the LTP had at least undertaken a legal assessment of the target jurisdiction (wider support function). This point gives rise to an issue of sequencing.

7.2 The “sequencing” issue: LTP as the “tip of the spear”

The general view is that markets should be liberalised before financial markets. Similar considerations arise when considering the work of the LTP. Clearly, it would be preferable for the LTP to be among the Bank’s “pioneers” in its move south, ensuring that legal assessments in targeted jurisdictions occur before the first transaction. Such action falls naturally under the LTP’s wider support function. The advantages seem obvious. First, even a cursory review of the region may indicate some jurisdictions are more difficult than others. A hierarchy of target countries will quickly emerge; this will assist discussion of potential transactions and enable better targeting. To be sure, there is little point (to quote one of our interviewees) in entering into a jurisdiction that is a “socio-political mess”.

7.3 The “law reform” issue

Following the completion of an overview (short form) legal assessment of the region with a view to quickly identifying and ranking jurisdictions, the LTP will be faced with designing law reform projects to quickly address most pressing gaps and shortcomings of the existing laws. For example, it is likely that real property rights are problematic in some jurisdictions in this region.⁵⁰ It is known that real property law reform is a massive task. Clearly defined property rights – real or personal – enable access to credit and thereby assist in domestic capital formation promoting economic growth.

In South Pacific jurisdictions facing the difficult task of shifting customary land into a Torrens-style land title system, the law reform decision has been to accelerate the development of secured transactions law and sequence that reform before real property law reform. By analogy, the LTP has clear expertise in personal property law reform suggesting that personal property law reform via secured transactions legislation may present as a stand-alone law reform project in this new sphere of operation.

⁵⁰ Hernando de Soto in *The Mystery of Capital*, 2003.

7.4 Law reform strategy

The LTP may consider adopting the following strategy in moving into the SEMED region:

- i) conduct a comprehensive assessment of the commercial legal system across its core legal areas
- ii) use the legal assessment to develop a strategy for maximising impact in the country concerned. This should result in an organised, sequenced approach, incorporated in the context of the overall Bank country and sector strategies
- iii) individual legal and institutional reform projects should follow a more structured approach themselves. Specifically, in the event that law reform opportunities present themselves, some consideration might be given to develop a standard form methodology or project sequence comprising – all things being equal – which includes the following elements:
 - o formal request for assistance
 - o clear terms of reference (ToR) incorporating provision of a dedicated draftsman at the client country end for the life of the project and a “best efforts” commitment to obtaining a cabinet (or similar) mandate
 - o formal cabinet/executive mandate
 - o onshore steering committee comprising stakeholders
 - o consultation
 - o diagnostic analysis followed by consultation
 - o Green Paper followed by consultation
 - o extensive public consultation
 - o White Paper followed by extensive public consultation
 - o draft Bill circulated
 - o bi-partisan support solicited
 - o draft Bill settled by relevant governmental agency (for example, AG’s office) paying especial attention to consequential amendments

- first, second and third readings or similar
- Bill enacted
- any minor amending legislation passed.
- Such an approach would provide the greatest opportunity for impact in the context of limited resources.

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