

Special Study

Legal Transition Programme Review

November 2012

Evaluation Department
(EvD)



Preface

The subject of this Special Study is the Legal Transition Programme from 2001-10. This Special Study was prepared by Tomasz Bartos, Senior Evaluation Manager, within the Evaluation department (EvD) of the European Bank for Reconstruction and Development (EBRD), with assistance from sector consultants Professor Douglas Arner, Professor Charles Booth, Professor Gordon Walker and Michael Panton, who carried out the data collection, analysed the results and prepared background reports. This report represents a shared effort by the consultants and EvD staff.

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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)
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

Executive summary

Legal and regulatory reform is a cornerstone of the EBRD's transition mandate as its countries of operations often fall short of internationally accepted standards of best practice. Since 1995 the Legal Transition Programme (the "LTP") has been the primary vehicle through which the Bank helps build transparent and predictable legal environments to support healthy markets and improve the investment climate.

This report provides the findings and recommendations from an independent evaluation of the implementation of the LTP from 2001 to 2010 (the "evaluation period"). The LTP's activity fields comprise: legal assessments, standard setting, outreach activities and legal reform (the "activity fields"). In all activity fields, the LTP currently focuses on eight core legal areas: concessions/public-private partnerships (PPPs), corporate governance, infrastructure regulatory reform and competition, judicial capacity building, secured transactions, insolvency, public procurement and securities markets (the "core legal areas").

During the evaluation period, the LTP initiated 87 legal reform projects funded under the Bank's Technical Cooperation Funds Programme for a total value of €26 million, benefiting 25 countries of operations. Most of these projects have been completed or are at an advanced stage of implementation. In addition, the LTP has completed a number of internally funded legal transition-related advisory projects to a value of €1.35 million.

This evaluation concludes that the LTP made an important, although quite narrowly focused contribution to legal reforms in the Bank's countries of operations, as well as to the Bank's operational objectives. Overall, the LTP's performance is evaluated as **Successful**. Through promoting legal reforms, the LTP directly supports the Bank's operational objectives of assisting its countries of operations in the transition to open market economies and the establishment of entrepreneurial opportunities within a multiparty democratic system.

The relevance of LTP's work is rated **High**. The LTP's core areas represent key legal transition areas in which both the LTP and the EBRD have accumulated extensive experience. These core areas reflect the Bank's priorities in terms of improvement needed to the legal environment to enable its operations.

The LTP's overall effectiveness is rated **Good**, mainly on account of strong evidence that the LTP's advice has been largely followed; many laws and regulations that the LTP helped to draft were approved and are utilised, while a substantial number of legal practitioners in the Bank's countries of operations benefited from the LTP's training, although its effectiveness has not always been possible to verify. Some institution building projects were of lower effectiveness and this is an area where the LTP should focus more in the future.

The LTP's overall efficiency is rated **Good**. It varies across the eight core legal areas and depends largely on the LTP's success in attracting and keeping high-calibre specialists in any given core area. It also reflects the LTP's management's strategy to allocate more resources to certain core areas, while keeping the LTP's involvement in other areas to a minimum.

Overall *transition impact and sustainability* stemming from the LTP's activities are rated **Excellent**. The LTP is, by definition, at the core of transition and it has achieved significant of transition impact by providing technical assistance for the development of legal structures, via projects, which support free market economies and promote legal reform. The LTP's work has been shown to greatly influence domestic policy formation, impacting frameworks for markets that promote function and efficiency. Skills transfer has also made an important impact, particularly through the LTP's outreach activities and dedicated training programmes.

Although this review evaluated the LTP against key criteria and focus areas, the "soft power" impact of the LTP on EBRD operations should not be overlooked. Local stakeholders highly appreciate the work of the LTP; it is seen as a formidable "calling card" for the EBRD and is clearly project enabling. If the work of the LTP was initially seen as at the "fringe" of the Bank's activities, it is now perceived as "mainstream" with a strong presence in several countries. Table 1 below provides a summary of the performance ratings in specific activity fields.

Table 1: Performance ratings for LTP activity fields and the legal reform core areas

Legal reform projects overall	★★★☆
• Concessions/PPP	★★★☆
• Corporate governance	★★★☆
• Infrastructure regulatory reform	
- in respect of telecommunications regulation	★★★★
- in respect of other infrastructure	★★☆☆
• Secured transactions	★★★★
• Insolvency	★★★☆
• Judicial capacity building	★★★☆
• Public procurement ¹	★★★☆
• Securities markets	★★☆☆
Legal assessments	★★★★
Standard setting	★★★☆
Outreach activities	★★★☆
LTP's overall assessment	★★★☆

Overall rating scale:

- ★★★★ Highly successful
- ★★★☆ Successful
- ★★☆☆ Partly successful
- ★☆☆☆ Unsuccessful

The rating above is at one level only marginally higher than that attained during the mid-term review conducted in 2000. However, this likely does not fully capture the consolidation and mainstreaming of the LTP at the EBRD or its substantially enlarged reputation among partners in the countries of operations

¹ LTP core area only since late 2009, which provided limited basis for full evaluation (further described in Section 4.7).

and international organisations. The rating should also be seen in the context of very uneven allocation of resources among different core legal areas by the LTP's management, which purposefully promotes certain priority areas, while limiting the LTP's involvement in other areas. The four core areas that were rated "Highly successful" or "Successful" accounted for 78 per cent of the LTP's budget and 83 per cent of its experts' time allocation, while four other areas rated "Partly successful" accounted for less than a quarter of the LTP's commitments and only 17 per cent of its experts' total time. Nevertheless, important challenges remain and warrant careful review and consideration going forward. The section below presents this evaluation's main general findings and recommendations.

Findings

- The need for "law on the books"² reform assistance varies widely across the Bank's countries of operations. However, the functioning of legal systems and institutions in practice is still universally substandard in all of the Bank's countries of operations (see Annex 5). Institution building has been an important part of almost all of the LTP's projects so far. To further strengthen the impact of its interventions, the LTP should now put even more emphasis on training legal practitioners and establishing institutions and administrative competency (see the Recommendations section).
- Most of the LTP's projects have defined operational and funding life spans, whereas the process of legal reform is usually long and highly susceptible to changes in the priorities, personnel and political configuration of the recipient country. In addition, there is often a lack of clarity and measurability in project-level benchmarks.
- The LTP's core legal areas are also key operational areas for the EBRD. In turn, LTP activity fields respond to the technical needs of the Bank and its countries of operations. In dividing the needs of transition countries across several focus areas, the LTP has identified gaps within the larger legal structures. Such gap analysis has enabled the LTP to address systemic issues within legal frameworks.
- A well-functioning, investor-friendly and free market-oriented legal structure is at the core of transition. Therefore the LTP's projects usually have a high degree of transition potential, however their actual impact varies, depending mainly on the determination of the LTP's local partners. The strongest impacts were achieved in those core legal areas where the LTP had well-developed in-house expertise and in the countries where its staff was able to focus their efforts for an extended period (for example, a PPP expert based in Moscow). Due to the LTP's relatively limited resources, such impact has been fairly "localised" and narrowly focused on a limited number of countries (except for secured transactions and telecommunications regulation, which achieved a strong impact across most countries of operations).
- While there has been increased compatibility and cohesiveness between the Bank operational departments and the LTP, a recurring internal view is that the LTP should more proactively promote its work to the Banking department, while liaising more closely with staff from other support units, keeping them informed about its operational priorities. The improvement of an "internal outreach" should be directed particularly towards EBRD staff based at the regional offices.

² Enacted legislation.

- The LTP has built an adequate repository of information and experience that can contribute and add value to the Bank's future projects in the southern and eastern Mediterranean (SEMED) region. The current core legal areas and activity fields can serve as a useful starting point, although country-specific assessments will largely dictate practice and policy areas of concentration. The difficulty to accurately assess local conditions in a new and totally different region cannot be overstated, as expanding the Bank's mandate will be complicated by fluid socio-economic structures where understanding and adherence to rule of law and transparency issues are generally weak. Thorough and detailed legal assessments remain critically important (see Annex 7).
- The LTP's three-year action plans lack clear objectives, milestones and timetables.
- In its legal reform projects the LTP has paid due attention to simplicity and transparency of proposed legal structures. These efforts should continue to avoid over-regulation, which may delay transition.
- In cases of some of the LTP's activities, there is simply not enough hard evidence to properly assess their success and/or their impact.
- There are clear limitations to the impact of the LTP's work as endogenous conditions may and sometimes do hinder LTP reform efforts. For instance, while an LTP mortgage training manual was heavily utilised by the local banks in Moldova, the growth of mortgage lending has been hindered by the global financial crisis and low salaries.

Recommendations

- The Bank/Office of the General Counsel (OGC) should undertake a strategic review of the LTP's priorities, core areas, resource allocations and the modes of engagement with the rest of the Bank as well as external players (for example, IFIs), with a view to re-orienting its focus in some areas (for example, securities markets to take account of the LC2 initiative,³ telecommunications regulations to take account of development and convergence in the information and communication technology (ICT) market), while increasing activities in others (for example, energy law and regulation, corporate governance, public-private partnerships (PPPs)). Historically the LTP has achieved the greatest success in areas to which considerable resources (funds and staff) have been dedicated over the longer term. To strengthen and expand the impact of its projects the LTP will require a gradual increase in its resources. For example, adding a Concessions/PPP expert could result in the LTP making a stronger impact beyond Russia. Similarly, a dedicated energy regulation or/and transport regulation specialist(s) would be required to build the LTP's reputation in these fields. Corporate governance is another important area where the LTP has been successful, however benefiting only a few countries due to resource constraints.
- Over the last 10 years, the LTP has dedicated substantial resources to conducting legal assessments and developing legal standards. These were highly successful undertakings and prerequisite to further actions. The LTP should continue updating its assessments and fine-tuning the set standards.

³ See the last recommendation.

- The LTP should sharpen its focus on projects that directly support legal reform processes, particularly with institutional capacity building and better designed training for judges, registrars, PPP or procurement officials. Such training should always incorporate specific targets for expected outcomes/accomplishments and specific measures to verify impact. This has not always been the case (for example, early phases of judicial capacity building) and has been a significant impediment to gauging the relevance and impact of this important work. The LTP has recognised the importance of such measures with its more recent projects.
- While the ultimate success of legal reform projects depends to an extent on external factors, the LTP should set more precise and measurable objectives in its three-year action plans (or in its annual plans, if introduced). This would improve monitoring and provide the potential for the implementation of these plans to be effectively evaluated.
- The LTP should integrate a “project results” column to its “LTP legal reform projects” list (see Annex 8). This would briefly summarise the concrete results of each project, for example listing the main outcomes and impacts, giving the date when the law was enacted, commenting on whether it is utilised, or why it was not approved, results of competency tests following training, and so on.
- The LTP should better structure (by organising it in a more systematic way, for example) its collaboration with other organisations, setting specific objectives and plans for such a collaboration in its three-year action plans.
- More focus on company law and secured transactions is needed as these areas greatly facilitate the Bank’s engagement and are at the core of transition.
- Increased efforts are needed in developing local capital markets. In this respect the LTP might usefully intensify its work on capital market development, possibly within the framework of the Bank’s Local Capital Markets and Local Currency Initiative.

1 The Legal Transition Programme: background to 2012 evaluation

1.1 The EBRD's Legal Transition Programme: evolution and scope of activities

This report provides the findings and recommendations from an independent evaluation of the implementation of the Legal Transition Programme (the “LTP”) during 2001-10 (the “evaluation period”).

Since its inception in 1991, the Bank, through its Office of the General Counsel (OGC), has considered legal reform as a primary cornerstone of its transition mandate. The relationship between legal reform and economic growth is supported by a large body of external empirical evidence.⁴ The EBRD promotes legal reform because a number of its countries of operations do not comply with internationally accepted standards of best practice.⁵ Thus, the Bank pursues activities that enhance the rule of law, the growth of a domestic legal culture⁶ and promotes policies conducive to improving the investment climate in its countries of operations.

The Legal Transition Programme, administered by the Legal Transition and Knowledge team (the “LTT”), established in 1995, is the primary vehicle through which the Bank implements these objectives. Evolving from an unfunded and *ad hoc* technical assistance resource to a more formalised programme undertaken by a dedicated team, the LTP has solidified its role within the EBRD. Using Bank funds and donor grants, the LTP is guided in its operations by three-year action plans (summarised in Annex 2), the current one running from 2010-12.

During the evaluation period the LTP initiated 87 legal reform projects funded under the Bank’s Technical Cooperation Funds Programme for a total of €26 million, benefiting 25 countries of operations (see the list of LTP’s projects in Annex 8). Most of these projects have been completed or are at an advanced stage of implementation. The LTP has also completed a number of internally funded advisory projects, to a value of €1.35 million. During that time, the LTP’s activity fields remained the same, that is, legal assessments, standard setting, legal reform and outreach (the “activity fields”). However the core legal areas on which the LTP focused its work were periodically adjusted (see Annex 2, describing the LTP’s evolution over 2004-10). Currently, in all activity fields, the LTP focuses on eight core legal areas: concessions/public-private partnerships (PPPs), corporate governance, infrastructure regulatory reform and competition, judicial capacity building, secured transactions, insolvency, public procurement and securities markets (the “core legal areas”).

⁴ Robert Barro, “Economic Growth in a Cross Section of Countries”, *Quarterly Journal of Economics* 106: 408-40 (1991).

⁵ LTP, Action Plan: 2010-12 (13 November 2009, Annex 1) 25.

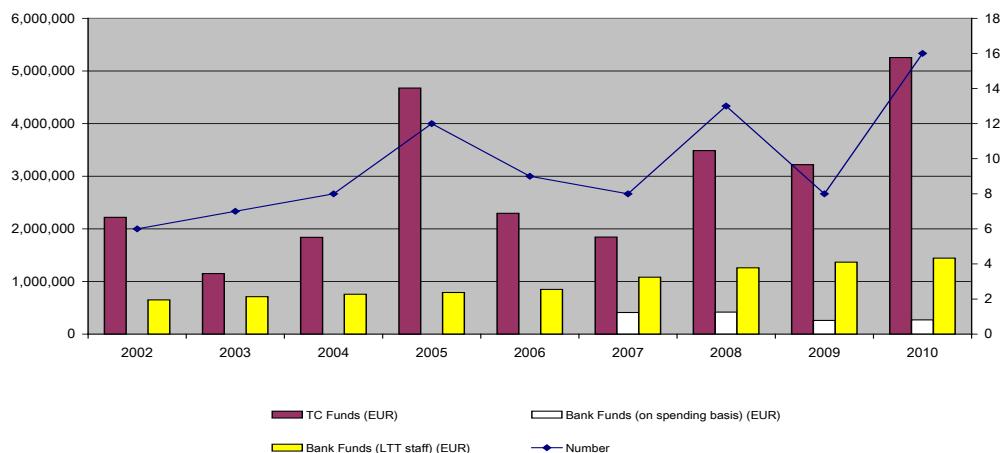
⁶ For an analysis of the implications of a rule of law doctrine in emerging economies, see, Frank Emmert, “Rule of Law in Central and Eastern Europe”, 32 *Fordham International Law Journal* 551 (2009).

The LTT is one of the 11 operational units within OGC.⁷ It has a headcount of 11 (sometimes strengthened by additional temporary appointments) and a separate budget within OGC. In 2010, the EBRD created the Financial Law Unit within the LTT to identify and address legal impediments to investments in specific areas such as capital markets, corporate governance, insolvency and secured transactions. The formal LTT reporting line runs vertically to one of three Deputy General Counsels and then to the General Counsel.

While there is a strong informal relationship with some other units within OGC, the LTP's key formal input to the department's work occurs through its contribution to the Framework of Local Laws in Operation (FOLLIO) – a database used by OGC to determine the legal risk of the Bank's operations. Based on the information contained in FOLLIO, OGC lawyers working on the Bank's financing projects prepare legal risk assessments that are part of each project's overall assessment during the OpsCom approval stage. In the past, the LTP has sometimes been regarded as "stand alone" and "not well integrated" into the work of OGC. The current view is that the LTP's work is more closely related to operational challenges.

The LTP's projects are funded from two sources: (i) technical cooperation funds, (donor grants) and (ii) the internal budget of OGC. The former source has usually financed larger legal reform projects, while the latter smaller legal assessments and outreach projects, as well as the LTT's staff and operating costs.

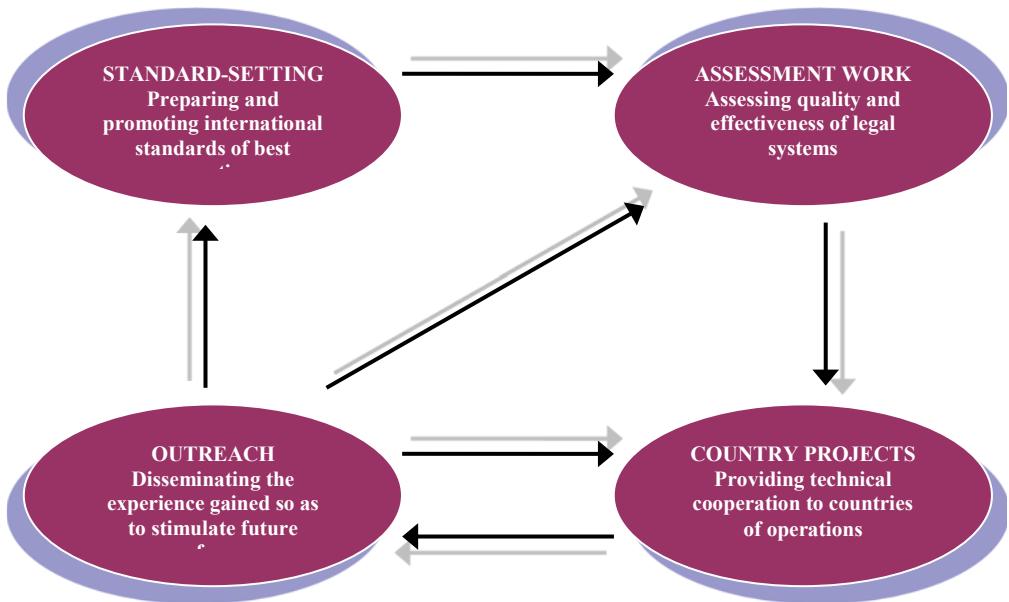
Figure 1: Summary of LTP funding 2002-10



An "integrated approach" to legal reform is central to the LTP's operating strategy. It comprises four activity fields and is applied across LTP's eight core legal areas. Their interrelationships are illustrated in Figure 2.

⁷ OGC operational chart as of June 2011.

Figure 2: LTP toolkit – the “virtuous circle of legal reform



The LTP's activities have been (and still are) governed by the following five operating principles:

- (i) The LTP projects should be directly related to the Bank's ongoing or potential investments.
- (ii) The LTP projects should be consistent with the Board-approved country and sector strategies.
- (iii) The LTP projects should have the support of the relevant country authorities and the Bank's country and/or sector teams. As a matter of practice, the LTP obtains from the relevant government a formal request for assistance before undertaking a country-specific project.
- (iv) The work of the LTP should be “additional”. The LTP may only take on projects in areas where the team has demonstrated legal expertise and where other law reform facilitators are not providing adequate assistance.
- (v) The LTP needs to seek the approval of the Technical Cooperation Committee for donor-funded projects.

1.2 2001 LTP's mid-term review

In 2001, the Bank's Evaluation department (EvD) conducted a comprehensive evaluation of the LTP's activities from its inception to end-2000. During that period, the LTP started, and largely completed, 74 legal reform projects funded under the Bank's Technical Cooperation Funds Programme (the “TCFP”), for a total of approximately €11 million. Additionally, there were numerous internally funded legal transition-related projects. The mid-term review (MTR) covered the LTP's four activity fields and spanned six core legal areas. Its rating of the LTP's performance was as follows:

Table 2: Rating of the Legal Transition Programme from the mid-term review in 2001

LTP as a whole	★★★★★
Legal reform projects overall	★★★★★
Including core legal areas:	
<i>Bankruptcy</i>	★★★★★
<i>Concessions</i>	★★★★★
<i>Financial markets</i>	★★★★★
<i>Corporate governance</i>	★★★★★
<i>Secured transactions</i>	★★★★★
<i>Telecommunications regulations</i>	★★★★★
OTHER LTP ATIVITY FIELDS:	
<i>Legal assessments</i>	between ★★★★★ and ★★★★★
<i>Standard setting</i>	★★★★★ (with secured transactions as ★★★★★)
<i>Outreach activities</i>	★★★★★

Source: Special Study: Legal Transition Programme, October 2001, EBRD Evaluation department.

Overall rating scale:

- ★★★★★ Highly successful
- ★★★★★ Successful
- ★★★★★ Partly successful
- ★★★★★ Unsuccessful

The most important lessons from the 2001 MTR included:

- The LTP lacks a formal and definitive document stating its overall policy, objectives and strategic approach. Such a strategy would also help the LTP to obtain a more permanent operational mandate, budget and staffing resources.
- The advantages of a more strategically orientated versus activity-orientated approach should be compared. A reduction in the variety of core legal areas and the strengthening of the LTP's in-house expertise was recommended.
- More rigorous channels of cooperation should be established throughout the Bank to increase the efficacy of the LTP. Further, self-evaluation should be factored into the LTP's procedure to build institutional memory.
- The short-term funding arrangements for the retention of LTP staff created an inherent instability that detracted from the LTP's effectiveness. Counsels should be retained with a view to longevity while promoting professional development.
- Background, pre-implementation work needs to be improved. Issues cited were:
 - lack of a systemic planning approach
 - rudimentary background research
 - legal drafting that was too broad
 - unrealistic timeframe allocation.

The MTR recommended the following:

- adopting a more systematic planning approach

- avoiding commitment to technical legal assistance without sufficient research into the broader legal context and the legal culture in the recipient countries
- increasing the LTP's focus by reducing the variety of legal core areas and enriching the LTT's in-house expertise to prevent dilution of the LTP's impacts
- placing less reliance on the demands of the recipient countries and donors and instead being more realistic when formulating objectives and implementation schedules, particularly about what is feasible and what the budget allows
- ensuring a greater emphasis on implementation
- establishing a working group with various department stakeholders, with the purpose of furthering LTP's integration within the Bank, and maximising synergy and the leveraging of operations between all parties
- ensuring further efforts towards continuing self-evaluation and independent reviews.

Following this review, the Bank and LTP implemented most of the MTR's recommendations, including:

- The LTP was restructured and provided with a permanent staff budget, which gradually increased from €0.6 million in 2002 to €1.4 million in 2010. This enabled the LTP to recruit experienced legal experts dedicated to different core areas (in some cases backed up by junior experts).
- The LTP introduced three-year action plans (summarised in Annex 2), which constituted a more systematic, strategic approach to its activities. The LTP's action plans are presented to and approved by OGC and the Bank's ExCom. The first plan covered 2004-07, the second 2007-09 and the most recent one 2010-12.
- The LTP intensified legal assessments, which gave it a better insight into the broader legal context. Over time, the LTP (which has retained about half its staff since the MTR) has also gained a very good understanding of the legal culture in the recipient countries.
- The LTP has been placing less importance on the demands of the recipient countries and donors and has instead been more realistic when formulating objectives and implementation schedules. The average project implementation timeframe grew from one year to over two years, while the average project budget doubled from €150,000 before 2001 to €300,000 in the evaluation period

However, the LTP increased, rather than decreased the number of core legal areas (from six to eight) and did not implement the MTR's two other recommendations (a working group and self-evaluation). The LTP commented that the increase of the core legal areas took place at the request of the Banking department (as the Procurement and PPPs/Concessions areas were added), while the establishment of a working group comprising stakeholders from various departments of the Bank proved difficult due to conflicting schedules and priorities. Instead, informal one-to-one contacts of LTP staff with the Bankers have been intensified. The LTP has also increased internal outreach through a dedicated web site and vigorous promotion of its activities in *Blueprint* (the EBRD's weekly internal publication).

The recommendation to step up self-evaluation was challenged by universally acknowledged difficulties with measuring the impact of legal reforms and the lack of an appropriate template or self-evaluation format. Nevertheless, the LTP made an attempt to self-evaluate the impact of selected projects, for example, Moldovan mortgage law, as well as several projects as part of its 2010-12 action plan (see Annex 2). One of the annexes to this action plan contains a grouping of the LTP's completed projects into

those with significant, medium, moderate and minimal impacts. Brief descriptions of the impacts, issues, and shortcomings of these projects have also been provided. Moreover, as part of this evaluation, the LTP completed a self-evaluation questionnaire prepared by the Evaluation team (see Annex 13).

1.3 Evaluation methodology, criteria and scope

There is no universally agreed quantitative model that measures the direct impact of legal reform on economic or social development. The absence of dedicated methodological tools that can produce relevant and reliable data constitutes a limitation on the ability to fully capture the LTP's direct impact on legal maturation within the selected countries of operations. However, the Logical Framework Approach (LFA) has been found to be particularly conducive to assessing complex, highly nuanced situations in the social sciences that are not subject to conclusive answers. This methodology was adopted in the 2001 MTR and its elements have also been utilised in this review. In addition, various external sources that 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") have been consulted (see Annex 5).

To assess the LTP's field performance, five sample countries from different regions and at different stages of transition were selected: Armenia, Hungary, Mongolia, Russia and Serbia (the "sample countries"). The Evaluation team conducted interviews with the LTP's project beneficiaries and stakeholders in the sample countries, as well as EBRD staff in London. In its research, the Evaluation team was looking primarily for "hard evidence" of the LTP's impact on codified domestic law, which has been utilised and is working well in practice.

The OECD Development Assistance Committee's (DAC) evaluation criteria of relevance, effectiveness, efficiency, impact and sustainability were adopted to assess the LTP's performance in the sample countries.

The 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 and evaluated at the activity field level. Only in the case of the most important activity field – the legal and institutional reform – each core legal area is rated separately. To limit the volume of this report, substantial amounts of evidence in support of the rating have been presented in the annexes (including sample country-specific performance in the legal reform area in Annex 4). Lastly, an important element of the evaluation approach was a self-evaluation questionnaire, which the LTP completed before the Evaluation team's fieldwork (see Annex 13). Annex 1 provides more details on the evaluation methodology.

2 Performance evaluation one: legal assessments

The objective of the LTP's legal assessment work is knowledge building on existing legal frameworks in the Bank's countries of operations to:

(i) make EBRD banking projects more efficient. The LTP's legal assessments form the basis of the legal annex to the EBRD's country strategies and measure (via FOLLIO) legal risk in the EBRD's banking operations. The latter tool is used in OpsCom briefings, when banking projects are presented for approval. The assessments also help the LTP identify priorities for legal reform projects.

(ii) provide a basis for policy choices by a particular country. Dissemination of legal assessment information encourages local debate about the need for reform within particular countries and also allows governments themselves to tap directly into this wealth of information. EBRD assessments are widely publicised via the EBRD web site and publications, as well as during specialist conferences.

During the evaluation period the LTP completed 23 legal assessments (listed in Annex 9). Legal experts (members of the Evaluation team) confirmed the generally very high standard of all legal assessment research undertaken by the LTP. Equally, the internal and external utility of the legal assessments have been confirmed by the EBRD's OpsCom members, as well as legal practitioners interviewed in the countries of operations. Some minor issues were identified in respect of the priority setting and targeting of these assessments but the reality of unforeseen, exogenous events must also be acknowledged. The LTP's performance in legal assessments in each of the eight core legal areas can be summarised as follows:

2.1 Concessions/PPP

The LTP conducts legal assessments of concession laws and examines the variety of policy options available, utilising as benchmarks international standards such as the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, EU concession *acquis* and other measures.⁸

In this regard, the LTP draws on extensive experience in central and eastern Europe and the Commonwealth of Independent States (CIS) in determining the effectiveness of evolving legal structures within transition economies. The LTP seeks to examine how PPP laws function in actual practice, rather than merely examining their theoretical underpinnings. It gathers information from a variety of sources, but an assessment questionnaire (the Legal Indicator Survey (LIS)) is the main analytical tool used to determine its implementation in actual practice. This assessment methodology has proven to be cost-effective and provide valuable data. Characteristics/outputs included:

- Concession law assessments were carried out in 2004-05 and 2007-08 and focused on the quality of the legislative framework.
- A Legal Indicator Survey of concessions took place in 2006, while an update of the concession laws assessment is currently under way.
- Of the five sample countries, Russia and Serbia made important progress in improving their concession laws (see Section 1 in Annex 4). These were the countries where, following the assessments, the LTP concentrated its legal reform activities.⁹
- During the last 20 years the EBRD has financed 17 PPPs in 10 countries in the water/wastewater sector and 16 PPPs in eight countries in the transport sector (see Annex 10). This relatively modest outcome of the Bank's effort to promote PPP indicates fundamental difficulties (primarily political) in encouraging this type of infrastructure financing but may also point to underlying deficiencies of the PPP legal framework.¹⁰

⁸ UNIDO Guidelines for Infrastructure Development through BOTs (1996), EBRD Core Principles for Modern Concession Law (2005), OECD Basic Elements of a Law on Concession Agreements (2000).

⁹ See Yulia Zvorykina, "PPP in the transport sector: a Russian view", *Law in Transition* 52 (2007).

¹⁰ The EBRD's Transport Strategy (draft), 2012.

2.2 Corporate governance

The LTP has effectively monitored and evaluated the fundamental aspects of corporate governance in the Bank's countries of operations through the following:

- comprehensive corporate governance assessments carried out in 2003, 2004 and 2007
- a Legal Indicator Survey, focusing on related party transactions, carried out in 2005
- the work described above fed into new legal reform projects in Armenia, Kazakhstan and Serbia
- the LTP's corporate governance assessments have frequently been used by the EBRD when evaluating the corporate governance of potential investee companies. This is important as, for example, in 2011 over 15 per cent (€1.3 billion) of the Bank's financing was through equity investments
- an assessment of the corporate governance of banks began in late 2010 and is currently ongoing. Its outcomes will be of importance to set the Bank's, as well as the LTP's direction for further work with the banks in the countries of operations, which is a priority for the Bank in the post-crisis environment.

2.3 Infrastructure regulatory reform and competition

Activities in this core area have concentrated on telecommunications and energy – sectors of high priority for the Bank and its clients. In this context, the LTP has measured regulatory and legal risk, primarily through the following actions:

- A 2009 telecommunications assessment examined the legal and regulatory infrastructure of the communication sectors. The resulting findings have provided direction for ongoing and future telecommunications law reform and the Bank's financing of projects.
- The 2010 energy sector assessment, which represented the LTP's most exhaustive, in-depth energy sector evaluation to date. It addressed the strengths and weaknesses of national frameworks, which regulate the energy industry. Economic, legal and structural impediments were examined, as most often they prevent competition (barriers to entry, for example). The impact of this fairly recent review has not yet been fully realised, however there is clear evidence that its findings have significant implications for the LTP's choice of legal reform projects aimed at improving the regulatory environment in this sector (for example, in Tajikistan).
- The LTP broke down its analysis to the sub-regional level, which allowed a consideration of the differing degrees of economic development within its countries of operations. Such hybrid methodology allowed consideration of the individual and unique characteristics and challenges that each region may bring.

2.4 Secured transactions

Secured transactions have been the LTP's core work area since its inception and remains the one in which LTP has accumulated impressive experience and a track record of successful projects (see Section 4.4). The LTP has established a well-documented record of legal assessments within the secured transactions arena:

- It was one of the first core areas subjected to formal evaluation by the LTP. The regional survey of secured transactions was conducted in 2000. This was followed by the survey of charges' enforcement in 2003, the survey of charges' registration systems in 2004 and the regional survey of mortgages in 2007. These surveys produced significant information and data that proved instrumental for the development of subsequent law reform projects (see Section 4.4), as well as being useful for assessing the Bank's lending risk.
- The assessments of secured transactions stand as an internal model within the LTP for developing long-term assessment strategies.
- The LTP developed diagnostic tools that have enabled it to accurately gauge the effectiveness of secured transactions laws. The credibility gained by the LTP in this area through its long involvement in assessing the viability of secured transactions has established the LTP as a leader in this type of analysis. It has also given the LTP an influential position from which to advise within the Bank's countries of operations.

2.5 Insolvency

The legal assessment of insolvency laws takes on increased importance during times of economic instability and/or market contractions, where increased pools of non-performing loans and subsequent liquidations/restructurings have the potential to increase dramatically.

The structure of insolvency laws typically impact lender behaviour in that it can influence creditor decisions and thus reduce the capital and liquidity pools that are available. Issues such as commencement criteria, the effect of the stay or moratorium on enforcement, collection actions and the filing of claims are but a few of the most pressing concerns. The following characteristics of the LTP work in this area have been identified:

- The LTP's expertise in insolvency law in general is not as extensive as it is, for instance, in secured transaction law. This is partly because the LTP has had difficulty in retaining a full-time staff member with sufficient expertise to manage such projects.¹¹
- Nevertheless, the LTP has been conducting assessments of insolvency laws with the first sector assessment taking place in 2003, with subsequent assessments completed in 2006 and 2009, and another one currently under way.
- Each assessment has grown in terms of depth and sophistication. In addition, in 2004 the LTP undertook the assessment of insolvency legal indicators to evaluate the basic effectiveness of the existing insolvency laws and provided the first indication as to the perceived functionality of new laws that had been enacted in some of the Bank's countries of operations.

¹¹ In January 2012 the LTP reported that it had recruited an insolvency expert who will start in April.

- The 2009 assessment subsequently explored factors that impact more foundational areas, such as the roles of insolvency administrators and trustees. The assessment highlighted the importance of the relationship between creditors and insolvency administrators, as these practitioners have a direct influence on how the services (insolvency procedures) are delivered. Such a relationship is crucial in preserving creditors' rights. The 2009 assessment further stressed the need for increased competency and training to build a more professional supporting body.
- The global financial crisis presented an opportunity for the LTP to focus on a critical analysis of the impact of the insolvency legal framework on the insolvency process. It is during crises that the inadequacies of an outdated regime become apparent. The LTP responded to this opportunity by concentrating on the Western Balkans and developing several projects, such as capacity building for the Serbian Bankruptcy Agency (see Section 5 in Annex 4).

2.6 Judicial capacity building

While the formal assessment of judicial capacity is a new endeavour, the LTP has already established itself as one of the key players in this field in some of the Bank's countries of operations. Because of the inherent link between economic growth and judicial capacity, the LTP has renewed its focus on analysing the factors that impact judicial capacity. During this evaluation legal experts noted the originality and utility of the assessment methodology developed by the LTP.

- The LTP's only assessment of judicial decisions was completed in 2010.¹² The LTP utilised an innovative methodological approach that evaluated judicial decisions across seven dimensions of judicial capacity¹³ in seven CIS countries. The objectives were two-fold: to reveal the practices within commercial courts in terms of efficiency and quality of decisions; and to gather data for reform projects. This assessment analysed practices within diverse socio-economic regions at varying stages of economic maturity.
- The assessment brought some unexpected results, demonstrating that in some countries (for example, the Kyrgyz Republic or Russia) speed of justice was less of a problem than was generally perceived. In another dimension – impartiality of court's decisions – the assessment showed that in only 60 per cent of cases where the state was a litigant, the state won. However this impartiality became more questionable in strategic sectors such as oil and gas, where the state entities won in nearly all cases (this is in line with research conducted by other organisations – see Table B in Annex 5).
- The LTP has recently completed deeper and more extensive judicial capacity assessments for Mongolia and Tajikistan that focused on a more precise identification of gaps in judicial capacity, providing the basis for new training programmes, which are now under way.

2.7 Public procurement

Public procurement was the last major core legal area, added to the LTP only in 2009. This area was deemed a priority as the Bank expanded its operations, increasingly financing public infrastructure projects and encountering issues related to lacking or inadequate procurement laws. The LTP's

¹² See Alan Colman, "The EBRD Judicial Decisions Assessment", *Law in Transition* 155 (2011).

¹³ These seven dimensions included: predictability of court decisions, quality of decisions, adequate legislative framework, speed of justice, cost of litigation, enforcement of judgement, impartiality.

assessment activities within a public procurement environment have been undertaken in cooperation with UNCITRAL and focus on the effectiveness of law in practice.

- The first formal procurement assessment was conducted in 2010-11 and utilised an innovative methodology that considered the degree to which a law fulfilled its stated purpose or its “legal efficiency”.
- This assessment focused on remedies, rather than compensation. While there are instances where compensation is a recommended approach when remedies are not practical, LTP’s assessment approach seeks to examine ways of facilitating the procurement process, rather than slowing or halting that process.
- The LTP’s public procurement assessments were very comprehensive in both scope and depth. They display methodological and analytical robustness and ultimately provide the basis for future initiatives (see Section 4.7).

2.8 Securities markets

The LTP’s assessments of the securities markets utilise methodologies that weigh the effectiveness of legal frameworks in advancing growth and stability within the capital markets. The assessments benchmark the existing legal structures against international best practices.

- The LTP’s conducted security markets assessments in 2004-5 and 2007, referencing the supervisory principles of the International Organization of Securities Commission (IOSCO).
- These assessments identified gaps that impede capital market growth, providing the analytical foundations for future legal reform initiatives. They also enabled the LTP to initiate constructive policy dialogue in several countries (see Section 4.8).
- As for internal use of LTP’s assessment of securities markets, the EBRD Finance team admitted that they have been of limited use for them. They were of the opinion that the IOSCO principles may have been too sophisticated for many of the EBRD’s countries of operations, where capital development is only in its infancy.
- These assessments have been of more use to external stakeholders. However, there is little evidence of follow-up projects. The LTP observed that in practical terms, bringing a country’s security markets closer to the benchmarks set by IOSCO principles could divert resources that might be better used in tackling more basic issues, such as money markets.

2.9 Overall evaluation: legal assessments

The LTP’s performance in legal assessments across all its core legal areas is rated, overall, as ***Highly successful***.¹⁴ This rating reflects the LTP’s role in developing or promoting innovative and sophisticated assessment methodologies that factored in the socio-economic intricacies of transition countries. This rating also recognises the high practical utility of these assessments for: (i) the Bank, to evaluate the legal risks of its operations, (ii) the Bank’s countries of operations, to identify the strengths and weaknesses of their legal framework and decide on reforms, and (iii) the LTP, to identify priorities for their legal reform projects. Moreover, the LTP’s expertise in assessing the legal frameworks of transition countries makes it

¹⁴ Overall performance rating scale: Highly successful, Successful, Partly successful, Unsuccessful.

especially well suited to apply it at an early stage of the Bank's operations in the SEMED region (see Annex 7).

The LTP's legal assessments determined the effectiveness of the existing legal and regulatory frameworks and identified barriers that impede growth and transition in the Bank's countries of operations – a prerequisite for determining the degree and type of intervention needed within a given jurisdiction. Therefore the *relevance* of LTP's work in this area is rated **High**.¹⁵ The rating applies to both internal relevance (for evaluation of the legal risk the Bank takes in its operations) and external (for the Bank's countries of operations, helping identify their legal reform needs).

Operational *effectiveness* within this activity field is rated **Excellent**,¹⁶ due to the high quality and comprehensiveness of outputs and, in most cases, wide applicability of the LTP's legal assessments. Their methodology evolved over the years. Lessons from early assessments have been applied in follow-up assessments, which resulted in the use of methodologies that are fine-tuned specifically to transition economies.

Efficiency of legal assessments is rated **Good**. The LTP displayed originality and innovation in selecting research methods to assess specific characteristics in countries, which present unique and nuanced challenges. The LTP has allocated substantial resources (estimated at 15 per cent of its internal budget) over the last 10 years to conduct legal assessments. The allocation of the LTP's staff to legal assessments varied by core area; in new areas (for example, procurement) it accounted for nearly 100 per cent of the dedicated expert's time, falling to an estimated 10 per cent in more mature areas (for example, secured transactions). The expertise of other organisations (for example, UNCITRAL, IOSCO) has been utilised. Moreover, LTP's legal assessments contributed to establishing the degree of legal risk to which the Bank's proposed banking projects would be exposed.

Transition impact and sustainability within this activity field is rated **Excellent**. The LTP's assessments were critical for legal policy development, creating a "road map" of strategic initiatives and future reform agendas. This was particularly strong in the early transition countries (ETCs) where no similar assessments have been conducted (for example, Armenia, the Kyrgyz Republic). However, even in more advanced transition countries (for example, Hungary and Russia), the assessments that targeted narrow, specific legal areas (for example, secured transactions or concession law) played an important role in setting the directions for legal reforms.

3 Performance evaluation two: standard setting

The second level of the LTP's integrated approach, standard setting, focuses on developing appropriate guidance for legal and institutional reform, as well as criteria for assessment. This is closely in line with the Bank's core objective under its transition mandate, to assist its countries of operations in establishing practice standards that are in harmony with international norms and practices. In the fast-growing economies within the Bank's countries of operations, globalisation itself dictates that prudent norms be internationally consistent. It is widely recognised that adhering to international best practice policies backed by a predictable legal framework is conducive to attracting investment and boosting confidence in the legal capabilities of a given state. The most relevant aspect of the Bank's contribution within the standard setting is its cooperative work with other leading international institutions, which have a long-standing track record in establishing such standards (see Annex 6).

¹⁵ Relevance rating scale: High, Medium, Low.

¹⁶ Effectiveness, efficiency and impact and sustainability rating scale: Excellent, Good, Satisfactory, Unsatisfactory.

Appropriately designed and disseminated standards have the potential to greatly leverage the work of the LTP in legal and institutional reform in the region, far beyond individual projects. However, while the LTP's activities in legal assessment have taken on a structured form, applied across focus areas, because of their individual nature, standard setting is much more context specific. Therefore the LTP's performance in this activity field is best evaluated in respect of each core legal area, as shown below.

3.1 Concessions/PPP

The LTP has worked extensively with UNCITRAL and UNECE when developing concessions and PPP legal standards. The United Nations views the partnership between government and the private sector as essential to increasing a state's capacity to deliver services and goods. In conjunction with these entities, the EBRD has sought to identify gaps in the existing guidance literature and then to establish and promote internationally recognised best practices and viable concession principles. In particular:

- the LTP participated in the UNCITRAL Working Group and Expert Panel on Model Legislative Provisions on Privately Financed Infrastructure Projects (2001-02)
- the LTP's expert takes part in the UNECE PPP Alliance activities (from 2003 ongoing), and is a member of the UNECE PPP team of specialists (from 2007 ongoing)
- the LTP contributed to the preparation of UNECE's standard training modules for officials working on concessions and PPPs (2009 and 2011)
- internally, the LTP has worked on standard-setting activities in close coordination with the EBRD Banking department; in particular with the Transport and MEI teams.

3.2 Corporate governance

Standard setting within corporate governance seeks to establish best practice policies that reflect the increasing need for transparency and accountability. Establishing (and adhering to) such standards lends credibility to a state and encourages capital inflows that support growing economies. In creating a balanced "playing field", harmonisation can be advanced, preventing (as was seen during the financial crisis) regulatory arbitrage, where some states promote more lax and under-regulated environments in the hope of attracting additional foreign investments.¹⁷

- Working with OECD and IFC, the LTP developed the policy briefs for Eurasian and south-eastern European financial institutions. These briefs contained recommendations on actions to improve corporate governance of banks in these two regions.
- The LTP has worked closely with the Russian Federal Commission on the Securities Market (RFCSM), producing a corporate governance code that standardises practices and operating procedures.
- Working in cooperation with the Institute of Corporate Law and Governance (ICLG), the LTP developed a standard methodology for rating the corporate governance of Russian companies. The rating system provides investors with a guide as to which Russian companies pursue best

¹⁷ Herbert V. Morais, "The Quest for International Standards: Global Governance vs. Sovereignty", 50 Kansas Law Review 779 (2002).

international practice, while it also gives an incentive to the Russian companies to apply good governance standards in order to increase their attractiveness to potential investors.

- The LTP's ongoing work in Armenia and Mongolia (see Section 2 in Annex 4) further illustrates its regional commitment to identifying and analysing key challenges impacting the implementation of higher corporate governance standards.
- The LTP is a founder and core member of the Development Financial Institutions Working Group on Corporate Governance, which sets the framework and standards for assessing corporate governance of investee companies by the IFIs.

3.3 Infrastructure regulatory reform and competition

The LTP's standard setting within the telecommunications and energy sectors is largely affected by directives and benchmarks established by the European Union and other international bodies, thus the LTP was not required to be as active as it would normally be in the absence of such directives. EU countries have an abundance of reference models to utilise for standard setting and harmonisation, while many non-EU countries have also adopted EU standards, particularly in the telecommunications sector.

- In respect of the energy sector, the LTP has supported international standards, such as the EU Directive on Energy Performance of Buildings.
- The LTP developed core principles for both the telecommunications and energy sectors.
- In the telecommunications sector in the Bank's non-EU countries of operations, the LTP has assisted in promoting transparent practices, including principles developed by the World Trade Organization (WTO) that have been influential in unifying practices and operational protocols.
- The LTP's standard-setting initiatives in telecommunications and energy are limited but it has been advocating regulatory uniformity, particularly in the ETC countries such as the Kyrgyz Republic and Mongolia.

3.4 Secured transactions

International guidelines for secured transactions encourage the uniformity and predictability that investors seek. There is evidence, notably from Asia, that capital inflows increase markedly when there are assurances that practices regarding secured transactions within a given state conform to international best practice.

The LTP has contributed significant scholarship within this sector.¹⁸ It has worked extensively in assisting the creation of standards, establishing a vast knowledge base that addresses the nuances and challenges of transition economies. A number of key documents have been developed, including:

- The EBRD Model Law on Secured Transactions
- The Core Principles for Secured Transactions
- The Guiding Principles for the Development of a Charges Registry
- The Core Principles for a Mortgage Law.

¹⁸ See generally, Frédérique Dahan, John Simpson, eds., *Secured Transactions Reform and Access to Credit* (Edward Elgar, 2009).

These documents contributed to defining best practice protocols.

3.5 Insolvency

Standard setting regarding an insolvency framework has been critical to establishing the predictability of the legal process and court rulings in the case of a debtor's bankruptcy, while protecting creditor rights and maximising a debtor's assets in the insolvency process. Imposing insolvency standards is a difficult process for transition economies, in that many of the laws pertaining to the protection of creditor rights have only recently been enacted (for example, in the area of secured transactions), with legal frameworks still being shaped by changing socio-political and economic factors. Additional factors include the varying practice traditions in each state and the differing legal infrastructures currently in place. It is, however, the adherence to international best practices that ultimately attracts foreign direct investment.

In the transition countries, standards applicable to insolvency law are primarily promulgated through international entities such as the *UNCITRAL Legislative Guide on Insolvency Law* and the *World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*. The LTP contributed to the promotion of these standards in the Bank's countries of operations as follows:

- The LTP has consistently integrated UNCITRAL and the World Bank insolvency standards into the LTP's advisory work, offering a unified voice from key international institutions.
- The LTP assisted the Commonwealth of Independent States (CIS) Inter-Parliamentary Assembly (IPA) with the development of a draft CIS model bank bankruptcy and liquidation legislation based on best international standards.
- Recently, the Russian government requested the assistance of the LTP to strengthen the insolvency administration profession by preparing standards of practice and conduct on key operational issues.
- An excellent example of standard setting in this area is the LTP's *Principles for Insolvency Office Holders*, discussed in more detail in Box 1 below.

Box 1: *Principles for Insolvency Office Holders*

While the LTP has worked extensively with international entities and promoted the reference documents listed above, it has also taken a leading role in establishing standards for insolvency practitioners. In 2006-07, the Bank developed the *Principles for Insolvency Office Holders*, which reflect the increasing importance that administrators have over the insolvency process. The principles were pioneering in that they address the qualifications, conduct and regulation of administrative office holders and liquidators as they work throughout the insolvency proceedings and thus rectified a significant deficiency within the insolvency process. The principles have been well received by the international financial community and have been used as a foundation reference in the countries in which the Bank operates (for example, Russia and Serbia), in addition to being utilised by several IFIs.

3.6 Judicial capacity building

Standard setting in the judicial capacity arena directly impacts a state's business climate and the potential for growth by providing a legal structure and practitioners that can be expected to perform at a level deemed acceptable by the international community. Attainment of and adherence to a certain standard of professional conduct helps to attract the foreign capital needed for growth and modernisation. It provides a backstop to help ensure the effectiveness of legal regimes that rely on the need for judicial assistance to protect legal rights, for example in the areas of secured transactions and insolvency. The LTP's standard-setting work within judicial capacity has taken a trajectory similar to that of legal assessment, that is:

- In 2010 the LTP developed the *Core Principles for Effective Judicial Capacity*. These principles reflect international standards in defining the activities of the judiciary and other actors. They are also intended to guide the LTP's work within judicial capacity building in other activity fields.
- The LTP's *Core Principles for Commercial Law Judicial Training in Transition Countries* are intended to function as a similar guide for LTP policy initiatives. These principles have been developed against the background of the individual legal systems of the region and reflect practical challenges faced by the transition countries.

As the principles were only developed in late 2010, their utility and impact are yet to be seen. However it is clear that the LTP has taken steps towards framing internationally accepted standards for benchmarking the performance of those involved in the judiciary chain by defining its own judicial capacity standard-setting mandates. Having established core principles, the LTP has gained extensive experience in, and knowledge of, judicial capacity building and is correctly positioning itself to advance international standards within this sector.

3.7 Public procurement

Standard setting within the public procurement sector is primarily represented by several international legal instruments. The revised 2010 *UNCITRAL Public Procurement Model Law* and the 2007 *WTO Government Procurement Agreement* are examples of international instruments that have made a significant impact on advancing uniformity and benchmarking. While the LTP refers to these best practice instruments, it has also individually contributed to the international standard-setting efforts in this arena. For instance:

- In 2010 the LTP devised the *EBRD Core Procurement Principles*. In seeking to harmonise recent scholarship, the core principles reflect the Bank's dual position as a financier and often a technical adviser. They promote efficient and transparent legal frameworks that meet international expectations, in addition to focusing on corruption prevention and institutional and enforcement capabilities.
- The LTP cooperated closely with UNCITRAL to shape procurement policy in selected transition countries.

Given the early stage of the LTP's activities in this area, a meaningful assessment is difficult. Based on the achievements so far, it can be expected that the LTP's activities in this area will continue, with a specific focus on monitoring and audit, planning and eProcurement.

3.8 Securities markets

The LTP's work on standard setting in securities markets concentrated on the preparation of several model laws in collaboration with the CIS Inter-Parliamentary Assembly. The key result from this work was:

- the adoption by the CIS IPA of an EBRD-sponsored model law in the area of investor protection and securities markets
- the LTP's work on securities markets standards in other countries has drawn almost exclusively from the work of IOSCO
- the LTP does not currently engage in standard-setting work in this area as it is now covered by other organisations.

It is worth highlighting that important standard-setting work in this area was completed by the LTP prior to the evaluation period. For instance, the Model Securities Law (MSL), completed in 2001, was adopted in Armenia and Ukraine. A similar project concerned the Investor Protection Model Law and was adopted by several countries.

3.9 Overall evaluation: standard setting

The LTP's *overall* performance in standard setting across its core legal areas is rated ***Successful***. Setting legal and regulatory standards has been one of the strategic objectives for international organisations as it contributes to global stability and uniformity by providing for the creation and adoption of globally recognised best practices. Standard setting directly addresses the goal of removing uncertainty in the marketplace by eliminating the arbitrary application of weak or inefficient laws; all factors that hinder both domestic and international capital flows. For this reason, the *relevance* of LTP's work in this area is rated ***High***.

The ongoing objective of standard setting is not simply the establishment of international "soft law", but the adoption of those standards into codified domestic "hard law" whenever feasible or appropriate. Additionally, standard setting has been an effective way for the Bank to establish itself as a leading proponent for effective legal change, providing strong support for prevailing guidelines from other international organisations such as the World Bank or IOSCO. Reflecting this view, *effectiveness* in this area is rated ***Good***.

In terms of operational efficiency, the LTP has cooperated closely on standard setting with other international organisations such as the World Bank and IOSCO, while concentrating its own standard-setting efforts on highly specialised fields and the most capable partners such as CIS IPA. Such coordinated efforts and the support among international entities (regardless of where a document may originate from) speaks to the larger goal of creating a more unified legal structure. The LTP's *efficiency* in this area is rated ***Good***.

Transition impact and sustainability within this area is rated ***Excellent*** as, by adopting and utilising a number of legal standards developed or promoted by the LTP, the Bank's countries of operations have advanced their integration into the global economy.

4 Performance evaluation three: legal and institutional reform

Legal and institutional reform typifies the general mandate of the EBRD in its countries of operations. It is a core activity and a foundational part of what the LTP does – an essential aspect of transition from a centrally planned to a free market economy. Legal reform projects are undertaken based largely on the political will and commitment of the respective country's government and stakeholders to conduct reforms in pursuit of advancing their domestic economies. In many ways, the effectiveness of the LTP's ability to initiate successful legal and institutional reform is dependent on the successful implementation of projects in other activity fields (mainly legal assessment and standard setting). This synergistic approach can be further enhanced by intensifying the LTP's outreach activities.

Legal and institutional reform transcends the promulgation of “black-letter law”, and by necessity, calls upon a development process involving societal commitment and an ownership of a rule of law doctrine to then advance to actual application, rather than merely a façade to satisfy the international community. For transition economies, both the adoption of legislation supporting legal and institutional reform and their implementation are critically important.

Thus, the Bank, primarily through the LTP, expends considerable resources in advising within this area,¹⁹ as it is a key element in building a sound investment climate. The performance of the LTP in supporting legal and institutional reform across each focus area is considered below, while its sample countries specific performance in each core legal area is presented in Annex 4).

4.1. Concessions/PPPs

The promotion of private sector participation in the delivery of public services is at the heart of the Bank's transition mandate in the infrastructure sector (please see a detailed assessment of the relevance of all core legal areas in Annex 3). Therefore the LTP's work on concessions/PPP legal reform is very closely correlated with that of the Bank itself and usually follows the Bank's “leads” for potential projects. This is because the interest of key decision makers (often at the local level) and the political will to explore concessions or PPPs is a prerequisite for the LTP to start working in this area.

Moreover, the prospect of a concrete project materialising due to the enactment or the adoption of a new concessions/PPP law fuels interest and provides an incentive for local politicians to cooperate with the LTP. The LTP's assistance in this area has included:

- providing draft laws
- advising on supporting regulations
- assisting in formulating policy
- providing institutional advice
- drafting concession template documents
- designing training modules
- producing heads of terms for concession and non-concession PPP agreements.

The LTP concessions/PPP specialist has been based in Moscow since 2009 and therefore the LTP's recent impact in this area has been mainly in Russia. It included amendments to the Russian Concession

¹⁹ See Figure 1 in Section 1.

Law, formulation of local concessions/PPP laws and input to the PPP strategy for toll road development. The LTP has also worked extensively on re-drafting the Hungarian concession law in support of the bank's toll road projects. However the new law has not been enacted (see section 1 in Annex 4).

4.1.1. Concessions/PPPs: overall evaluation

The LTP has fully recognised the importance of the concessions/PPP legislation for both the countries of operations and the Bank itself, and moved decisively, particularly in Russia, filling the legal expertise gap in this relatively new area. The LTP's efforts in supporting legal reforms in respect of concessions/PPP legislation are *rated overall* as **Successful**. This rating takes into account the important role played by the LTP, mainly in Russia, promoting amendments to the concession law and leading the development of the regional PPP law for Perm, which now serves as a model for other Russian regions.

The *effectiveness* of the LTP's interventions in this area is rated as **Satisfactory**. Although laws have been drafted and had an important demonstration effect, they are yet to be enacted (for example, Perm, Hungary) and tested in practice. This is largely beyond the LTP's control, nevertheless it defines the practical effects of the LTP's work. Moreover, the Bank's relatively modest success with promoting PPPs to date (see Annex 10) might also indicate a limited effectiveness of the LTP's efforts in this area.

The LTP's *efficiency* is rated **Good**. This rating combines the LTP's excellent efficiency in Russia and satisfactory-to-good efficiency elsewhere. As LTP has one concessions/PPP expert on its staff, it decided to concentrate primarily on one country (Russia), rather than spread such a valuable resource thinly among many countries. This strategy enabled LTP to work very efficiently with the Russian counterparts; however it left limited capacity to intervene elsewhere, particularly outside the CIS.²⁰ However, this decision is seen as the right choice as Russia offered (and still does) a good combination of the need for legal assistance in this area and the prospects of potential PPP projects, which might be pursued by the Bank (close cooperation of the LTP's concessions/PPP expert with the Bank's MEI and the Transport teams has been noted).

Nevertheless, the EBRD's recent Transport Strategy (still in draft form) states that "*Improvements need to be made to the legal framework and tender process in many countries if they are to apply the PPP concept successfully*",²¹ indicating that other countries could also benefit from the LTP's assistance in respect of developing/reforming their concessions/PPP laws. This view is reinforced by the LTP's own assessment of concessions/PPP laws in the Bank's countries of operations, which demonstrated that even the "advanced transition" countries such as Croatia, Hungary and Poland suffer from defective laws, regulations and practices in respect of concessions/PPPs.²² Therefore, as the promotion of PPPs across its region of operations is of strategic importance for the EBRD, the LTP should consider strengthening its resources in this area (see Recommendations below).

The *impact and sustainability* of the LTP's interventions in the concessions/PPP area is rated **Good**, primarily on account of the demonstration effect of the regional law drafted for Perm on other Russian regions. Also the LTP's efforts in respect of the toll road PPP regulations in Hungary had a regional impact, providing a blueprint for legal solutions in other countries in Central Europe (for example, Poland, the Slovak Republic). Lastly, due to the ability of its expert to develop close working relations with the

²⁰ In addition to Hungary and Russia, dedicated LTP legal reform projects in concessions/PPP were recently conducted in Kazakhstan, Romania and Ukraine. Earlier, also the Baltic states, Serbia and Slovenia benefited from the LTP's advice in respect of their concession/PPP laws.

²¹ Transport Strategy (Draft) March 2012.

²² "Concessions laws in transition countries – the EBRD's assessment", *Law in Transition*, 2007.

State Duma Committee on PPP, the LTP raised awareness among influential decision makers in Russia of the benefits PPPs can bring. This should yield tangible benefits in the longer term. Going forward, to increase the impact and sustainability of its interventions, the LTP should move beyond enacted legislation as a benchmark of success to a focus on implementation as the key to ensuring practical and long-term impact.

4.1.2. Concessions/PPPs: findings

- Work on concessions/PPP legal reform requires a focused, hands-on approach. The best results are achieved when the legal expert is based in the target region/country and can work on a daily basis with the decision makers.
- Bi-partisan “buy in” at the political level at the beginning of the reform process is critical in mitigating political risks (Hungary).
- Concessions/PPP law reform at the federal level in large countries with diverse regions (for example, Russia) is particularly complex. To achieve a sustainable demonstration effect, the focus should be on regional solutions through regional projects.
- Due to current resource limitation, LTP involvement in concessions/PPP law reform in smaller countries (for example, Armenia) is best structured alongside the Bank’s efforts to develop concrete projects.
- There are often no legal solutions to “PPP bottlenecks” as many of the Bank’s countries of operations have adequate concessions/PPP laws. However their governments’ capacity to implement PPP projects remains limited. Addressing this issue is more in the realm of the EBRD’s Banking teams (MEI and Transport) in respect to prospective projects (through, for instance, The Vienna Institute), rather than LTP.

4.1.3. Concessions/PPPs: recommendations

- Work on concessions/PPP is particularly resource intensive and best done from a regional base. The LTP should consider adding a PPP legal specialist who could focus on at least one more region, which is of strategic importance for the development of PPP projects by the Bank (for example, Central Asia, Western Balkans).
- Russia: prioritise involvement with specific projects at the regional level based on the counterpart’s commitment, and leverage the Perm PPP project to provide a “best practice” model for similar projects. Consider providing more substantial EBRD/LTP TC assistance for the preparation of the most promising PPP projects. Include building public awareness and education in such assistance. At the federal level, future involvement should focus on input to the Experts’ Council and educational efforts.
- Armenia: utilise the Russian experience with regional projects to focus on project-driven legal input. For example, in the proposed Yerevan water and/or Metro project, seek an early stage involvement with the local champion and stakeholder to assume a leadership role in the relevant Working Group or Steering Committee, with a view to obtaining bi-partisan support and buy in from the local population.

4.2 Corporate governance

Three projects and one theme stand out as the key achievements of the LTP in the corporate governance core legal area in the sample countries:

- The Russia Corporate Governance Project, implemented from 2002 onwards, where the LTP assisted the RFCSM in preparing a voluntary corporate governance code for listed companies. Compliance with the code is now achieved via a “comply or explain” rule. This code has played a significant role in shaping the corporate governance landscape in Russia.
- A similar project in Armenia (jointly undertaken with the International Financial Corporation (IFC)).
- A project on company law reform in Serbia.

The key internal benefit of the LTP’s work in this area is the application of corporate governance principles when the EBRD reviews potential investments. Under this process, corporate governance counsel from the LTP reviews the structure and practices of the Bank’s potential investee companies to ensure that they are consistent with basic requirements and to assess how they can be improved via contractual covenants. This contributes to the achievement of both internal and external efficiencies.

The EBRD’s Banking department values the LTP’s work on corporate governance highly, particularly in respect of banks.²³ Because the EBRD takes a minority stake in investee companies, their corporate governance, especially in respect of minority shareholders, is of critical importance to the Bank.²⁴ The LTP developed corporate governance checklists, which the Bank have found very useful. However some bankers noted that the “reality on the ground” was sometimes different and it was not always possible to apply one template to all investee companies. More interaction between bankers working with the investee companies and the LTP could provide better feedback on practical issues (including loopholes) and to better ground the LTP in local practices. This in turn should enable the LTP to prepare country/sector-specific checklists (see Section 2 of Annex 4).

4.2.1 Corporate governance: overall evaluation

The LTP’s performance in promoting good corporate governance is rated *overall* as **Successful**. The main achievement supporting this rating has been the development of the corporate governance code in Russia, which has had important and lasting implications on business practices. Moreover, the LTP also contributed to elevating corporate governance standards in other countries (for example, Armenia and Mongolia).

The *effectiveness* of LTP’s interventions in this area is rated **Excellent**. All completed corporate governance projects achieved their objectives, as the governance codes were enacted and are widely used in practice. Moreover, the LTP’s work on corporate governance also directly benefited the Bank as it remains one of the top investors in the region.

The *efficiency* of LTP’s intervention is rated **Satisfactory**. During the evaluation period the LTP (with only a single corporate governance expert at its disposal) concentrated on developing legal reform projects in

²³ See, for example, *Corporate Governance of Banks in Eurasia – a Policy Brief* (EBRD, 2008).

²⁴ Equity investments account for 15 per cent of the EBRD’s business volume (2011) or €1.3 billion.

only four countries.²⁵ Nevertheless, these were priority countries for the Bank in terms of corporate governance and the most willing to cooperate with the Bank on these issues. High resource concentration paid dividends as all projects attained a high success rate. Nevertheless, as the improvement of corporate governance remains a cornerstone of the transition impact in many of the Bank's operations, the LTP's resource review (see Recommendations) should analyse the needs in this core area particularly closely, with a view to intensifying and expanding the coverage of the LTP's corporate governance-related activities.

Transition impact and sustainability within this area are rated **Excellent**. Promotion of high standards of corporate governance is one of the six key elements of the Bank's transition agenda.²⁶ Transcending any one sector, establishing sound corporate governance practices is an essential element for transition 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 follows the rule of law.²⁷

The LTP's projects in this area had a strong, tangible impact on corporate governance practices in Armenia, Russia and Serbia. Corporate governance codes prepared with the LTP's assistance are still used and are expected to be so for the foreseeable future. There is no evidence of the LTP's corporate governance projects having a wider (regional) demonstration effect. As the LTP's own assessment demonstrates, nearly all transition countries suffer from highly deficient corporate governance legislation.²⁸ Therefore, the LTP should step up its efforts to build on its successes in Russia to develop similar projects in other CIS countries, as well as capitalising on important achievements in Armenia to improve corporate governance in other Caucasus countries.

4.2.2 *Corporate governance: findings here*

- One of the reasons that corporate governance projects have a high success rate is that they do not require legislation *per se*, therefore avoiding the typical difficulty of drafting and passing reform legislation.
- Key stakeholders (stock exchanges and governments) can be expected to support corporate governance projects as international standard-setting bodies and competitive pressures drive the case for reform.
- Thus, corporate governance proved to be a very good target for the LTP with a high success rate and strong transition impact. This suggests that the LLT should increase its efforts to identify more corporate governance projects in other countries (and these, as indicated by the LTP's legal assessment of this area, are plentiful).
- Corporate governance projects are also highly beneficial for the Bank, as it remains one of the top investors in the region. In this respect, the LTP's "virtuous circle" provides a useful paradigm to be considered by the LTP when selecting target areas.

²⁵ In addition to the three sample countries mentioned above, the LTP also implemented a dedicated corporate governance project in the Kyrgyz Republic.

²⁶ The remaining five being: enhanced competition, market expansion, framework for markets, skills transfer and demonstration effect.

²⁷ See generally, The Bank for International Settlements, Basel Committee on Banking Supervision, CONSULTATIVE DOCUMENT, PRINCIPLES FOR ENHANCING CORPORATE GOVERNANCE, 15 June 2010, 4-7, available at <http://www.bis.org/publ/bcbs168.pdf>.

²⁸ "Assessing the Effectiveness of Corporate Governance Legislation", Law in Transition, 2006.

4.2.3 Corporate governance: recommendations

- Through its work in Russia, Armenia and Mongolia, the LTP has built a good reputation in respect of corporate governance projects and it should seize the opportunity to build on this success and expand to other countries.
- At the same time, the LTP should consider expanding beyond the corporate governance of listed companies to address overall company law and corporate governance issues, especially for small and medium-sized enterprises. The transition impact in this respect is likely to be much greater, and more directly related to Bank investments. In this context, working closely with the Bank's equity teams is recommended.
- There is now a set of well-known international benchmarks suggesting that further work on Code drafting may be a task better left to other agencies.
- There is still strong demand for corporate governance education in respect of banks and enterprises, particularly state-owned. The LTP should consider developing such targeted training, keeping in mind close coordination with other international organisations which are also targeting this area in selected countries.
- The development of corporate governance-assessment tools for EBRD investments is a particularly significant development for EBRD operations. There is much scope for further promulgation (and perhaps even commercialisation) of this tool.

4.3 Infrastructure regulatory reform and competition

Infrastructure regulatory development is an important driver of economic growth. Establishing an adequate regulatory framework is a challenge for transition countries as they try to ensure fair competition and transparency to attract investors. At the same time, a significant part of this challenge is a fundamental internal debate, still unresolved in some countries, as to what the priorities in this sector should be and where the balance between the national interest and the need for investments may best be struck. The LTP has been active in facilitating legal and regulatory reforms primarily in the telecommunications sector, starting from the early days of LTP's existence. It stands out among the LTP's activities as the core legal area with the largest number of country-beneficiaries.²⁹ In its work in this sector, the LTP has sought primarily to create a legal structure that removes barriers to access and provides for the elimination of anti-competitive behaviour so that healthy, efficient competition can thrive. In effect, the Bank's efforts in relation to supporting transition in the telecommunications sector have been actually led, by and large, by the LTP. From 2007 onwards, the LTP decided to expand its activities in this area into infrastructure sectors beyond telecommunications and currently the Infrastructure Regulation and Competition core area consists of: telecommunications, energy (electricity and gas), energy efficiency, natural resources and general competition.

The LTP has focused on the broader interdependency of infrastructures, finding that there are rarely stand-alone, isolated problems, but rather challenges to the larger, systemic regulatory environment. This has resulted in an increased dialogue between the LTP and country authorities, in that the LTP is now involved in problem-solving throughout the entire policy process. This has been particularly beneficial in regards to the shifting regional focus towards the ETCs and the Western Balkans.

²⁹ The LTP provided telecommunications regulatory reform support to 19 of the Bank's countries of operations.

The LTP achieved impressive results in this area in all sample countries (except Hungary, where major work has been done before the evaluation period). Application of an integrated approach meant that following the development of regulatory regimes, the LTP assisted in the training of the regulators and the establishment of the regulatory agencies. Although there was no energy regulation LTP project in the sample countries during the evaluation period, the LTP has already engaged in this important new sub-sector in some other countries, for example, in Kazakhstan where the Network Infrastructure project (2006) was requested by the Banking team and was closely linked to an investment project. (see section 3 of Annex 4).

4.3.1 Infrastructure regulatory reform and competition: overall evaluation

The LTP's intervention in respect of telecommunications regulation is rated overall as **Highly Successful** for its efficiency and effectiveness, while the team's activities concerning other infrastructure regulations are rated as **Partially Successful** due to their limited extent and impact so far.

The telecommunications and energy sectors are often seen as "engines of economic growth and modernisation". In weighing the question of the LTP's success within the telecommunications sector, a member of the Bank's management team asserted that the sheer scale of the LTP's engagement in this area could testify to its success, while the impact of the telecommunications regulatory training arranged by the LTP could be seen when dealing with telecommunications sector officials before and after such training.

In terms of energy regulation, the EBRD practitioners expressed the opinion that the LTP needs to integrate more into the Bank's culture and engage in substantive activity, rather than pursuing matters that "academically suit them." It was noted that there is a need for the LTP to engage with sector bankers as currently the LTP pursues its objectives without seeking adequate input from those deeply involved in energy-related infrastructure issues. It was noted that although energy is a top priority for the Bank, it did not seem to have the same level of importance within the LTP. There was a consensus among EBRD departments that the addition of a dedicated energy regulatory/legal specialist to the LTP, would improve responsiveness to the needs of the Bank's Power and Energy team, as well as to the priorities of the countries of operations.

The LTP's effectiveness in this area is rated **Good** (with effectiveness in the telecommunications regulatory reform tilting towards *Excellent*). The LTP usually applied an integrated approach to its interventions in the telecommunications area, engaging in policy advice, drafting of legislation and regulatory procedures, as well as the training of practitioners. Moreover, the LTP also supported the approval of the legislation, effectively explaining the implications of the proposed new regime to the legislators, which proved to be particularly important for it to be enacted into law. Even where the LTP's interventions were not entirely effective (Mongolia), the training provided to regulators was highly beneficial.

The LTP's telecommunications projects were well coordinated with the Bank's investment activities, facilitating the financing of four telecommunications operations in Armenia, 11 in Russia, five in Serbia and one in Mongolia, during the last five years. This was important given the global crisis and the constraints on commercial bank lending.

The efficiency of the LTP's work on telecommunications regulatory reform is rated **Excellent**, while that on energy regulatory reform is **Unsatisfactory** (with the potential to become Satisfactory/Good if sufficient resources are allocated to this area). Out of all LTP core legal areas, the largest proliferation projects were

in the field of telecommunications regulation. These projects benefited 19 countries and in cases where there has been only one LTP project in a country, usually it has been a telecommunications regulatory reform project, sometimes in several phases (for example, Bosnia and Herzegovina, Estonia, Kosovo, Montenegro and Turkmenistan).

The *transition impact and sustainability* within this area are rated **Excellent**. Many countries in the bank's region made substantial progress in strengthening their regulatory regimes (with Ukraine being a notable exception, see table E in Annex 5). Ensuring fair competition is essential for the transition process to succeed and the LTP has provided valuable inputs for creating legal systems that are more sophisticated and better suited to defining and protecting investor interests. Most of the legislation on which the LTP assisted with in the sample countries was enacted and is widely utilised, serving as an important demonstration to other countries in the region which have not yet opened their telecommunications markets to competition. The demonstration effect was particularly strong in respect of the LTP's (still few) energy sector regulation projects. Innovative projects like Ulaanbaatar Clean Air deserve particular mention in this respect. Also in Mongolia, the LTP's cooperation with EITI is hoped to have a strong impact on the mining industry, promoting transparency of financial flows.

The fluid state of both telecommunications and energy technology, coupled with the consideration of such issues as environmental and social impact, are highly complex and difficult topics for transition countries when economic and technical resources are at a premium. Therefore the LTP's assistance in these areas has had a particularly strong impact. Lastly, it needs to be highlighted that the technological advances in both telecommunications and energy have also had a strong developmental impact on the countries' population.

Telecommunications is particularly important in connecting populations in geographically remote areas of countries such as Mongolia, Russia or Kazakhstan, with the rest of the world.

4.3.2 Infrastructure regulatory reform and competition: findings

- Telecommunications regulation is often highly political, with deeply entrenched pockets of power that resist change, particularly the introduction of competition and transparent laws and regulations.
- Energy security is a top priority for the most transition countries and will remain so for the foreseeable future.
- One important reason for the LTP's success in the telecommunications regulation area has been its ability to convince the Bank's Telecommunications team of the high value of its services and to align its interventions very closely with the Bank's telecommunications projects. The LTP has not yet developed such a relationship with the Bank's Power and Energy team.
- State-owned monopolies are often the greatest hindrance to reform and change in energy and telecommunications sectors³⁰.

4.3.3 Infrastructure regulatory reform and competition: recommendations

³⁰ The Bank has been pursuing selected projects with state-owned enterprises in the energy sector in some countries (for example, Ukraine). Such projects have always reform-related conditionality, however it is not always effective (see Power and Energy Sector Review, 2011, PE11-526S).

- Dedicate more resources to energy/energy efficiency regulatory reform. For example; adding technical in-house expertise.
- Improve the efficiency of internal communications with the Bank's energy specialists through structured, periodic meetings to discuss current issues and the Bank's priorities in the sector.
- Focus on projects supporting regulations for easing market entry to facilitate growth in the sectors.

Infrastructure development is a priority for SEMED countries. The LTP must ensure that it has the ability to quickly assess this new region's needs in this area and provide assistance (see Annex 7 for more details on SEMED).

4.4 Secured transactions

Together with telecommunications regulatory reform, the LTP has been most active in secured transactions law reform which is also where the impact of its interventions has been the strongest. The LTP is recognised as the leading authority on secured transactions legal issues in the Bank's countries of operations. Also, within the EBRD, many of the bankers interviewed during this Review indicated that their first, often only, interaction with the LTP was in the area of secured transactions. This is because many of the Bank's operations are product-driven, so the LTP's work on legislation enabling new financing products (for example, mortgages, securitisation) has a direct impact on the Bank's operations.

The difference in the degree of secured transactions law development among the Bank's countries of operations is even bigger than in other core legal areas. The advanced countries are now moving from secured transactions laws to specialised markets such as securitisation. In contrast, many ETCs are still struggling to develop a basic framework to enable secured transactions (Russia seems to be a special case, "putting the cart before the horse", as it embarked on the development of specialised markets legislation with unfinished framework law reform).

The LTP has been instrumental in developing or amending secured transactions law in all sample countries. In most cases, training of registrars followed legislation reform projects. In some countries (for example, Hungary) the LTP has been active for more than 15 years. Its critical contribution in the early days of transition is still well remembered and appreciated. Moreover, the LTP worked on innovative securitisation solutions in Russia and other countries, which are expected to enable warehouse receipt financing (see Box 1 in Annex 4). The case of Georgia illustrates the LTP's less successful intervention in the area of secured transactions legal reform, which is also targeted by other international organisations.

4.4.1 Secured transactions: overall evaluation

The LTP's overall activities in secured transactions are rated **Highly Successful**. Despite minor setbacks with some projects the depth and scope of the interventions undertaken in this area underscore the excellent transition impact achieved in a large number of countries, as well as the LTP's contribution to the Bank's operations, which were facilitated or even made possible, thanks to the LTP's secured transactions projects.

The effectiveness of the LTP's assistance in this core area is rated **Good** and can be evidenced by the large number of transactions completed by the Bank for which security packages incorporated pledges on receivables, pledges on movables, mortgages, and so on. The secured transaction core legal area is one

of the most challenging among those pursued by the LTP, as to work effectively it requires an approved law, well-coordinated with other laws and secondary legislation, as well as a number of auxiliary institutions, for example, charge registers. The LTP was able in most cases to deliver advice on the full set of these elements, sequencing them carefully and ensuring that functional systems were put in place. However the real test of the effectiveness of a new law comes only in cases of borrower default or, even more, fully fledged bankruptcies. The Bank's Corporate Recovery team (which deals with financially distressed clients) confirmed that the LTP's work helped them recover lender losses and retain a very low impaired asset ratio (2.6 per cent in 2011).

Some imperfections were identified in the integration of secured transaction systems developed with the LTP's assistance (for example, in Hungary and Russia). However it would be difficult to make the LTP responsible for these as legal reforms on secured transitions remain susceptible to political interference. Also, the effectiveness of new legislation in providing SMEs with increased financing has not yet been fully demonstrated.

The *efficiency* of LTP's work in secured transactions is rated **Excellent**. Over the last decade, the LTP, working primarily with one experienced specialist, has been engaged in secured transactions projects in 14 countries, ranging from advanced (for example, Poland, Slovak Republic) to ETCs (for example, Azerbaijan, Mongolia, Georgia). The LTP is currently exploring a pledge law reform project in Turkey and a project in Turkmenistan on the credit information reporting system and secured lending. The LTP helped develop comprehensive regimes for a wide variety of secured transaction types (for example, pledges on moveable and immovable assets, mortgages, leasing and post-harvest financing).

The *transition impact and sustainability* of the LTP in this area is rated **Excellent** and can be exemplified by generally well-functioning regimes, which have been in continued operation and widely utilised, including by the EBRD. The elements of secured transaction projects, such as institution building and education via the training of key personnel in the secured transactions process, had a particularly strong transition impact (for example, in Serbia). Groundbreaking projects (for instance, the introduction of mortgage law in Moldova) or those promoting innovative solutions (such as the warehouse receipt project in Russia) provided an important demonstration effect.

4.4.2 Secured transactions: findings

- Secured transactions and bankruptcy are strongly intertwined; the true test of the effectiveness of a security is whether it will be effective if the debtor becomes insolvent. A number of the LTP's projects were put to such tests through the work of the Bank's Corporate Recovery team. This generally confirmed the effectiveness of the systems supported by the LTP's projects.
- Secured transactions is an area of law reform in which the LTP's expertise is internationally recognised and the involvement of the LTP in such a law reform project can bring visibility to the EBRD, as demonstrated for example, in Hungary.
- The introduction of a new secured transactions law does not have an automatic impact on SMEs.
- Legislation without adequate enforcement limits the viability of secured transaction systems.
- The LTP might consider projects that assist country registrars with data collection regarding debt collection and enforcement, which would support the monitoring of debtors' overall debt burdens.

4.4.3 Secured transactions: recommendations

- Secured transaction legal reform projects overlap in some instances with judicial capacity building and insolvency and therefore should be better coordinated and sequenced³¹ to achieve an even stronger impact. For instance, the LTP might consider complementing secured transactions projects with components addressing judicial capacity building with a focus on insolvency matters.
- After a secured transaction law reform project is completed, the LTP should always follow up on it with implementation support and institution building projects to ensure that the law achieves its intended goals.
- The LTP should consider allocating more resources for the development of innovative collateral-based lending models (such as pre-harvest financing: see Box 1 in Annex 4) that can increase lending to individuals from rural, economically disadvantaged regions who currently have difficulty accessing capital.

4.5 Insolvency

Insolvency laws are critical to a well-functioning banking system, yet they remain underdeveloped in many of the EBRD's countries of operations. Moreover, banks are often reluctant to commence insolvency cases, knowing that the process will be costly and regulators may pressure them if they admit to bad debts. This failure to act creates a blockage in the system. Moreover, in many countries the insolvency process is very expensive and the banks cannot write off the debts until all enforcement actions are exhausted.

So far, the LTP's involvement in insolvency legal reform has been relatively limited. However the recent global financial crisis prompted the LTP to renew its examination of insolvency issues. It found that the region is still plagued by inadequate legislation. While the global recovery slowly continues, it is greatly dependent on creating a legal framework that emphasises the responsibilities and rights of debtors and creditors and assists in the restructuring of viable business concerns and the distribution of assets when enterprises fail.

While the creation of a balanced and fair legal structure is imperative, there is also a continuing need for improvement in administrator capacity. Increasing the qualifications and professionalism of insolvency administrators is a crucial step to ensuring an effective and ethical insolvency regime. The LTP's two-pronged focus – legal structural analysis and professional administrator focus, addresses burdensome, ambiguous insolvency laws and trains administrative officials who are not yet well-adapted to best practice norms. This approach has been implemented with mixed results in Russia and Serbia, as well as on a regional level (see section 5 of Annex 4).

³¹ It might be interesting for the LTP to look at the lessons from the many Asian jurisdictions that reformed their insolvency laws in the aftermath of the 1997 Asian financial crisis without giving appropriate consideration to the need for secured transactions reform. Ideally, secured transaction law reform should precede or run concurrently with insolvency law reform.

4.5.1 Insolvency: overall evaluation

The LTP's *overall performance* in insolvency law reform is rated as **Partly Successful**, mainly on account of the limited effectiveness and efficiency of its interventions. For many years, the main issue has been the LTP's inability to attract and retain an experienced insolvency specialist. Therefore the LTP does not have as much expertise in insolvency law reform as it does in other areas and its interventions lack continuity.

The *effectiveness* of the LTP's work in insolvency has been mixed and is rated **Satisfactory**. There were several notable successes before the evaluation period (for example, in Hungary and Russia), however due to the loss of internal expertise, the LTP missed the opportunity to build on these early successes and expand in this area. Nevertheless, in recent years several well-prepared and targeted projects in insolvency have been initiated (in Serbia and Russia, for example) and are expected to bring practical and tangible results in terms of better training of insolvency administrators.

The *efficiency* of LTP's work in insolvency is rated **Satisfactory**. In addition to the three sample countries, the LTP also initiated insolvency projects in Georgia, Romania and Uzbekistan. Compared with other core legal areas, this was a rather unimpressive record. However the evaluation took into account the prolonged periods without an insolvency expert during the last decade.

The *transition impact and sustainability* of LTP's interventions in this area is rated **Good**. In elevating the performance of key entities (such as Insolvency Office Holders), the LTP has contributed to improving the efficiency and the reliability of insolvency practice, strengthening important market institutions. The Serbian legislative implementation assistance project is a good example, as it has been followed up by a second phase, focused on insolvency regulatory capacity building, which should reinforce the impact of the first phase. Nevertheless, the task ahead of the LTP in this area remains challenging. Most of the Bank's countries of operations have been ranked at the bottom of the list in "resolving insolvency" category of a recent "Doing Business" review by the World Bank (Serbia was ranked 113 – the worst in Europe, save for Ukraine, see table C in Annex 5).³²

4.5.2 Insolvency: findings

- The global financial crises highlighted the need for more efficient insolvency legal structures within the Bank's countries of operations (for example, Serbia, Hungary).
- Legislation without adequate enforcement (for example, in the area of secured transactions) limits the viability of any (even good) insolvency law and procedures (for example, in Serbia and Russia).
- Initiatives that go beyond legislative enactments and legal frameworks, such as assisting insolvency regulators with data collection regarding insolvency cases, help identify gaps in the system's effectiveness.
- Projects that focus on the interconnection of secured transactions and bankruptcy laws offer good opportunity for the Bank to have wider impact.

³² Comparisons with the oldest available "Doing Business" index (2004) demonstrate that little progress has been achieved. For instance, in Serbia no improvement was registered in respect of two out of three indicators (only the share of recovered debt slightly increased from 20 per cent in 2004 to 24 per cent in 2011).

4.5.3 *Insolvency: recommendations*

- Bolster in-house insolvency expertise and improve the retention of quality legal counsel in this field. The LTP needs a senior lawyer with sufficient experience and expertise to manage large-scale insolvency law reform projects.³³
- Consider increasing the number of insolvency training and capacity building programmes for judges and insolvency administrators.
- Investigate the cross-border aspects of insolvency law frameworks in selected of the Bank's countries of operations.

4.6 **Judicial capacity building**

The attractiveness of a country for foreign investors is often determined by its ability to assure that an investor's legal rights will be enforced and protected by an effective and efficient judiciary system. While there have been significant advances in the Bank's countries of operations in the development of black-letter law, (law on the books), implementation and practical application has often been weak and unpredictable due to limitations in judicial skills throughout the legal process.

Furthermore, impediments such as lack of resources, corruption and the lack of an independent judiciary are additional factors that are often inherent in transition economies and counterbalance economic development.

The LTP has not been active in judicial capacity building in the sample countries (with the exception of Mongolia, where a project has been recently initiated), therefore the evaluation reviewed the LTP's performance in this area in other, mainly CIS countries. The LTP made substantial efforts to train judges in the Kyrgyz Republic, implementing together with the International Development Law Organization (IDLO), five phases of a judicial capacity building project, which benefited over 300 judges. The focus of this training was on dealing with commercial legal cases and included structured courses, creation of a judicial training centre in Bishkek, as well as apprenticeship at Russian and Kazakh courts. However the impact of the first four phases of the course was uncertain as the judges have not been subject to any verification of their knowledge acquired at the end of these courses, while the judicial training centre had problems running courses on its own when one of the phases of the programme terminated. Following phase five of this training project, the LTP implemented the judicial decisions evaluation project, focused on expert qualitative analysis of randomly selected judicial decisions made by judges who participated in the LTP's courses, with the view of testing the impact of the training project (see section 6 of Annex 4).

4.6.1 *Judicial capacity building: overall evaluation*

The LTP's activities in judicial capacity building are rated *overall* as **Partly Successful**, mainly on account of their uncertain effectiveness and limited efficiency, which was mainly due to a late arrival of an expert dedicated to this area.

The *effectiveness* of the LTP's activities in judicial capacity building is rated **Satisfactory**. A substantial number of judges in the Kyrgyz Republic and some other ETCs have benefited or are now benefiting from

³³ The LTT reported that a new insolvency specialist joined the LTP in April 2012.

the LTP's training programmes. However, a lack of competence exams at the end of the courses makes it impossible to systematically verify their effectiveness. A randomised judicial decisions assessment was only introduced after phase five, following the recruitment of a dedicated judicial capacity building expert. An expended, "real-life" judicial training impact assessment is to be tested during the LTP's Tajik project, which is to be implemented in 2012-14³⁴. Moreover, the effectiveness of the institution building components of the LTP's projects is also uncertain. The Kyrgyz experience demonstrates that even willing counterparts might be unable to create institutions which will outlive a project. On the positive side, over the years the LTP has received several unsolicited comments from various businesses (for example, the Bank of Moscow) praising the LTP's efforts to improve the quality of judiciary decision-making in the CIS countries and stressing the practical importance of this work for them.

The LTP's efficiency in this area is also rated **Satisfactory**. The LTP hired its judicial capacity building expert only in 2009 and by the end of the evaluation period he developed phase five of the Kyrgyz project and initiated new projects in Mongolia and Tajikistan.³⁵ Therefore it is evident that due to the delay with recruiting a dedicated expert, project development in this area has been less dynamic than that for other LTP core legal areas. However, the difficulties in ensuring cooperation in this sensitive field from local counterparts are recognised. It is commendable that the countries targeted by the LTP were ETCs – that is, those which might not be easy to work with but were in the greatest need of such assistance. In the case of its "flagship" project in this area (in the Kyrgyz Republic), the LTP teamed up with IDLO, which substantially increased the efficiency of its intervention. The World Bank has been implementing similar judicial capacity building projects in Azerbaijan, FYR Macedonia, Romania and Russia in recent years. The LTP has been monitoring these projects although no joint initiatives have been developed yet.

Transition impact and sustainability of the LTP's activities in judicial capacity building is **Not rated**. 300 Kyrgyz judges were trained during phases 1-4 of the project, however its impact is impossible to verify due to the lack of any tests at the end of the courses. Only the last phase introduced a randomised judicial decision assessment, while a full-scale impact verification is planned for a similar project in Tajikistan (see footnote below). Moreover, the Kyrgyz Republic (the country of focus for the LTP's activity in this area) has been recently ranked 135 (among 142 in the world³⁶) – the worst among all of the Bank's countries of operations for judicial independence (see table B in Annex 5). This implies that the impact of any capacity building projects in the Kyrgyz Republic may be limited as fundamental issues, such as judiciary independence, remain unresolved.

Furthermore, during the evaluation period the LTP projects in this area have been relatively narrowly focused on a few selected ETCs. Recent international data indicate that virtually all of the Bank's countries of operations display acute deficiencies in their dispute resolution process (see table A in Annex 5). Although such rankings should be viewed with caution, it is telling that even advanced countries are ranked at the bottom of the list (for example, Poland 97 or the Slovak Republic 139 out of 142 countries in total).³⁷

³⁴ This assessment project (blessed with a budget of GBP 350,000) will be implemented by consultants managed by the OCE (with input from EvD) during a three-year period. It is expected to provide a better understanding of the effectiveness and the impact of the LTP's judicial training.

³⁵ The LTP reported that the development of judicial capacity building projects has been particularly dynamic in recent years (after the Evaluation Period). New projects were developed in Albania, Moldova, Bulgaria and Bosnia and Herzegovina.

³⁶ The Global Competitiveness Report 2011-2012, chapter 1.06 "Judicial Independence".

³⁷ The Global Competitiveness Report 2011-2012, chapter 1.10 "Efficiency of legal framework in settling disputes".

4.6.2 *Judicial capacity building: findings*

- Legal reform without the development of supporting institutions is unlikely to succeed. For example, secured transaction and insolvency law regimes are more likely to take hold in jurisdictions in which the judiciary and supporting personnel have received training on the goals and technical aspects of the legal reforms (based on Hungarian, Serbian and Mongolian experience).
- It is impossible to assess the impact of capacity building projects, which do not include competency tests at the end of the programme or other impact verification measures.

4.6.3 *Judicial capacity building: recommendations*

- Reassess the utility of training programmes not connected to specific sector reforms that can be monitored, such as with respect to judiciary independence.
- In countries which suffer from a lack of the judiciary system's independence, the LTP should make an effort to combine training programmes with (or make dependent on) the reforms increasing such independence.
- Competence exams at the end of the training courses to verify their impact and effectiveness should be mandatory and their inclusion a condition for the approval of future projects in this area. Depending on the experience from the (soon-to-be-implemented) impact assessment project in Tajikistan, try to design a standardised judicial decision impact assessment measures, which could be introduced following most of the LTP's judicial training projects.
- Consider increasing resources for judicial capacity building to expand the scope and countries covered by the LTP's intervention in this core area.
- Consider administering an *ex post* competency tests to those judges who passed through earlier LTP training programmes.

4.7 Public procurement

Issues related to gaps and inefficiencies in public procurement laws in the Bank's countries of operations emerged during the last decade as one of the main obstacles to the successful implementation of the EBRD's public sector projects (mainly related to infrastructure). Thus, in late 2009, on the strong recommendation of the Banking department and the Procurement department, the LTP added Public Procurement to its core legal areas. Therefore this is a relatively new area for the LTP, in which its activities over the last few years have focused on the assessment of existing laws and standard setting (see sections 2.7 and 3.7).

Other IFIs (for example, the World Bank, ADB) have been involved in public procurement issues for decades and as a very latecomer to this area, EBRD has much to learn from them.

The LTP's activities related to legal reform in procurement started only recently and so far have been concentrated on Albania and Ukraine. Neither of them is one of the sample countries, however, the evaluation undertook a brief desk review of the LTP's activities which was undertaken to assess their expected impact and effectiveness. The project in Albania 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. The LTP has also recently 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. However, 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.

4.7.1 Public procurement: overall evaluation

The LTP's law reform efforts in public procurement are still in their infancy, and do not, as of yet, provide a significant track record. *Overall* they are rated **Partly Successful**. This rating reflects the scope and depth of the LTP's activities to date, which are limited, but growing, reflecting their importance to both the Bank and its countries of operations.

Effectiveness of the LTP's intervention in this area is rated **Satisfactory to Good**, mainly on account of the opinions expressed by EBRD bankers and the Bank's Procurement department staff who appreciated the LTP's work in Albania and Ukraine, as well as its assistance in resolving *ad hoc* procurement issues related to the Bank's public sector projects. The establishment of public procurement as a core area speaks to the increasing integration of the LTP into the Bank and testifies to the LTP's responsiveness to the Bank's priorities. However, there is no empirical evidence yet of the effectiveness of the LTP's pilot projects initiated in this area.

Efficiency is rated **Satisfactory to Good** as, so far, only two countries have been targeted by the LTP's public procurement reform projects. Nevertheless, the LTP's orientation in this initial stage was towards assessment and promoting international standards of compliance, which had a wider impact on the regional level. One of the most important aspects of the LTP's procurement work came from its involvement in and use of the model UNCITRAL law. With up to seven countries involved, the relationship with UNCITRAL was very important to advancing the LTP's initiatives and work within the Bank's countries of operations. An UNCITRAL representative expressed his appreciation for the LTP's involvement with UNCITRAL. Given the agency's limited budget and the personnel restrictions under which it operates, the LTP was able to harness resources that UNCITRAL would not have on its own.

Transition impact and sustainability of the activities in this area is rated **Satisfactory** as it has not yet been evidenced. It has strong potential to become Good or Excellent when the projects are completed. Promotion of a fair, open and transparent procurement process, where competition can flourish, is crucial for the opening of what have largely been monopolistic markets. Furthermore, transfer of skills features strongly in the LTP's procurement projects started to date and is expected to make an important positive impact.

4.7.2 *Public procurement: findings*

- The LTP's work on public procurement is one of its core areas, the most closely interlinked with the Bank's projects.
- Auditing and supervisory functions remain crucial to improving public procurement efficiency.
- Cooperation with other international organisations can leverage the LTP's resources and increase the efficiency of its interventions.

4.7.3 *Public procurement: recommendations*

- Consider focusing increasingly on supporting the implementation of public procurement legal reforms (law in practice).
- Given the importance of this core area for the Bank and the beneficiaries, consider allocating more funding and personnel resources to public procurement.
- Step up cooperation with international organisations and other IFIs which consider efficiency of public procurement in their countries of operations to be of critical importance (for instance, ADB in respect of Central Asia and AfDB in respect of SEMED).

4.8 **Securities markets**

The LTP's work in securities markets during the evaluation period was limited due to the proliferation of similar work initiated by other institutions. Already before 2001, considerable work had been completed by the European Commission (EC) on securities regulation.³⁸ After 2001, the pace of reform increased as the EC implemented the third and final phase of the Financial Services Action Plan (FSAP – comprising 42 directives). The Bank's EU and EU-candidate countries of operations adopted these directives, as did several non-candidate countries to facilitate foreign portfolio investments in their countries. Lastly, a number of EBRD countries of operations also have institutions that are members of International Organisation of Securities Commission (IOSCO) and seek to meet IOSCO standards. In addition, the fallout from the “roaring nineties”, the 1997 Asian Financial Crisis, and the Russian crisis in 1998, were among the events that prompted a rethink of worldwide stock market regulation and corporate governance.³⁹

At the same time, a set of competitive pressures was forcing consolidation in the industry⁴⁰ (for example, NASDAQ OMX Armenia).⁴¹ Thus, there were (and remain today) a powerful set of forces external to the LTP, driving change in securities markets regulation. Therefore securities markets are not a priority area for the LTP.

³⁸ See Niamh Maloney, EC SECURITIES REGULATION (Oxford University Press, 2002). Here, the term “securities regulation” is conventionally glossed as including securities markets. Note that the EBRD gives the term “securities markets” a wide connotation.

³⁹ See generally, Rob Rosen and Gordon Walker, INTERNATIONAL SECURITIES REGULATION, Vols. 1-8 (Oxford University Press) and Gordon Walker and Rob Rosen, INTERNATIONAL SECURITIES REGULATION: PACIFIC RIM, Vols. 1-4 (Oxford University Press).

⁴⁰ Mark Fox and Gordon Walker, *Motives and Mechanics of Cross-border Securities Markets Mergers* [2006] 21 (11) JIBLR 621-627.

⁴¹ See NASDAQ OMX (Armenia) <http://www.nasdaqomx.am/en/history.htm>.

EBRD bankers and treasury officers interviewed in the course of this Review expressed the view that the LTP's recent focus on local capital markets has been a move in the right direction.⁴²

4.8.1 Securities markets: overall evaluation

The LTP's activities in the securities markets law reform are rated **Partly Successful** mainly on account of its diminishing relevance during the evaluation period, which also affected the effectiveness and efficiency of the LTP's intervention in this area.

Effectiveness of the LTP in security markets is rated **Satisfactory**. It achieved its main successes in this securities markets legal reform before the evaluation period. Nevertheless there have been several more recent projects aimed at advising governments on revising their insolvency legal framework to allow for close-out nettings. Two other important projects which achieved their objectives in this area should be mentioned: improving the legal and regulatory framework governing the Russian debt capital markets and drafting a new law on corporate and municipal bonds in Albania that was adopted in 2010.

The LTP's *efficiency* in this area is rated **Good**. This rating does not reflect a high proliferation of LTP projects in securities markets (which was not the case) but rather a wise decision to optimise its operations and in the view of limited opportunities, to dispense with a separate security markets specialist. Instead, the LTP's corporate governance specialist has been covering securities markets part-time, and only recently was a junior specialist recruited to focus on local capital markets.

Transition impact and sustainability of the LTP's efforts in this area are rated **Satisfactory**. The creation of a strong capital market is imperative for domestic growth and global integration and therefore it has high transition potential. 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. However, the LTP's capacity to make an impact on the securities markets has been clearly limited by the predominance of EU securities regulation law and IOSCO guidelines, which provided the main incentive for many of the Bank's countries of operations to reform their capital markets. The EU directives and IOSCO guidelines are now significant factors impacting the legal regimes of many of the Bank's countries of operations. Nonetheless, the LTP's contributed to this process by advising how such legislation can be transposed to or made to work in the context of local law.

4.8.2 Securities markets: findings

- Securities markets regulation and law reform is an area better left to other international agencies and stakeholders.
- Securities markets have been correctly identified by the LTP as a low priority area for the foreseeable future.
- However, there remains a key role for the LTP in promoting higher corporate governance standards, as well as in niche products such as municipal bonds or the regulations related to local currency markets.

⁴² Since 2010 the LTP dedicated a new staff member to work on capital markets, primarily local.

4.8.3 Securities markets: recommendations

- Continue strategic refocus of this legal area on local capital markets. To better reflect this change consider renaming this core area as a “Local Capital Markets Law and Regulations”, reflecting its new focus.
- Strengthen links with the Bank’s Treasury department, whose staff have acquired unique securities markets expertise in the Bank’s countries of operations. Consider how this expertise could be utilised.
- Continue careful resource management in respect of staffing and allocating funds to securities markets activities.

4.9 Overall evaluation: legal and institutional reform

Table 4 summarises the LTP’s performance rating for legal and institutional reform in all core legal areas. The *overall* rating for the LTP’s legal reform activities across its core areas is ***Successful***. Legal and institutional reform is a primary objective of the LTP, as it seeks to achieve concrete results in terms of improved legal framework across the Bank’s operating region, which better responds to investors’ needs.

The LTP has sought to overcome legal impediments to investments by providing legal and institutional reform assistance in support of a viable investment climate hallmarked by transparency and an adherence to the rule of law, as seen through a predictable and stable legal structure.

Table 4. Legal and institutional reform – core legal areas’ rating summary

Core Legal Areas	Overall	Effectiveness	Efficiency	Transition Impact and Sustainability
Concessions/PPPs	★★★☆	●●●●○○	●●●●●○	●●●●●○
Corp. Governance	★★★☆	●●●●●●	●●●●○○	●●●●●●
Infrastructure				
Regulatory Reform				
-telecommunications	★★★★	●●●●●●	●●●●●●	●●●●●●
-energy/other	★★★☆	●●●●●○	●●○○○○	●●●●●○
Secured transactions	★★★★	●●●●●○	●●●●●●	●●●●●●
Insolvency	★★★☆	●●●●○○	●●●●○○	●●●●●○
Judicial Cap. Build.	★★★☆	●●●●○○	●●●●○○	Not rated
Public Procurement ⁴³	★★★☆	●●●●○○/●●●●●○	●●●●○○/●●●●●○	●●●●○○
Securities Markets	★★★☆	●●●●○○	●●●●●○	●●●●○○
Overall	★★★☆	●●●●●○	●●●●●○	●●●●●○

⁴³ LTP core area only since late 2009, which provided a limited basis for full evaluation (further described in section 4.7).

Overall Rating scale

- ★★★★ Highly successful
- ★★★* Successful
- ★★* Partly Successful
- ★* Unsuccessful

Effectiveness, efficiency and TI rating scale:

- | | |
|--------|-----------------------|
| ●●●●● | Excellent |
| ●●●●●○ | Good |
| ●●●●○○ | Satisfactory |
| ●●●○○○ | Marginal |
| ●●○○○○ | Unsatisfactory |
| ●○○○○○ | Highly Unsatisfactory |

In some cases, promoting a culture of reform was hindered by local resistance to change, where for some entities it is simply more profitable to adhere to the current inefficient *status quo*. Additionally, the uneven global recovery has also put pressure on new legal and economic ideas and structures; sometimes resulting, again, in a desire to maintain past patterns of behaviour.

The *overall effectiveness, efficiency, as well as transition impact and sustainability* of the LTP's interventions are rated **Good**, reflecting the high importance of the LTP's work and its direct relation to the Bank's mandates and objectives. The majority of the LTP's projects brought expected and sustainable results, particularly in respect of black-letter law. One aspect of the LTP's projects which proved especially challenging was ensuring the sustainability of institutional strengthening measures in the context of its projects.

5 Performance evaluation four: outreach

This final component of the LTP integrated approach focuses on disseminating its work to maximise its impact. Of particular note are two major resources: *Law in transition* and the LTP web site, both of which are invaluable and easily accessible sources of information. Combined, they form the best comprehensive source of information available on legal and institutional transition in the Bank's countries of operations. *Law in transition* in particular is used to disseminate all aspects of the LTP's work. Moreover, it is used as a tool to develop approaches, often in conjunction with particular assessment, standard setting, legal and institutional reform or outreach activities (such as conferences). Issues and focus topics covered in *Law in transition* during the evaluation period are listed in Annex 11. The sections below briefly evaluate the overall effectiveness of outreach in each of the LTP's core legal areas.

5.1 Concessions/PPPs

Outreach activities in this area are rated **Highly Successful**. The dissemination of information related to concessions/PPP structure and legislation is seen as critically important due to there being relatively little information on such concepts, which are still new to many of the Bank's countries of operations. The above rating reflects the LTP's success in producing a number of high-profile publications, including two major Russian language publications on PPPs, issued in 2009 and 2011 (see section 1, Annex 4). Such publications still remain quite unique and effectively fill the information gaps on the intricacies of concessions and PPPs. Although they concentrate primarily on the Russian experience, the fact that the LTP funded their high quality translation (verified by the Bank's PPP practitioners and lawyers), ensures their wider application, for instance in other CIS countries.

Moreover, several *Law in transition* reports (in English, for example, 2007) had a special focus on concessions/PPPs, sharing information on regional concessions/PPP projects, the evaluation of their implementation and assessments of the foundational, and evolving laws that support them. The LTP's concessions/PPPs expert based in Moscow has been a keynote speaker in many workshops and conferences in Russia and the impact of his activities in spreading PPP expertise cannot be overestimated.

5.2 Corporate governance

Outreach efforts within a corporate governance field focus on the dissemination of information relevant to establishing a viable governance framework and promoting the transparent practices, and an adherence to the rule of law. Through its outreach efforts, the LTP seeks to share information that advances the strengthening of domestic capital markets and thereby assists in forming stronger regulatory and supervisory capacities within its countries of operations. The LTP has worked extensively with international organisations to advance the dissemination of its expertise and experiences in this area. Its work with the Organisation for Economic Co-operation and Development (OECD) has been especially noteworthy in that they have jointly produced valuable findings disseminated through policy briefs, workshops and the legal journal *Law in transition* (for example, 2006, 2009). Recent high profile Corporate Governance Roundtables in London, Georgia and Serbia served to advance the Bank's governance initiatives, while solidifying relationships with other key entities. Outreach performance in this area is rated ***Successful***.

5.3 Infrastructure regulatory reform and competition

The LTP's outreach focus within the regulatory and infrastructure reform arena, has been dominated by cooperative work with other leading international organisations, such as the World Bank and the European Commission. The LTP frequently participates in joint publication projects and conferences where key information is produced and distributed. In addition to adding to the literature and discussions through such activities, it also serves to strongly promote the LTP's expertise in these fast-evolving areas. The focus on renewable energy, in the face of increasing evidence of climate change, is central to advancing the pursuit of such environmental integrity, which the Bank considers a cornerstone of its policy.

The LTP's outreach activities in this area are rated ***Highly Successful***. The LTP's regional conference work has been particularly valuable in granting the LTP the ability and opportunity to authoritatively frame the legal and regulatory reform debate surrounding the telecommunications and energy sectors.

5.4 Secured transactions

The LTP's outreach activities within the secured transactions sector are rated ***Highly Successful***, reflecting the high profile, long-standing work done by the LTP, both individually and in conjunction with other international organisations. Both avenues have been highly successful and have had a substantial impact within the international community. In terms of cooperative work, the LTP has worked extensively with UNCITRAL and the World Bank's legal department in presenting secured transactions reform information. The involvement in the Global Collateral Laws and Registries Program with the World Bank, in addition to the work done with the Swiss Secretariat for Economic Affairs (SECO), are high profile activities that have helped showcase the LTP's expertise and influence in this area. The LTP has

established itself as a resource for complex secured transactions reform in advanced, mature markets, as well as in emerging and transitioning economies. The LTP's opinions and findings in this area are highly regarded and sought after. This bodes exceedingly well in terms of supporting other projects outside the Bank's current region of operations.

5.5 Insolvency

Much of the LTP's outreach activities in insolvency are done in cooperation with UNCITRAL and the World Bank, in addition to the IMF, which, in a post-crisis environment, has been involved with an increasing number of insolvency issues. Outreach activities in insolvency are concerned with publicising and disseminating research findings and experiences concerning creditors' and debtors' rights, administrative capacity and other issues relating to insolvency laws. The LTP works closely with the World Bank as a member of Insolvency and Creditor/Debtor regimes Task Force, and in this capacity the LTP's staff participates in workshops on insolvency matters. The LTP's outreach activities within the area of insolvency are rated ***Partly Successful***. The global and financial crisis has presented extraordinary challenges to emerging and transitional economies. How debt is handled is a key element in preserving market stability and preventing defaults. The work that the LTP undertakes in insolvency is limited but valuable in that it contributes to strengthening the secured transactions and insolvency structures within the Bank's countries of operations.

5.6 Judicial capacity building

Outreach in terms of judicial capacity entails disseminating information about the "professionalisation" of the judicial sector. Issues such as the education and training of judges and supporting legal administrators are critically important in developing a legal structure that can support economic growth. Under those ideals, the LTP's outreach activities are typically coordinated with other international organisations such as the World Bank. The LTP has taken part in conferences on capacity building and judicial training. The LTP's participation in regional conferences (for example, in the Kyrgyz Republic) has led directly to the development of additional projects within the Bank's countries of operations (for example, Mongolia).

The LTP's outreach activities within the area of judicial capacity building are rated ***Partly Successful***. Judicial competency is directly linked to the confidence that external investors have in the legal system of a given state. Transition economies are often faced with unique and nuanced challenges that frequently require a multi-disciplinary problem-solving approach. The LTP's outreach activities are useful in that they potentially provide forums whereby information and experiences are shared. While the LTP's work within judicial capacity building is still being shaped, the LTP's recent, more aggressive outreach efforts are likely to raise awareness of issues related to the remaining inefficiencies in the judicial systems of some of the Bank's countries of operations (for example, *Towards Better Courts - Law in transition*, 2011).

5.7 Public procurement

The LTP's specific outreach activities in the area of public procurement are represented by its collaboration on joint outreach projects with other international organisations. The Bank's partnership with the World Bank and the Asian Development Bank for the 2010 Regional Public Procurement Forum held in Georgia, is an example of such cooperative outreach efforts.

Based on the Bank's current efforts, the LTP's outreach activities within the public procurement environment are rated as ***Partly Successful***. While these outreach efforts are at an initial stage, the LTP's participation at high profile conferences, such as the one in 2010, bode well for its future anticipated public dialogues within this sector. This opinion is bolstered by LTP's close working relationship with UNCITRAL, which will undoubtedly have a long-term positive future impact on the dissemination of timely and practical procurement information.

5.8 Securities markets

The outreach activities in this area are rated as ***Partly Successful***. The LTP ensured the dissemination of relevant assessment results related to securities markets through the EBRD web site and *Law in Transition* (2008). Given the more limited scope of the assessment and the limited activities in this sector, outreach achievements have been minimal.

5.9 Overall evaluation: outreach activities

The LTP's overall outreach activities across all core legal areas are rated ***Successful***. Notwithstanding outreach activities, separate for each core legal area (as described above), in the last 10 years the LTP considerably strengthened its capacity to disseminate its knowledge through collective, well-designed measures, specifically: (i) the establishment of *Law in transition* as a key vehicle for disseminating the LTP's research. It is a unique publication among IFIs published twice yearly in English and Russian, containing a synthesis of the LTP's assessments, country projects, as well as views from international legal experts, including those from the Bank's countries of operations; (ii) the launching of the LTP internet page, which is regularly updated with publications of research and legal information. It includes an interactive tool enabling readers to do comparative analysis of the LTP's assessments and test different scenarios; and (iii) the appointment of a dedicated person within the LTT in charge of legal knowledge management, whose sole job is to ensure that the LTP's outreach objectives are achieved.

The impact of many of the LTP's outreach activities has been amplified due to cooperation with other international organisations such as the World Bank, the IMF and UNCITRAL, among others. By participating in high-profile international events, LTP is able to advocate its various positions regarding legal reform. Outreach activities have additionally successfully showcased the LTP's expertise and have contributed to solidifying its reputation as a leader across its core areas. As an important additional benefit, the LTP's outreach activities, while directed externally, have also raised awareness of the LTP within the Bank. Nevertheless, there is some room for improvement of the LTP's "internal outreach", particularly in respect of increasing the awareness among the Bank staff based at the regional offices about the LTP's activities being undertaken in their countries.

6 Conclusions and recommendations

6.1 Overall evaluation

Overall, the LTP's performance is evaluated as **Successful**. Through promoting legal reforms, the LTP directly supports the Bank's operational objectives of assisting its countries of operations in the transition to open market economies and the establishment of entrepreneurial opportunities within a multiparty democratic system.

The *relevance* of LTP's work in this respect is rated **High**. The LTP's core areas represent key legal transition areas in which both the LTP and the EBRD have accumulated extensive experience. These core areas are distinct, yet interrelated, and reflect the needs of transition countries in addition to reflecting the Bank's priorities in terms of improvement needed to the legal environment to enable its operations. The LTP has been successful in identifying gaps within the larger legal structure, while segmentation has allowed it to systematically address issues within legal frameworks (see the detailed justification of the relevance rating in Annex 2).

The LTP's *overall effectiveness* is rated **Good**. There is compelling evidence that the LTP's advice has been largely followed; many laws and regulations which the LTP helped to draft were approved and are utilised; while a substantial number of legal practitioners in the Bank's countries of operations benefited from the LTP's training, although this is not always possible to be verified. Some institution building projects were subject to lower effectiveness and this is the area where the LTP should focus more in the future. The effectiveness of LTP's efforts, which is manifested through its degree of engagement with its countries of operations, is strongly associated with and complemented by the efficiency with which services are delivered.

Although notable progress was made in many countries of operations, the region's legal system still suffers a high degree of inefficiency (see Annex 5). In terms of effectiveness in serving the Bank, with some exceptions there is a growing cohesiveness and compatibility between the LTP and the Bank (which was not always the case during the initial period of the LTP's work). As one interviewee in London stated, "although the EBRD is transaction-driven, whereas the LTP is policy-driven, the relationship has grown stronger and more productive". The two entities are moving towards being on the "same page" in terms of goals and objectives.

The LTP's overall efficiency is rated **Good**. It varies across the eight core legal areas and depends largely on the LTP's success in attracting and keeping, more or less permanently, high calibre specialists in any given core area, as well as on the LTP's management's decisions how to allocate scarce resources. The LTP was successful in attracting permanent experts to some core areas (such as secured transactions, telecommunications regulation, corporate governance and more recently judicial capacity building), while other areas proved more challenging (insolvency). However, the ever-increasing sophistication of the LTP's country law assessments and its legal reform-related interventions suggest that LTP's overall efficiency may become universally good (see recommendation in relation to the LTP's resource review).

Overall *transition Impact and sustainability* stemming from the LTP's activities are rated **Excellent**. The LTP is, by definition, at the core of transition and it has achieved a high degree of transition impact by providing technical assistance for the development of legal structures, via projects, which support the development of free market economies and promote legal reform. The LTP's work has been shown to

greatly influence domestic policy formation, impacting frameworks for markets that promote function and efficiency. Skills transfer has also made an important impact, particularly through the LTP's outreach activities and dedicated training programmes. Nevertheless it is noted that this impact has been concentrated relatively narrowly on the countries on which the LTP chose, or was able, to focus, given available resources. Moreover, this impact cannot always be verified, which constitutes a serious impediment to the LTP's efforts (for example, the first four phases of judicial capacity building in the Kyrgyz Republic).

Although this review evaluated the LTP against key criteria and focus areas, the "soft power" impact of the LTP on EBRD operations should not be overlooked. Local stakeholders highly appreciate the work of the LTP; it is seen as a formidable "calling card" for the EBRD and is clearly project-enabling. If the work of the LTP was initially seen as at the "fringe" of the Bank's activities, it is now perceived as "mainstream" with a strong presence in several countries. This perception was highlighted in Russia where one interviewee described the EBRD (via his experience with the LTP) as the "only player with the political and financial influence and confidence of the Russian state".⁴⁴

The outcome of this evaluation bears remarkable similarity to that of the MTR ten years ago. Under both evaluations the LTP's "flagship" core legal areas of secured transactions and telecommunications regulation were evaluated as "highly successful", corporate governance as "successful" and the remaining core legal areas as "partly successful" (with the exception of Concessions/PPPs which is now rated "successful") in respect of the legal reform, while legal assessment activities are now rated firmly as "highly successful".

This rating is at one level only marginally higher than that attained during the mid-term review conducted in 2000. However, this likely does not fully capture the consolidation and mainstreaming of the LTP at the EBRD or its substantially enlarged reputation among partners in the countries of operations and international organisations.⁴⁵

The rating should also be seen in the context of very uneven allocation of resources among different core legal areas by the LTP's management which purposefully promotes certain priority areas, while limiting the LTP's involvement in other areas. The four core areas which attained the rating "highly successful" or "successful" accounted for 78 per cent of the LTP's budget and 83 per cent of its experts' time allocation, while the other four areas rated "partly successful" accounted for less than a quarter of the LTP's commitments and only 17 per cent of its expert's total time allocation.

Nevertheless, important challenges remain and warrant careful review and consideration going forward. The section below presents the main general findings and recommendations stemming from this evaluation, while specific recommendations for the LTP's strategy directions in the new SEMED region are laid out in Annex 7.

⁴⁴ Interview with a partner of a leading international law firm in Moscow, 27 July 2011.

⁴⁵ This opinion has been recently confirmed in a reputable publication by Terence C. Halliday and Bruce G. Carruthers: "Bankrupt: Global Lawmaking and Systemic Financial Crisis", Stanford University Press 2009. On page.92 it singled out the LTP/EBRD's approach to legal reform support as the most effective and concluded that: "*The result is an unusually nuanced approach to the fundamental tension between global uniformity and national particularities that stalks all IFI initiatives.*"

6.2 Findings

- The need for “law on the books⁴⁶” reform assistance varies widely across the Bank’s countries of operations. However, the functioning of legal systems and institutions in practice is still universally substandard in all of the Bank’s countries of operations (see Annex 5). Institution building has been an important part of almost all of the LTP’s projects so far. To further strengthen the impact of its interventions, the LTP should now put even more emphasis on training legal practitioners and establishing institutions and administrative competency (see Recommendations).
- Most of the LTP’s projects have defined operational and funding lifespans, whereas the process of legal reform is usually long and highly susceptible to change in priorities, personnel and political configuration of the recipient country. In addition, there is often a lack of clarity and measurability in project-level benchmarks.
- The LTP’s core legal areas are also key operational areas for the EBRD. In turn, LTP activity fields respond to the technical needs of the Bank and its countries of operations. In dividing the needs of transition countries across several focus areas, the LTP has identified gaps within the larger legal structures. Such gap analysis has enabled the LTP to address systemic issues within legal frameworks.
- A well functioning, investor-friendly and free market-oriented legal structure is at the core of transition. Therefore the LTP’s projects usually have a high degree of transition potential, however their actual impact varies, depending mainly on the determination of the LTP’s local partners. The strongest impacts were achieved in those core legal areas where the LTP had well developed in-house expertise and in the countries where its staff was able to focus their efforts for an extended period (for example, PPP expert based in Moscow). Due to the LTP’s relatively limited resources, such impact has been fairly “localised” and narrowly focused on selected countries (except for secured transactions and telecommunications regulation, which achieved a strong impact across most countries of operations).
- While there has been increased compatibility and cohesiveness between the Bank’s operational departments and the LTP, a recurring internal view is that the LTP should more pro-actively promote its work to the Banking department, while liaising more closely with staff from other support units keeping them informed about its operational priorities. The improvement of an “internal outreach” should be directed particularly towards EBRD’s staff based at the Resident Offices.
- The LTP has built an adequate repository of information and experience that can contribute and add value to the Bank’s future projects in the southern and eastern Mediterranean area (SEMED). The current core legal areas and activity fields can serve as a useful starting point, although country-specific assessments will largely dictate practice and policy areas of concentration. The difficulty of accurately assessing local conditions in a new and totally different region cannot be overstated, as expanding the Bank’s mandate will be complicated by fluid socio-economic structures where understanding and adherence to rule of law and transparency issues are generally weak. Thorough and detailed legal assessments remain critically important (see Annex 7).
- The LTP’s three-year action plans lack clear objectives, milestones and timetables.

⁴⁶ Enacted legislation.

- In its legal reform projects the LTP has paid due attention to simplicity and transparency of proposed legal structures. These efforts should continue to avoid over-regulation, which may delay transition.
- In some of the LTP's activities, there is simply not enough hard evidence to properly assess their success and/or their impact.
- There are clear limitations to the impact of the LTP's work as endogenous conditions may and sometimes do hinder LTP reform efforts. For instance, while an LTP mortgage training manual was heavily utilised by the local banks in Moldova, the growth of mortgage lending has been hindered by the global financial crisis and low salaries.

6.3 General recommendations

- The Bank/OGC should undertake a strategic review of the LTP's priorities, core areas, resource allocations, and the modes of engagement with the rest of the Bank, as well as external players (IFIs), with a view to re-orienting its focus in some areas (for example, securities markets to take into account the LC2 initiative⁴⁷ or telecommunications regulations to take account of the fast development and convergence in the ICT market), while increasing activities in other areas (for example, energy law and regulation, corporate governance, PPPs). Historically the LTP has achieved the greatest success in these areas to which considerable resources (funds and staff) have been dedicated over the longer term. To strengthen and expand the impact of its projects, the LTP will require a gradual increase in its resources. For example, adding a concessions/PPP expert could result in the LTP making a stronger impact beyond Russia. Similarly, a dedicated energy regulation or/and transport regulation specialist(s) would be required to build the LTP's reputation in these fields. Corporate governance is another important area where the LTP has been successful, however benefiting only a few (four) countries due to resource constraints.
- Over the last 10 years, the LTP has dedicated substantial resources to conducting legal assessments and developing legal standards. These were highly successful undertakings and prerequisite to further actions. The LTP should continue updating its assessments and fine-tuning the set standards.
- The LTP should sharpen its focus on projects which directly support legal reform processes, particularly in respect of institutional capacity building and better designed training for judges, registrars, PPP or procurement officials. Such training should always incorporate specific targets with respect to expected outcomes/accomplishments and specific measures to verify impact. This has not always been the case (for example, in respect of early phases of judicial capacity building) and has been a significant impediment to gauging the relevance and impact of this important work. The LTP has recognised the importance of such measures in respect of its more recent projects.
- While the ultimate success of legal reform projects depends to an extent on external factors, the LTP should set more precise and measurable objectives in its three-year action plans (or in its annual plans, if such plans are to be introduced). This would improve monitoring and provide the potential for the implementation of these plans to be effectively evaluated.

⁴⁷ See the last recommendation.

- The LTP should integrate a “Project Results” column to its “LTP legal reform Projects” list (see Annex 8), which would briefly summarise the concrete results of each project (for example, listing the main outcomes and impacts, giving the date when the law was enacted, commenting on whether it is utilised, or why it was not approved, results of competency tests following training, and so on).
- The LTP should better structure (for example, by organising it in a more systematic way), its collaboration with other organisations, setting specific objectives and plans for such a collaboration in its three-year action plans.
- More focus on company law and secured transactions is needed as these areas greatly facilitate the Bank’s engagement and are at the core of transition.
- Increased efforts are needed in developing local capital markets. In this respect the LTP might usefully intensify its work on capital market development, possibly within the framework of the Bank’s Local Capital Markets and Local Currency Initiative.

6.4 Recommendations in respect of LTP’s activity fields

6.4.1 Legal assessment

- Increase the practice of combining in-house assessment information with that of other international entities, particularly when moving into SEMED.
- Factor into assessments the impact that culture and society has on the legal system in any given country and the impact it may have on the Bank’s subsequent interventions, especially in SEMED region.
- Each legal assessment should also include a detailed outreach and dissemination plan, with reasons, actions and timetables specifically set out.

6.4.2 Standard setting

- Increase cooperative initiatives with other leading IFIs and organisations.

6.4.3 Legal and institutional reform (general)

(see section 4 for recommendations related to each core legal area)

- Consider increasing resources, particularly for energy regulatory reform, concessions/PPPs, corporate governance and judicial capacity building (in addition to any increases needed to properly address challenges in SEMED).
- Step up efforts aimed at institution building. A continued awareness that laws alone are not the sole effective solutions for advancing transition is needed.
- Introduce rigorous impact assessments on completion of projects, with particular attention to those related to training and capacity building.
- Adopt a clear set of objectives for legal reform projects, which should be stated in the three-year action plans and updated annually.

6.4.4 Outreach

- Increase “internal outreach” efforts to keep bankers informed on the LTP’s activities, particularly those based at the Regional Offices and in respect of the LTP projects, which may directly affect banking projects.

Annex 1: Evaluation methodology

1 Purpose of the evaluation

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.

2 Stipulations

Legal reform does not function within an ideological vacuum. The strength of a legal environment greatly determines the legitimacy of a state on both a domestic and international level. Further, legal reform additionally supports reform efforts in other areas such as economics, political and human rights. This Review presumes the desirability of legal reform, with an understanding that it furthers the establishment of a free market economy and a thriving private sector. It is thus held that the pursuit, realisation and benefits of legal reform, as articulated as a foundational objective, require no further validation.

3 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,⁴⁸ 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 traditions⁴⁹ and the development of their respective legal frameworks.⁵⁰ By definition, all are “transition economies”.⁵¹ 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.⁵²

Against this background, the following sections address methodological options.

4 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.⁵³ 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.

⁴⁸ 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.

⁴⁹ See generally, Patrick Glenn, *Legal Traditions of the World*, 4th ed. (OUP, 2010).

⁵⁰ This is a common theme in the various Legal Indicator Surveys carried out by the EBRD.

⁵¹ See Article 1, Agreement Establishing the EBRD.

⁵² We do not discuss the so-called “legal transplant” problem in this report.

⁵³ Supra note 4 at 5.

5 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.⁵⁴ 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:

- *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.
- *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.
- *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.
- *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.
- *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:

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

⁵⁴ 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_1,00.html.

- *Environmental effectiveness:* Reflects the EBRD's commitment to sustained growth with minimum environmental impact.
- *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.
- *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.

6 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.

7 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:⁵⁵

1. Model CIS Company Law
2. CIS Model Bankruptcy and Liquidation Law
3. CIS Model Investor Protection Law
4. CIS Model Securities Law

⁵⁵ 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.

8 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.

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 OIs 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.

9 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.

10. 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.

Annex 2: Evolution of the Legal Transition Programme 2004- 10

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.

2004-07 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.

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.

2010-12 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.

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.⁵⁶ 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.⁵⁷ From a functional or commercial point of view, there is no distinction between the various terms used to describe such arrangements.⁵⁸ A sharp distinction must be drawn between civil-law jurisdictions and common law jurisdictions.⁵⁹ 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 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.⁶⁰

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.

⁵⁶ 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.

⁵⁷ Alexei Zverev, Milica Zatezalo, *Concessions law in transition countries: the EBRD's assessment*, LAW IN TRANSITION (2007) 7.

⁵⁸ See Christopher Clement-Davies, *Public-private partnerships in central and eastern Europe: structuring concession agreements*, LAW IN TRANSITION 38, 39 (2007).

⁵⁹ "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.

⁶⁰ Christopher G. Bradley, *Partner Capture in Public International Organisations*, 44 AKRON LAW REVIEW 261 (2011).

Within the European market, the first semester value of PPP transactions totaled €9.7 billion,⁶¹ 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 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."⁶²

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 made⁶³ (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 Projects*⁶⁴ and the United Nations Economic Commission for Europe (UNECE) Build Operate Transfer Group),⁶⁵ the overall assessment was that the legal environment had scope for improvement.⁶⁶

⁶¹ 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).

⁶² Peter Snelson, *Public-private partnerships in transition countries*, *LAW IN TRANSITION* (2007) 30, 37.

⁶³ See Craig Averch, Hsiannin 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).

⁶⁴ See Jose Faria, *International efforts to promote and harmonise concession law*, *LAW IN TRANSITION* (2001) 29.

⁶⁵ Geoffrey Hamilton and Travis Coleman, *Public-private partnerships for infrastructure development: The next steps*, *LAW IN TRANSITION* 32 (2001).

⁶⁶ Alexei Zverev and Milica Zatezalo, *Concessions laws in transition countries: the EBRD's assessment*, *LAW IN TRANSITION* 1 (2007).

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.⁶⁷ 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.

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.⁶⁸

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.⁶⁹ 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

⁶⁷ 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>.

⁶⁸ 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).

⁶⁹ See here, for example, Reiner Kraakman et al, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Oxford; OUP, 2004).

shareholders or, as the question is sometimes framed: how do the outside investors get a return on their investment and their money back?⁷⁰

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.⁷¹ 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 healthy and robust investment climate.

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

⁷⁰ 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.

⁷¹ On the agency problem, see Michael Jensen, *A THEORY OF THE FIRM* (Cambridge, Harvard University Press, 2000) at 85-87.

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.⁷²

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.

⁷² Maria Vagliansindi, Laura Campbell, *The EBRD: promoting transition through competition*, LAW IN TRANSITION 35-37 (2004) .

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.

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.

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.⁷³

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 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.⁷⁴ 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.

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.

⁷³ 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.

⁷⁴ 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.

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 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.

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.⁷⁵ 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.)⁷⁶ Lastly, a number of EBRD countries also have institutions that are ordinary members of IOSCO and seek to meet IOSCO standards.⁷⁷ 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.

⁷⁵ This point was confirmed during fieldwork in Hungary.

⁷⁶ See Raj Panasar and Philip Boeckman, eds., *EUROPEAN SECURITIES LAW* (Oxford: Oxford University Press, 2010), 9.

⁷⁷ Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, FYR Macedonia, Hungary, Kazakhstan, Lithuania, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, Slovenia, Ukraine and Uzbekistan.

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.⁷⁸ 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 political and financial influence and confidence of the Russian state".⁷⁹ The same interviewee stated that it was "difficult to overestimate the influence" of the LTP presence in Moscow.⁸⁰

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.

⁷⁸ Activity areas being legal assessment; standard-setting; outreach and legal and institutional reform.

⁷⁹ Interview with Fedor Teselkin of Freshfields Bruckhaus Deringer in Moscow, 27 July 2011.

⁸⁰ *Ibid.*

Annex 4: Legal reform projects – the Legal Transition Programme's sample countries specific performance

1. Concessions/PPPs

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.⁸¹ Moreover, it also resulted in the

⁸¹ 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.

publication of two books on PPPs⁸² 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.

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 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.⁸³ 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.

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 provided⁸⁴ 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.

⁸² "PPP – ways of improving the legislation", 2009; and "PPP – practice, problems, future", 2011.

⁸³ 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.

⁸⁴ M6-M60 Motorway project, a €74.6 million loan was signed in May 2008.

2 Corporate governance

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.

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.

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.

3. Infrastructure regulation and competition

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).

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 2012.⁸⁵

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.

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.

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

⁸⁵ 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).

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. Secured transactions

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.⁸⁶ The LTP intervened, refusing to be associated with the new law until changes were made to address the problem related to notaries.

⁸⁶ 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.

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.

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 counterparts of this project expressed the opinion that the LTP's continued engagement is essential for reforms to advance.

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 box 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.

Box 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.

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.⁸⁷ 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).

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.

5. Insolvency

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, 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.

⁸⁷ See Microsoft.NET, Microsoft Case study, Customer Solution Case Study, Serbia Ranked Top Country for Business Reforms with Company Registration System

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.⁸⁸

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 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.

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.

⁸⁸ 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.

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.

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.

6. Judicial capacity building

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.⁸⁹

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 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

⁸⁹ 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".

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 Unit⁹⁰ (see box 2 below).

Box 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.

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.

⁹⁰ Commercial Law Judicial Capacity Building project in the Kyrgyz Republic – Evaluation Report, April 2009, the IDLO Evaluation Unit, prepared by Anna Matveeva and Arianna Fraschetti. (this is one of very few instances where an EBRD project has been evaluated by an external organisation).

7. Public procurement

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.

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.

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. UNCITRAL 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).

8. Securities markets

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 2007.⁹¹ Gaps were identified and the amended law was based on a standard adopted earlier in Estonia.⁹² It was passed into law in October 2007.

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.

Russia

An assessment of securities market legislation in Russia was carried out in 2007.⁹³ 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).⁹⁴ 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.⁹⁵

⁹¹ See EBRD, *Securities Markets Legislation Assessment Project – 2007 Assessment* (EBRD 2007).

⁹² See the Law of the Republic of Armenia, *On Securities Market*.

⁹³ See EBRD, *Securities Markets Legislation Assessment Project – 2007 Assessment* (EBRD 2007). This assessment was carried out by Chadbourne & Parke LLP, Moscow.

⁹⁴ Rachel Morarjee, *Stock Exchange Merger creates market less prone to squabbling*, FINANCIAL TIMES, (3 October 2011).

⁹⁵ 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

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.

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.

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.

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.

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.

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.

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.⁹⁶ 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.

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 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.

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”.

⁹⁶ At the time of writing this report the SEMED region countries where EBRD was to operate included: Egypt (subject to Board approval), Morocco, Tunisia and Jordan.

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.⁹⁷ 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.

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:

- formal request for assistance
- clear terms of reference (ToR) incorporating provision of a dedicated draftsperson at the client country end for the life of the project and a “best efforts” commitment to obtaining a cabinet (or similar) mandate
- formal cabinet/executive mandate
- onshore steering committee comprising stakeholders
- consultation
- diagnostic analysis followed by consultation
- Green Paper followed by consultation
- extensive public consultation
- White Paper followed by extensive public consultation
- draft Bill circulated

⁹⁷ Hernando de Soto in *The Mystery of Capital*, 2003.

- bi-partisan support solicited
- 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.