

PROMOTING ECONOMIC GROWTH AND DEVELOPMENT FOR ALL

Concept Note

I. INTRODUCTION

The commitment of the 2030 Agenda for Sustainable Development¹ of “leaving no one behind” applies to all nations and people, for all segments of society, and endeavors to reach first those who are furthest behind. The Sustainable Development Goals (SDGs) are unique in that they call for action by all countries, poor, rich and middle-income to promote inclusive prosperity, while protecting the planet. They recognize that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs, including education, health, social protection, and job opportunities, while tackling climate change and environmental protection. Specifically, Goal 10 of the 2030 Agenda seeks to reduce inequality within and among countries, including as relates to economic and commercial opportunity, while Goal 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment, and decent work for all.

Fostering economic opportunity is a strategic goal of IDLO. IDLO believes that empowering people also means promoting their potential for wealth creation. Emerging economies are claiming an increasing share of the global economy, but structural impediments - such as unequal access to education, low rates of women’s education and participation in the labor force, and a lack of social inclusivity - mean that the ‘middle-income trap’ is already a distinct risk. Indeed, Target 3 of SDG 8 specifically calls for the promotion of development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services.

Other crippling obstacles need to be addressed to ensure sufficient legal capacity to negotiate trade terms and solve commercial disputes; increased incentives for climate-positive, energy-efficient development; strong service delivery; and appropriate enforcement of intellectual property rights, to encourage creativity, or, conversely, avoid overzealous enforcement of these rights, which may deny the poor access to technological benefits and life-saving medicines.

Under its Strategic Plan 2017-2020 (or Strategy 2020)², IDLO reiterates its commitment to supporting the 2030 Agenda for Sustainable Development, to strengthening legal and judicial capacity, and to supporting economic development, for an improved investment climate and strengthened access to justice for the private sector.

¹ See <http://www.un.org/sustainabledevelopment/development-agenda/>.

² See http://www.idlo.int/system/files/event-documents/IDLO%20Strategy%202020_0.pdf

II. DESCRIPTION OF THE PROGRAM

Goal: Strengthen inclusive legal and regulatory frameworks conducive to market activity and sustainable economic development with specific attention to the poor and marginalized

Outcome 1: Strengthen the capacities of Least Developed Countries (LDCs) to prepare for, and conduct, negotiations and participate in arbitral proceedings or alternative dispute resolution methods

Context and Problem Statement

The forty-seven Least Developed Countries (LDCs) are the world's poorest and can benefit substantially from responsible and well-managed foreign direct investment (FDI) to generate income, jobs, and technological upgrading to advance their economic growth and sustainable development. Yet, the LDCs do not often have the human or financial resources to participate effectively in investment-related negotiations, and to secure the most favorable outcomes for their people and economies. This divide is further exasperated as gender inequality in economic progress remains a challenge for LDCs.

This capacity differential can lead to negative outcomes, such as unbalanced investment projects, and contracts that are liable to renegotiation, and may generate disputes that must be resolved through international arbitration, disrupting the relationship between the investment partners. This, in turn, entails considerable costs for the parties involved, be they governments, domestic firms, or foreign investors. Well-negotiated and fair investment projects and contracts are, therefore, in the long-term interest of all partners. Similarly, unbalanced investment-related international agreements may not be conducive to the sustainable development of the LDCs.

IDLO, in partnership with the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), has designed an Investment Support Program for Least Developed Countries (ISP/LDCs), to provide legal and technical advice and assistance to requesting LDCs on investment-related negotiations and dispute settlement, and to develop their capacity in these areas.

The ISP/LDCs was first discussed at a side event during the 2016 Midterm Review of the Program of Action for the Least Developed Countries³, which reaffirmed the global commitment to address the special needs of the LDCs. Since then, IDLO and the UN-OHRLLS have developed the Program, which was officially launched at an event on September 22, 2017, at the UN Headquarters in New York⁴⁵, with the support of high-level participants, including ministers, heads of Investment Promotion Agencies of the LDCs, and representatives of development partners of the LDCs, as well as experts in this field. The event and subsequent approaches revealed a strong interest in the Program by both potential beneficiary countries, including Gambia, Myanmar, and Senegal, and potential donors, such as the European Union, which has pledged one million euro.

³ See <http://unohrlls.org/UserFiles/File/IPoA.pdf>.

⁴ See <http://www.idlo.int/news/highlights/un-and-idlo-launch-new-investment-support-programme-least-developed-countries>

⁵ <http://www.idlo.int/news/highlights/launch-investment-support-programme-least-developed-countries-summary-debate>

Proposed Approach/Focus

Based on requests from LDC governments and eligible private sector entities, the Program will provide negotiation and dispute-settlement advisory and representation services, as well as tailor-made, targeted training and capacity development activities. IDLO will arrange for multi-disciplinary teams to assist them in preparing for, and conducting, negotiations and participation in arbitral proceedings or alternative dispute resolution methods. As requested, the Program will also arrange complementary training and capacity building. The Program has already received expressions of interest from – and will harness – the services of lawyers and experts (e.g. in tax management, tendering and procurement, accounting and financial analysis, environmental management, etc.), who are ready to provide support to, and build the capacity of, the LDCs on a “pro-bono” or reduced fee basis, thus catalyzing the readiness of professionals worldwide to contribute their expertise to the sustainable development of the poorest members of the international community. The Program will develop and promote public-private partnerships as a cost-effective means for achieving sustainable economic growth, through optimal public resource management, quality and timely provision of public services, reduced risks, and built-in synergies, alliances and cooperation.

Beneficiaries may request advisory support and tailor-made capacity development in the following illustrative focus areas of investment-related negotiations and dispute settlement:

Investment-related negotiations

- Conducting/reviewing the feasibility of a proposed investment project between the beneficiary and a potential foreign investor, and other related assessments and evaluations;
- Preparing contract negotiation positions;
- Preparing tender documents and managing tendering processes (where contracts are to be awarded through a competitive process);
- Preparing financial structures for the operation and management of a proposed
 - project;
- Drafting and negotiating contractual provisions;
- Selection of the dispute settlement method, which may include arbitration of disputes before an institution or ad hoc, depending on the nature of the project, as well as the applicable law and place and seat of arbitration;
- Preparing a monitoring system to ensure contract compliance and avoidance of disputes;
- Preparing and conducting negotiations on Bilateral Investment Treaties or other investment-related agreements, and strengthening the capacity of beneficiary officials active in this field.

Investment-related dispute settlement

- Advising and/or representing the beneficiary in existing or potential arbitration/mediation or negotiation proceedings between the beneficiary and an investor, and in the enforcement (or challenge) of an award;
- Selecting arbitrators (where the arbitration clause is silent on the method of selection, the expert will advise the beneficiary on nominating an appropriate arbitrator based on qualifications, expertise, and experience);
- Preparing submissions (drafting and finalizing the various pleadings to be filed before an arbitral tribunal or any other body chosen by the beneficiary and investor for the settlement of disputes);
- Attending arbitration hearings; and
- Preparing and examining evidence.

The Program will advance the diversification of investments to cover a range of sectors and industries, including to make LDCs less dependent on extractive industries only.

Strengthening national capacity through on-demand, tailor-made training will underpin the Program's success. Strengthened capacity will ultimately attract sustainable FDI, and ensure longer-term sustainability of the proposed intervention. Tailor-made transfer of knowledge, experience, and skills on investment-related negotiations and dispute settlement issues, based on locally-defined parameters, will underpin the advisory and representation services. This approach will strengthen the ability of beneficiary country institutions and individuals, alongside the sector itself.

In all cases, experts will provide quality professional advice and tailor-made capacity development on requested issues, as well as information and analysis. This will help the beneficiary assess options, decide upon its interests, priorities, and strategies, and weigh the trade-offs that may be involved when goals conflict. The Program will draw on the expertise of legal specialists worldwide, who have regional and/or international experience, and who are able to provide support in multiple legal systems. The Program will also explore relevant collaborative arrangements and partnerships with other national, regional, and international expert bodies (such as the Secretariat of Permanent Court of Arbitration, and the Africa Legal Support Facility hosted by the African Development Bank), in order to optimize success and impact of the intervention.

All assistance under the Program will be demand-driven, provided upon request, and designed for quick response.

Outcome 2: Build stronger and better functioning courts and legal institutions responsible for the commercial law sector, and increase business confidence in the Judiciary

Context and Problem Statement

Commercial law is one of the main deficit areas in transition economies and in countries seeking to move up the economic value chain. Globalization has vastly expanded the need for competence in this field to increase business confidence and ensure inclusive growth. A sound knowledge and practice of commercial law facilitates economic integration. It enables poorer nations to secure better terms in international or bilateral trade agreements, and empowers resource-rich ones to handle large foreign investment flows. Where investment is scarce, commercial law capacity encourages it by fostering an overall transparent business climate.

Many countries in transition and middle-income countries continue to face endemic problems that stifle their economic growth. Among the most pervasive of these are government interference in the economy and corruption. Corruption also prevents proper and fair access to and administration of justice in the country.

A fair judiciary and a law enforcement system that operates with integrity are vital components for economic growth. Often, judiciaries can be perceived as ineffective and easily influenced, and in need of commercial law capacity building to ensure quality, impartial and effective enforcement, to increase public confidence and trust.

Greater and more effective use of mediation, as an effective and attractive form of alternative dispute resolution to commercial disputes, can bring about a range of potential benefits. Mediation

can substantially reduce caseload burdens, improve clearance rates, and raise efficiency in the administration of justice.

The protection of intellectual property rights, when effectively and efficiently enforced, can also play a significant role in economic development, both by stimulating innovation and attracting FDI.

Similarly, a strong regime for the protection of competition is an important pre-requisite for economic development. Free and fair competition, regulated by well-articulated and comprehensive legislation, serves to prevent the domination of markets by individual companies or small groups of economic actors.

Proposed Approach/Focus

To address the above-mentioned challenges, the Program will implement tailor-made, field-based, economic and commercial law capacity development activities, based on in-depth needs assessments and/or requests for assistance from governments and public institutions, addressing such issues as:

(i) Commercial law judicial training and capacity building

Property rights in commercial transactions, land contract disputes, insolvency, creditor rights and secured assets, privatization disputes, breaches of commercial agreements, intellectual property rights, and corporate governance. Exposure to regional and international best practices through apprenticeship programs. Establishing commercial law sections within Judicial Training Centre libraries. Training of Trainers (TOT) for Judicial Training Centre staff. Development of commercial law decision databases. Analysis of judicial reasoning in commercial law cases. Development of judicial benchbooks on commercial law.

(ii) Capacity building of bailiffs in relation to enforcement of court decisions in commercial matters

Functional analysis of training needs and court enforcement legislative review. Training programs for bailiffs focusing on, e.g. conflict resolution techniques, and the use of soft power and persuasion to convince judgement debtors to pay; basic civil procedure and advocacy skills, to prepare bailiffs for defending challenges to the enforcement process in court. Development of case management databases (e.g. online registers of enforcement matters).

(iii) Alternative dispute resolution (ADR) for business disputes

Reform of the legal infrastructure supporting the use of domestic and international arbitration, and implementation of the UNCITRAL model law. Enforcement of the decisions of local and in particular international arbitration. Establishment of mediation centers to promote the use of mediation to resolve business disputes. Raise awareness of existing ADR mechanisms to promote usage among target populations. Train small and medium enterprise (SME) owners, especially women, on using ADR mechanisms in dispute resolution. Development of reference material and guidebooks on the setting up of such mediation centers. Train and develop capacity of mediators.

(iv) Capacity building for members of competition authorities

Competition law reform, notions of undertaking and agreement in EU competition law, definition of the relevant market, judicial review of competition decisions, notion of dominance and abuse, and competitive assessment of mergers.

(v) Public procurement

Review of public procurement legislation. Public procurement principles and role of accountability bodies in monitoring public procurement activities. Roles and responsibilities in

the public procurement process. Procurement planning. Specifications preparation and writing. The bidding process. Evaluation of bids. Contracting and contract management. Records management in procurement. Ethical issues in procurement.

(vi) Intellectual Property Rights (IPRs)

Importance of intellectual property in economic development, and importance of protection and enforcement. Basic principles, legal characteristics, and legal arguments of trademarks, patents, copyright and neighboring rights.

(vii) Establishing an online system of access to judicial decisions

Legislative review and reform. Development of websites and national databases of judicial acts addressing commercial law disputes. Training for judges and judicial personnel on publishing judicial decisions. Raising awareness of online systems of access to judicial decisions among target users.

(viii) Anti-Corruption

Strengthened integrity, independence, efficiency, transparency and accountability of administration of justice and related processes. Increased capacity to monitor and evaluate the performance of prosecutors in conducting quality preliminary investigation and litigation of criminal cases. Development of judicial benchbooks. Management and oversight of criminal justice reform. Support to civil society organizations to enhance public accountability.

Gender Mainstreaming

Among IDLO's core values and guiding principles are gender-sensitivity and gender-responsiveness, respectfully. To support its gender commitments outlined in its Strategic Plan 2017-2020, and further explicitly laid out in its Gender Strategy, IDLO is committed to ensuring that its work effectively contributes to gender equality, women's empowerment, and the achievement of fair justice outcomes for women and girls, in line with international human rights standards and global commitments on gender equality. IDLO will ensure that the development and implementation of all Program activities benefit from gender analysis to promote gender inclusion. As an example, the Program will ensure that judicial training on commercial law involves women trainers and judges; that there is gender balance among beneficiaries; that non-discriminatory, gender-responsive laws, policies and literature are reviewed; that discriminatory and inaccessible commercial structures and systems are dismantled; and that ADR-related activities actively promote and record the use of alternative procedures by women.

III. PROGRAM EXPECTED RESULTS

In line with international development cooperation best practice and accepted principles of results-based management (RBM), IDLO's Strategy 2020 Results Framework provides a logical articulation of the different levels or chains of results expected from its substantive programmatic interventions in order to achieve positive change within the rule of law sector.

This Program specifically supports Goal 10 of the SDGs, which calls for the adoption of sound policies to empower the bottom percentile of income earners, as well as the promotion of economic inclusion for all - regardless of sex, race or ethnicity - as a means of reducing the widening income inequalities. Action Goal 5 of IDLO's Strategy 2020, which seeks to support legal and judicial actors to promote economic opportunity and sustainability, in turn, contributes to attaining SDG 10, by supporting the following specific outcomes:

- *Capacity of justice sector institutions to fight corruption and financial crimes is strengthened*
- *Individual and institutional capacities to address economic development, economic and commercial law adjudication, enforcement of judicial decisions and alternative dispute resolution, are strengthened*
- *Laws and policies to remove barriers faced by entrepreneurs within the target group, including women, are implemented [adopted - supported]*
- *Laws and policies promoting [equitable] trade, investment and sustainable natural resource management are implemented [adopted - supported]*

IV. PROGRAM BENEFICIARIES

In addition to supporting the governments of the 47 LDCs, as designated by the United Nations General Assembly⁶, the Program will also assist eligible private sector entities as well as middle-income countries and transition economies.

The Program will pay particular attention to supporting businesses owned by women and individuals from other marginalized and excluded groups, and promoting their access to economic opportunities. On demand, technical and capacity building assistance will be designed to support their special needs.

V. IDLO EXPERTISE AND EXPERIENCE

As the only intergovernmental organization exclusively devoted to promoting the rule of law, IDLO works to enable governments, empower people and strengthen institutions to realize justice, peace, and sustainable development. IDLO provides technical legal assistance and capacity development at the national and local level, often in the poorest and most insecure parts of the world. It works in partnership with local actors and with different legal systems in an enabling and empowering – rather than prescriptive or directive – way. IDLO has extensive experience in countries emerging from conflict or striving towards democracy and is increasingly also working in emerging economies and middle-income countries to strengthen their legal capacity for sustainable development and economic opportunity.

Founded in 1983, IDLO has established itself as a global leader in the rule of law assistance field. From its origins as an organization seeking to alleviate disparities in capacity between lawyers in developing countries and their counterparts in advanced economies or international institutions, IDLO has grown and diversified to meet the demands of the evolving rule of law field and to provide leadership in the international community. For over 30 years, IDLO has provided support for national legal and judicial reform strategies and other nationally agreed frameworks, including those that set the agenda for recovery from armed conflict. In recent years, it has established programs that focus on the legal empowerment of the poor and on ways for countries to use the law to reduce the risks of some of today's global challenges. It builds networks of legal innovators across the globe who exchange specific practical experience on legal reform. Additionally, IDLO seeks to advance the knowledge base on the rule of law, and actively shares this information with and for the international development community.

IDLO has extensive experience in working in the area of economic and commercial law. Recent programming of relevance includes a large-scale project in Kyrgyzstan, which built the capacity of sitting judges on commercial law, and strengthened the capacity of the Judicial Training Center (JTC)

⁶ See https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf

to systematize judicial training, and sustainably and independently deliver capacity building for the judicial corps.

IDLO has since implemented similar capacity building projects for the Judiciaries of Jordan, Mongolia, Montenegro, Tajikistan and Tunisia. They strengthened the justice sector to deal effectively with commercial disputes through the development of new training modules and the delivery of trainings to judges and other justice sector professionals.

IDLO currently provides assistance to relevant Tajik stakeholders to review and amend legislation and regulations on public access to judicial decisions, and is – in addition to enhancing the Economic Court’s technical capacity - developing a website and comprehensive database for the publication of its decisions to the broader public. In Mongolia, IDLO is establishing an institutional mechanism to enhance the quality and consistency of judicial decisions, and developing an appropriate methodology for reviewing the quality of judicial decisions within the Judicial General Council (JGC).

IDLO is implementing a capacity building projects with bailiffs in Mongolia and Ukraine to support the more effective enforcement of court judgements in commercial matters, while IDLO’s commercial mediation projects in Kyrgyzstan, Mongolia, and Tajikistan, support the legislative drafting process, advancing the realization of the draft laws on mediation, and promote and strengthen the mediation institutions to resolve business disputes.

In Ukraine, IDLO support the country’s anti-corruption, deregulation and decentralization reforms, working at the national and local levels - with Ministries, Regional and City administrations - and at the grass-roots level with civil society organizations engaged in the pursuit of rule of law, transparency and accountability. The scope of IDLO’s work includes supporting the Special Anti-Corruption Prosecutor’s Office (SAPO) in implementing its public relations and communications strategy for increased transparency and visibility, and the National Anti-Corruption Bureau of Ukraine (NABU) in ensuring it has sufficient investigative authority as provided by Law; drafting new and improved legislation for e-governance reform and while working with regional governments, state actors, civil society, and the business community to implement the resultant mandatory system of electronic public procurement; working with ministries on concrete anti-corruption measures, both legislative and procedural; designing and streamlining of administrative services in line with international best practices through unified Public Service Centers in Odessa, Mariupol, Karkiv; providing anti-corruption grants to a select number of civil society organizations to enhance oversight of, and trust in, implementation of the anti-corruption reforms; and providing dedicated support to the Ministry of Interior in the reform of the National Patrol Police and awareness-raising of Gender-Based Violence and Trafficking in Persons in local communities.

In October 2017, IDLO organized and hosted a Judicial Conference on Insolvency Matters in Croatia, which supported the implementation of the Croatian insolvency legal framework, by helping Croatian judges share their experience of handling insolvency cases, learn about best practice in dealing with insolvency matters, develop a mutual understanding and uniform approach to dealing with problematic issues in the area, and enhance the knowledge of insolvency law and practice.

IDLO enhanced the transparency and accountability in Somali public financing by building the capacity of Somali procurement officers from the Ministry of Finance and other relevant ministries. IDLO and the Somali procurement officers worked together to establish and administer a sound procurement system with strengthened procurement practices.

IDLO worked to strengthen the capacity of examining magistrates and public prosecutors in Tunisia in investigating techniques and mechanisms to deal with financial and economic crime-related cases. IDLO also worked with civil society to strengthen its capacity to participate in the fight against

financial and economic crimes, and members of the Pôle Judiciaire Financier and selected judges with training on banking practice and procurement.

Over the years, through implementation of its economic and commercial work, IDLO developed strong relationships with, among other, national Judiciaries, commercial courts, Judicial Training Centers, bailiff services, Chambers of Commerce, and Competition Commissions. In addition, IDLO has collaborated with a number of bilateral and multilateral partners to deliver programming in this field, including the Governments of Italy, The Netherlands, and the United States, as well as the Kuwait Fund for Arab Economic Development (KFAED), the European Bank for Reconstruction and Development (EBRD), and the Arab Bank for Economic Development in Africa (BADEA).

VI. SUMMARY REQUEST

The International Development Law Organization is requesting three-year flexible funding to accelerate its delivery of programs that strengthen market function and inclusive economic development, with a focus on poor and marginalized populations. Specifically, IDLO will support governments to negotiate and establish inclusive legal and regulatory frameworks.