

# Modern Law for Global Commerce

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## **Section on Commercial Law Development and Technical Legal Assistance: Goals and Stakeholders**

### **Multilateral Organisations and Legal Technical Assistance: Learning from Experience**

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Assisting countries to improve their laws is today a mainstream activity of many multilateral organisations. For the international financial institutions this work goes to the heart of their efforts to foster progress, particularly by seeking to improve the climate for both domestic and cross-border trade and investment. This objective is shared by other bodies too, including the United Nations Commission for International Trade Law whose important work we are marking at this congress. This shared purpose is accompanied by a growing convergence of the ways in which assistance is delivered.

But this state of affairs was not always so. The early work of the international financial institutions focused heavily on financing infrastructure development with technical assistance playing a modest and subsidiary role. Legal assistance was rare and was limited to introducing technical rules rather than strengthening the system that creates and implements them. This reflected a view of development that confined the role of the law to articulating economic prescriptions.

But by the eve of the establishment of UNCITRAL some forty years ago, the United Nations, in a report based on the seminal study of Professor Clive Schmitthoff, was confident enough to proclaim that “there is an increasing awareness that a modern legislative framework is the necessary foundation for sound economic and social progress”. Interestingly, a footnote to the report reveals what was apparently a representative view at the time that “the law should not [be allowed to] lag behind technical progress and material achievements”. It was as though, at best, law could avoid imperilling such accomplishments. However, in the subsequent two decades the idea that law could actually help drive and shape progress did slowly take hold among multilaterals. But when set against the immense needs of client states, the volume of technical legal assistance provided by multilaterals was tiny.

Certainly at the time when UNCITRAL was established, it could not have been expected that the organisation would provide very much by way of technical assistance. The report of the Secretary General of the United Nations that recommended the creation of UNCITRAL proposed that its “primary function” be as a coordinating body of the agencies already working on international trade law. Formulating new

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laws was also envisaged. However, “services in connection with technical assistance activities” in the field of international trade law was the last of the various functions enumerated, provided they were “within the limits of available resources”. Given the sheer breadth of UNCITRAL’s initial remit there must have been very obvious limits to what could be expected of a secretariat comprised of only as many lawyers as could be recruited within a budget – even in 1967 terms – of \$31,600!

For their part, the international financial institutions tended to finance legal assistance, not from their ordinary capital resources, but through donor funds provided by their shareholders. However funding legal technical assistance was often uninteresting for donors. This was because, while providing support was usually conditional on advisory services being delivered by a national of the donor, the demands of the reform project often called for the funding of locally based expertise, particularly for analysing and drafting laws and supporting them through the approval and implementation phases. Donor funding was also more available for technical assistance projects that offered measurable results within the time horizons of the donors’ budgetary rounds. Yet legal reform processes and outcomes, whether evolutionary or more radical, are rarely tidy or predictable. This recalls the sentiment attributed to Zhou Enlai, who when asked about the impact of the French Revolution thought it too early to say.

But while the tied nature of much donor funding may have made legal reform projects more challenging, the constraints imposed by the conditional nature of the support shouldn’t be exaggerated. Where legal technical assistance has produced disappointing results, the source of funding is usually irrelevant (although there is evidence that tied funding makes the cost of delivery higher) and the reasons often varied and complex. In this respect, legal technical assistance is a field that has yielded many lessons. Many of these are acknowledged by multilateral organisations and have been internalised by them in the design of their legal reform programmes.

Five lessons stand out:

*First, law is relevant to the development process.*

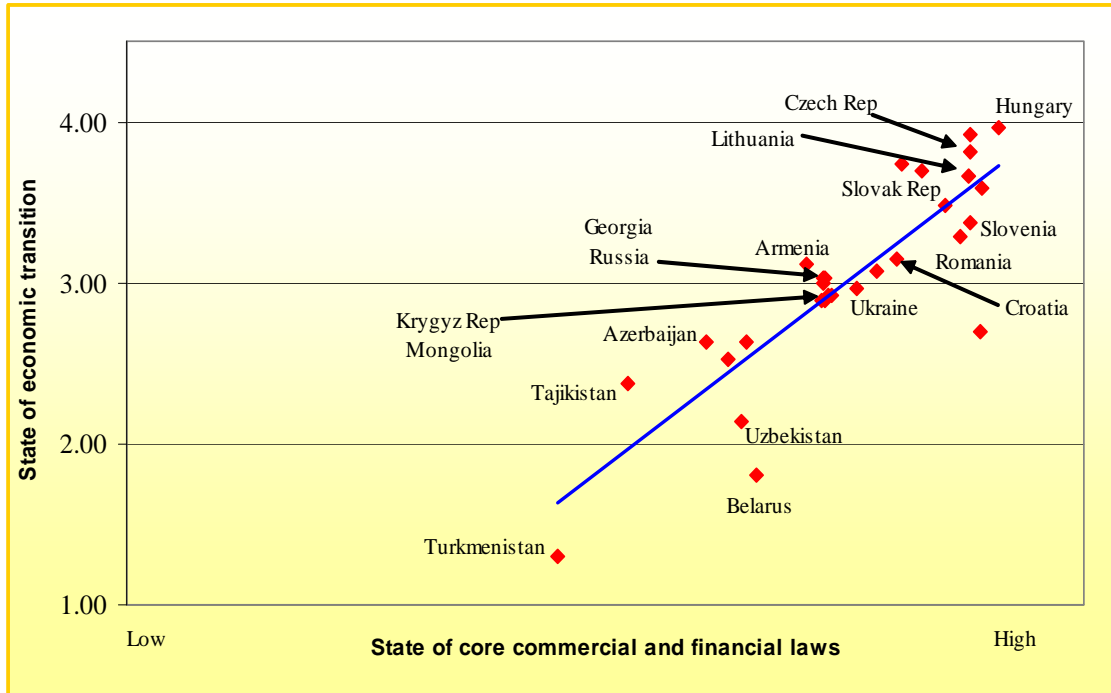
The Asian Development Bank was among the first among the international financial institutions to conclude emphatically that law played a role in the growth of what were then called the Asian tiger economies. It did so after a multi-year study of the economies of Asia, the conclusions of which were published on the eve of the crisis in the Asian financial markets in the 1990s. That event, like the subsequent turmoil in the Russian markets that followed, gave resonance to the earlier finding and spurred the multilateral development banks to make strengthening the investment climate a more direct subject of their work.

Prior to this, the dominant view in policy circles was that the laws and institutions that support the market would develop naturally in response to the needs of the projects and the entities which the development banks financed. In the past decade, all of the major international financial institutions have called for legal systems to be responsive to the needs of the market and all provide legal technical assistance for this purpose.

*Secondly, sound economic laws go hand-in-hand with other dimensions of reform.*

Studies of several international organisations, including the World Bank in its Doing Business Reports, explore the linkages between legal and economic reform. Since 1995, the European Bank for Reconstruction and Development has measured annually both dimensions of reform across the region where it invests, namely central and eastern Europe and the Commonwealth of Independent States. The EBRD studies suggest that, at least in the region where it operates, there is a strong positive correlation between the quality of core commercial and financial laws and the state of economic advancement. (see chart 1)

**Chart 1: The relationship between commercial and economic advancement in transition countries**

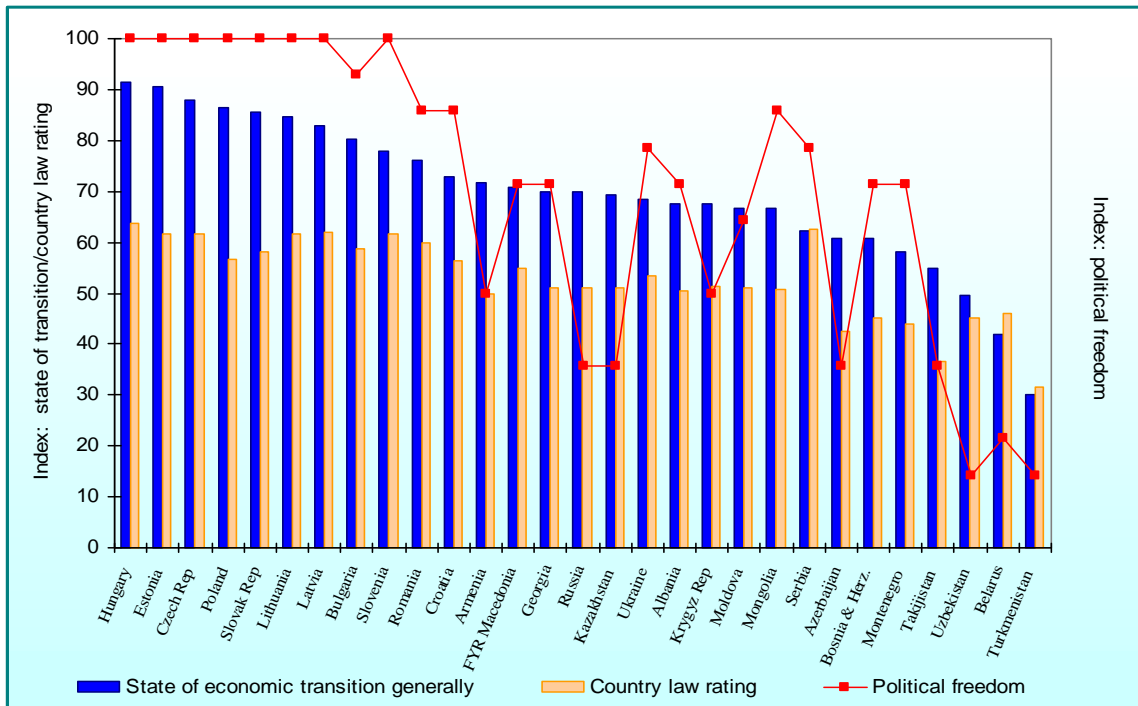


*Source:* EBRD Transition Report 2006, Table 1.1; EBRD Composite Country Law Index, Sept. 2006

*Note:* Economic transition ratings range from 1 to 4.5, with a perfect score indicating that economic transition has been achieved across all key economic dimensions. A perfect score for core commercial and financial law indicates that such laws fully conform with international standards and are fully implemented

The issue of causality is more complex of course. And the question of whether progress is linked to political freedoms can be a difficult and sensitive one for multilateral organisations given that their charters frequently prohibit them from taking political considerations into account in their decision making. But it is an easier subject institutionally for the EBRD to grapple with given that, unique among international financial institutions, its support is confined to those geographically qualifying countries that embrace democratic principles and market-oriented economies. The Bank's own studies, as well as the research of others, shows that in the countries where the EBRD operates the levels of economic advancement, legal progress and political freedom are positively correlated and that progress and failures along these dimensions tend to reinforce one another. (See chart 2)

**Chart 2: Relationship among law, economic transition and political freedom in transition countries**



Source: EBRD Composite Country Law Index, Sept. 2006; EBRD Transition Report 2006, Table 1.1; Freedom House, Freedom in the World, 2007

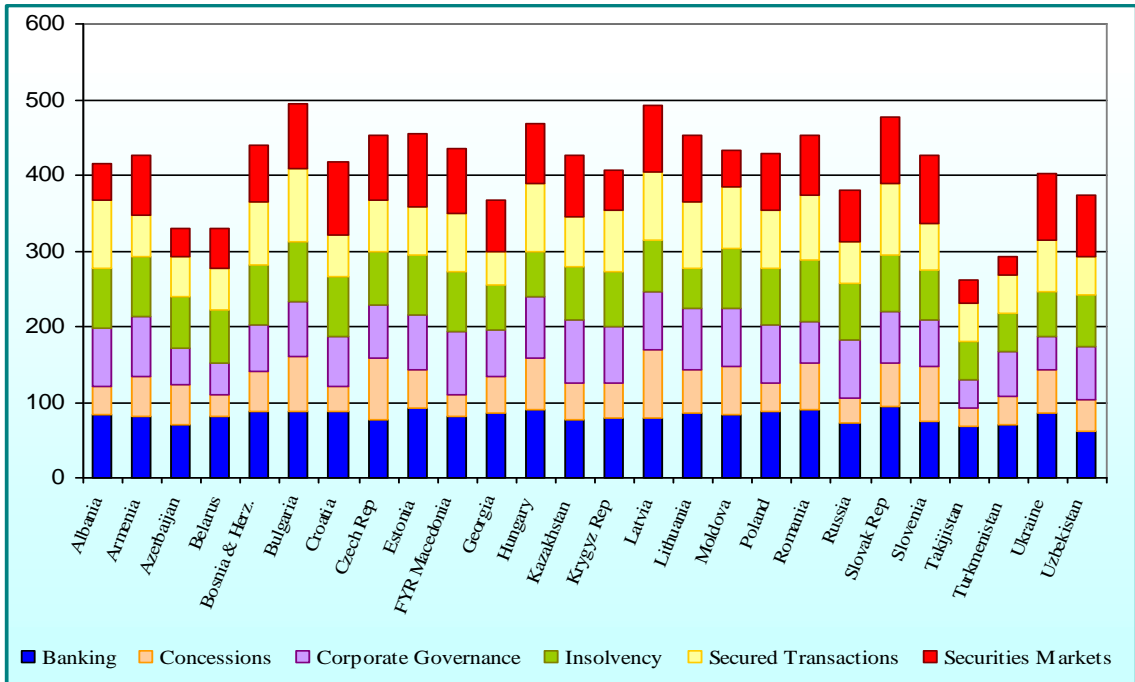
Note: The higher the score, the higher the state of economic transition, commercial laws or political openness.

*Thirdly, economic laws should be benchmarked against international standards.*

Following the Asian and Russian financial crisis, the World Bank and the International Monetary Fund took a lead in working with the multilateral development organisations and others to forge international standards in key areas of economic activity. Subsequently, in 2002, the Monterrey Declaration that called for economic laws to be evaluated relative to international standards or uniform principles, thereby fostering greater transparency and comparability of laws across different countries. These efforts built on existing initiatives and helped spur the development of emerging ones. For example, in the early 1990s, the EBRD developed a model law based on core principles for the legal creation of non-possessory pledges of moveable assets. The OECD developed principles on corporate governance and the World Bank developed guidelines for insolvency laws. UNCITRAL has developed many texts which embody or establish international standards, including, for example, its legislative guide for privately financed infrastructure projects.

For its part, the EBRD has assessed the state of many core economic laws in the transition countries, including the laws on concessions and public-private partnerships using UNCITRAL's work in this field as the preferred standard. (see chart 3) Later this year, the Bank will publish an assessment of the state of international arbitration laws in the CIS countries measured against UNCITRAL's model law on this subject. (See chart 4)

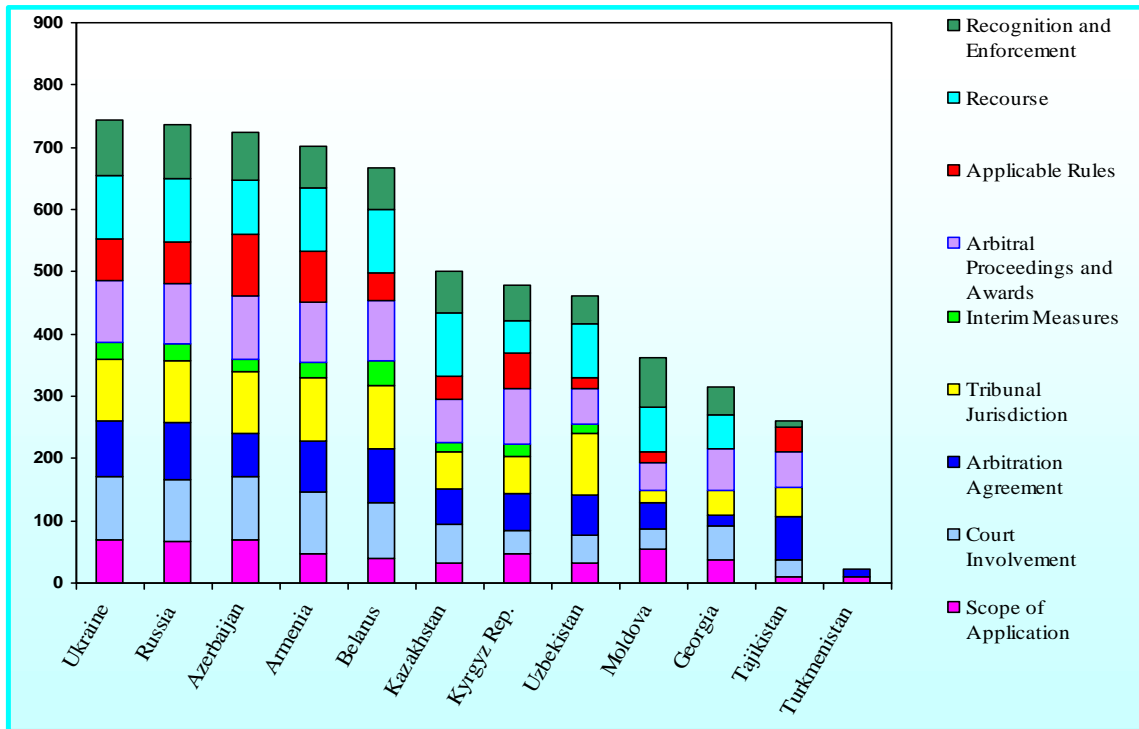
**Chart 3: Conformity of commercial laws in transition countries with international standards**



Source: EBRD Legal Surveys 2000-2007

Notes: (i) The laws of each sector are scored using an index of 100. Sectoral scores are then tallied, with 600 representing full approximation with international standards. The higher the score, the greater the degree of conformity with international standards

**Chart 4: Conformity of commercial laws of CIS countries with UNCITRAL Model Law on International Commercial Arbitration**

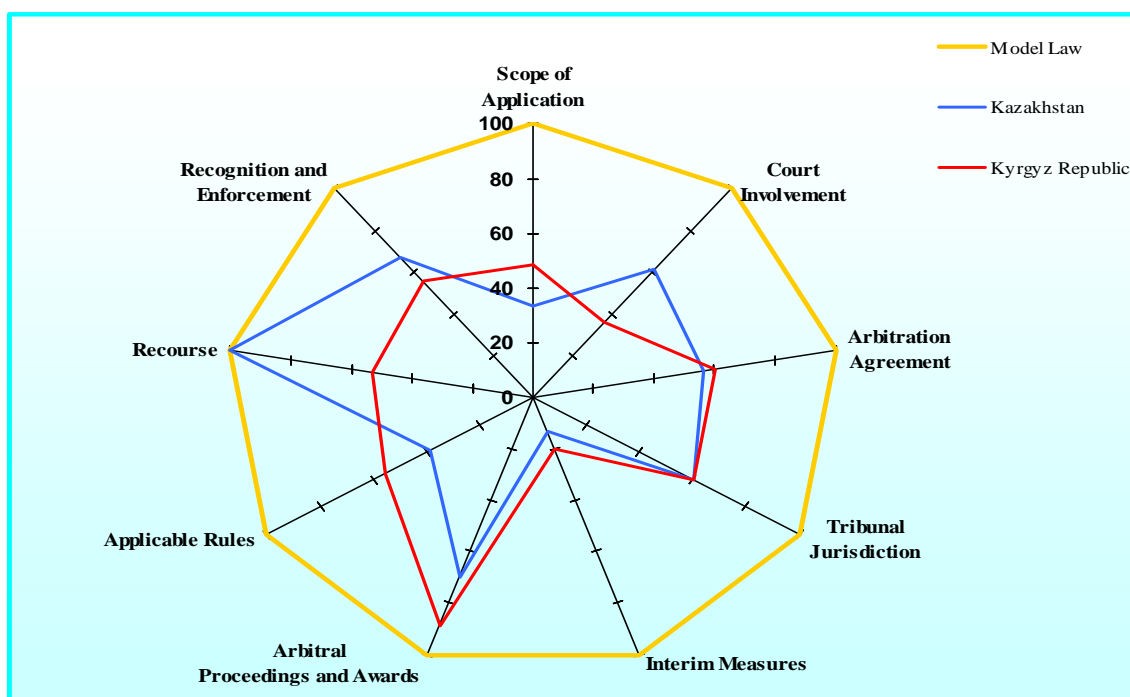


Source: EBRD Arbitration Law Assessment, 2007 (to be published)

Note: The laws of each sector are scored using an index of 100. Sectoral scores are then tallied, with 900 representing full approximation with the principles of UNCITRAL's Model Law on International Commercial Arbitration.

International standards also provide a reference point for the design of legal technical assistance projects. Detailed assessments also help identify precisely where assistance is required. (See chart 5) Rarely is there a need for the introduction of wholly new laws, particularly in core areas of economic activity, and it is better to retain what is good and discard only what needs discarding. Designing legal technical assistance projects that use international standards as a benchmark also helps guard against the danger, sometimes seen in the past, of crudely transposing foreign laws which may be unsuitable for countries seeking to enter, or entrench their positions in, the international economic order.

**Chart 5: Conformity of commercial laws of Kazakhstan and Kyrgyz Republic with UNCITRAL Model Law on International Commercial Arbitration**



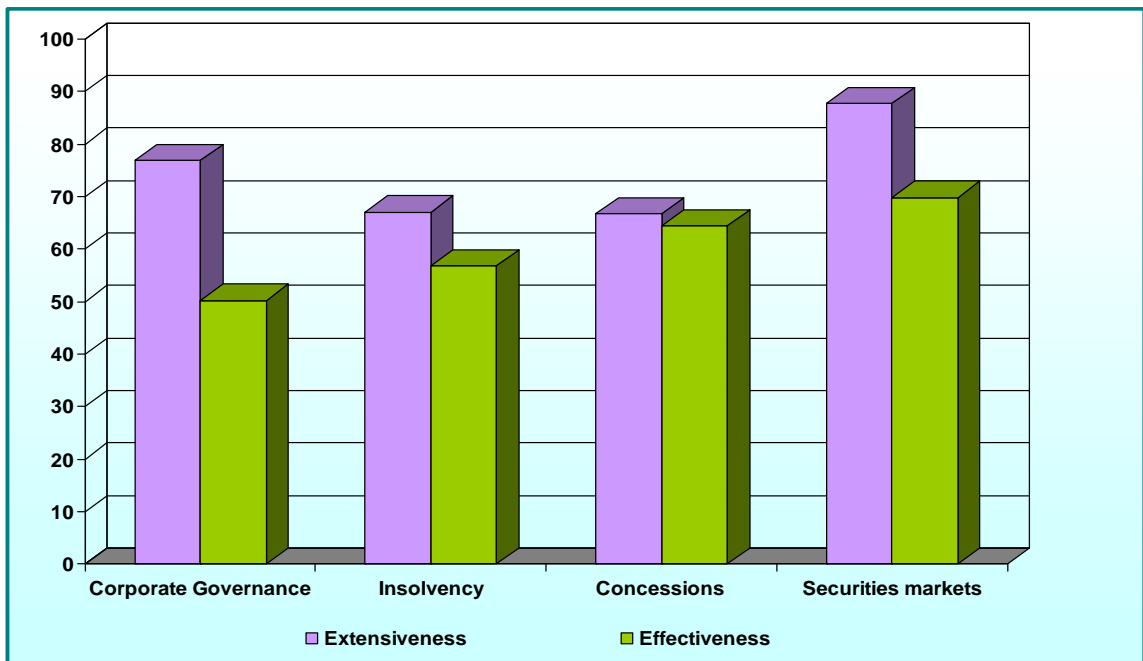
Source: EBRD Arbitration Law Assessment, 2007 (to be published)

Note: The fuller the web, the more compliant the law with the UNCITRAL Model Law on International Commercial Arbitration.

*Fourthly, technical assistance should extend to ensuring good laws are actually implemented.*

Historically, legal technical assistance tended to confine itself to the drafting of new laws or the revision of existing ones. Insufficient attention was given to how these laws would be implemented. However, a dominant feature of the commercial and financial laws in the region where EBRD operates is that there is a consistent and stubborn ‘implementation gap’. (See chart 6). This is troubling because good laws that are not effective are deprived of the economic benefits they should bring. For example, the EBRD’s research suggests that in attracting foreign investment and improving access to domestic credit, the existence of a bankruptcy regime that actually works is more important than whether a specific insolvency law is more creditor or debtor friendly. But even more worrying where laws are routinely not implemented - to the point where there is a chasm between what the law requires and what it actually means - confidence among citizens in the rule of law is eroded.

**Chart 6: Comparison of quality of legal rules and their degree of implementation: the case of the Baltic States**

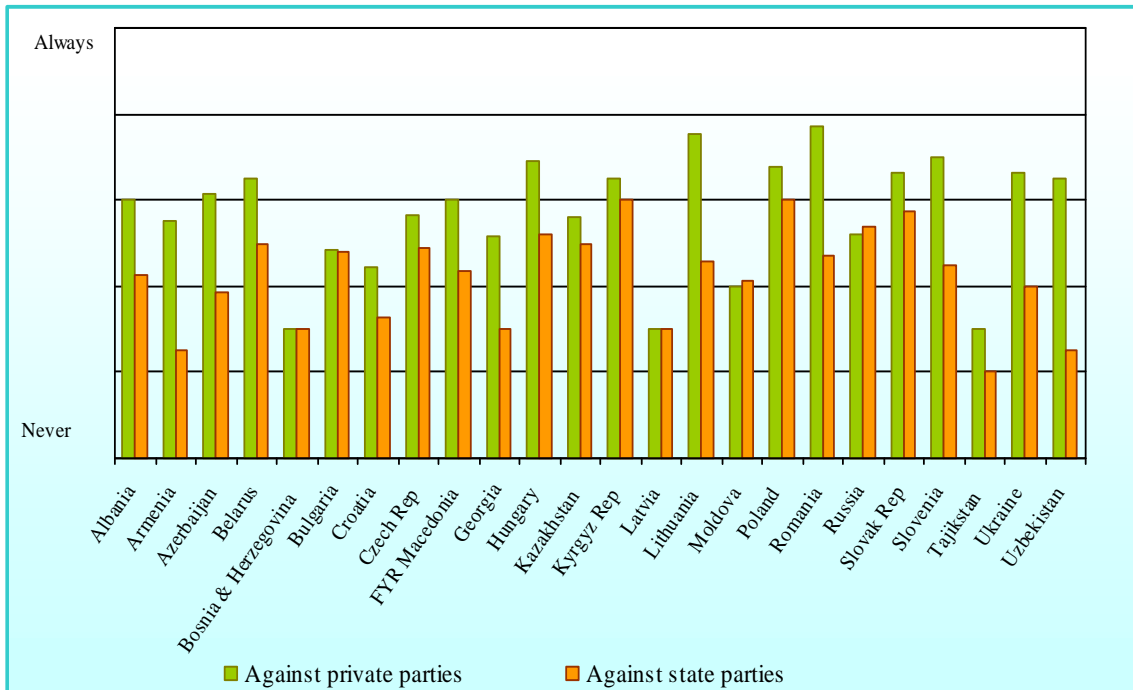


Source: EBRD Legal Assessments, 2004 – 2007

Note: Scoring is based on an index of 100, with a perfect score indicating that the relevant law fully conforms with international standards (extensiveness) and/or is fully effective (effectiveness).

Accordingly, technical assistance projects should be designed in a manner sensitive to how the new laws will be supported judicially and administratively, including whether the institutions required to implement the law are equipped for the job. Where required, advisory services should extend to building the legal institutions themselves, including strengthening the independence and competence of the legal profession, the law universities and the courts. Here, the International Development Law Institution has done valuable work in strengthening the judiciary and the EBRD is pleased to be working with IDLO to train judges in the Kyrgyz Republic. There is an urgent need in many countries for this kind of “institution building”, especially if the confidence of those subject to the law is to be earned and enhanced. (See chart 7)

**Chart 7: Perception among local lawyers of how often courts in transition countries uphold legal rights in commercial disputes**



Source: EBRD Legal Indicator Survey 2002

Note: Law firms were asked: “Do private parties generally believe that courts would recognise and enforce their legal rights against (i) another private party and (ii) state parties?”

*Fifthly, the legal reform process itself should be a focus of technical assistance.*

Legal technical assistance has sometimes foundered because efforts to craft good laws, even those well calibrated to the enforcement capacity of the recipient country, have not been matched by the attention paid to ensuring that the economic purposes of the laws are well understood by those who prepare, legislate, execute, advise and adjudicate on those laws. While the idea of law is highly ambulatory, reform proposals that are sponsored from abroad must be embraced locally and adapted to local conditions if they are to become embedded in the legal system of the home state and are to have the best prospects of achieving their goals.

To be sustainable, reform should also address or have a positive influence on the processes by which the law is improved. This way countries can build on the experience that aid provides. The legal and institutional reform process should be inclusive and open. This will help ensure that those who must enforce the law or are affected by it understand its core objectives, thereby facilitating future changes to the law when needed and reducing the chances of the law being subverted through improper influences. Focussing on improving the processes by which countries improve their law may also stimulate demand for better economic laws, thereby encouraging a virtuous cycle of reform.

Provision by multilateral organisations of legal technical assistance has yielded many lessons for each of those bodies. But there is likely too an acknowledgement among most international organisations that the five listed above are lessons they all recognise to some extent. A shared view of what experience has taught multilateral organisations whose specific mandates differ, sometimes markedly, should not be surprising. Underlying values, such as the need to support development and the belief, held by UNCITRAL and others, in the promise and potential of international trade law to help achieve prosperity, are values that can be embraced by many. And the belief that law can be harnessed to secure not only the material progress of nations but - as Cicero believed its purpose to be - the wellbeing of the people, is a conviction that can have universal appeal.