

USAID/CEE/NIS COMMERCIAL LAW REFORM ASSESSMENT TASK
Final Report

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To: Mr. Nicholas Klissas, CTO, EE/MT/ILE (2 copies)

PPC/CDIE/Acquisitions Unit (2 Copies)

Re: Contractor: Booz·Allen & Hamilton Inc.
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This Final Report summarizes the activities and accomplishments under the CEE/NIS Commercial Law Reform Assessment Task, which was implemented by Booz·Allen & Hamilton from March 1998 through December 2000.

I. Background

This project was designed to provide USAID with an overall view of the commercial law reform process and progress to date in Central and Eastern Europe and the Newly Independent States, with the purpose of guiding USAID to the best strategy for future commercial law assistance. With this framework in mind, the project had three main objectives:

1. To assess the degree of development and the level of effectiveness of the Commercial Law and Institutional Reforms (C-LIR) initiated in a small sample of countries in Central Europe and the Newly Independent States - initially Poland, Romania, Ukraine, and Kazakhstan. (Croatia, Macedonia, and Albania were also assessed after revision of the initial methodology.)
2. To identify the root causes of the "implementation/enforcement" gap and develop practical strategies to address them.
3. To provide analytical and planning tools and metrics that will help USAID design new approaches to sustainable, cost-effective C-LIR.

II. Activities

Booz·Allen, working closely with USAID, designed and tested a diagnostic methodology for assessing the C-LIR environment in developing and transition countries as a tool for strategic planning and project prioritization. The results and approach were vetted among a group of more than 50 C-LIR practitioners in Prague at a workshop in December 1999. These practitioners confirmed the overall findings and approach, and also made recommendations for modifications to the methodology. Thereafter, the methodology was revised, and three more assessments were

performed. Based on this extensive experience, Booz·Allen then produced a handbook for conducting C-LIR assessments.

Chronologically, Booz·Allen performed the following tasks:

September 1998	Methodology and indicators (CLIR 1.0)
October 1998	Diagnostic assessment in Poland
December 1998	Diagnostic assessment in Romania
March 1999	Diagnostic assessment in Ukraine
June 1999	Diagnostic assessment in Kazakhstan
November 1999	Synthesis Report of first four assessments
December 1999	Prague Workshop
February 2000	Indicators revised (CLIR 2.0)
March 2000	Diagnostic assessment in Croatia
June 2000	Diagnostic assessment in Macedonia
September 2000	Diagnostic assessment in Albania
December 2000	Diagnostic Methodology Handbook

III. Results

The C-LIR project succeeded in creating, testing, verifying, and utilizing a diagnostic methodology that can be used by legal reform professionals for strategic purposes at relatively low cost. By enabling quantification of qualitative issues, the methodology also permits useful comparisons between countries and regions for analysis and planning at a broader level. More specifically, the Booz·Allen successfully met the objectives outlined at the beginning of the project:

1. Assessing degree of effectiveness of reform efforts in a sample of countries. In the first four countries (Poland, Romania, Ukraine, and Kazakhstan), the Diagnostic Teams were able to pinpoint areas of success and weakness in efforts to date. The findings were verified at the Prague Conference by regional specialists and professionals from each of the countries assessed, who found that the scores and narrative assessments were accurate. This success directly resulted in the adoption of the methodology by several missions who commissioned assessments in additional countries (Croatia, Macedonia, and Albania).

2. Identifying root causes of implementation-enforcement gap and developing practical strategies to address them. One of the most important aspects of this project was the identification of the relationship between supply and demand in the "market" for reform. The diagnostic indicators and narrative reports confirmed that much of the well-intentioned, top-down reform simply did not capture or represent local stakeholder demand for the changes. Further analysis of these issues through the additional assessments and implementation programs tend to identify an inherent weakness in the early reform efforts in concentrating on the policy makers who were not connected with or accountable to the end-users affected by the policies. Laws drafted by outsiders, handed over to a local "champion", and then pushed through the legislative system have seldom been implemented at a useful or meaningful level. They are often perceived by end-users as "foreign" laws that ignore local reality and are thus irrelevant, no matter how well they were drafted.

These findings are now leading to different approaches to legislative reform. In particular, there is an increased awareness that outside "demand" -- exogenous forces such as World Bank conditionalities -- may be useful but is not at all sufficient, and that the reforms must be pursued on multiple fronts. That is, new laws should be the subject of extensive analysis, debate and feedback from all stakeholders, especially those from civil society most likely to be affected by the changes. One strategic approach recently suggested during discussions with other legal reform specialists is that all donor-sponsored legislative reform efforts should have mandatory public notice and feedback requirements as part of the legislative process. Another strategic suggestion is that foreign experts should be responsible for assisting local drafters to create new laws, rather than drafting the laws themselves on behalf of the recipient country. This will not only avoid infamous "search-and-replace" laws,¹ but also ensure local input while training local professionals in the process of drafting.

Still on the legislative side, the C-LIR studies have shown that many countries undergoing reform do not have mechanisms for gradual evolution and correction of laws, thus making their implementation difficult. In more developed democracies, stakeholder organizations such as bar associations, accountants, trade groups, and other supporting institutions identify needed changes and provide input to legislators to make the needed changes, thus adjusting legal practice as needed to permit law to keep up with changes in society. Albania provides an excellent example of this finding.

Albanian stakeholders generally felt that the laws adopted there since 1993 were generally good laws, but needed amendment in a few particulars. Upon further questioning, however, they were unanimously unable to identify a mechanism for making those amendments. This finding implicates the need for additional work with civil society organizations, both in helping them to understand their role in legal reform, and in creating mechanisms for them to fulfill that role.

By expanding the dimensions for analyzing reform, the C-LIR project also helped to emphasize this need for work with supporting institutions as a necessary component of legal reform initiatives. Early efforts focused primarily on governmental implementing institutions such as the courts, without necessarily bringing in the supporting institutions at levels needed to ensure the necessary changes in institutional behavior.

The C-LIR project has identified the need to broaden greatly the scope of assistance for any needed law. On a practical side, this means that effective programs may take longer and cost more than many of the early efforts, which did not result in effective implementation. For example, the diagnostic analysis of Croatia indicated the need for a collateral law and registry system. In the past, this might have been addressed by having a foreign expert draft the law, vet it with the banking association, Ministry of Finance, and other government officials for "buy in", then get it adopted by the legislature, possibly through the use of mandatory conditionalities from an International Financial Institution. Instead, the law is being developed by first engaging the stakeholders with a demand for such financing, tapping into their demand as a driver for change, and then engaging them to participate in the legislative changes. The result is a slower process, but one which is effectively owned by the local population. This same kind of slow and deliberative process is being successfully used in Albania also.

¹ There are numerous anecdotal stories from various regions regarding laws taken from one jurisdiction and "adapted" for another by simply using the search-and-replace word processing function to change the name of the country.

The C-LIR diagnostic methodology permits analysts to identify weaknesses at numerous levels so that appropriate multi-dimensional programs can be developed to address needs. Moreover, the four-dimensional methodology itself can be used for each level of analysis. That is, before providing assistance to an implementing institution, strategic planners should: (i) assess the weaknesses in the framework laws under which the institution operates; (ii) identify the internal institutional weaknesses; (iii) note any gaps in supporting institutions; and (iv) analyze the supply and demand vectors for change. In Croatia, the Zagreb Mission used the initial C-LIR diagnostic to identify weaknesses in the commercial courts and registries, then conducted separate diagnostic analyses of these institutions before moving forward into implementation. Interestingly, the Mission (with entirely new program officers since the original assessments) used the diagnostic approach as the basis for their request for proposals for a multi-year commercial law reform program. Other missions have also applied required the C-LIR approach when creating new legal reform programs.

3. Providing analytical and planning tools and metrics that will help USAID design new approaches to sustainable, cost-effective C-LIR. The C-LIR diagnostic methodology has been proven and adopted as an analytical planning tool for designing new approaches. This has been shown through the use of the methodology in an additional four countries for that purpose after the Prague Workshop. (In addition to Croatia, Macedonia, and Albania, the Belgrade Mission recently commissioned a C-LIR diagnostic for Serbia, and has made ongoing C-LIR analysis a part of a one-year task order.)

This tool can clearly be expanded for other areas of legal and institutional analysis. In addition to the seven areas of law currently covered by the methodology (bankruptcy, collateral, company, competition, contract, investment, and trade), others can be added as needed, such as banking, fiscal (including specific sub-areas of taxes), customs (currently covered only by a few questions under trade), WTO compliance, or even non-commercial laws such as pension funds or criminal procedure. By using the approach explained in the Handbook, a legal reform specialist can add such other areas of law by identifying the essential elements of the Framework Law, then devising appropriate questions (with scores) for the law, the Implementing Institution, any relevant Supporting Institutions, and the Market for Reform. Moreover, the approach can be used even without creating new score sheets.

This methodology can also be used for examining the institutions themselves. As noted previously, Booz-Allen conducted a C-LIR assessment of the Croatian Commercial Courts prior to designing and implementing programs of assistance for USAID/Zagreb. The assessment looked at the Legal Framework for the courts, including internal laws, legal relations between the courts and other branches of government, constitutional issues, and court rules. The team also examined the courts as Implementing Institutions for various areas of law, while determining the level of systemic support available through the Supporting Institutions such as judges and bar associations, the Ministry of Justice, and others. The Market was examined in order to identify areas in which the courts and other institutions supported or resisted change. This comprehensive approach identified numerous specific areas of institutional and legal changes needed, as well as areas in which support could be provided through more than 50 specific recommendations.

Another example of additional uses for this methodology occurs in the structuring of the recently-awarded Croatia Commercial Law Reform Program. First, it should be noted that the background analysis for the request for proposals was provided in the C-LIR format, following

the four dimensions of reform. The RFP set forth eight separate tasks - Court & Case Administration, Alternative Dispute Resolution, Enforcement of Judgments, Land Registry, Company Registry, Collateral Registry, Legal Information Systems, and Education & Training in each of the other areas. Under the successful Booz-Allen bid, each of these areas was addressed from a C-LIR methodology, and will now be implemented on the same basis. For example, we addressed Education and Training -- not normally examined from a four-dimensional approach -- by first addressing Legal Framework issues regarding mandatory or voluntary Continuing Legal Education programs, examined strengths and weaknesses in the potential Implementing Institutions (such as the Ministry of Justice) and the Supporting Institutions (such as the Bar Association and the Law Faculty), and identified areas in which the demand for reforms were strongest and provided opportunities for building new training programs.

The C-LIR Diagnostic Methodology provides a template for consistent approaches to legal reform between and within USAID Missions as well as other reform organizations. It has been used successfully and efficiently to analyze the legal reform environment and design new programs for reform based on broad-based understanding of the numerous interests and vectors in making reforms effective and sustainable. Continued scoring of the different legal areas will provide a growing database of comparative information for use by analysts and planners, but even without the scoring the approach itself provides a valuable cost-effective, structured, and highly efficient tool for legal and institutional reform efforts.

IV. Reports and Deliverables

The following technical reports and deliverables were produced under this project (plus several additional assessments produced under separate funding - indicated in italics) and are included on the CD-ROM attached to the hard copy of this report:

- A. Diagnostic Reports for Individual Countries
 - 1. Albania
 - 2. Croatia
 - a. Registries Modernization
 - b. *Commercial Courts Assessment*
 - c. *Access to Legal Information and the Policy Process*
 - 3. Kazakhstan
 - 4. Macedonia
 - 5. Poland
 - 6. Romania
 - 7. Ukraine
- B. Synthesis Report (comparing Kazakhstan, Poland, Romania and Ukraine)
 - 1. Complete English Version
 - 2. Russian Translation of Executive Summary
- C. Prague Workshop Report
- D. Diagnostic Methodology Handbook
- E. Final Report

V. Next Steps

While the project and deliverables are completed, there is substantial work still to be done with the C-LIR methodology. This includes rolling out the methodology to a larger audience through

seminars and presentations. The Europe and Eurasia Bureau of USAID/Washington and the many missions of the region adopted the methodology and have begun to use it. Other bureaus, however, have not yet joined in. These include Africa, Asia, and Latin America, all of which could profit from this diagnostic tool. Indeed, it might be interesting to do comparative analyses in each to determine how they differ from the European and Eurasian sample, as well as to verify the applicability.

A number of World Bank representatives have also expressed strong interest in the methodology and would have indicated a desire to hold a joint workshop with USAID and Booz-Allen to demonstrate the approach to the Bank's reform professionals. Likewise, there has been some interest expressed by representatives of the Inter-American Development Bank in understanding this tool further.

In addition, it might be useful to hold a training program for USAID technical specialists in how to use the methodology in the context of R4 reports, legal assessments, and strategic planning. These individuals could actually conduct additional diagnostics, or could simply learn to apply the methodology in their planning and assessments.

Clearly, the four-dimensional diagnostic approach can be applied to any area of law. USAID may wish to consider developing separate indicators for other priority areas of legal and institutional reform, as well as developing deeper versions aimed specifically at principle implementing institutions (such as courts, anti-monopoly agencies, and the customs service).

Booz-Allen & Hamilton is interested in expanding the C-LIR practice and will be available to assist USAID for any of the above tasks, as well as to continue conducting high-quality diagnostic assessments.