Assessment of Legislative Reform Portfolio Projects in Ukraine

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Acronyms and Abbreviations

AmCham	American Chamber of Commerce
APTS	Agricultural Policy Transition Support
BEST	Bureau for Economic and Social Technologies
CDR	Commercial Dispute Resolution
CLC	Commercial Law Center
CLRP	Commercial Law Reform Project
COP	Chief of Party
COTR	Contract Officer's Technical Representative
DFID	Department for International Development
DIALOGUE	Development Initiative for Advocating Local Governance in Ukraine
FEG	Foundation for Effective Government
FINREP	Financial Sector Rehabilitation Program
GOU	Government of Ukraine
IBSER	Institute for Budgetary and Socio-Economic Research
IFC	International Finance Corporation
JSC	joint stock company
LINC	Local Investment and National Competitiveness project
LLC	limited liability corporation
MFSI	Municipal Finance Strengthening Initiative

MHR	Municipal Heating Reform project
ODG	Office of Democracy and Governance
OECD	Organization for Economic Cooperation and Development
OEG	Office of Economic Growth
PDP II	Parliamentary Development Project II
PPB	performance program budgeting
PPP	Public-Private Partnership
SME	small and medium-sized enterprise
TCBoost	Worldwide Support for Trade Capacity Building Project
UROL	Ukraine Rule of Law
USAID	United States Agency for International Development
USG	United States Government

Executive Summary

The USAID/Ukraine Office of Economic Growth (OEG) has asked the USAID-funded Worldwide Support for Trade Capacity Building (TCBoost) project to undertake an assessment of OEG's work in legal/regulatory reform – activities that span across a total of nine projects at various stages of implementation. This has been done "with a view toward improving the return on the combined efforts of OEG partners." This assessment specifically examines how USAID may "better coordinate all legal reform activities" and emphasizes strengthened coordination among OEG projects and better integration of opportunities arising from the work of other stakeholders and constituencies.

In early 2011, the TCBoost assessment team ("the team") traveled to Ukraine, holding more than 40 interviews with a wide range of stakeholders, including U.S. government counterparts, USAID Chiefs of Party (nine in total), and 14 OEG project counterparts and beneficiaries. The team also sought the perspective of private and non-governmental sector actors. These interviews built upon a thorough review of sources, both primary (including responses to a standardized questionnaire for OEG management and COTRs) and secondary, that was undertaken prior to travel.

Political and Economic Backdrop

Before delving into issues surrounding specific core areas of legal and regulatory reform activities, it is helpful to contextualize these activities within Ukraine's current political economy. The election of President Viktor Yanukovych in February 2010 represented a significant shift from the dashed hope and chaotic political infighting of the "Orange Revolution" regime represented by former President Viktor Yushchenko and Prime Minister Yulia Tymoshchenko. To much of the Ukrainian society, President Yanukovych represents political stability, consolidated, strong and self-confident power and a solution to some of the economic challenges that came to Ukraine with the 2008 global financial crisis.

In office, Yanukovych has quickly oriented Ukraine towards a more pro-Russia stance, while consolidating power within the Verkhovna Rada (Parliament), the Ministries, and key judicial institutions (including the Constitutional Court). He does not just preside over an "oligarchic dictatorship," he actively leads it. Unlike the political dynamics of Russia, where prominent business people are reported to be allowed to thrive financially as long as they remain out of politics, in Ukraine business and politics have a much tighter alliance. Many of the Ukraine's most prominent business people are members of the Verkhovna Rada; a small number of oligarchs reportedly dominate the economy.

That said, the Yanukovych administration is aware of the need to give the electorate a better standard of living. At the end of 2010, Yanukovych introduced the Program of Economic Reforms: "Wealthy Society, Competitive Economy, Efficient State." The program includes proposed legislative reforms to support the programs goals of, *inter alia*, creating a better business environment by reducing state interference in the economy and lowering administrative barriers to economic development. The sincerity of this commitment remains open to question and the reform environment remains challenging: Ukraine's scores on international rankings of business environments and competitiveness remain low, and widespread corruption poses a formidable obstacle to growth. Nonetheless, GOU counterparts appear open to legal and regulatory assistance from USAID, as long as the Agency is seen as guiding reform but not dictating it. There are encouraging signs of civil society activism, as evidenced by popular discontent with the new Tax Code and civil society engagement in pension reform.

Commercial Law in Ukraine

USAID's current legislative interventions include the development of sophisticated financial products and important efforts in energy efficiency –evidence of a relative degree of sophistication in the overall economy. However, Ukraine has neglected certain foundational aspects of its commercial legal environment, particularly with respect to real property and commercial transactions, and work on those issues is not complete. The team looked at four core elements of a commercial law regime for this assessment: property rights, contract law, company law (legislative personality) and commercial dispute resolution (CDR). In the course of field work, other commercial law areas were frequently mentioned as well, including pension reform, public-private partnerships (PPPs), and bankruptcy.

To increase coordination and overall effectiveness of USAID OEG's work in these areas, the team recommends that OEG:

- Encourage the GOU to place English-language translations of Ukrainian law on major international websites and promote efforts to link such websites to the Verkhovna Rada's website's "Laws in English" section
- Coordinate an ad hoc advisory group on land rights, led by the newly launched AgroInvest project
- Encourage continued outreach on MHR's work on energy efficiency
- Facilitate conversation and consensus-building pertaining to next steps on the Commercial Code, led by the Commercial Law Center (CLC)
- Develop and/or enhance existing SME assistance programs to build the advocacy capacity and collective interests of SMEs
- Revisit a more formalized approach to a commercial law training through the Academy of Judges
- Coordinate an ad hoc advisory group on pension reform, led by the FINREP project;
- Engage the Institute for Budgetary and Socio-Economic Research (IBSER) to support outreach efforts for the PPP project
- Seek effective, relatively low-cost expertise in reviewing draft laws, specifically the draft Bankruptcy Law

- Play to the CLC's strengths and assign it a greater role in the implementation of core commercial laws.

The team was asked to focus on two projects implemented by Ukrainian partners: the Commercial Law Reform (CLR) project implemented by the Commercial Law Center, and the Municipal Finance Strengthening Initiative (MFSI), implemented by IBSER. IBSER's work was uniformly praised by interviewees. CLC was also praised for its legislative drafting skills in core commercial laws; however, some respondents felt the Center was being "spread too thin" with respect to the vast number of laws and regulations it is called upon to address. Based on this information, the team recommends that OEG plays to CLC strengths and assign it a greater coordinating role with respect to core commercial laws, commercial law training, strengthening of the commercial courts, and service delivery to SMEs

Portfolio Management

To gauge how OEG could better coordinate and manage its legal/regulatory activities across its project portfolio, the team interviewed both internal (i.e., USAID, USAID implementing partners) and external (e.g., GOU counterparts, Ukrainian economic institutions) stakeholders. Internal interview questions drilled down on communication/coordination issues along three channels: (a) between USAID Contracting Officer's Technical Representatives (COTRs) and Chiefs of Party (COPs), including through a recently developed "legislative/regulatory activity matrix"; (b) among different COPs and technical staffs, i.e., project-to-project; and (c) between OEG and other offices within USAID/Ukraine, namely the Office of Democracy and Governance (ODG). Based on interview results, the team recommends OEG:

- Convene tightly organized monthly COP meetings
- Formalize the matrix and share it directly with COPs, but regard it as a launching pad for strengthened coordination, rather than a concluding point of coordination
- Integrate ODG projects more fully into OEG legal/regulatory reform activities.

External stakeholders' perceptions of USAID OEG's work were positive overall. Counterparts work from clearly articulated agendas—consequently, counterparts are more interested in guidance provided by international best practices, rather than feel "directed" to pursue particular agendas. They remain open and enthusiastic about receiving technical assistance and training from USAID; many communicated specific requests through the team.

Conclusion

The legislative reform work found among USAID's major OEG assistance programs is extensive and complex. Managing such a broad-based portfolio, especially under Ukraine's set of political conditions, is enormously challenging: it calls for careful monitoring of legislative interventions, coordination of legislative priorities, collaboration among actors, and planning for implementation. One virtue of the current portfolio is that it is responsive to the major dynamics of the political economy – that is, it tracks those areas where lawmakers have demonstrated a commitment to change. In the urgency of facilitating these reforms, USAID should be equally vigilant, through tactics other than legislative drafting (such as consensus-building, training and public outreach), in promoting change where such determination may not exist. Until Ukraine

resolves to tackle its fundamentals – including vast oligarchic restrictions on meaningful entry into the marketplace, remnants of Soviet economic values, and toleration for corruption at all levels – the impact of outside assistance will be less effective than donors intend.

1. Introduction

USAID/Ukraine's Office of Economic Growth (OEG) currently oversees an unusually broad, ambitious and complex portfolio of projects. In the Ukrainian political and economic environment, this breadth and depth is strategic and appropriate—reform is more likely to occur when working to find specific champions and points of entry in several areas at once, rather than banking on interventions in one area. OEG investments have provided USAID with a high degree of credibility among its Ukrainian counterparts. Past successes in USAID's law-related economic growth assistance, including early support for critical laws strengthening access to credit, Ukraine's entry into the World Trade Organization in 2008, and more recent contributions to the pivotal Law on Procurement, show that USAID assistance can help drive Ukraine toward more dynamic, accessible, internationally compatible legal norms.

Without exception, activities within each project play some role in legislative and regulatory reform—the unitary nature of the GOU and the legal code basis of Ukrainian law require it. As USAID enters its 20th year of assistance to Ukraine, it is timely and useful to assess the agency's current interventions pertaining to the development and implementation of the country's legal framework. OEG has asked the USAID-funded Worldwide Support for Trade Capacity Building (TCBoost) project to undertake an assessment of OEG's work in legal/regulatory reform – activities that span across a total of nine projects at various stages of implementation. This has been done "with a view toward improving the return on the combined efforts of OEG partners."[1]

This assessment specifically examines how USAID may "better coordinate all legal reform activities"[2] and emphasizes strengthened coordination among OEG projects and better integration of opportunities arising from the work of other stakeholders and constituencies. From the most basic to the most complex legislative activities, this report identifies specific, immediate opportunities to strengthen the coordination of USAID legislative activities and, in turn, their results. These pertain not only to the various OEG projects, but also to other USAID and U.S. government actors and key stakeholders.

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[1] See Assessment of Legislative Reform/Legislative Assistance Portfolio projects in Ukraine, Scope of Work, Section A (November 2010; revised January 2010) (hereinafter "Scope of Work"). The team met with representatives of all projects except for the recently awarded AgroInvest project.

[2] See Scope of Work, Section D. Although Section D refers to "legislative reform activities relevant to improving the economic and social well being of all Ukrainians," this report focuses, unless otherwise stated, on activities instituted and led primarily by the Office of Economic Governance.

METHODOLOGY

The TCBoost assessment team ("the team") was comprised of a Ph.D. economist (Team Leader Michael Blackman), an American lawyer (Louise Williams) and a Ukrainian lawyer (Valentyna Rostopira). The team combined legal and economic perspectives, as well as greatly varied experiences of working in Ukraine. Mr. Blackman previously had worked in Ukraine for 6 years and Ms. Rostopira has spent most of her professional life in Ukraine. Ms. Williams had never worked in Ukraine, but brought deep experience in conducting more than 20 USAID-sponsored legal and regulatory assessments throughout the world.

Prior to convening in Kyiv, the team developed a questionnaire for the OEG project Contracting Officer's Technical Representatives (COTRs) (Appendix C). Their responses provided vital information on their projects' missions, visions, accomplishments, challenges, systems of communications and coordination. The team received responses for each OEG project with a legislative component.

In addition to these primary sources, the team relied on secondary sources. OEG shared the OECD's **Anti-Corruption Network for Eastern Europe and Central Asia, Second Round of Monitoring Report for Ukraine** and The Economist Intelligence Unit's **January 2011 Ukraine Report**. The Embassy shared materials, including LINC's Assessment of **Import/Export Clearance Processes: Odessa Commercial Sea Port**. Individual projects also generously provided a wide range of project information and documents.

In late January-early February 2011, the TCBoost team met in Kyiv to begin field work. With OEG assistance, the team held more than 40 meetings (Appendix B). The team met with U.S. government (USG) counterparts [i.e. USAID's OEG and Democracy and Governance Office (ODG), U.S. Embassy Economics Section and Political Section)], OEG and ODG project Chiefs of Party (nine in total), and 14 OEG project counterparts and beneficiaries [i.e., Government of Ukraine (GOU), the Verkhovna Rada (Parliament), and NGOs)]. The team also sought the private sector perspective through meetings with the American Chamber of Commerce in Ukraine (AmCham), the Kyiv School of Economics, ING Bank, and a private entrepreneur. Drawing on their diverse backgrounds and experience, the team synthesized the information gained from these interviews and discussions. During the course of interviews, certain respondents expressed a willingness to be quoted, provided they remained anonymous. The authors have honored that request throughout this report.

USAID's Economic Growth Portfolio

- Commercial Law Reform Project, Commercial Law Center (July 2008–July 2011)
- Local Investment and National Competitiveness Project, Chemonics International (March 2009–April 2012)
- Agricultural Policy Transition Support, Academy for Educational Development (September 2010–May 2011)
- AgroInvest, Chemonics International (February 2011–ongoing)
- Financial Sector Rehabilitation Program, Booz Allen Hamilton et al. (October 2009–October 2012)
- Municipal Heating Reform Project, International Resources Group (February 2009–February 2012)
- Public Private Partnership Development Project, Academy for Educational Development (October 2010–September 2015)
- Municipal Finance Strengthening Initiative, Institute for Budgetary and Socio-Economic Research (October 2008–September 2011)
- Development Initiative for Advocating Local Governance in Ukraine Project, Association of Ukrainian Cities (April 2010–April 2014)

SAMPLE GROUP

The eight OEG projects interviewed were the Commercial Law Reform Project (CLRP), the Local Investment and National Competitiveness (LINC) project, the Agricultural Policy Transition Support (APTS) project, the Financial Sector Rehabilitation Program (FINREP), the Municipal Heating Reform (MHR) project, the Public-Private Partnership Development Program for Ukraine (PPP), the Municipal Finance Strengthening Initiative (MFSI), and the Development Initiative for Advocating Local Governance in Ukraine (DIALOGUE). The AgroInvest project was not interviewed, since it only began implementation in February 2011. The team encountered a broad scope of engagement in legal and regulatory reform activities among projects. For example, the CLRP, implemented by Ukrainian partner CLC, has a broader, more open-ended mandate to draft legislation across a number of commercial law areas; while other projects have highly specific and sophisticated legislative or regulatory focuses, e.g., MHR's focus on the Law on Condominiums, the APTS project's work to introduce pre-harvest receipts to Ukraine; and FINREP's specific interest in financial legislation, including the recently amended Law on Joint Stock Companies.

The team formally consulted with two ODG projects, the Ukraine Rule of Law (UROL) project and the Parliamentary Development Project II (PDP II). Although OEG and ODG have different priorities (OEG tends to focus on economic efficiency, while ODG is more concerned with political and social equity), they work in complementary areas. It is beneficial to understand the ODG perspective on economic issues, e.g., how civil society and the media view specific reforms. Improved communication between OEG and ODG can also facilitate the coordination of USAID/Ukraine position on issues that impact both spheres. This is reflected in the team's recommendations in Section 5.

ASSESSMENT SCOPE

In the course of its meetings, the team encountered a number of high-priority areas of legislative reform. Early on, the team recognized the need to become familiar with these areas – among them, the Commercial Code, the Law on Private Public Partnership, the Joint Stock Company Law, legislation pertaining to energy efficiency, and the Law on Bankruptcy. The objective was not to develop deep expertise in any of these laws, but rather to know enough about their provisions to understand how they interact with the OEG portfolio. Similarly, as the assessment progressed, the team reviewed key reform measures, such as pension, tax and land reform, to acquire a general understanding of their relation to the OEG portfolio. This is reflected in the team's observations and recommendations.

Through a series of internal conversations, the team worked to develop an understanding of how effectively USAID/Ukraine's OEG legislative efforts are operating. Drawing on the team's legal and economic skills, background and experience, this assessment was intended to provide an educated and informed assessment of how well the OEG portfolio is succeeding in its work. To be sure that this was the case, the team periodically consulted the OEG Director and Deputy Director, to test whether its understanding was consistent with USAID/Ukraine's OEG perspective.

This assessment provides a snapshot of the operation of the OEG portfolio, beginning with a brief discussion of the political economy of legislative reform in Ukraine. Next, the report examines the core commercial law areas (e.g., property law, contract law, company law and commercial dispute resolution) identified in the scope of work as well as some other areas encountered during the field work. This section also presents the team's conclusions concerning the perceived performance of two Ukrainian implementing partners: the Commercial Law Center (CLC) and the Institute for Budgetary and Socioeconomic Research (IBSER). The report then examines the general perceptions of external (i.e., counterparts and beneficiaries) and internal (USAID COTRs, implementing partners) of OEG management of the legal/regulatory portfolio. This is followed by a set of concrete recommendations that can help OEG enhance the current effectiveness of their portfolio.

2. Political/Economic Backdrop

A brief summary of the historical context for Ukraine's political economy and current topics pertaining to political actors and political will is presented below. This summary contextualizes many of the challenges of, but also potential opportunities for, implementing key legislative and regulatory reforms in the economic sphere.

POLITICS

Brought to power by the nationwide popular protests triggered by allegations of voter fraud in the run-off vote for Ukraine's 2004 Presidential elections (the Orange Revolution), the policies of President Viktor Yushchenko and his administration of "Oranges" seemed to signal a break with Ukraine's past. Espousing a reformist agenda, the new administration strengthened Ukraine's pro-Western orientation with its discussion of joining NATO and future EU membership. Unfortunately, the government's performance did not match popular expectations. Its energy was wasted on internal quarrels between President Yushchenko and Prime Minister Yulia Tymoshchenko. Although the Orange Revolution was the result of social action, it did not lead to a period of stronger civil society. The contentious relationship between the President and the Prime Minister led to popular disillusionment with their government.

During the Yushchenko presidency, Ukraine was also hit by the global financial crisis, suffering particularly heavily from its effects. Ukraine's major exports, such as steel and cement, plummeted, while its population tried to cope with foreign currency-denominated consumer loans as its exchange rate dropped sharply. Ukrainian GDP fell by 15% in 2009, further slowing progress toward building a more vital civil society. Ukraine's pro-European and pro-NATO foreign policy antagonized many Ukrainians, who blamed the West, as well as their own leaders, for the country's ills.

Although he lost the Presidency to Yushchenko in 2005, Victor Yanukovych and his supporters did not waste the intervening period, but rather used this time to plan their return to power. In the 2009 Presidential campaign, Yanukovych's major opponent—Yulia Tymoshchenko-- was a rival who had discredited herself in the eyes of many Ukrainians. Yanukovych won power in February 2010 because he promised Ukrainian society what it really wanted: political stability and consolidated and strong power. Upon assuming power, Yanukovych radically changed the governing style from the chaotic infighting that characterized the "Oranges" to one of relative discipline, determination, and self-confidence.

Following the country's independence from the Soviet Union in 1991, Ukraine's first presidents (Kuchma, et al.) had tried to maintain some sort of balance between the pro-Russian sentiment in

its eastern and southern regions and the pro-European orientation in western Ukraine. The Oranges had shifted the balance of Ukrainian policy strongly westward. With Yanukovych in the presidency, the balance tilted decisively in a pro-Russian direction. This was exemplified by the signing of two agreements with Russia on April 21, 2010, which enhanced the new administration's domestic popularity and sharply contrasted it from the undisciplined style of its predecessor. The so-called "gas-for-fleet agreements" provided Ukraine a ten-year discount on Russian natural gas in return for a 25-year extension of the Russian Black Sea Fleet's lease in Sevastopol. Once in office, Yanukovych began consolidating his political power. He and his allies in the Verkhovna Rada (Parliament) maneuvered successfully to amend Parliament's internal regulations on political factions and coalition building. With these changes in place, Yanukovych lured enough national deputies from the opposition to secure a majority coalition for his Party of the Regions, along with the Communists and Volodymyr Lytvyn's (Speaker of Parliament) bloc.

With his reorganization of central government agencies, Yanukovych has asserted his power in the ministries. He has similarly exerted control over the Office of the General Prosecutor and the Constitutional Court. Even from this position of great power, Yanukovych does not appear to be done. He does not just preside over an "oligarchic dictatorship," he actively leads it.

ECONOMY

Unlike the political dynamics of Russia, where prominent business people are reported to be allowed to thrive financially as long as they remain out of politics, in Ukraine business and politics have a much tighter alliance. Many of Ukraine's most prominent business people are members of the Verkhovna Rada. As one interlocutor archly commented during this assessment, "It is no longer enough to be a millionaire -- You have to be a *billionaire* to be in Parliament." Among the benefits of public office for the business-minded is broad parliamentary immunity from criminal prosecution.[3]

Yanukovych's Party of the Regions reflects both the political dominance by and the diversity of these business interests. For example, Rinat Akhmetov, a diversified industrialist who is listed among the world's billionaires by *Forbes* magazine, is one of the leaders of the relatively more European-minded part of the Party of Regions. Dmytro Firtash, another billionaire who earned his wealth in food, titanium, and gas and who holds a large stake in RosUkrEnergo, is prominent in the party's gas lobby and sees its interests threatened by increased integration with Europe.

Other wealthy businessmen, such as Viktor Pinchuk, son-in-law of former President Kuchma, are not as closely tied to Yanukovych as others, but still have considerable influence and access to power. Yet other oligarchs are reported to be tied to other power bases, such as the Dnipropetrovsk-based one, and are currently somewhat out of favor and less active. Regardless of their proximity to power, a small number of oligarchs reportedly dominate the economy. One

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[3] *See* USAID, Parliamentary Immunity Brief: A Sumamry of Case Studies of Armenia, Ukraine, and Guatemala (August 2006), *available at* http://www.agora-parl.org/sites/default/files/USAID%20-%20Parliamentary%20Immunity%20Brief-A%20Summary%20of%20Case%20Studies%20-%202006%20-%20EN%20-%20PI.pdf.

respondent described the dominant dynamic in the economy as the presence of "eight clans" that exert their power and influence both inside and outside the government.

Having come to office after Ukraine was hard hit by the economic crisis, the Yanukovych administration is particularly aware of the need to give the electorate a better standard of living. At the end of 2010, Yanukovych introduced the Program of Economic Reforms: "Wealthy Society, Competitive Economy, Efficient State," through which he announced an even more ambitious objective – attaining a European quality of life for the Ukrainian people.

The Economic Reforms Program announced the strategic directions of Ukraine's public policy for 2010–2014. Among other priorities, according to this plan, the President and Government will focus on:

- Having low inflation, providing stabile public finances and strengthening the financial system;
- Creating a better business environment by reducing state interference in the economy, lowering administrative barriers to economic development and modernizing the tax system; and
- Improving Ukraine's infrastructure in energy, coal mining, oil and gas, and housing communal services, as well as developing transport infrastructure and land market; these programs also feature a transition from subsidies to self-support of social services.

This reform program is reported to contain the list of key draft laws which need to be adopted for its implementation. At the first stage, the program pays particular attention to the drafting and adoption of key laws. Reportedly, the Yanukovych administration has not truly begun to focus on this program.

Improving Ukraine's difficult business environment represents a considerable challenge for the Yanukovych administration. As illustrated by its scores in the World Bank's *Doing Business* initiative (145th out of 183 countries surveyed in 2010)[4] and the World Economic Forum's *Global Competitiveness Report* (125th out of 139 for Burden of Government Regulation)[5], Ukraine's business regulatory environment has been markedly poor, and has worsened in the past two years. The small size of the SME sector in Ukraine is consistent with a pattern of overly burdensome government regulation, weak institutions, and a "highly inefficient market for goods and services."[6] Regulatory abuses create incentives for and foster corruption, as further illustrated by the country's poor showing in Transparency International's most recent Corruption Perceptions Index (134 out of 178 countries surveyed, tied with, among others, Nigeria, Sierra Leone, and Bangladesh).[7] In December 2009, Ukraine completed a 3-year, $45 million Millennium Challenge Corporation (MCC) Threshold Program agreement. This program,

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[4] World Bank, *Doing Business 2011, available at* www.doingbusines.org.

[5] World Economic Forum, *Global Competitiveness Report 2010-11, available at* http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf.

[6] Id. at 27-28.

[7] Transparency International, *Corruption Perceptions Index, available at* www.transparency.org.

implemented by USAID, aimed to reduce corruption in the public sector through civil society monitoring and advocacy, judicial reform, increased government monitoring and enforcement of ethical and administrative standards, streamlining and enforcing regulations, and combating corruption in higher education.[8] Notwithstanding these efforts – and some tangible achievements among them – perceptions of corruption in the country did not budge. Assessed against its designated peer group, including Indonesia and the Philippines, "Ukraine failed the MCC indicators" for corruption, according to one USG representative involved in the process.

Business people anecdotally report that, under the Yanukovych administration, the State Tax Service and other authorities have grown more intrusive and that the number of inspections of businesses unaffiliated with the so-called "eight clans" is increasing. In the perception particularly of smaller players, the regime has made it more difficult to run a business and has raised the cost of doing so. Compounding these challenges are reports of worsening implementation of Customs regulations, increased technical barriers to trade, and a pervasive sense of corruption within the courts.

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[8] *See* website of the Millennium Challenge Corporation, *available at* www.mcc.gov.

3. Commercial Law in Ukraine

Although the complexity of Ukraine's economic issues generally warrants the depth of USAID's current legislative interventions – which include sophisticated financial products and important efforts in energy efficiency – Ukraine has neglected certain foundational aspects of its commercial legal environment, and work on those issues is not complete. Presumably as a foundation on which to discuss its complex interventions into legislative reform today, USAID/Ukraine requested review of four core aspects of commercial law reform and OEG's role supporting these areas: (1) property rights (addressed here in terms of real property, but not with respect to movable or intellectual property); (2) contractual rights and obligations; (3) "legal personality" (which this report interprets as referring to general provisions of company law); and (4) commercial dispute resolution.

This section also addresses some general and specific legal areas (e.g., pension, public-private partnerships, bankruptcy, etc.) that recurrently emerged in conversation throughout the team's time in Ukraine. Although any of these topics could generate lengthy substantive analysis in themselves, they are discussed here specifically as they relate to the scope of work and to current USAID-supported legislative reform activities.

GENERAL LEGAL/REGULATORY REFORM

From the outset, it is noteworthy that few of Ukraine's core commercial laws are readily accessible to outsiders seeking to invest in the country, except in summary form as provided by the Verkhovna Rada.[9] Although English-language translations are available from various local sources, indexed translations of the country's major commercial laws do not appear on major international websites for law-sharing, such as the World Bank's *Doing Business* law library or the Global Legal Information Network of the U.S. Library of Congress. Besides the Civil and Economic Codes, no other major commercial laws are available at the website of the CLC,[10] an institution established by USAID nearly 10 years ago and dedicated to commercial law. This lack of accessibility for outsiders sends a poor message about Ukraine's attitudes and openness toward investment, in contrast to the more abundant information offered by several of its Eastern European neighbors. As recently noted by the World Bank, willingness by governments to provide current and pertinent information to the private sector both within and outside of a country's borders signals an "openness to competition," which is a core value of market-oriented

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[9] English-language *summaries* of Ukrainian law, arranged in chronological order, are available from the website of the Rada, http://portal.rada.gov.ua/rada/control/en/index.

[10] The CLC's website is found at www.commerciallaw.com.ua.

economies. Ensuring that a country's laws are "clear and publicly available," according to the World Bank, is one factor that "reduces room for discretionary (and rent-oriented) behavior by public officials."[11]

Virtually all laws enacted with the support of OEG partners get translated into English, either by a USAID-implementing partner, or by other donors involved in legislative reform or even by local institutions, such as universities and think tanks. Translation is an expensive, cumbersome process; although this assessment observed no evidence of duplication of this difficult work, nor did it find a clearly coordinated means of sharing the results (usually funded, directly or indirectly, by public monies). Laws drafted with OEG support typically are fully reviewed by a U.S. lawyer or economist. However, the same cannot be said of implementing regulations. Rather, as one Chief of Party said, "Good management and dialogue with local staff on priorities and expectations becomes especially important when it comes to the quality of implementing regulations, which few Americans can read in Ukrainian." Ultimately, the importance of regulatory legitimacy and local capacity for regulatory drafting outweighs the U.S. interest in "perfect" regulations. As a practical matter, translation of regulations, even those directly supported by OEG projects, would be too expensive. Nonetheless, OEG should remain mindful that the vast scope of its portfolio means that a great deal of rulemaking takes place without full awareness of the output.

PROPERTY RIGHTS

The core components of real property rights are set forth in Ukraine's **Constitution** (1996), which recognizes the general right of real property ownership; its **Civil Code** (2004), which provides the legal framework for acquisition, possession, disposal and use of real property and further sets forth the general parameters for leasing; and its **Land Code** (2002), which addresses the use and ownership of land. Ukrainian law distinguishes between title to land and title to buildings, such that the owner of a building typically does not own the land on which the building is situated. The law creates "permanent use" rights for State Owned Enterprises, municipal enterprises, and government entities, and further provides for the lease of land on a short-term or long-term basis.[12] Foreign individuals and entities may lease land in Ukraine, but they may not own it.

Although efforts to create a unified registry of real property rights have been underway since around 2004, they have yet to result in a single system which allows for clear, easily verifiable registration and assessment of property rights. Rather, at least six independent registries of real property may come into play when land or buildings are sold or otherwise transferred.[13] This fact is reflected in Ukraine's poor showing in the World Bank's annual *Doing Business* survey of the conditions for "Registering Property," , where the country ranks 164th out of 181 countries

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[11] *See* World Bank, MENA Development Report, *From Privilege to Competition: Unlocking Private-Led Growth in the Middle East and North Africa* (2009) at 18-19.

[12] Further details about real property rights in Ukraine are set forth in Gide Loyrette Nouel, Real Property Investment Law in Ukraine (2007), *available at* http://www.europe-re.com/files/00034800/GLN_Ukraine1.pdf.

[13] Id. at 5.

surveyed– last among 25 Eastern European and Eurasian countries surveyed in 2010.[14] The number of steps and time it takes to transfer land, or to secure it with a mortgage, far exceed world averages. Property institutions further create an environment in which untold numbers of public and private actors are in a position to seek "informal fees" – small bribes or speed money – simply to advance the process. In the 20 years since its independence, Ukraine has generally failed to address one of the pillars of a market-based society in which real assets, including land and permanent fixtures and dwellings, can be collateralized and sold to generate future wealth – namely, its law pertaining to real property.

Currently, in the area of real property, OEG projects are directly involved in two major initiatives to change the legal framework. First, a long-enforced **moratorium on the sale of agricultural land** (chiefly farmland) is projected for removal in the near future, such that, once it is lifted, a vast new supply of valuable real property will enter the market. The social and economic implications of this seemingly simple change are enormous. On the one hand, a free market in farmland could open up important new commercial opportunities in the agriculture sector and allow Ukraine to finally deliver on the economic promise of its rural resources. On the other hand, the near-overwhelming role played by the country's powerful oligarchs (the "eight clans," as characterized by one interviewee) could result essentially in a multiplication of their riches, while displacing and disenfranchising small landholders and causing other grave social consequences.

According to numerous interviewees, the likelihood that the Verkhovna Rada will act on the land issue in the near future is very high. However, there is a lack of consensus within the government over what reform should look like ("The ruling party is full of factions," one interviewee stated. "They are fighting over land.") Various stakeholders interviewed for this assessment, including representatives of OEG-sponsored projects, also articulated sharply contrasting views of how the GOU should best approach the moratorium. Changes in Ukraine's land policy will hold enormous interest not merely to the country's farmers, but also to domestic and foreign investors, local governments, lenders, and others.

A second set of law-related initiatives pertaining to real property concerns efforts to bring energy efficiency to the country's public and private buildings, as supported by the OEG-sponsored Municipal Heating Reform project (MHR). Proposed changes in the legal framework include amendments to the housing code to improve energy efficiency in new construction and a law on home-owner associations, which aims to strengthen the governance (and in turn, the energy consciousness) of multi-dwelling buildings.[15]MHR's efforts to support these laws and others implicate the interests of other OEG and ODG projects, including those involved in promoting investment, environmental preservation, and civil society. In a society that is considered enormously wasteful with respect to the use of its energy resources (Ukraine is "two times more energy inefficient than Russia," according to one interviewee), mindsets, habits, business practices, and oversight will have to change

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[14] World Bank, *Doing Business 2011, available at* www.doingbusines.org.

[15] *See* USAID/Ukraine table of laws and regulations addressed by OEG-funded projects in December 2010.

CONTRACT LAW

Ukraine's **Civil Code** and the **Commercial (Economic) Code** simultaneously entered into force on January 1, 2004. Since then, the law of contracts in Ukraine has been a source of jurisprudential inconsistency, confusion, and mischief. Both codes define the "essential conditions" of contract law, with the Civil Code applying to disputes between individuals and legal entities, and the Commercial Code covering relations between two or more legal entities or a legal entity and the state. In civil law countries, it is not uncommon to have two such codes, but it is also not considered essential.

In Ukraine, the language of the Civil Code is widely perceived as far more consistent with free-market standards, in which freedom of contract is the norm, while the Commercial Code contains provisions that sharply limit contractual freedoms and allow for significant judicial interference in the terms of a contract's execution.[16] As one example of their different approaches to contract law, the Civil Code allows for some flexibility in the price that may be paid in exchange for goods or services – for example, price may be determined by considerations such as prevailing or market norms – while the Commercial Code requires that contracts specifically delineate a negotiated price.[17] In this respect and others, the absence of flexibility and freedom of contract in the Commercial Code permits judges to set aside contracts that, under the Civil Code, would likely remain standing. The co-existence of two codes addressing the law of contracts reflects Ukraine's historical division between "Eastern" and "Western" schools of thought.[18] Almost immediately following their enactment, criticism of the Commercial Code began. In 2006, the OECD called for the repeal of the Commercial Code, repeating the recommendation offered in another forum by a UNDP panel.[19] The two codes regulate "largely the same subject," an OECD report noted, but are "conceptually opposite." Moreover, the OECD said:

> The 'guillotine' approach should be applied in this case and bring to an immediate and unequivocal end to the long and fruitless academic debates over which code is better and how to reconcile them. The Civil Code should be quickly and substantively improved …[20]

This recommendation, now five years old, withered under a lack of commitment to make such a dramatic change. Since the codes took effect, legal drafters and advocates of legal reform, including CLC, have continuously pushed for a series of amendments in most commerce-related laws that expand the application of the Civil Code, while marginalizing the use of the Commercial Code. Furthermore, USAID-supported training of commercial law judges, mainly

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[16] For a detailed analysis of how the Civil and Commercial Codes differ in their approach to contract law, see Lyubov Logush, "Contract Law in Ukraine," *available at* http://www.ekmair.ukma.kiev.ua/bitstream/123456789/362/1/Logush_Contract.pdf.

[17] Id. at 72.

[18] Id. at 65.

[19] OECD, UNDP Ukraine,and EU/TACIS, *Summary of recommendations and issues for discussion*, Roundtable on Enterprise Development and Investment Climate in Ukraine (Session 1, Legal Framework for Business Operations) (June 13, 2006), *available at* http://www.oecd.org/dataoecd/26/21/37051136.pdf.

[20] Id. at 3.

through the CLRP (as implemented through the CLC), has emphasized the more market-friendly aspects of the Civil Code, and encouraged judges to rule on contract-related cases pursuant to its terms, rather than to those of the Commercial Code. Yet these efforts have stopped short of calling for the repeal of the Commercial Code completely. According to stakeholders interviewed for this assessment, commercial court judges depend on the Commercial Code for their very existence, and thus would sharply oppose its abolition.

The fact that commercial court judges often may "choose" between two laws whose application would result in different outcomes in a case provides opportunities for corruption. Although USAID and other donors have supported efforts to increase court transparency and professionalism of judges – including through the recently enacted Law on Judiciary and Status of Judges—the reputation of Ukrainian judges remains extremely poor, and this "legal loophole" is among the major reasons cited, particularly with respect to commercial court judges. The blatant inconsistency between the two codes also represents a flawed signal to the investment community, who face an unpredictable environment for contract law enforcement, one that diminishes the attractiveness of Ukraine as a commercial partner.

Ukraine's Commercial Code represents a poor framework for doing business and is inconsistent in content and in spirit with the Civil Code, as well as with other key pieces of economic legislation. An effort to repeal the Commercial Code during the Yushchenko years was blocked by "vested interests." Under Yanukovych, who is more sympathetic to "Eastern" values, the code is not prioritized for change now. "No one knows if it will ever change," said one government official. Recently, the legal and judicial community has resisted confronting the issue directly, and instead has concentrated avoiding, marginalizing or "neutralizing" implementation of the Commercial Code. Of course, this is hardly a practical, long-term approach if Ukraine sincerely wishes to strengthen its business environment, which needs clarity and predictability in the content and implementation of the law. The best advice remains that of the OECD and UNDP. In fact, to do anything other than repeal the Commercial Code simply adds to the "long and fruitless quest" to reconcile the irreconcilable. A summary of major inconsistencies between the Civil and Commercial Codes in Ukraine is set forth at Appendix F.

LEGISLATIVE PERSONALITY (COMPANY LAW)

Shortly after its independence, Ukraine adopted a **Law on Business Associations** (1991), which set the stage for five types of formal companies: the joint stock company (JSC), the limited liability company (LLC), the additional liability company, the full liability partnership, and the limited liability partnership.[21] In 2008, after at least a decade of deliberation and with support from various USAID and other donor projects, the Verkhovna Rada passed a new **Law on Joint Stock Companies** to bring Ukraine more into line with international standards of corporate governance. On February 3, 2011, the Rada adopted a set of major **amendments to the Joint Stock Company law**. These amendments reportedly simplify and improve mechanisms of corporate governance by joint stock companies and further aim "to prevent conflict situations in the activities of joint stock companies, reliable protection of the rights and legitimate interests of

[21] *See* USAID Commercial Law Reform Assessment for Europe and Eurasia: Ukraine (1999), *available at* http://www.bizclir.com/galleries/country-assessments/Ukraine.pdf.

the shareholders, who would provide for the effective production activity, as well as creation of maximum legal barriers against potential raiders' attacks."[22]

USAID was involved in the preparation of the amendments to the Joint Stock Company law, primarily through the CLC. In December 2010, CLC noted its work on amendments "to remedy problems … over the period of its enforcement," as well as commensurate changes to the Civil Code.[23] CLC also participates in drafting at least four different sets of regulations pertaining to the Joint Stock Company law. In addition, FINREP works closely with the capacity-building of Ukraine's Securities Commission, which is charged with promoting appropriate systems of corporate governance, as anticipated by the new amendments. Relatedly, the MHR is working on a draft law on "converting communal enterprises holding activities in the area of heat, water supply and sanitation into business associations" – namely, limited liability companies or joint stock companies. Enactment of this law will present immediate challenges concerning its implementation.

In addition to the formal grounds on which to form a company, a very common approach to doing business in Ukraine is as a "self-employed individual." This model, though useful and appropriate for individuals who actually make a living through independent contracting and personal enterprise, has been seriously abused throughout Ukraine's economy.[24] Namely, companies of all sizes – including those that would most appropriately register as LLCs or JSCs – for years have avoided their tax burdens by treating most or all of their workers not as formal employees, but as self-employed individuals. Ukraine's poor record of formalization is reflected in its relatively low (though recently improved) ranking under *Doing Business* for "Starting a Business" – 118 out of 181 countries surveyed in 2010.[25] The new Tax Code endeavors to move Ukraine's "gray economy" enterprises into the formal sector. Indeed, transforming thousands of casually formed SMEs into properly established business associations "presents huge management challenges," according to one expert.[26] SMEs will require assistance in the process of formalization, so that they can properly adhere to the new Tax Code and avoid the unscrupulous interference by the tax police that they fear.

With respect to economic legislation impacting their interests, SMEs have almost no voice. This fact contrasts with the relatively strong representation of larger business interests, which are significantly incorporated into the legislative drafting process. Namely, through its 16 sector-specific committees and excellent access to lawmakers and ministry officials, the American Chamber of Commerce surveys and represents the interests of its membership, which consists of foreign investors from at least 50 countries, including many of Ukraine's larger companies. In addition, Ukraine's legislative drafting process incorporates the input of the Foundation for

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[22] See "Legislation Update (February 11, 2011)" page of the website of the American Chamber of Commerce, *available at* http://www.chamber.ua/about_advocacy/legislation/current.

[23] *See* USAID/Ukraine table of laws and regulations addressed by OEG-funded projects in December 2010.

[24] See Business Ukraine, "In Focus: Ukraine's New Tax Code" (December 2010) at 15.

[25] World Bank, *Doing Business 2011*.

[26] Business Ukraine, "In Focus: Ukraine's New Tax Code" (December 2010) at 15.

Effective Government (FEG), a private-sector-oriented think-tank that, while managed by an independent governing board, is run and paid for by one of the country's most powerful oligarchs.

Thus, while AmCham and FEG expressed general satisfaction with the Tax Code, the same law was greeted with fear and loathing by Ukraine's community of small business persons acting in the shadow economy. In November 2010, following the enactment of the new Tax Code, Ukraine experienced several days of street protests by small entrepreneurs, who perceived changes in the tax law as highly threatening to their interests. The government reportedly responded to these protests by agreeing to set up a special committee for entrepreneurs. (Although this initiative was mentioned to the assessment team once, there did not seem to be a general awareness of "next steps" pertaining to this committee).

Significantly, although small entrepreneurs came out in large numbers to oppose the new law, they did not, according to various observers, exhibit a coherent understanding of how it would directly impact them. Rather, their message appeared to be that, given the perceived high costs and inconveniences of formalization, they preferred to remain "gray." In addition, now that the law has been enacted, there does not appear to be a strategy for bringing businesses currently operating under the most casual rules into compliance with the law – that is, into the formal economy through registration with the state. Third, neither the law nor its defenders anticipate or address the fear of smaller business operators of the perceived antagonistic, overwhelming interference in their affairs by the country's tax police.

Ukraine's disregard for the special concerns and interests of SMEs starkly contrasts with the awareness in many other developing environments that entrepreneurship is a cornerstone of economic growth. In Ukraine, there is no government ministry or department dedicated to encouraging the establishment of new companies and few donor or government-supported business development services. In addition, the extraordinary influence of oligarchs in Ukraine's economy gravely undermines opportunities for SMEs. Rather than cultivating SMEs as sources of vital supplies and services, the country's oligarchs tend toward developing entire supply chains, thus discouraging entry into their many areas of interest. Although some argue that the 2010 legislative session contained "more than 100 laws … that would support SMEs," these core realities likely render SMEs unpersuaded that there is genuine Parliamentary support for their interests.

In 2007, a joint report of the International Finance Corporation (IFC) and the European Commission declared that the "system of government regulation and control over the activity of [SMEs] currently in place in Ukraine impedes sustainable economic development and erodes Ukraine's competitiveness."[27] Little has changed since that report, which further found that there are proportionally far fewer SMEs in Ukraine than there are globally or in Europe in particular.[28]

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[27] IFC, Business Environment in Ukraine (2007) at 7.

28 Id. at 8.

Aspects of support for SMEs currently exist within LINC, which works with local entrepreneurs and business leaders, and within the CLC, which occasionally provides legal training to joint stock company representatives and other entrepreneurs. However, there is no OEG-sponsored project that directly supports the formalization and advocacy concerns of SMEs. Other donors may be working in the area of SME support; however this did not become clear during this assessment.

COMMERCIAL DISPUTE RESOLUTION

USAID has supported fair and efficient commercial dispute resolution (CDR) since the early years of Ukrainian independence. It has done so through both general rule of law support, executed at various junctures through ODG, and support specifically to the country's commercial courts, usually by way of the CLC. Under *Doing Business*, Ukraine rates relatively well for "Enforcing Contracts," the chapter that measures the time and cost of resolving contractual disputes; in the most recent survey, it ranked 43rd in the world.[29] This measurement, however, does not reflect the perceived quality of judicial decisions, which, throughout this assessment, were routinely decried as poor and impacted by corruption.

Since its establishment in 2003, and currently as implementer of the OEG-sponsored Commercial Law Project, CLC has provided "institutional development support" to Ukraine's commercial courts, helping devise an automatic case management system and a registry of court decisions and sponsoring national and international conferences at least once a year to address commercial law topics. CLC also sponsors workshops for companies, entrepreneurs, and lawyers, helping them better understand the commercial law regime so as to avoid future disputes. In addition, CLC prepares and distributes a variety of online and traditional publications related to commercial dispute resolution, including, in addition to its website (www.commerciallaw.com.ua), manuals for legal professionals, a newsletter, a law journal (published twice to date), and a series of publications for entrepreneurs. As one key aspect of commercial dispute resolution, CLC has consistently encouraged commercial court judges to opt in their jurisprudence for the tenets espoused by the market-oriented Civil Code, as opposed to the Commercial Code, which, as discussed above, has less respect for freedom of contract.

The CLC's work with courts supplements that provided by UROL, which has been deeply involved with Ukraine's entire court system since 2006. UROL is involved with activities impacting all of the country's 800 court buildings, 8,000 judges (around 1000 of which are commercial court judges), and 35,000 court staff members. UROL specifically works on the legal framework pertaining to the judiciary; court administration and case management; judicial selection issues; judicial training; and issues pertaining to courts and society, including how the courts relate to the public and how they are covered in the media. Following the recent enactment of the new Law on Judiciary and Status of Judges, the UROL intends to be highly active in its implementation, including through direct assistance to the Academy of Judges, the institution charged with implementing the new law's mandatory requirements for annual continuing education for judges.

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[29] World Bank, *Doing Business 2011*.

Notwithstanding CLC's longstanding relationship with the commercial courts, its interactions appear to maintain a degree of informality – or an ad hoc quality – that can be said to diminish its effectiveness. Namely, although CLC routinely engages in "roundtable discussions" over new laws with commercial court judges, a full, robust and consistently administered commercial law curriculum and an organized, predictable schedule for its administration remain lacking. One local partner said that although it had conducted "a single, one-time event" in cooperation with the CLC, much more needs to be done on a consistent, sustained basis to educate judges about changes in the commercial law. The issue of CLC's role in the training of commercial court judges is discussed later in this Section (Ukrainian Implementing Partners – Commercial Law Center).

OTHER COMMERCIAL LAW AREAS ENCOUNTERED

The team encountered several other technical areas in the course of its assessment of OEG's portfolio for legislative reform, including pension reform, public-private partnerships, and bankruptcy. These topics are briefly addressed below.

Pension Reform

Ukraine's fiscal challenges run deep, and its unwieldy system of pensions, though not fully to blame, is a large part of the problem. Most observers of Ukraine's legislative arena believe that pension reform is imminent, although a minority suggests that the controversies involved will result in the Verkhovna Rada backing away from any meaningful change. Regardless, it is a given that reform of the pension system cannot consist merely of "best practice" legislation written by outside experts.[30] The impact that legislative changes will have on all Ukrainians, whose futures may change dramatically as a result of a new law, requires sensitive and widespread efforts at public outreach and consensus-building, even before legislative drafting begins. It is necessary to understand who will represent the various impacted constituencies, and how well prepared all constituents are to speak to the complexities of the changes. And it is critical that all stakeholders are given a chance to voice their needs and concerns, both before and during the legislative drafting process. As summarized by USAID economic growth advisor Wade Channell, "When parties to legislative reform perceive that they are adequately represented, given a chance to voice their opinions, and exposed to the arguments of competing interests, parties [to legislative reform] are more likely to consider the outcome legitimate, even if it does not fully achieve their aims."[31]

Pension reform warrants significant coordination within USAID, including among all pertinent projects, for the duration of the legislative reform project. FINREP is already deeply involved in pension-related legislative drafting, including the draft laws "On Implementing Accumulation System of Mandatory State Pension Insurance" and "On Pension Reform Legislative

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[30] *See* Keith A. Rosten, "The Scaffolding for Legal Infrastructure: Developing Sustainable Approaches," 16 Tul. J. of Int'l and Comp. Law 395, 400 (2008) (arguing against donor-sponsorship of laws written by outside experts based on international best practice, and in favor of the more time-consuming approach of supporting "a local effort at drafting the best law that local drafters can draft").

[31] Wade Channell, "Law as Relationship: Toward a More Ethical Legal Reform," Perspectives (Fall 2008) at 24.

Measures."[32] FINREP will also likely be heavily involved in drafting of regulations, following enactment of any new law. One of FINREP's local partners, the Securities Commission, will be significantly involved in implementing the new law, specifically through asset investment and oversight of private pension fund managers, and hopes to rely on FINREP's counsel. In addition, ODG's civil society-oriented initiatives are currently involved in consensus-building surrounding pension reform. Fortunately these groups are already working together, and FINREP is also in constant contact with other key donors, including the European Union, the World Bank, the IFC, and others.

However there appears to be a broader range of interests and expertise among various USG representatives and USAID partners that is not yet fully incorporated into USAID planning surrounding pension reform. These include U.S. Embassy representatives, who, due to the sensitive and highly political nature of pension reform, will likely take an increasingly close interest in the legislative process. Both Embassy and project representatives expressed interest during this assessment in having greater access to one another; pension reform is one area where direct communication as events unfold may be particularly worthwhile. In addition, the PDP II project and the ODG-sponsored media project will be involved, respectively, in critical parliamentary and public information aspects of the pension reform efforts. Moreover, other OEG projects, though not directly involved in legislative drafting on pension reform, can offer insights from their various constituencies that may impact how FINREP approaches its drafting role. The constituents of these projects would also benefit from whatever knowledge the projects are able to share.

Public-Private Partnerships

The 2010 law pertaining to Public Private Partnerships in Ukraine is considered merely a "framework" for future legislative initiatives. In itself, it is insufficient to support joint public-private investments. The law attracts a wide variety of opinions. Some observers interviewed for this assessment regard it as a "high-quality law," while others say it conflicts with Ukraine's preexisting laws on concessions and is too obscure in its definition of "PPP." Still others say that as a driver for large-scale infrastructure investments, the law will have no impact, because investors have little confidence that a 30-year commitment to the Ukrainian market is safe. For their part, actors in the municipal heating arena are eager to immediately develop PPPs that lead to greater private investment in utilities such as water and heat.

To make PPPs a reality, a great deal of additional legislative and regulatory work must take place. To date, the CLC has provided some assistance to the Ministry of Economy, but reports suggest that the nature of the work may have been beyond the CLC's core competencies. Now that USAID's PPP project has begun, it will oversee PPP-related legislative and regulatory efforts. Demand for that project's services will likely include analysis of how the PPP law squares with a variety of other laws. Also, the government will likely seek help in preparing a "model for development in Ukraine" based on the PPP law and amendment of laws to an extent that cannot

32 *See* USAID/Ukraine table of laws and regulations addressed by OEG-funded projects in December 2010.

be accomplished by decree. Other stakeholders advocate training for local officials who may be involved with PPPs as soon as possible, regardless of the state of the legislation.

Bankruptcy

Through research, consensus-building, legal drafting and other interventions, the CLC is overseeing OEG's support for the development of a "revolutionary" new Ukrainian bankruptcy law, one that aspires to be more in line with international best practice and to allow for a more fluid and transparent system of winding up or reorganizing insolvent companies. The State Bankruptcy Department within the Ministry of Economy, which works with the CLC on this project, is highly satisfied with these efforts and optimistic that a revitalized bankruptcy practice will become the norm in Ukraine (although it backed away, reportedly, from some of the most innovative provisions). The Department believes the new law will be enacted during the first half of 2011. However, it is not clear that the CLC has accessed deep resources available in bankruptcy reform that have been used in the past by other USAID-sponsored bankruptcy reform efforts in the region. Namely, through a variety of mechanisms, the bankruptcy bench of the United States courts has made itself available for legal reviews and feedback on draft bankruptcy laws throughout the world for nearly 20 years.[33]

Following enactment of the new law, which is anticipated for the second half of 2011, CLC will likely participate in preparations of regulations. It would also be well suited for implementation of the new law, through preparation of a bankruptcy law curriculum and training of judges, lawyers, and other bankruptcy professionals.

UKRAINIAN IMPLEMENTING PARTNERS

The assessment scope of work requested a specific focus on two projects implemented by Ukrainian partners: the Commercial Law Reform Project (CLRP) implemented by the Commercial Law Center (CLC), and the Municipal Finance Strengthening Initiative (MFSI), implemented by the Institute for Budgetary and Socio-Economic Research (IBSER). Both the CLC and IBSER are viewed as potential "legacy institutions" of USAID support in Ukraine; hence the specific focus on assessing the organizational performance and capacity of these partners. The team's assessment of these partners and projects is presented below.

Commercial Law Center

USAID/Ukraine created the CLC in 2003, through a contract with the U.S.-based Emerging Markets Group (EMG). Until 2008, the CLC operated under the direction of that contract, with oversight by OEG. In 2008, U.S.-based management ended and the CLC became entirely locally managed (though still almost entirely funded by USAID) and the prime implementer of the Commercial Law Reform Project (CLRP). In this respect, the CLC can be counted among

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[33] For example, the National Association of Bankruptcy Judges offers continuing education to judges and lawyers and advocates for quality and uniformity among judicial decisions from bankruptcy courts. See website of the National Association of Bankruptcy Judges, *available at* http://www.ncbj.org/index.html.

successful efforts to adhere to the increasingly observed value of local ownership and control over development initiatives.

From the outset, the CLC operated as a "demand-driven" institution, essentially responding to requests for legislative and regulatory assistance from the government and further acting, where necessary, to defend the case *against* certain laws (although any efforts to block the excessively Soviet Commercial Code enacted in 2003 proved unsuccessful).[34] During the EMG period, the CLC also contributed to the training of commercial court judges, as well as other stakeholders such as commercial lawyers and academics, in key topics in commercial law. It further engaged in public outreach and education efforts, as well as the development of a case management system and registry of judicial decisions.

During field work for this assessment, a variety of stakeholders described the CLC in its current form as having core strengths and obvious weaknesses. On the one hand, the CLC is known to employ a strong team of lawyers who are adept in their specialty, which is commercial law. These lawyers are perceived as particularly strong at advising the government on transactional law issues, such as company formation and governance, contracts, bills and notes, secured transactions, and mortgages. They also perform "excellent work," according to respondents who know the project well, on administrative law issues, which center on the territory of due process, including notice, appeal, clarity of regulations, etc. The Foundation for Effective Governance (FEG) specifically commented that USAID "should provide CLC more resources" and that "CLC is the only organization in Ukraine that can write [good] legislation."

The ability of the CLC to expand from that core, however, is regarded as less successful. Lawyers who have been assigned jobs in less familiar areas – including government procurement, land, PPP, and NGO law -- have not been considered especially effective by other OEG and government partners. Accessed by USAID recently as a general legislative drafting and advising group on all economic reform issues that preoccupy the Mission and Embassy, the demands on CLC are not considered realistic. In short, as stated by one respondent, "USAID shouldn't expect CLC to adequately address and handle every legal issue that arises in the economic sphere." Indeed, it would not be prudent to seek from a U.S. law firm specializing in labor and employment legal advice in real estate.

There are several ways that CLC can expand upon its core competencies, thus committing to the business of strengthening the core commercial laws that, unlike its neighbors, Ukraine did not develop in an especially successful form.. Rather than trying to advise the government on a multitude of laws that may be better left to OEG-sponsored projects with discrete knowledge about the specialized topics (i.e., FINREP, AgroInvest, PPP, and MHR), CLC may better serve the needs of the community by concentrating on the areas set forth in the recommendations section of this report.

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[34] USAID/Emerging Markets Group, *Ukraine Commercial Law Project:Final Report* (May 28, 2008).

Institute for Budgetary and Socioeconomic Research

Like CLC, IBSER also emerged from projects previously implemented by expatriate contractors: the Support for Economic and Fiscal Reform (SEFR) project implemented by DAI and the Municipal Budget Reform (MBR) project implemented by RTI. Effective budget management and transparency are key to local budget autonomy, better services provision and reduced corruption. Guided by this principle, the SEFR and MBR projects were tasked with promoting the performance program budgeting (PPB) method at the local level. With the goal to support the local interest in PPB development and make the process of budget reform sustainable, USAID directed MBR to create Ukrainian capacity for budget reform support. In 2007, the MBR project helped a group of progressive public finance and budget experts establish the Institute for Budgetary and Socio-Economic Research (IBSER), as an all-Ukrainian non-profit organization, to help the GOU and local governments carry on sustainable budget reforms and build on MBR's best practices on PPB development and implementation. In September 2008, IBSER received direct funding from USAID to implement the Municipal Finance Strengthening Initiative Project (MFSI).

In the course of team discussions with implementing partners, stakeholders and beneficiaries, IBSER and its work on MFSI were uniformly praised. The organization was consistently complimented for being very professional, extremely responsible and highly client-focused. For example, the Bureau for Economic and Social Technologies **(**BEST) commented, "We make very time urgent requests for information—sometimes in as little as one hour—and they always are able to comply and provide excellent responses." The Kyiv City State Administration is so pleased with IBSER's work on Performance Program Budgeting that it asked the team to inform USAID of its strong desire to extend this collaboration.

Other USAID projects, such as MHR and DIALOGUE, recognized IBSER as a greatly-valued and very effective partner. They noted that IBSER was dependable for technical competence and working effectively with its beneficiaries. In terms of working relationships, IBSER is as skilled at maintaining highly effective relationships with its major central government counterpart (Ministry of Finance) and local partners, such as the Rivne Municipal Government. IBSER works effectively and is a strong and reliable OEG partner. Fostering greater cooperation with IBSER will benefit all of its potential partners, particularly in the new PPP area.

It is worth noting that IBSER's relative success may be partially explained by its very specific focus. IBSER, at least on behalf of USAID, has concentrated on one set of issues alone (municipal finance) and has thus been enabled to develop a lot of credibility and expertise in that niche. As an organization, IBSER's specialization to budget and budgetary process issues, with associated training and awareness efforts, allowed it to build deep capacity in these areas. Its clients and counterparts greatly appreciate this expertise and highly value IBSER's work. By specializing , IBSER has avoided the challenge of attempting to be "all things to all people".

4. OEG Portfolio Management

INTERNAL PERCEPTIONS (USAID PROJECTS)

The OEG portfolio is quite broad with a number of projects engaged in legal and regulatory reform activities to varying degrees. For this reason, the survey questionnaire for OEG COTRs and COPs featured several questions eliciting response on the level of coordination and communication—both formal and informal—in the management of the overall portfolio. This includes communication/coordination:

- Between OEG COTRs and Chiefs of Party (COPs);
- Among different OEG COPs and other technical staff;
- Between OEG and other offices within USAID/Ukraine—specifically

The results, as gleaned through the surveys as well as interviews in Ukraine, are presented below.

COTR-COP Communication/Coordination

Currently, OEG employs a system of communication that combines both formal and ad hoc exchanges of information between its COTRs and COPs and other project personnel. Informal or ad hoc communication between COTRs and COPs is regular and ranges between at least once to several times a week. In response to team questionnaires, COTRs reported formal information exchanges ranging from weekly to less frequently. This was confirmed in meetings with the projects. COTRs and activity managers appear, in turn, to convey information on legal/regulatory reform up the chain to the OEG Director and Deputy Director.

While this system meets many of the informational needs of OEG management, it poses its own set of challenges. This system places the informational burden on the Office Director and COTRs to obtain and transmit information. As project information is passed up and down the OEG hierarchy, critical information can be lost. This was evidenced even during the field work itself, when certain projects indicated that they had misunderstood the nature of the assessment, including the degree of their participation. Other information might not be recognized as relevant and thus not transmitted at all. The current system is also time-consuming. A more structured approach to communications could benefit OEG operations, specifically given the portfolio's wide-ranging breadth and depth.

Communication/Coordination among OEG COPs

OEG COPs were generally positive about their interactions with OEG management and activity managers. However, several OEG COPs expressed a need to be more formally connected with their counterparts on OEG projects; one professed to have "very little communication with the

other COPs." COPs benefit from understanding how their specific activities fit into the overall OEG portfolio and the larger picture of political and economic dynamics in Ukraine. This is especially true in the legal and regulatory area, where specific reforms impact a variety of stakeholders in different ways, having implications for programming across the board. As one COP interviewed succinctly put it, "I need to know the political priorities to work effectively. Other COPs need to know what I'm doing, and I need to know what they are doing."

While OEG currently convenes quarterly COP meetings, several respondents felt these meetings should occur more often—no less frequently than once a month -- given the sometimes fluid nature of political developments in Ukraine. Respondents recognized the tricky balance between informational needs and demands on time. Everyone is hard at work achieving USAID's and GOU partners' desired results and outcomes. However, COP meetings—tightly organized and with closely observed time limits—were viewed as a worthwhile investment given the potential benefits from understanding USG positions on "bigger picture" political and economic issues, as well as those from cross-pollination and multilateral coordination.

One tool initiated by OEG to monitor its implementing partners' work in legislative and regulatory reform is a Microsoft Excel-based matrix through which, on a monthly basis, projects identify the laws and regulations they are working on, the significance of the law or regulation, the status of the law or regulation, and the number of hours per month they devote to the process. [Please see Appendix G]. The assessment team reviewed the first edition of the matrix, compiled for December 2010, which included reports from five OEG projects and listed more than 135 laws and regulations, at least 17 of which consumed more than 40 hours of project time during the month.

The matrix is clearly a useful tool, assuming that it is indeed maintained on a monthly basis; formalized with a title and one new tab per month; and shared on a timely basis among all the projects. It ought not be viewed as an end in itself, of course, but rather a useful step in the process of monitoring OEG-sponsored legislative and regulatory reform work. The matrix does not yet contemplate implementation of the laws and regulations once they are enacted. An additional column identifying current or anticipated implementing measures might prove useful in future iterations.

OEG-ODG Communication/Coordination

ODG projects-specifically UROL and PDP II--are delivering technical assistance and training in partnership with the Verkhovna Rada and the courts with direct relevance to the OEG activities in legal/regulatory reform. By communicating regularly with colleagues in ODG, OEG could gain additional information and insight that could enhance the performance of its project portfolio. For example, PDP II holds monthly coordinating meetings focuses on legislative efforts; OEG participation at these meetings could help the Office keep current on the Verkhovna Rada's legislative priorities, and improve understanding of how draft laws are developing and how specific parliamentary committees (e.g., those related to passing legislation relevant to OEG) are interpreting their own priorities.

ODG projects can also offer the perspectives of civil society and media on hot button political and economic issues impacting OEG programming, such as land reform, pension reform and

labor issues. Coordination on these issues will improve the consistency and uniformity of messages delivered through OEG and ODG communications and outreach programs at the project and portfolio levels. The team is not necessarily suggesting that OEG and ODG must reach consensus on all of these issues: as was mentioned earlier, OEG and ODG projects often come from different perspectives on the same issue (efficiency vs. equity); however there are benefits gained from understanding and acknowledging these differences and addressing areas of commonality. There is also demonstrated interest on the ODG side: when asked about her interest in participating in the OEG COP Meeting, the PDP II COP stated she would do so "in a heartbeat."

EXTERNAL PERCEPTIONS (COUNTERPARTS AND PARTNERS)

Ukraine has benefited from the past twenty years of development assistance. Counterparts and local partners are operating from relatively explicit work plans and appear to understand the priorities of the current administration, whether they are operating in the government, Parliament, or non-governmental sector. The political, economic and social environment continues to pose certain challenges to delivering donor-funded assistance—Soviet-era mindsets still persist in many aspects of government and society; a tendency that has only become reinforced under the current government. However, there is a sincere desire on the part of counterparts to cooperate with USAID and other donors to improve life for the Ukrainian people. This stems from a desire for self-improvement, and is reinforced by the overwhelmingly positive view of USAID assistance—both past and present--among counterparts.

First Deputy Head of the State Bankruptcy Committee Voronko, commented on the USAID-supported CLC, "I praise their assistance very highly." Similarly, Dmytro Tevlev, Chair of the Securities and Stock Market Commission, reported, "We are very happy and satisfied with our cooperation with USAID projects." Mr. Kalchenko, Commissioner of the National Electroenergy Regulatory Commission, the recent counterpart of the MHR project, said, "I know that we will benefit from USAID assistance…even in the 3-4 months of cooperation with MHR we have benefited tremendously." Similarly, when asked of his impression of USAID's work, Sergey Protsyk, of the Rivne Oblast Government, immediately commented, "IBSER is highly professional, fast and meets its client's needs. I am very satisfied with them." Occasionally, respondents referenced past positive experiences of cooperation with USAID, e.g. how helpful past study tours were to government officials or how useful past USAID technical assistance had been to their work.

USAID beneficiaries were very receptive to receiving USAID/OEG. Counterparts remain interested in learning from best international practices. Some counterparts expressed this in vague terms, while others had specific requests; e.g., the Deposit Guarantee Fund is interested in learning more about the U.S. Federal Deposit Insurance Corporation; the Parliamentary Committee on Industrial and Regulatory Policy and Entrepreneurship would like to apply lessons learned in Georgia on entrepreneurship and business environment to the Ukrainian context. Other counterparts and beneficiaries requested more training. For instance, Irina Zapatrina of the Intergovernmental Advisory Council to the Ministry of Economy on Public Private Partnership argued that there was a strong need for a comprehensive training of local authorities who will implement public private partnership at the local level.

Counterpart meetings were organized with the help of the USAID projects. Concerned about the possibility of a potential sampling bias skewing responses in a more favorable direction, the team organized some meetings on its own. Although this was not a scientific test of possible sample bias, it did provide useful additional observations. There was no appreciable difference in perceptions of USAID's work by respondents contacted directly versus those contacted by USAID or its projects. Both groups were similarly pleased with their experiences and observations of USAID assistance. The team does not doubt the reliability of these responses.

Probing deeper, the team did uncover a few issues with a slightly critical cast: one counterpart, while satisfied with his overall experience of OEG project assistance, admitted that his institution's early association with USAID project had not been trouble free. However, the collaboration became overwhelmingly positive once a new COP took over the project.[35] Another noteworthy example of qualified praise of USAID assistance came from a GOU counterpart who complimented his collaboration with USAID/OEG projects, but appeared envious of the time and attention that some local beneficiaries enjoyed from a particular USAID OEG project.

[35] To elicit better quality information the team reassured respondents that they would not be identified in its report to USAID.

5. Recommendations

In this section, the team recommends ways that USAID/Ukraine OEG can work with project partners (expatriate and Ukrainian) to maximize the efficiency and effectiveness of legal reform efforts and monitor legislative reform activities of implementing partners (expatriate and local). The recommendations are grouped by "technical activities" and "portfolio management."

TECHNICAL ACTIVITIES

Recommendations on technical activities are listed below according to commercial law areas as presented in Section 3. The relatively rapid pace of the Yanukovych Presidency's policy agenda argues that OEG should emphasize efforts to coordinate the work of its implementing partners on specific legislation and policy efforts. Since the plans of the President's Administration and the Verkhovna Rada list of priority legislation are public, they can help guide OEG in these coordination efforts.

The convening of ad hoc coordination groups figures prominently among the team's recommendations—an appropriate suggestion given the complexity of issues and the number of stakeholders involved. The prioritization and frequency of coordination meetings will depend on factors such as the speed of legislative or regulatory reform initiatives led by the GoU or the Verkhovna Rada, the complexity of the issue, reports on how specific legislation or regulations develop as they work their way through the government or parliament, or if there are changes in the way the USG views the subject.

General Legal/Regulatory

Encourage GOU to place English-language translations of Ukrainian law on major international websites and promote efforts to link such websites to the Verkhovna Rada's website's "Laws in English" section. Few of Ukraine's core commercial laws are readily accessible to outsiders seeking to invest in the country. OEG should encourage the GOU to place English-language translations of Ukrainian law on major international websites, such as the *Doing Business* law library and the U.S. Library of Congress. These should be linked to the "Laws in English" section on the Verkhovna Rada's website. All core commercial laws should also be indexed and provided on the CLC's website.

Property Rights

Coordinate ad hoc advisory group on land rights. OEG should develop an ad hoc advisory group on land rights, coordinated by the new AgroInvest project. The group should also include representation from LINC (which already has a representative on a legislative working group),

PPP and CLC, as well as from ODG projects including PDP, UROL and those engaged in civil society. The group should also seek the input of AmCham Ukraine, which is already heavily involved in the issue. The group should convene and continue to work together through formal and informal channels not only through the enactment of final legislation, but also during the development and implementation of supporting regulations *and* implementation of the entire regime. Coordination should include efficient mechanisms for sharing information. A regular conference call or "listserv" should be instituted.

Strengthen communication among OEG projects on energy efficiency issues. The team's interviews and examination of the legislative reform matrix revealed that OEG has devoted considerable resources to reforming laws pertaining to energy efficiency. Given this investment on the policy side, there should be commensurate efforts to implementing the priority of energy efficiency itself. Strengthening communication and encouraging integration with/between MHR and other OEG projects can help achieve this goal. For example, LINC can help investors and other enterprises in the regions respond to the new business opportunities that may come from the new laws. The PPP project can help identify how the private sector could be involved with large, "green," energy-saving projects. Civil society groups can help spread the word about the importance of energy efficiency. Leveraging resources would be more effective than relying on just one project (MHR) to promote energy efficiency in housing and business.

Contract Law

Facilitate conversation and consensus-building on next steps on the Commercial Code. OEG is uniquely positioned, through the CLC, to facilitate an important conversation and consensus-building activity on next steps regarding the Commercial Code. This inquiry can be multifaceted: it can take place through the media, through judicial roundtables, through law reviews and other academic writings, and through conferences and symposia. For such an effort, coordination with UROL and PDP, other USAID-supported projects, private-sector constituencies, and other donors involved with developing commercial law in Ukraine is highly advisable. A reasonable period for this discussion would be about one year, with the practical goal being a fully developed consensus from a broad base of stakeholders, articulated to the country's government and citizenry, about the appropriate next legislative steps.

Company Law (Legislative Personality)

Develop and/or enhance existing SME assistance programs to build collective interests of SMEs. Assuming that the key concerns of SMEs do not receive meaningful donor support elsewhere, and based on the conditions detailed earlier in this report, OEG should consider adding an SME component to an existing project or commissioning a new project aimed at building the collective interests of SMEs. The project or component could assist SMEs in the process of formalization, so that they can properly adhere to the new Tax Code and avoid the unscrupulous interference by the tax police that they fear; include a review of the Tax Code to ensure that it properly reflects the concerns of SMEs; focus on advocacy capacity of SME representative groups; and integrate SMEs into the implementation of the new Law on Procurement (i.e., ensuring SMEs can benefit from the new law)

Commercial Dispute Resolution

Propose a commercial law curriculum and training to the Academy of Judges. OEG, through the CLC, should propose to the Academy of Judges, the institution charged with implementing the continuing legal education requirement, a commercial law curriculum. That set of courses should include instruction not only on the core laws that commercial court judges typically encounter, but also an evolving group of next-generation, more sophisticated laws (including, for example, the new Joint Stock Company amendments, the Law on Condominiums, the bankruptcy law, and others). It should further encompass an appropriate curriculum for new judges. In Ukraine, although there have been many opportunities for judicial training over the years from myriad donor sources, there is generally "little coordination between different entities that provide judicial trainings."[36] The CLC could also assume a leadership role to correct this situation on behalf of commercial court judges.

Other Commercial Law Areas

Coordinate ad hoc advisory group on pension reform. OEG should designate a lead partner (e.g., FINREP) to coordinate an ad hoc informational and advisory group on pension reform. The group should also include LINC, CLRP/CLC, MFP, and DIALOGUE, as well as various ODG projects such as PDP II. This group should convene in person at least once for informational purposes and continue to communicate by e-mail and listserv on a regular basis.

Encourage the PPP project to conduct outreach with support from IBSER. The PPP project should be encouraged to learn from prior USAID efforts in this area. PPP is a relatively new area of donor intervention, and lessons from the field are rapidly emerging from such regions as North Africa and Southeast Asia. As in other areas of legislative reform, the Ukraine PPP project should be encouraged to communicate regularly – again, perhaps through an ad hoc committee – on its efforts. OEG should draw upon IBSER—a reliable and well-regarded local partner-- to help orient the PPP project by sponsoring a working group meeting for PPP, with MFSI and other relevant projects, such as MHR, CLC, LINC and DIALOGUE. In addition, OEG should ensure that any government ministry (beginning with the Ministry of Economy--the body charged with implementing the new law) involved with PPPs receives an unequivocal signal – by way of an MOU or other statement of cooperation – that USAID supports the GOU effort.

Seek effective, relatively low-cost expertise in reviewing draft laws. The potential for error and embarrassment is great where USAID-sponsored projects signal their approval for draft laws that contain crucial inconsistencies with best practice or major terminology errors. OEG should require that all projects ensure that a U.S.-educated lawyer review and analyze all draft laws being worked on under their projects. This step can take place near the end of a legislative drafting process; the point is to minimize the chance for misstatement of key principles. As previously discussed, it is likely not cost-effective to make a similar requirement for implementing regulations.

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[36] ABA/CEELI (ABA Rule of Law Initiative), *Judicial Reform Index for Ukraine (Vol. 2)* (2005) at 20.

In addition to expatriate U.S. lawyers engaged for certain OEG projects, at least two sources of expertise could contribute to such an effort, at minimal cost (per diem and travel) to USAID. These are the following:

- The Committee on International Judicial Relations of the U.S. Judicial Conference (including bankruptcy judges): IJRC@ao.uscourts.gov. Chair: Judge Diarmuid O'Scannlain (Court of Appeals for the Ninth Circuit) (415) 355-890).
- The American Bar Association Rule of Law Initiative International Pro Bono Legal Specialists program (contact: Michael Maya, Deputy Director, mmaya@staff.abanet.org).

Ukrainian Implementing Partners

Play to CLC strengths and assign it a greater role in the implementation of core commercial laws. CLC, overall, is regarded by other OEG implementing partners, GOU counterparts and other institutions as a strong source of legislative drafting in its core areas. Rather than continuing to respond to requests for legislative drafting assistance on matters that may not only be beyond its core areas of expertise, but also duplicative of challenges taken on by other OEG projects, the CLC should:

- Facilitate the critical consensus-building surrounding the Commercial Code, with a long-term objective of its repeal, as discussed in Section 3
- Continue its work developing a strong bankruptcy law that adheres to international best practices, and then proceed with its implementation through dissemination, outreach, and training
- Build more structured, less ad hoc training capacities vis-à-vis the commercial courts, specifically through a regular, curriculum-driven series of trainings in cooperation with the Judicial Academy for all 1,000 commercial court judges, thus meeting the new continuing education requirements of the Law on Judiciary and Status of Judges
- Revisit other key commercial laws enacted over the last decade, including the secured transactions law and the Joint Stock Companies law, to determine whether more effective implementation is necessary to improve perceptions of their quality and effectiveness
- Strengthen access to the country's entire body of commercial law, through an indexed library of commercial laws and regulations (or links thereto) available on the CLC website, in addition to an indexed library of English-language translations of commercial laws, on both the CLC website and international portals
- Work with law schools to strengthen the general commercial law curriculum and develop supporting dialogue in the commercial law community about key issues, through symposia and law journals
- Create an anti-corruption program for the commercial courts, starting with a benchmark survey of perceived corruption in the commercial courts and followed by tangible responses to survey findings, including strengthened judicial education, public monitoring of the courts, possible creation of an ombudsmen facility, and advocacy for criminal prosecution of corrupt judges
- Create, possibly in cooperation with LINC, an SME-oriented regional commercial law curriculum, specifically training SMEs about the process and impact of formalization and the business growth opportunities (access to credit, government contracts, etc.) derived from formalization

- Strengthen any existing commercial court judges association, or, if one does not exist, establish such an organization for the purpose of improving the reputation and professionalism of the corps of judges.[37]

In addition, if USAID or CLC wishes to achieve genuine sustainability, now is the time to develop a more targeted program to do so, including through reevaluation of CLC's NGO/charitable status, which prohibits it from making any money.

Demonstrate firm commitment to continuing the PPB reforms implemented by IBSER at the local level. The assessment team heard uniformly positive feedback on IBSER's implementation of the MFSI project—especially from Ukrainian counterparts. While funding situations can often be fluid, it will be important to communicate firmly USAID's commitment to support the GOU's goal of completely rolling out PPB by 2014.

Portfolio Management

Convene tightly organized monthly COP meetings. OEG should hold monthly COP meetings, a request of more than one COP the team interviewed. The meetings should have a closely observed time limit, with an agenda emailed to attendees in advance. Submissions to the agenda should be closed by a defined date, e.g. by end of the week prior to the meeting. The meetings should typically begin with updates from the Office Director on information gained from the Country Team Meeting and conversation with the USAID Front Office, so that projects and COTRs understand political priorities that can impact their project's operations. The rest of the meeting should hearken back to the "classic COP meeting" style: giving each COP 5-10 minutes to share a few key developments on their projects. COTRs and Activity Managers should also participate. This meeting will allow for the multilateral information sharing requested by COPs, and enhance the overall efficiency of communication within OEG.

Integrate ODG projects more fully into OEG legal/regulatory reform activities. ODG projects work closely with the Verkhovna Rada, the judiciary, civil society and the media—all of whom play critical roles in advancing legal/regulatory reform. OEG and its implementing partners should leverage the knowledge of their peers in ODG. This can be done by integrating ODG into new coordination mechanisms recommended above or through preexisting mechanisms such as PDP II's monthly coordination meetings and semiannual Parliamentary Projects Fair, an event designed to introduce technical assistance projects to the Verkhovna Rada. To reduce demands on time, OEG members could participate in ODG events on a rotating basis, reporting back to the larger group either in COP meetings or via email, listserv, etc.

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[37] This assessment encountered conflicting reports over whether a commercial court judges association has been established and is currently functioning. An excellent model of a judges association established with USAID support is the Macedonian Judges Association, which is dedicated to judicial independence and improving the reputation of judges, among other goals. *See* website of the Macedonian Judges Association, *available at* http://www.mja.org.mk/index%20ang.htm. An example of a highly successful judges association dedicated to commercial law is found in the United States, where the National Association of Bankruptcy Judges offers continuing education to judges and lawyers and advocates for quality and uniformity among judicial decisions from bankruptcy courts. See website of the National Association of Bankruptcy Judges, *available at* http://www.ncbj.org/index.html.

6. Conclusion

The legislative and regulatory reform work found among USAID's major OEG assistance programs is extensive and complex. Managing such a broad-based portfolio, especially under Ukraine's onerous political conditions, is enormously challenging: it calls for careful monitoring of interventions, coordination of priorities, collaboration among actors, and planning for implementation. One virtue of the current portfolio is that it is responsive to the major dynamics of the political economy – that is, it tracks those areas where lawmakers have demonstrated a commitment to change. In the urgency of facilitating these reforms, USAID should be equally vigilant, through tactics other than legislative drafting (such as consensus-building, training and public outreach), in promoting change where such determination may not exist. Until Ukraine resolves to tackle its fundamentals – including oligarchic restrictions on meaningful entry into the marketplace, remnants of Soviet economic values, and toleration for corruption at all levels – the impact of outside assistance will be less effective than donors intend.

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Appendix A. Statement of Work

Assessment of Legislative Reform/Legislative Assistance Portfolio projects in Ukraine

A. Purpose of Assessment

The purpose of this assessment is to assist USAID/Ukraine in undertaking a targeted internal analysis of all projects in the Office of Economic Growth (OEG) that have a legislative and regulatory component with an emphasis on projects implemented by the Commercial Law Reform (CLR) project and the Municipal Finance Strengthening Initiative (MFSI).

B. Background

An effective, transparent and predictable legislative and regulatory environment is key to Ukraine's ability to implement reforms, stimulate economic growth and ensure effective governance and service provision. Notwithstanding Ukraine's recent progress in adopting a slew of important pieces of legislation, Ukraine's legislative and regulatory system still lacks consistency, transparency and fairness and, in many cases, does not meet the European Union's requirements. A vast body of legislation of Soviet-era vintage, combined with an equally daunting body of new legislation adopted since independence, forms a confusing web of conflicting rules enforced by weak institutions.

Since an improved legislative and regulatory environment is critical for nearly all sectors where USAID is providing assistance, almost all projects implemented by OEG include legislative and regulatory components in their portfolios.

Commercial reform is an important area for USAID assistance. USG long-term assistance in this area is focused on improving the legislative environment in Ukraine and removing regulatory barriers to conducting businesses. In particular, through its Commercial Law Center project, USAID has helped Ukraine move toward OECD Corporate Governance Principles and build the capacity of its judiciary to enforce legislation in a consistent way in order to establish a clear market-oriented policies framework. USAID has provided assistance in drafting and promoting the adoption of the Public Private Partnership law and a law on factoring, drafted new laws governing bankruptcy procedures and Limited Liability Companies, and the implementation of the Joint Stock Company law. In addition, legislative efforts were put into streamlining the permit system, simplifying the registration of non-resident companies, counteracting the unlawful takeover of enterprises and raider attacks so as to help municipalities and industries become more competitive in world markets.

Another important assistance area is municipal budget reform. USAID assistance in this area is focused, in particular, on improving fiscal decentralization, strengthening municipal creditworthiness and introducing performance program budgeting at the local level. USAID has been providing assistance in this area since 2003. Since 2008 USAID, jointly with the Ministry of Finance, has been implementing a national pilot project to introduce PPB in four regions of Ukraine. The President and GOU have set as one of their strategic goals the introduction of PPB and midterm budgeting in all local budgets, and to increase local development budget resources, specifically via access to domestic and external credit resources.

C. Current Mission Initiatives with a legislative and regulatory reform component

The Office of Economic Growth currently supports the following activities that include legislative reform and legislative assistance:

Commercial Law Reform Project
Implementer: Commercial Law Center (CLC)
Total Estimated Cost: $2.8 mln
Project Period: 7/14/08–7/14/11

The purpose of the Commercial Law Reform being implemented by the Ukrainian NGO, the Commercial Law Center (CLC) is to strengthen the legislative and regulatory environment and the commercial court system, thus improving the overall business climate in Ukraine. The project goals include improving commercial legislation, increasing capacity of legislative professionals, businesses, and the public to use the commercial legislative system, and making more widely available information on commercial laws, cases, procedures, and best practices. CLC has actively participated in drafting 35 new laws, critical for doing and developing business in Ukraine, and shepherded them through the Parliament to ensure their adoption. In addition, CLC has participated in drafting and amending the Civil Procedural Codes, Code of Administrative Court Procedure and the Code of Commercial Court Procedure to ensure more openness and transparency of the court's system.

CLC has also provided support in creation and ensuring adequate operation of state registries: the Unified State Registry of Legislative Entities and Individual Entrepreneurs, the registry of court's decisions and the Unified State Registry of Enforcement Procedures. An important component of the CLC activity is coordination of efforts of legislative professionals, academics and practitioners in comparative analysis and harmonization of Ukraine's legislation with that of the EU.

Local Investment and National Competitiveness (LINC)
Implementer: Chemonics Int.
Total Estimated Cost: $20.9 mln
Project Period: 03/16/09-04/01/2012

The LINC program is a three-year initiative for achieving the U.S. Government's priorities of fostering broad-based, sustainable growth and Euro-Atlantic integration. Working hand-in-hand with local and national government authorities, local industries, and potential investors, LINC aims to boost Ukraine's ability to compete internationally. LINC provides space to accelerate national-level reforms, as well as build models of sub-national partnerships that court investment

and provide efficient services to businesses. LINC also assists the governments (local and regional) of the Autonomous Republic of Crimea (ARC) to undertake improvements to the business and investment environment and enhance the productivity of industries and enterprises so as to diversify and reorient Crimean goods and services into more competitive markets. Legislative work largely falls under contact task 1a. which covers post WTO accession issues of international food safety standards, government procurement, and the development of a customs code. Other legislative activities include areas associated with land registration, investment regulations, and at times, de-regulation.

Agricultural Policy Transition Support (ATPS) Project
Implementer: Academy for Educational Development
Total Estimated Cost: $383,000
Project Period: 09/01/2010–05/31/2011

The APTS project serves as a bridge between previous agricultural activities and the soon to be launched AgroInvest project. The project is helping Ukraine to spur economic growth by facilitating the adoption of market-oriented, WTO compliant agricultural reforms through a 'bottom-up' process which not only strengthens the likelihood that critical reforms will be adopted but also builds upon the expertise of local organizations. Activities seek to facilitate a public-private policy dialogue while promoting public awareness for major agricultural reforms. The project develops the institutional capacity of local organizations for driving these market-oriented reforms under AgroInvest and into the future.

In response to a request by Ukraine's Deputy Prime Minister, the APTS project drafted legislation that will allow for the use of pre-harvest financing, an innovative mechanism for making credit available to agriculture producers, which uses the future value of crops as loan collateral. This instrument is particularly useful since producers are not currently able to use their land as collateral due to a moratorium on the sale of agricultural land. The project has also been working, along with other industry groups, to remove the recently established export quotas that restrict trade and harm agricultural producers.

AgroInvest
Implementer: TBD
Total Estimated Cost: TBD
Project Period: TBD

AgroInvest will accelerate and broaden economic recovery in Ukraine and contribute to global food security efforts through a more inclusive and competitive agriculture industry. Expected to begin in the fall of 2010, the project will seek to: support a stable, market-oriented policy environment; stimulate access to agricultural finance; and facilitate market infrastructure for small and medium producers. In particular, AgroInvest is expected to help make rural landholders and producers aware of their land rights, facilitate the adoption of legislation needed to lift the moratorium on agricultural land sales, increase agricultural lending to small and medium producers, establish wholesale and regional markets, and strengthen the capacity of producer organizations and industry associations.

The project is expected to produce a market-oriented, WTO-compliant policy strategy and help the GOU, the Parliament of Ukraine, other state agencies, as well as private organizations, to implement this strategy. The strategy will be developed by the contractor in consultation with the GOU, key NGOs, and private industry associations. Agenda items addressed by the project will include land reform, taxes, agricultural finance, cooperative legislation, tariff and non-tariff barriers, subsidies and the fine tuning of wholesale market and warehouse receipt legislation. The contractor is expected to utilize the expertise and capacity of the Agrarian Markets Development Institute (AMDI), a Ukrainian NGO, to pursue legislative reform and to help industry associations push for policy improvements.

Financial Sector Rehabilitation Program (FINREP)
Implementer: Booz Allen Hamilton/FMI/Bankworld/Emerging Markets Group
Total Estimated Cost: $12.4 mln
Project Period: 10/20/2009-10/19/2012

FINREP's goal is to help Ukraine rebuild from its current economic and financial crisis and establish a sound, transparent, and resilient financial system. FINREP integrated with the Capital Markets Project during CMP's final year, and activities support legislators and regulators with the banking recapitalization and resolution process, help financial sector regulators implement risk-based supervision and regulate the private pension system, help build a domestic securities market as a source of stable long-term capital, and support vulnerable populations with debt restructuring and financial literacy campaigns. Project goals are a strong financial sector that is regulated by politically and financially independent entities, supported by the best international industry standards, and trusted by Ukraine's citizens. FINREP is closely coordinated with the donor community, particularly under the World Bank-USAID PTAP partnership.

Municipal Heating Reform Project
Implementer: International Resources Group (IRG)
Total Estimated Cost: $16 mln
Project Period: 02/25/09-02/24/12

The Municipal Heating Reform (MHR) Project was designed to help Ukraine transform municipal heating into a financially viable, well-managed, and fairly regulated sector that delivers reliable, quality services at affordable prices to the population, public institutions, and local industries.

In order to strengthen the legislative , regulatory, and institutional framework leading to the improvement of heating services, tariff regulations, and compliance with EU legislation in this sphere, the MHR Project Team works closely with the National Government of Ukraine (GOU) and local governments. The project is also working with 35 pilot cities to undertake municipal energy assessments, develop municipal energy plans, specifying metering equipment, assisting municipalities in obtaining financing for energy efficiency projects, implementing energy efficient technologies and methodologies, and monitoring the results of the projects. The project is also facilitating the establishment of condominium and home-owner associations. In order to mobilize private sector resources for the benefit of society and sustained development of Ukraine's energy system, the project is also working with the Ukrainian government to build a

sound legislative and regulatory environment for private investment and develop public-private partnerships with private enterprises to fund selected energy-efficiency projects in pilot cities.

Public-Private Partnership (PPP) Development Program for Ukraine
Implementer: Academy for Educational Development (AED)
Total Estimated Cost: $12.5 mln
Project Period: 10/01/10-09/30/15

Recently awarded, the goal of the Public-Private Partnership (PPP) Development Program for Ukraine is to promote the use of public-private partnerships, with an expanded role of private sector finance and operational expertise in public infrastructure development, to improve infrastructure and public services in both urban and rural areas. The program promotes the use of public-private partnerships through: 1) undertaking necessary legislative and institutional reforms; 2) establishing a national public-private partnership unit to serve as a bridge between government and private sector interests; 3) undertaking a capacity building and stakeholder communications program; and 4) creating a project development facility to initiate and finance a sustainable pipeline of PPP projects.

Under the Legislative and Regulatory Development component the project is designed to1) review the existing PPP legislation and address stakeholder concerns; 2) track and improve ongoing policy and legislative initiatives; 3) draft a strategy which encompasses efforts intended to secure the most important reforms; 4) propose clear PPP regulations and procedures for transportation, communal services and energy sectors; 5) assist the GOU in reviewing and amending PPP related laws and regulations to improve PPP design, competition, award, and implementation and align them with relevant EU standards. The strategy should include transfer of technical expertise, capacity building efforts, and promotion of selected PPP transactions.

Municipal Finance Strengthening Initiative (MFSI) Project for Ukraine
Implementer: Institute for Budgetary and Socio-Economic Research (IBSER)
Total Estimated Cost: $2.5 mln
Project Period: 10/01/08-09/30/11

The purpose of the Municipal Finance Strengthening Initiative (MFSI**)** project is to enhance the municipal capacity to plan and finance the development of municipal infrastructure through fiscal decentralization, improved intergovernmental transfers and public finance management.

To achieve the above-stated project purpose, USAID, through its implementing partner IBSER (the Institute of Budget and Socio-economic research) helps national and local authorities:

1. Improve the national legislative and regulatory framework to make sufficient public and private funds available to municipal utility companies to ensure sustainable provision of all their essential services;
2. Increase local government capacity to develop realistic municipal infrastructure development strategies and use program performance budgeting for implementing those strategies in pilot oblasts selected by the Ministry of Finance for Performance Program Budgeting phase in;

3. Identify funding options for municipal infrastructure development strategies and introduce modern alternative financing schemes, including performance contracting and efficiency loans secured by future fee revenues, to support major improvements in municipal infrastructure.

At the national level, the Implementing Partner works on improving the legislative and regulatory framework to enhance cities' creditworthiness and develop their ability to attract budget, debt and equity financing for infrastructure development by:

- reviewing the existing legislative and regulatory framework to identify gaps and problem areas;
- drafting new or amending the existing legislation to remove obstacles for local governments to borrow and increase their own-source revenues;
- focusing on improving the existing system of intergovernmental budget relations in what concerns capital transfers.

At the local level, the implementing partner trains pilot municipalities and provides them with technical assistance in capital budget planning based on performance program budgeting. It provides assistance to the Ministry of Finance in conducting state-supported pilots on Performance Program Budgeting (PPB) implementation in local budgets in four oblasts of Ukraine. In addition, MFSI helps municipalities develop, test and implement innovative financing technologies to fund renovation and energy efficiency improvements in public and private buildings and other infrastructure development projects. The Implementing Partner also helps cities link their infrastructure development strategies with adequate financial planning and diverse sources of financing.

Development Initiative for Advocating Local Governance in Ukraine (DIALOGUE) Project
Implementer: Association of Ukrainian Cities (AUC)
Total Estimated Cost: $4.2 mln
Project Period: 04/30/2010-04/29/2014

The purpose of the project is to advance decentralization in Ukraine. The project creates and widens the environment for local government reforms to ensure a broad-based support for decentralization from Ukrainian public servants, civil society organizations, and the public at large. In the long run, the Project is expected to result in an equitable dialogue between local governments and the central government and the formation of the expanded legislative and institutional framework for sustainable development of local territorial communities in Ukraine.

The project is developing a sustainable mechanism for drafting, assessing and implementing local government legislation. The project supports efforts to draft and implement several key pieces of legislation to enhance the autonomy of local governments. Assistance is provided to improve the local government legislation process at all stages, including: new legislation, need assessment and justification, legislation drafting, feedback on new legislation, implementation, and analysis of impact of current and draft legislation of the local government sector.

The project focuses on improving the legislation development process by engaging the Association of Ukrainian City's Center for Legislation Initiatives and developing the Center's

legislation development strategy. Program activities include data collection and studies at the local and national levels to substantiate the need for new legislation and analyze short-and long-term implications of legislation proposals.

D. Statement of Work

Objective

The objective of this assessment is to inform USAID/Ukraine how to better coordinate all legal reform activities in the OEG portfolio with a view toward improving the return on the combined efforts of OEG partners. The assessment is intended to be an internal review of all projects in the Office of Economic Growth (OEG) involved in legal reform, with an emphasis on two projects implemented by local partners, the Commercial Law Reform (CLR) project implemented by the Commercial Law Center, and the Municipal Finance Strengthening Initiative (MFSI), implemented by the Institute for Budgetary and Socio-Economic Research (IBSER). The assessment will address legislative reform activities relevant to improving the economic and social well being of all Ukrainians.

Activities

- Meet with partners involved in legal reform activities, including government officials, NGOs, donors, etc. (the Mission will supply recommendations). The team should also meet with D&G projects on legislative and judicial strengthening as appropriate;
- Prepare a brief (1-2 page) description of historical context, which outlines the political, governance and legislative and regulatory environment in Ukraine. The description should succinctly situate the legislative and regulatory reform efforts in the broader political economy of Ukraine;
- Evaluate the roles and interests of major political actors, and the political will for undertaking commercial legislative and regulatory reform, identifying who is likely to “win” and “lose” from enactment of reforms;
- Assess USAID's role to date in supporting three key aspects of commercial law reform: (1) property rights; (2) contractual rights and obligations; and (3) commercial dispute resolution. Identify appropriate next steps, if any, for USAID involvement in supporting these areas, emphasizing suitable roles for existing USAID projects and opportunities for improved efficiency and effectiveness;
- In addition to the three areas listed above, analyze the legislative and regulatory reform efforts undertaken by all current OEG programs, with a particular emphasis on projects being implemented by CLC and IBSER.
- Recommend ways that USAID/Ukraine OEG can work with project partners (expatriate and Ukrainian) to eliminate duplication of efforts and capitalize on areas of potential complementarity to maximize the efficiency and effectiveness of legal reform efforts;
- Recommend ways that USAID/Ukraine can best monitor legislative reform activities of implementing partners (expatriate and local)
- Present preliminary findings to Mission directors and personnel.

Methodology

It is anticipated that a three-person team will be needed to conduct the work in three stages.

Preparation Phase: The first phase of the assessment will involve reviewing background materials and key documents; developing an assessment and evaluation methodology that includes primary research questions and interview protocols; and preparing a schedule of interviews for the subsequent field work stage. It is anticipated that 4 days/team member will be needed for this phase to begin o/a January 10-21, 2011.

Field Work Phase: The team will conduct 12 days of field research, including gathering and reviewing documents and data, and conducting structured interviews with key informants and beneficiaries. The team will also present its initial findings to USAID/Ukraine OEG in an exit briefing o/a February 4, 2011. The work called for in this phase will begin o/a January 24. .

Final Report: The assessment team will present a draft report of its findings and recommendations to USAID within 10 working days from the time of departure. The report will include all of the activities outlined above, although not necessarily in the order specified above. The draft report will be no more than 50 pages. The report shall include an executive summary. Appendices should at a minimum include the scope of work for the evaluation; a list of individuals interviewed; a complete description of the methodology used for the evaluation; and any questionnaires used. It is anticipated that 6 days/team member will be required to draft the initial report, respond to USAID/Ukraine requests for clarification, and edits the final draft as appropriate.

F. Team Composition and Roles

The Assessment Team will be carried out by a three person team. The team shall include:

An Economic Growth Expert (Team Leader-Expatriate) with a professional background in international law and/or development economics, He/she shall be responsible for coordinating and directing the overall assessment effort, including preparation and submission of the draft and final assessment report. He/she should have a minimum of 10 years experience in the design, implementation, and/or evaluation of foreign assistance programs including USAID-related commercial/legal reform programs. As assessment team leader, he/she should be thoroughly familiar with techniques of program impact appraisals and possess good organization and team-building skills. The team leader should have excellent written and oral communication skills in English. Previous overseas work experience in the region and knowledge of the Russian and/or Ukrainian is highly desirable.

A Commercial Lawyer (Expatriate) with at least 10 years of relevant experience analyzing, implementing and evaluating initiatives that support access to economic opportunity and the rule of law. He/she should have specific expertise in commercial law reform; judicial systems; labor and employment; women's economic participation; and aid effectiveness. He/she should have experience conducting comprehensive legal and institutional diagnostics of business environments and proposing reforms and initiatives geared toward economic growth. Experience with USAID-funded programming highly desired.

Legal Expert (Ukrainian): A lawyer, political scientist, public sector management specialist, or researcher. Minimum degree BA in Law or related field. Good understanding of political dynamics, the legislative and regulatory framework and political actors in Ukraine is essential. At least three years' work experience required. Knowledge of USAID and other donors is preferable.

USAID will appoint at least one USAID/OEG staff member to participate in the assessment, including in all meetings during the field research stage.

G. Deliverables

- A draft document (maximum 50 pages, excluding annexes) covering the points in the Activities section above - due ten days after completion of field work;
- A final report that incorporates Mission concerns – due five days upon receipt from Mission/OEG;
- A PowerPoint presentation to mission management o/a February 4, 2011 outlining assessment recommendations;.

H. Logistical Support

USAID/Ukraine will provide the following logistical support for the team:

- Arranging meetings with USAID/Ukraine partners, GOU counterparts (as appropriate) and international donors (as appropriate) and maintaining team meetings as they change/evolve
- Office and meeting room space

The team should procure the following, with assistance from USAID/Ukraine:

- Lodging and transportation to/from airport
- Translation/interpretation services
- Car and driver services

I. Organization

USAID/Ukraine will prepare an initial set of background documents and suggest a tentative schedule of interviews. The schedule will be fine tuned with the team leader/assessment team.

J. Technical Direction

Technical direction during the performance of this delivery order will be provided by Mike Martin, Director, USAID/Ukraine Office of Economic Growth.

Appendix B. People Interviewed

Monday, January 24th
USAID, Office of Economic Growth
Michael Martin, Director
Paul Richardson, Deputy Director
Gleb Kryvenko, Project Management Specialist

USAID, Office of Democracy and Governance
Laura Palmer-Pavlovic, Deputy Director
Oleksandr Piskun, Democracy Project Management Specialist
Victoria Marchenko, Civil Society and Media Program Manager
Iryna Smolina, Rule of Law Project Management Specialist

Local Investment and National Competitiveness Project
Howard Ockman, COP
Tetyana Dudka, Deputy COP

Financial Sector Rehabilitation Program
Robert Bond, COP
Yuliya Vitka, Head of Legal Department

Tuesday, January 25th
U.S. Embassy, Economics Section
Chever Voltmer, Economics Office
Aaron Mayhew, Economic Analyst

U.S. Embassy, Political Section
Colin Cleary, Counselor for Political Affairs
Dorothy Mayhew, Law Enforcement Section
Catherine Ricker, POL Analyst

Commercial Law Reform Project
Valentyna Danishevska, Director
Yuriy Volshchynar, Legislative Development Director
Irina Inozemtseva, Professional Development Director

Ukraine Rule of Law Project
David Vaughn, COP
Natalia Petrova, Deputy COP
Olesksandr Biryukov, Legal and Policy Specialist
Sergey Suchenko, Case Management Specialist
Yuliya Golovanova, Legal and Training Specialist
Miroslava Vorontsova, Judicial Testing and Discipline Specialist
Dmytro Filipenko, Legal and Communications Specialist

Wednesday, January 26th

Municipal Heating Reform Project
Andriy Mitskan, DCOP

Association of Ukrainian Cities
Myroslav Pittsyk, Executive Vice President
Volodymyr Parkhomenko

Municipal Finance Strengthening Initiative
Iryna Scherbina, COP
Sergiy Protsyk, Strategic Development and Investment Department, Rivne City Council

Agricultural Policy Transition Support Project
Victor Andrievsky, COP

Thursday, January 27th

Ministry of Regional Development
Sergiy Romanyuk, Deputy Minister

Parliamentary Development Project II
Eleanor Valentine, Project Director in Ukraine
Edward Rakhimkulov, Deputy Project Director in Ukraine
Dennis Bazilevych, Executive Relations Manager

Friday, January 28th

Intergovernmental Advisory Council to the Ministry of Economy on PPP
Irina Zapatrina, Head of Advisory Council

Anatoliy Prymachenko, Entrepreneur

Ministry of Housing and Municipal Economy
Olga Romanyuk, Deputy Minister

Monday, January 31st

Ministry of Economy
Oleksyi Voron'ko, Head of State Department on Bankruptcy, Ministry of Economy

Verkhovna Rada
Natalya Korolevskaya, Head of Committee on Industrial and Regulatory Policy and Entrepreneurship
Yuriy Ordenko, Consultant to Head of Committee

Securities and Stock Market State Commission
Dmytro Teveliev
Maxim Libanov, Head of Department for Analytical Support

Ministry of Justice
Inna Yemelyanovna, First Deputy Minister

Tuesday, February 1st
Foundation for Effective Governance
Andrei Lobach, Senior Project Manager

Public-Private Partnership Development Program
Allan Pieper, COP

Ministry of Finance
Yuriy Drachuk, Deputy Head of State Debt Department

USAID/Ukraine, COTR Meetings
Ryder Rogers, LINC COTR
Evgenia Mailova, LINC Activity Manager

Deposit Guarantee Fund
Andrii Olenchuyk, Deputy Managing Director
Volodymyr Pospolitak, International Management Institute

Wednesday, February 2nd
Bureau for Economic and Social Technologies
Valeriy Gladkiy
Svitlana Taran
Natalia Leshchenko

USAID/Ukraine, COTR Meetings
Gleb Krivenko, CLC COTR

Kevin McCown, FINREP COTR
Natalia Berezhna, FINREP Activity Manager

State Committee for Regulatory Policy and Entrepreneurship
Oleksandr Andrieiev, Director of Permit System Department

AmCham
Jorge Zukoski, President

Kyiv School of Economics
Oleksandr Rohozynski, Director

Thursday, February 3rd
Kyiv City State Administration

Oleksandr Popov, Head
Volodymyr Repik, Head of Finance Department

Ministry of Economy and Trade
Anatoly Maksiuta, Deputy Minister of Economic Development and Trade

ING
Vyacheslav Honchar, Vice President

Friday, February 4th
National Energy and Electricity Regulatory Commission (NERC)
Valeriy Kalchenko, Commissioner

USAID: Presentation of Draft Findings

Appendix C. Questionnaire

Questions for USAID/Ukraine Assessment

A. Mission

1. What is the overarching purpose of your project?

2. Do you feel that USAID's vision of this project differs from yours? Has their strategic vision changed since this project has been awarded, either officially or unofficially?

B. Objectives

1. What are the specific aims of your project? What are the intermediate steps necessary to achieve them? Are all of these measures in your manageable interest? Do you feel they are reflected accurately in your work plan?

2. Were the prerequisites envisioned b USAID in place before this project commenced? Were these milestones to be achieved by a prior USAID project? Or were they expected results under a project funded by another donor?

3. What unanticipated steps has your project had to focus on in order to achieve its goals? How much time and effort do you need to dedicate to these measures?

C. Accomplishments

1. What have been your successes to date?

2. How do you measure these accomplishments, i.e. what are your benchmarks?

3. How do these benchmarks relate to the project's mission and objectives?

4. What do you attribute these successes?

5. In areas where there has been less progress, why do you think that they have not enjoyed as much success as others?

D. Opportunities

1. What are the most promising opportunities within the scope of the project, e.g. local champions, necessary support from key players?

2. What do you think are the most interesting opportunities beyond the project scope?

E. Challenges

1. What do you think are the key constraints that prevent you from achieving the project objectives or mission?

2. Do you believe these are internal, e.g. communication issues, resource issues? Or are they external factors, e.g. corruption, lack of political will?

F. Communication

For USAID:

1. How many COTRs/Activity Managers oversee the "commercial law" portfolio?

2. If more than one, how often do they meet to discuss the progress of their projects and how to coordinate their efforts?

3. On average, how frequently do COTRs talk to COPs about:

a) programmatic matters?

b) strategic directions of the project?

4. For Mike Martin: How much time do you dedicate to coordinating the EG portfolio? How much time for the "commercial law" portfolio? How time could you dedicate to the commercial law oriented projects?

5. Is there a regular COP Meeting? If yes, how often does it meet? How does it work? {What I'm after: do people sit and wait for their 5-10 minutes to report out but are otherwise quiet? Or is it interactive? What kinds of information are shared at it?}

6. What other formal/informal mechanisms does Office of Economic Growth have to coordinate programs?

7 How would you feel about having a commercial law working group with regular meetings?

8. COTRs, would receiving a brief weekly summary of your project's upcoming meetings and activities help manage these projects and coordinate their activities?

9. Do you observe any significant difference in how the locally-based implementing partners perform relative to U.S.-based ones? For example, in areas such as project administration, relationships with government or non-government counterparts, etc.?

For COPS:

1. How often do you chat with your COTR about:

a) programmatic matters?

b) strategic directions of the project?

2. If there is a COP Meeting, how useful do you find it? What kind of information is shared at it? Do you feel that this COP Meeting benefits you? How could it be better?

3. Have there been incidents when it would have been helpful had you known about other projects' activities in advance? How often has this happened? Can you give an illustrative example?

4. How often do you report to your COTR about project activities? Would it be helpful if you had such information on other USAID projects? How willingly would you share this kind of information about your project with other USAID projects?

5. Do you think there would be value in having a commercial law working group with regular meetings?

6. Do you think an on-line exchange of information among USAID commercial law projects would be useful?

7. How often do you talk with other COPs? How often outside USAID-organized meetings or events?

8. How often do you interact with people in the USAID/DG Office? How often do you talk to personnel on DG projects that have work related to your project's work?

9. Do you see any difference in how U.S.-based contractors interact with USAID versus Ukraine-based ones?

Appendix D. Legislative Environment

During the assessment team's meetings with OEG projects and their counterparts the following reforms have been mentioned as priorities:

Pension Reform

Land Reform

Tax Reform

Municipal Heating Reform

Deregulation of Entrepreneurial Activity

Judiciary Reform

Administrative Reform

Reform of Healthcare System

Laws discussed during assessment team meetings with projects, their counterparts and other interlocutors:

Commercial Code

Civil Code

Tax Code

Budget Code

Land Code

Law on Public Procurement

Law on Public Access to Information

Law on Private Public Partnership

Bankruptcy Law

Law on Judicial Enforcement

Law on Moratorium on Selling State Property

Joint Stock Companies Law

Law on Rent and Concession

Law on Housing and Communal Services

Law on Access to Public Information

Law on Central Bodies of Executive Power

Law on Court System and Status of Judges

Law on Insolvency

Law on System of Guaranteeing Deposits

Law on Permit System

Draft laws/legislation discussed during assessment meetings with projects, their counterparts and other interlocutors:

Draft Labour Code

Draft Housing Code

Draft Code of Commercial Procedures

Draft Law on Condominiums

Draft Law on Land Market

Draft Law on Water Supply

Draft Law on Drinking Water

Draft Law on Natural Monopolies

Draft Law on Economic Stimulation of Communal Enterprises

Draft Law on Professional Self Regulation

Draft Law on Small and Medium Business

Draft Law on Markets

Draft Law on Consent by Default

Draft Law on Asset Investment and Asset Preservation

Draft Law on Public Debt and Guaranteed Public Debt

Draft Law on National Energy and Electricity Regulatory Commission

Appendix E. Government Priorities and Requests for USAID Support

Ministry of Justice

Priorities:

1. Judiciary Reform
2. Criminal Justice Reform (new edition of Code of Criminal Procedures, Criminal Code)
3. Administrative Reform - Law on Central Bodies of Executive Power
4. Formation of the unified notary (combining public and private notaries)
5. Enforcement of decisions made by the European Court of Human Rights, developing preventive measures to avoid failure to enforce these decisions
6. Penitentiary System Reform
7. Improvement of judicial enforcement

Ministry of Finance

Priorities:

1. Drafting by-laws on Risk Management and Provision of government guarantees
2. Adoption of Law on Public Debt and Guaranteed Public Debt

Required support:

- Assist to facilitate the adoption of the Law on Public Debt and Guaranteed Public Debt in the Parliament

Ministry of Housing and Communal Services

Priorities:

1. National Strategy for Heating Supply
2. Model Agreement on Providing Property for Rent
3. Mechanisms for heat and water utilization
4. Creating a National Regulator for heat and water supply

5. Supporting adoption of the Housing Code and Law on Condominiums

Required support:

- To develop a Concept of Formation of Prices and to introduce new procedures for creation of prices
- To develop the national program of metering building with multiple flats where the system of consumption based billing will not function
- To review all standards of consumption

Ministry plans to combine efforts of some projects in order to raise investments. For this purpose some business plans have been developed.

State Bankruptcy Department, Ministry of Economy

Priorities:

1. Drafting and preparation for adoption of new Bankruptcy Law.
2. Drafting by-laws to implement the new Law on Bankruptcy.

Required support:

- After the adoption of the new Bankruptcy Law, support for raising public awareness and organization of conferences, round tables
- Training of arbitration administrators (arbitration enforcement officers)
- Training of judges on application of new provisions of the law
- Collecting and generalising court practice

Parliament Committee for Industrial and Regulatory Policy and Entrepreneurship

Priorities:

1. Deregulation
2. Improving tax policy

Required support:

- Raising public awareness in the regions on PPP and deregulation
- Education and trainings on newly adopted legislation
- Help organizing exhibitions and conferences
- Support of NGOs and associations of small and medium-sized entrepreneurs to unite all of them in one national movement
- Expertise in drafting law and support in its implementation
- Increase focus of USAID projects on the local level in order to unify entrepreneurs' efforts at the local level
- Support of the web-site www.reforms.org.ua
- Support of social networks

- Support for the creation of the Committee's web-site

Securities and Stock Market State Commission

Priorities:

1. Introducing system of prudential supervision and risk management
2. Reforming corporate governance,
3. Improving corporate governance legislation

Required support:

- Organizing trainings, providing information, methodology, and expertise in the area of prudential supervision and risk management (They would ideally like a USAID project that specifically deals with prudential supervision and risk management)
- Training of judges on the Law on Joint Stock Companies

Deposit Guarantee Fund

Priorities:

1. To draft 30 by-laws need to implement the Law on System of Guaranteeing Deposits
2. To implement the Strategy for the Protection of the Rights of Consumers of Financial Services

Required support:

- Assistance and expertise in drafting 30 by-laws in order to implement the Law on System of Guaranteeing Deposits
- Expertise to prepare an analytical document to be submitted to the Government in order to implement the Strategy for the Protection of Rights of Consumers of Financial Services

State Committee on Regulatory Policy and Entrepreneurship

Priorities:

1. Improvement of permit legislation
2. Drafting amendments to the Law on Permit System
3. Improvement of the system of issuing permits by one administrator

Required support:

- More analytical support and expertise
- Support for raising public awareness of the amendments to the law and of the advantages of one-stop-shop system

- Increase the number of Ukrainian regions supported by USAID

National Energy and Electricity Regulatory Commission

Priorities:

1. Adoption of the Draft Law on National Energy and Electricity Regulatory Commission
2. Drafting licensing requirements
3. Developing unified forms of reporting
4. Developing methodologies for and recommendations to licensors

Required support:

- Expertise in drafting legislation

- Organization and developing curriculum for trainings of licensors and representatives of local administrations

Kyiv City State Administration

Priorities and required support in the following areas:

1. Administrative reform
   - Drafting the City Development Strategy

   - Defining the System of Administration

   - Human Resource Policy

   - Efficient use of funds

   - Civic involvement

2. Healthcare Reform
   - Introduction of the system of family physicians

   - Primary assistance

   - Hospital cashier (public cashier for pensioners and those who have privileges)

3. Reform of the Communal Housing Sphere
   - Implementation of the national program

4. Reform of the Transport Infrastructure
   - Applying modern technology

5. Social Reforms

- Implementation of the Project “Social Card for Kyivites”

Ministry of Economic Development and Trade of Ukraine

Priorities and required support in the following areas:

1. Local borrowing

2. Private public partnership raising public awareness

Appendix F. Major Commercial and Civil Codes Inconsistencies

The Commercial Code and Civil Code are confusing and overlapping. The major inconsistencies between the Commercial and Civil Codes concern ownership, legal entities and contracts.

Commercial Code	Civil Code
I. Spheres of regulation	
According to Article 1, the Commercial Code determines the basic fundamentals of commercial activity in Ukraine and regulates business relations arising in the process of organizing and carrying out commercial activity between business entities, as well as between these entities and other parties to commercial activity. ***Article 4 par.1*** of the Commercial Code provides that property and personal non-property relations regulated by the Civil Code ***shall not be regulated*** by the Commercial Code. At the same time, ***Article 4 par.2*** provides that even if property relations of business entities, regulated by the Civil Code, are not regulated by the Commercial Code, nevertheless particular parts of their regulation ***shall be determined*** by the Commercial Code.	According to Article 1, the Civil Code regulates personal property and non-property relations (civil relations) on the basis of legal equality, goodwill and the independence of the property of the parties. Also, this Article provides that civil law shall not be applied to property relations based on administrative, or other, relationships of one party to another party, nor to those based on tax or budgetary relationships, unless otherwise established by the law.
"Activity" and "business activity" are interpreted as an activity of business entities in the sphere of public production, which is focused on the manufacturing and selling of products, the performance of work or providing services that have cost/value and prices.	From the provisions of the Civil Code it can be said that some forms of relations, regulated by the Civil Code, are related to selling products, performance of works and providing services that have cost/value and prices, which (according to the Commercial Code) are spheres of regulation of the Commercial Code.

Comments: Here we observe a paradox and something of a legislative void: on one hand, the Commercial Code ***does not regulate property relations***, while on the other hand, the Commercial Code ***determines certain aspects of its regulation*.** These provisions of the Commercial Code have a special relationship with respect to the Civil Code, in that these Commercial Code provisions almost block the application of the Civil Code in the regulation of property relations.	
II. Ownership	
Article 63 of the Commercial Code **introduces a notion of the mixed form of ownership** (on the basis of combination of the property of various forms of ownership).	Concerning forms of property, The Constitution of Ukraine and the Civil Code (Articles 325, 326, 327) establish only private, state and municipal ownership and **do not distinguish any mixed form of ownership**.
As well as the ownership rights, the Commercial Code (Art.133 par.1) establishes other proprietary rights: (i) the right of economic supervision, and (ii) the right of operational management, as the basis of the legal treatment of business entities' property.	The Civil Code established the ownership rights (Articles 316, 317) and other proprietary rights in others' property - the right of possession, and the right of use (Article395).
Comments: The definition *mixed form of ownership* indicates only the participation of members of various forms of ownership in establishing of an enterprise.	
III. Legal entities	
Commercial Code (Articles 576, 207) provides for a **special legal personality**, i.e. a legal entity has specific rights and obligations that correspond to its goals/objectives and the tasks related to its activities.	According to the Civil Code (Article 91 par.1), legal entities have **universal legal personality**, i.e. a legal entity has the same civil rights and obligations (legal capacity) as a natural person except those, which by their nature can belong only to a human being.
According to the Commercial Code, an enterprise is a **subject**/agent of a business activity. Article 62 par.1 defines an enterprise as an independent business entity established by a competent body of public administration, or local government, or other parties, for the purpose of satisfaction of public or personal needs through regular production, academic research, trade and other activity in compliance with the procedures provided for by the Commercial Code and other laws.	The Civil Code defines an enterprise as an **object** of business activity. Article 191 par.1. specifies that an enterprise is an integrated property complex used for carrying out of business activity
According to Article 79 par.1 a business	A business partnership (a limited liability

partnership, in cases provided for by the Commercial Code, may consist of one member.	company, an additional liability company, joint stock company) can be created by one person who becomes its single member (Article 114 par.2 of the Civil Code).
Comments: Article 113 of the Commercial Code provides for the notion of *private enterprise* that operates on the basis of private ownership by one or more persons. This article also provides that a private enterprise shall also be deemed an enterprise acting on the basis of private ownership of the business entity, i.e. legal entity. From the above-mentioned provisions of the Commercial Code (Art.79) and Civil Codes (Art. 114) it is clear that there is no need for having such a definition of the private enterprise in the Commercial Code, which is, in fact, quite confusing.	
IV. Contracts	
The Commercial Code requires the use of supply contracts (Article 265) by businesses. The Commercial Code is very prescriptive in what forms of contracts it permits for legal entities and private entrepreneurs, disallowing commonly used sales-purchase contracts. It requires the utilization of the archaic supply contract, which was used under the Soviet system. Moreover, the Commercial Code specifies that supply contracts will be further regulated by decrees from the Cabinet of Ministers (Article 271).	The Civil Code is not restrictive and allows for sale-purchase contracts (Article 655) and supply contracts (Article 712) which can also be concluded by and between legal entities and private entrepreneurs.
Comments: Some Commercial Code provisions relating to liability for legal violations committed during business activities were taken from the Soviet Civil Code. These include provisions on compensation for losses, penalties and operational economic sanctions, and administrative economic sanctions. It is paradox but currently, the Ukrainian legislation contains legal norms of both the new and the old (Soviet era) Civil Codes at the same time.	

The inconsistencies between the Commercial and Civil Codes might be eliminated if: 1) the spheres of regulation of these two codes were clearly distinguished; and 2) the norms of these codes were reconciled by making references to one another, removing duplications and contradictions, and using common terminology in both codes.

Appendix G: OEG Legislative Matrix

[Please see separate file attached]