

DEVELOPMENT LAW CAPACITY BUILDING: TRAINING LEGAL PROFESSIONALS FOR DEVELOPMENT

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1. Introduction

At base, “development law” means using a legal system to achieve sustainable economic development (Hager, 1972). To reform and administer a country’s laws, regulations and judiciary (and to negotiate international agreements and resolve disputes under that system) requires competent legal professionals, including government and corporate legal advisors and judicial personnel (i.e. judges, magistrates, prosecutors and other court officials). Thus capacity building is a necessary and continuing component of international development law.

Development law capacity building has evolved through successive stages over the past four decades. Initially confined to the academe (university law teaching) as part of the “law and development” movement, it virtually disappeared in the mid-seventies - only to reappear and flourish some years later in new garments.

This paper traces the history of legal training, technical assistance and related institution building from their origins in the 1960s to their demise in the mid-70s. It then examines their revival in the eighties and nineties, with the emergence of business globalization. Over the past 20 years, development law capacity building has shifted in emphasis from international commercial transactions to economic law reform to good governance; and most recently to legal and judicial reform. In the process, the subject has acquired increasing recognition and financial support from the development assistance agencies that control its destiny.

Turning to future trends and prospects, it appears that the best opportunities for training and technical assistance in the field of development law lie ahead. This is especially true when it comes to putting law at the service of poverty reduction, crafting dispute resolution systems for international rule making and implementing conflict resolution for peacekeeping.

From the outset, the author has been both observer and participant in the field of international development law. He served as a law school instructor in Africa under a Ford Foundation-sponsored program in 1963-1965, and years later he was co-founder and Director General of the International Development Law Institute in Rome. Currently he is President and principal consultant in the firm Resolve-Consult International, LLC. The report and observations that follow draw heavily from his personal experiences and observations.

2. Beginnings: the Rise and Fall of “Law and Development”

Post World War II decolonization was a precipitating factor. The science and practice of economic development, which began with the Marshall Plan and the reconstruction of Europe, soon reoriented itself toward newly independent countries in Africa and Asia. In the field of law, this took the form of scholarship (such as Professor A.N. Allott's learned studies on African customary law) or tutelage (such as the drafting of the Ethiopian Civil Code by Professor Rene David and the Ghana Company Law by Professor L.C.B. Gower).

Meanwhile, the independence movement - especially in Sub-Saharan Africa - captured the imagination of lawyers in the West. With financial support from American foundations, programs sprang up to assist new law faculties and to advise national administrators and judicial officers. As colonial governments retreated, the atmosphere was heady. "Law and development" became a fashionable term, in both academic institutions and development agencies.

During the period from 1960 to 1972, legal development was seen more as an end in itself than as a means of achieving economic growth, although the two were often linked in the rhetoric of grant applications to development donors. Improvement of the courts, the legal profession and the quality of justice were the goals to be served. At the same time, the legal approach to economic development tended to be quite academic and theoretical. Producing studies in the spirit of Max Weber on how law affects social behavior, the "Law and Modernization Program" at Yale Law School was a case in point. Scholars debated the merits of "legal engineering," but stayed aloof from real world policy making. In those days, economic development was viewed by most as the exclusive province of economists. Legal professionals remained outside the development circle.

One of the very few exceptions was Dr. Ibrahim F.I. Shihata, an Egyptian jurist who had acquired an S.J.D. degree from the Harvard Law School. In 1969, when he was a legal advisor to the Kuwait Fund for Arab Economic Development, he published a seminal paper entitled "Role of Law in Economic Development: The Legal Problems of International Public Ventures." Among other things, he observed in the article that economic development creates "a great challenge for the legal profession, a challenge which is yet to be fully answered" (Shihata, 1969). Addressing the issue of "why law in development?" rather than capacity building *per se*, Dr. Shihata concluded that law "is not that negative tool which merely reflects society in a given stage" but rather "a dynamic mechanism that can positively respond to and influence society's growing needs for organization and development." His argument made clear that what was required was the education and training of lawyers. For almost two decades, however, Shihata was a voice in the wilderness.

- **Phase 1: Academic Teaching and Research**

Project SAILER (Staffing of African Institutions for Education and Research) funded by the Ford Foundation played a more active role, but confined its activities to research and teaching on the machinery of justice. From its inception in 1962 to April

1972, SAILER sent some 116 law teachers (mostly, but not entirely, from North America) to law faculties in 14 African countries. According to its founder and historian, the late John S. Bainbridge, SAILER's investments in time and money were "more than warranted" (Bainbridge, 1972). Reflecting on the accomplishments of SAILER, he wrote:

There are an increasing number of African scholars and African institutions that are concerned with the dynamic characteristics of law and legal development. Law is being increasingly viewed as an instrument of social change. There is a growing awareness that law's service to the community is more of a right than a privilege. There is increasing insistence that the predictive quality of law and its procedures must be strengthened and its application made equal to all peoples in all stations.

Later reviewers of SAILER and other law and development efforts were less kind (Messick, 1999). According to the critics, the movement lacked any theory of the impact of law on development, making it impossible to set priorities or evaluate results. There was too little participation of local lawyers who would need to carry out the reforms. And the movement tended to ignore customary law and other informal legal systems.

SAILER was not alone in the legal teaching and technical assistance field. For example, the Asia Public Services Fellowship Program of the Syracuse University Maxwell Center for the Study of Overseas Operations and the MIT Fellows in Africa Program of the Sloan School of Industrial Management recruited lawyers and other professionals to assume advisory and operational roles in the new administrations in Africa and Asia. Although most of the experts came from the United States, some were European (including Professors L.C.B. Gower and William Twining of the UK and Zacharias Sundstrom of Finland)

Whatever lasting impact these activities had on their intended beneficiaries, they greatly influenced the western lawyers who participated as visiting faculty, advisors, administrators or draftsmen. An Arden House conference of law teachers ("Twenty Years After") in 1986 revealed that many of them become full-time educators. Others joined development assistance organizations, such as the United States Agency for International Development, voluntary service agencies or non-governmental organizations promoting development. Some of those returning from professorial assignments in Africa or Asia embellished northern law school curricula with courses in "African Customary Law," "Foreign Investment in Developing Countries" or simply "Law and Development." Many research projects on law and development found homes at Yale, the University of California, Berkeley and other prestigious schools.

North American interest in the subject declined almost as abruptly as it began. Not surprisingly, a decrease of projects in the mid-70s was paralleled (or was caused) by an evaporation of funds. The Ford Foundation discontinued its funding of the

International Legal Center (ILC), the successor of SAILER. The published *mea culpas* of two scholars marked the end of the era (Trubek and Galanter, 1974).

But the idea refused to die. With more modest funding from new sources, the International Center for Law and Development (ICLD) supplanted ILC. At the same time, it adopted a grass-roots approach to replace advisory assistance at the official level. Law faculties at Glasgow and Warwick continued to offer LL.M. programs in law and development. The International Law Institute (ILI), then attached to Georgetown University, began offering short courses in negotiation and trade law for a developing country audience. Based in Washington, D.C., it drew many of its short-term faculties from the World Bank and local law firms. The Law Faculty of the University of Windsor, which offered courses on law and development for LL.B. students since 1972, hosted at least a dozen symposia on law and development. It was at the 1981 Windsor symposium that plans for the creation of the International Development Law Institute, discussed below, were first presented to an international audience.

Looking back, the law and development “movement,” as it is now termed, had a dynamic of its own. Extraneous factors, such as the availability of funding or the enthusiasm of individual lawyers recruited to serve as teachers or advisors, determined the state of play. As suggested above, what seemed to be lacking were an overriding development vision, clearly defined objectives and a generally acknowledged relevance to the central issues of economic development. Those deficiencies cost the movement its funding and eventually caused its demise.

Indeed, Professors Trubek and Galanter in their famous farewell article (Trubek and Gallanter, 1974) criticized what they characterized as the “liberal legalist” approach—the assumption that legal development “can be equated with exporting U.S. institutions.” The era of the “legal missionary,” they said, was over.

Did the American lawyers serving in Africa in the early 60s see themselves as “legal missionaries?” Probably not. They (including the author) went to Africa with modest objectives. They simply wanted to lend a hand: to teach some courses in the law schools, assist in the ministries or in the courts and perhaps advise local counterparts. With few exceptions, they were technocrats plying their craft in foreign lands. Their time horizons were limited. Most of them saw their African service as a two or three year prelude to law practice back home. Perhaps some of them (like many U. S. Peace Corps Volunteers at the time) were or became idealists, prone to cynicism when their best-laid plans went awry. Indeed, the American Peace Corps, better known for sending young college graduates to remote villages, inaugurated a lawyers’ program in 1963.

Having failed to define law and development goals in the first place, the planners were hard pressed to distinguish success from failure a decade later. Added to this were changing circumstances. Institutions that utterly lacked teachers in 1962 could boast of ample numbers by 1974. By the same token, the need changed: from law

faculty classroom to government ministry. The transformation of SAILER to ILC mirrored that change. While SAILER provided law teachers and researchers, ILC sent lawyers as advisors to the courts and ministries. It also enlarged the geographic scope from Africa to the rest of the Third World.

Other law and development activities that survived the seventies were those undertaken by two divisions of the Commonwealth Secretariat based in London. The Legal and Constitutional Affairs Division assisted member countries in the development of their constitutions and legal systems, concentrating in later years on human rights, commercial crime and trade law. At the same time the Secretariat's Economic and Legal Advisory Service Division (formerly Technical Assistance Group) furnished consultancies on economic law and policy.

Despite an expansion in mandate and geography, "law and development," as originally conceived, was by 1974 largely viewed as irrelevant, an historical curiosity. With the small-scale exceptions noted, the "movement" at large was dead in its tracks.

• **Phase 2: Public International Law**

An effort to resurrect law and development occurred in the seventies. At the instance of developing country diplomats (some probably influenced by the legal education programs of the previous decade), a few scholars began to articulate a legal doctrine in support of economic development. Europeans, mainly French academics, took up the cause of linking development to international public law. Professors Hervé Cassan, Guy Feuer, Maurice Flory, Francois Luchaire, Michel Virally and Dean Jean Touscoz considered the relationship between public international law and development in light of political changes (especially decolonization) affecting internal law. All of them saw in the newly articulated norms of international development law an opportunity for North-South dialogue and an instrument to serve the interests of the "less developed countries" (as the term was then used).

The Algerian scholars on the other hand (for example, Mohammed Bedjaoui, Ahmed Mahiou, Noureddine Terki and especially Madjid Benchikh) took a more ideological stand, preferring to see development law as an instrument to achieve the New International Economic Order (NIEO). It is significant that some of them used the two notions of international development law and NIEO indifferently. Benchikh in his *International Underdevelopment Law* (Benchikh, 1983) was probably the most polemic, arguing that in spite of the good intentions of its promoters, development law did nothing but reinforce the dependence of developing countries and increase the gap between rich and poor.

In 1972, Justice Keba M'Baye of Senegal articulated the right to development. "Each man," he said, "has the right to live and the right to live better" (M'Baye, 1972). Professor Juan Antonio Carrillo Salcedo of Spain put forth a similar line of reasoning in the same year. The 1986 Declaration on the Right to Development added a seal of approval by the United Nations.

Meanwhile the ideology of development emanating from the United Nations Charter and General Assembly Resolutions proclaiming the first two Development Decades as well as the declarations of Non-Aligned Countries summit meetings in Lusaka (1970) and Algiers (1973) culminated in three principal instruments in 1974;

- The Declaration on the Establishment of a New International Economic Order;
- The Programme of Action; and
- The Charter of Economic Rights and Duties of States.

These documents provided a legal basis for specific claims of the developing world for economic assistance, compensatory financing, technical assistance in kind, preferential treatment in trade, transfer of technology, protection of the common heritage of mankind (especially the law of the sea), participatory equality in international economic relations and the right of states to choose their economic system. Yet the emphasis on substantive rules in international law masked great gaps in expertise that constrained developing country efforts to negotiate effectively with outsiders.

The publication of *Getting to Yes*, by Professor Roger Fisher and William Ury (Fisher and Ury, 1982) transformed the science of negotiation from “win-lose” (negotiation as a zero-sum game), to “win-win” (negotiation as mutual problem-solving). This book had a profound effect not only on the training of negotiation skills, but also on the development of alternative dispute resolution (ADR), both of which were to become critical elements the capacity building of legal professionals in the decades that followed.

The Brandt Commission, working in the late 1970s acknowledged the importance of negotiation skills for developing countries and recommended that “the bargaining capacity of developing countries, particularly of the smaller and least developed countries, *vis-à-vis* the transnational corporations should be strengthened.” Indeed, this declaration became an implicit *raison d’être* for a major revival of law and development in the form of the International Development Law Institute.

3. Revival: Development Law Training for a Global Market

By 1980, law and development had reached another impasse. Its pragmatic side was largely confined to legal education and judicial administration, while its connection to economic development was mostly theoretical - expressed as a normative legal principle in the Right to Development (*Droit International du Développement*) and various UN Resolutions. Meanwhile, developing country legal advisors and lawyers were experiencing an acute need for practical legal training, as their governments began to abandon policies of nationalization of business and exclusion of foreign investment. The “development lawyer” was waiting to be born.

- **Phase 3: International Trade and Investment**

Into this vacant space came the International Development Law Institute (now better known as I.D.L.I. or “Id-lee”). Inspired by the African experiences of SAILER, IDLI was founded in 1983 by three western lawyers (the author, another American and a Frenchman) then serving with development cooperation agencies in Cairo.

With the help of Dr. Shihata, who hosted the first meeting of the Board of Directors in Vienna in March 1983 and became its Chairman, the Institute took shape as a non-governmental organization. Legally established in Rotterdam as a Dutch *stichting* (foundation), IDLI established its headquarters in Rome, Italy. Some saw the IDLI initiative, with its emphasis on practical contributions of lawyers in international commercial law, as the last great hope for law and development.

Deriving from the developing country experiences of the three co-founders, IDLI broke sharply from previous law and development undertakings. First of all, it resolved to be multi-national in every aspect of its organization and funding. Its organizers were sensitive to the risks of ethnocentrism, especially in the context of divergent legal systems. At the same time, the founders demonstrated from the outset a willingness to share ownership of the project as broadly as possible. In fact, the wide participation IDLI encouraged was an important element of its success. Recipient countries, potential donors, law professors, practicing lawyers and many others were invited to comment on the initial scheme. A curriculum-planning workshop held in May 1983 brought experts from around the world to advise the organizers on course requirements and training methodology. Openness to learning, receptivity to outside counsel and pragmatic experimentation characterized IDLI in its early years.

Notwithstanding the participation of distinguished international legal personalities on its Board, the Institute faced a wall of skepticism in its initial years. Hearing about IDLI for the first time, lawyers and non-lawyers alike asked, “Why train lawyers? What do they have to do with economic development?” To most observers in 1982-1983, lawyers had no business in the development field. In this climate, the very establishment of the Institute was a remarkable accomplishment. Indeed, during this formative period, the founders felt themselves swimming against a swift current.

Another frequent question in the early days was “Why Rome?” The decision to locate in Italy was based on several factors: proximity to Africa and the Middle East, numerous air links with developing countries, linguistic neutrality between English and French and the promise of host government funding support. With a relatively new cooperation program, the Italian Government was actively seeking worthwhile projects to support. It quickly became IDLI’s largest donor and remained so through the years.

One drawback however, could not be overcome: the absence in those days of a suitable Italian law for international non-governmental organizations. For this reason, IDLI legally established itself offshore. Notwithstanding the practical challenges of

operating as a foreign entity in Italy, the Institute maintained its legal status as a non-governmental organization until the *stitching* was dissolved at the beginning of 1991.

In retrospect, it was the beginnings of business globalization that pushed IDLI from the margin to the mainstream. A shift from ideology to pragmatism in the developing world, a recognition that the private sector is a stronger engine of growth than the state, the move to policy-based lending by the World Bank, the ebbing of the Cold War, a new emphasis on “good governance” by the Development Assistance Committee (DAC) of the Organization for Economic Co-operation and Development (OECD) and the collapse of the Berlin Wall (putting a spotlight on the importance of having a legal framework for international business) put IDLI (and law in development, more generally) on the map. Governments and businesses dealing across borders began to see the need for trained legal professionals—not only to provide competent counsel for trans-border deals, but also to draft and enforce new law and to participate in the privatization process.

By the late eighties the Italian Government was suggesting that IDLI become an intergovernmental organization. The promise of a headquarters agreement with tax benefits and elimination of the administrative burdens of operating as a foreign entity were attractive inducements. At the same time, both management and the Board of Directors wished to avoid politicization of the Institute. Accordingly, a first effort was made to internationalize through existing international organizations. Preliminary expressions of interest came from UNDP, UNITAR and the World Bank. However, these plans were dashed when the UN General Counsel ruled against UN Agency membership. With the approval of the IDLI Board of Directors, the Institute then approached individual states, particularly those of the Board members.

In February 1988, eight governments signed in Rome the “Agreement for the Establishment of the International Development Law Institute.” That Agreement was novel in several respects. First, it departed from the usual practice of imposing membership dues or assessments on member states. To the contrary, it stipulated that members were not obliged to provide funding and moreover were not responsible for any indebtedness of the Institute. The Agreement contemplated meetings of an Assembly only once every three years and provided that while member states could overrule the Board on policy issues or the filling of vacancies on the Board of Directors, such action would have to be taken by a majority of the states within 90 days after notification of such decisions. These provisions served to protect the Institute from politicization. To date, no decision of the IDLI Board of Directors has been overruled by the state members, nor have the states imposed any political conditionality.

The Institute’s initial thrust was toward development law skills and the rules of the game in international transactions. This program emphasis reflected the fundamental need that IDLI originally intended to address, namely the disparity of skills and information among legal professionals on the two or more sides of an international commercial transaction.

Sustaining the Institute until the end of the eighties were the *Development Lawyers Course*, a twelve-week skills course, and the *International Business Transactions Seminars*, a series of two-week seminars on specialized international commercial contracts, the topics of which would change every year. These programs were designed for mid-career legal professionals (at the outset, mostly government legal advisors and private lawyers) from developing countries. They were regularly offered in Rome in both English and French language versions. From the outset they attracted participants from all over the developing world, although the majority were from Africa and the Middle East.

The *Development Lawyers Course* (DLC) has been IDLI's flagship offering from its first iteration in 1984. The underlying premise is that government legal advisors in developing countries are reassigned often during their careers from one department or ministry to another or (particularly in the case of male lawyers) from ministry to private sector. The need is thus for "portable skills" that are relevant and useful in various contexts and for substantive knowledge in several high value areas, such as commercial and development finance, public procurement, trade and investment. Accordingly, the DLC attracts mainly younger (3-10 years experience) mid-career lawyers in government service. And it introduces them to several important skills of the development lawyer, offering a risk-free environment in which to practice those skills in the substantive fields cited.

Although the DLC's principal skill-building ranges from advising to negotiating to drafting to resolving disputes, it also includes reviewing and revising agreements and monitoring performance as well as basic accounting for lawyers and Internet legal research. With IDLI staff facilitating and providing instruction in some of the skill areas, international experts from private practice, corporate legal departments and development finance agencies serve as short term faculty members in the substantive law topics. Delivered each year in both English and French language versions, the DLC usually attracts about 150 applications for its 30 places. Some governments reportedly take into account completion of the DLC in awarding promotions to their legal officers.

The *International Business Transactions* (IBT) seminars are designed for a more specialized and usually more senior audience. With topics recommended each year by the IDLI trainers and approved by the Board of Directors, the IBTs have covered a wide range of subjects, of which the following are only a few examples:

- Negotiation of Petroleum Exploration and Development Agreements
- Barter and Countertrade
- Technology Transfer Agreements
- Debt Rescheduling Agreements
- Joint Venture Agreements
- Franchising Agreements
- Intellectual Property

- Project Finance
- Construction Contracts
- Legal Aspects of Electronic Commerce

In 1986 IDLI designed and conducted its first in-country “Training Workshop,” a one-week program in Beijing on company law for the draftsmen of the Chinese company law and legal advisors in the public enterprises. This effort was prophetic in two senses: it launched the Institute’s external activities and it anticipated later programs in economic law reform.

The need for training and related technical assistance for international commercial transactions continues unabated. IDLI’s *Development Lawyers Course* (now offered in a ten week rather than 12-week format), remains the Institute’s most popular offering. And the *International Business Transactions* seminars continue to draw specialized negotiators, while a high percentage of the in-country workshops address transactional topics. As the global market attracts more players and as the instruments for global business expand, legal professionals around the world need to keep pace through mid-career training.

- **Phase 4: Good Governance**

During the Cold War, Western development assistance tended to focus on capital projects - bricks and mortar undertakings in the Third World that could match tit-for-tat with the Communists in the competition for hearts and minds. Since many of the beneficiary governments were led by corrupt dictators, much development money inevitably wound up in Swiss bank accounts—lending credence to the popular view that foreign aid was “taking money from poor people in rich countries to give to rich people in poor countries.”

With the breakup of the Soviet Union, development planners were freed from Cold War political constraints. For the first time, they could take a more realistic approach to economic and social development. In the context of the OECD/DAC donors “club,” they concluded that physical infrastructure was less relevant to development than human factors. Under the rubric of “good governance,” they identified human rights, respect for the rule of law, transparency in public procurement, gender equality and government accountability as central and in that context emphasized training (“human resource development”) and technical assistance.

As indicated above, the banner of good governance raised IDLI’s profile, since the Institute was already offering training courses in such public law areas as procurement and environmental law and promoting human rights through its DLC training modules on development assistance and gender equality through its recruitment of women lawyers as trainers, visiting experts and participants. As the multilateral and bilateral donors began to establish “democracy” and “governance” centers or divisions in their own bureaucracies, funding became available for governance projects.

Perhaps the biggest breakthrough in the governance field was anti-corruption. Transparency International, an international non-governmental organization founded by Peter Eigen, a former World Bank lawyer, in the early 90s, made that topic politically correct. With the strong support of the World Bank, TI organized a series of “Integrity Seminars” in Africa and elsewhere. On the one hand, TI pointed the finger at specific nations in its annual listing of the “most corrupt” regimes and on the other encouraged proactive anti-corruption activities through its national chapters springing up in almost every country. Development donors joined the parade. As a result, the good governance agenda now includes anti-corruption as a top priority.

IDLI has brought legal and judicial forces to bear on governmental corruption. It began offering seminars in both its regular and in-country programs on “Legal Prevention and Judicial Control of Corruption,” and participated with the Center for the Study of Democracy, its longtime counterpart in Sofia, in its “Coalition 2000” project, an initiative of Bulgarian NGOs to attack corruption in multiple activities supported by donors and monitored by the Center’s social research arm.

The Coalition 2000 approach took on a regional face in the South-Eastern Europe Legal Development Initiative (SELDI), introduced jointly by the Bulgarian Center for the Study of Democracy (CSD) and IDLI under the Stability Pact for the Balkans.

Parallel to the Institute’s anti-corruption training and project management roles, IDLI’s first Director General promoted “best practice certification (BPC)” as a new tool to fight corruption (Hager, 1999). In a nutshell, BPC would use voluntary external certification of agreed upon organizational systems (for both private companies and procurement units of governments) to avoid, detect and sanction corrupt behavior. This idea, and a similar one being advanced by TI, is gaining support in international agency and private sector circles.

As in the case of international trade and investment, the good governance crusade shows no evidence of decline. Indeed, to the contrary, governments and international finance agencies are according higher priority to governance issues.

- **Phase 5: Economic Law Reform**

With the fall of the Berlin Wall, countries of Central and Eastern Europe and the former Soviet Union began to transform their legal systems to accommodate the demands of the free market. Many, if not most, of these countries harbored aspirations of becoming a member (or at least a trading partner) of the European Union. Most of them had pre-Soviet era legal systems that were civil law-based. It is not surprising therefore that they wanted their new laws to be harmonized with EU law. For its part, the EU allocated funds under its PHARE and later TACIS programs to support the “approximation” of EU law in the region of Central and Eastern Europe and the Commonwealth of Independent States.

As “law reform” was released from its former status as “too political” to handle, IDLI designed a new regular offering, the *Enterprise and Investment Lawyers Course* (EILC), a five-week course offered in Rome in both English and French language versions. The EILC covered several topics considered essential in shaping a legal environment conducive to international trade and investment:

- Company Law
- Bankruptcy
- Banking Law
- Capital Markets
- Investment Law, and
- The Role of the State (including both Regulation and Social Safety Nets)

Almost immediately, the EILC rivaled the older DLC in popularity. It attracted candidates from transition economy countries and developing countries, the latter generally older and more experienced than the former. Significantly, the EILC early on refuted the prevailing wisdom that eastern country participants would refuse to share a course with those from developing countries. Indeed, the EILC audiences have each enjoyed a geographic mix.

Perhaps even more important than the twice a year delivery of the EILC, has been the increasing demand for economic law reform Training Workshops in country. With financial support principally from EBRD and USAID, IDLI has delivered more than 20 tailor-made workshops a year on EILC subject matter topics, at the outset emphasizing legislative approaches for draftspersons and later, enforcement techniques for regulators.

More than any other development in the eighties, the opening up of the “Eastern Countries” put a spotlight on the importance of international development law capacity building. That investors would not flock to such countries without the certainty and predictability of a sound legal system was manifest. Only the largest international corporations could risk funds in lawless regimes. Thus the first priority was to draft commercial legislation that would suit the new free market economies and attract serious investors and traders. From 1990 to 1992, the situation in Central and Eastern European legal circles was chaotic. Legal technical assistance reflected wasteful duplication and well (or not so well) - intentioned ineptitude.

When the European Bank for Reconstruction and Development (EBRD) came into existence in 1991, IDLI persuaded its first General Counsel (Andre Newberg) to host an international colloquy on the subject of “Setting an Agenda” for legal technical assistance and training in Central and Eastern Europe. Held in London in November 1991, the colloquy brought together more than 100 representatives of interested donors and service providers. IDLI designed and facilitated the colloquy in collaboration with the Program on International Financial Systems of the Harvard Law School. The colloquy not only addressed key issues, such as the prioritization

and sequencing of legislation to promote investment, but also set in motion efforts to increase transparency and cooperation among all the players.

The following February, EBRD invited IDLI to co-chair a similar meeting of CIS representatives in Moscow. Here again the focus was on economic law drafting, regional harmonization and institutional development.

Unlike the older Breton Woods organizations, the EBRD was encouraged to promote free market systems. Notwithstanding a prohibition on political activity, the World Bank has allowed loan and grant funds to be used for governance projects that have an essentially *economic development* objective.

Economic law reform widened the capacity building agenda. Together with good governance discussed above, it also brought substantial new money into the game. Suddenly, both international financial institutions (especially the World Bank, the Asian Development Bank, the African Development Bank and the Inter-American Development Bank) and bilateral donors (especially Germany, the United States and the United Kingdom) were funding consultants to draft commercial laws, not only in the former planned economies, but increasingly also in the developing countries.

The infusion of financial resources attracted new service providers. Development consulting companies (including the so-called “beltway bandits” of Washington, D.C), university law faculties and even law firms began to compete for lucrative contracts, often as members of “consortia” bidding for multi-year legal development projects.

The American Bar Association launched its Central and Eastern European Initiative (ABA/CEELI) early in the decade. Although CEELI originally focused on CEE countries, it soon expanded into the “Newly Independent States” (NIS). CEELI sent volunteer lawyers to the transition economy countries on yearlong missions to assist in drafting constitutions, criminal law and civil procedure and economic law. It also vetted draft legislation with American specialists, hosted visiting delegations of lawyers and judges, and sent U.S. specialists to lecture in the beneficiary countries. While most of the CEELI and other donor-funded projects aimed at creating economic legislation centered on consultancies and other elements of technical assistance, there were usually training or institutional capacity building components as well. More recently, ABA/CEELI has established a regional training center in Prague.

The German Government, undergoing its own absorption and legal transformation of the former East Germany, carved out a special role for Central and Eastern Europe and the Former Soviet Union. In 1992, the German Ministry of Justice created the German Foundation for International Legal Development (*Deutsche Stiftung für internationale rechtliche zusammenarbeit e.v.*) the so-called IRZ Stiftung. Drawing from its privatization experiences in the former East Germany, IRZ provided experts and trainers for countries of Central and Eastern Europe and the New Independent

States. While IDLI was establishing its Asia Regional Training Office in the Philippines, ILI created a “Legal Centre of Excellence” in Uganda.

By the last quarter of the decade, economic law reform projects shifted their preoccupation from law drafting to law implementation; that is, from legislation to enforcement. Thus the economic law reform topic merged with the newest umbrella for international development law, namely “legal and judicial reform.” Under such projects, the target audience shifted from lawyers and legal advisors to judges, magistrates, prosecutors and court administrators.

- **Phase 6: Legal and Judicial Reform**

Several milestones marked the path to legal and judicial reform. First, the international financial institutions (IFIs) in the early nineties began to reorganize their legal departments to emphasize legal projects. For the first time, for example, legal officers at the World Bank became “task managers” for such projects. This was a major departure from the conventional wisdom that Bank (and other cooperation agency) lawyers were to act only as “advisors” to project operators.

At the same time new units were created in the IFIs to oversee legal (and later judicial) projects. In the World Bank, this took the form of the “Legal and Judicial Reform Unit;” in the Inter-American Development Bank, a “State and Civil Society Division” was created in the Sustainable Development Department, but included legal officers. During his four-year tenure as General Counsel of the Asian Development Bank (ADB), Barry Metzger made legal technical assistance a top priority of the Bank’s Legal Department, but without creating a new organizational structure.

More recently, the ADB has sponsored studies on the role of law and legal institutions in Asian economic development and has commissioned individual country legal assessments. It has also established the helpful “LawDev” Internet forum and funded judicial reform and other legal training projects throughout Asia.

Beyond the bureaucratic shifts lay the general evolution from legislative drafting to implementation in the targeted countries. As new economic laws in support of the free market were adopted across Central and Eastern Europe and the NIS and as privatization influenced law reform in the mixed economies of Africa, Asia and Latin America, attention turned to regulation and enforcement issues. Logically, this new focus put into relief serious shortcomings of the judiciaries in those countries. Judicial reform began to replace legal reform as a priority, but wise observers recognized that they were intimately related as two parts of a coherent system. Indeed, judicial reform itself came to be seen as one important part of good governance, along with well functioning administrative systems, anti-corruption and respect for human rights.

- **Phase 7: Institution-Building**

IDLI's participation in transition economy country projects in the early nineties gave rise to a new product for the Institute: NGO sustainability. As multiyear projects funded by the EBRD and the U.S. Agency for International Development (USAID) put the Institute in regular collaboration with certain local counterpart organizations over a period of time, those counterparts first began to request training of trainers and later "twinning consultancies" on organizational management and fundraising. More simply stated, the counterparts asked first, how does IDLI train mid-career legal professionals? And then, how did IDLI sustain itself as a non-governmental organization? The Institute responded by sharing its methodology for legal training and its experience as an NGO.

The newly created "NGO Unit" became IDLI's center for "third sector" activity. Locally recruited student interns researched EU country laws on NGOs, a handbook on non-profit management was begun and the twinning consultancies soon gave way to in-country workshops on NGO law, sustainability and advocacy. A pilot workshop in Poland funded by the Dutch Government inspired similar training programs in 1999 and 2000 on NGO sustainability in Cameroon and Zimbabwe under a Norwegian (NORAD) grant.

One important contribution of IDLI to institution building has been the creation of alumni associations in various parts of the world. The Institute now has almost twenty active associations of former participants in Africa, Asia and Latin America, with more on the way. In a sense, they are themselves evidence of the Institute's success as a mid-career training institution. The alumni associations not only assist IDLI in its recruitment and fellowship promotion activities, but also replicate the Institute's training methodology in many countries. Moreover, they are becoming an active part of the civil society.

Similarly, IDLI has assisted in the creation of new counterpart organizations in Eastern Europe and has cooperated with existing ones. In implementing in-country workshops, the Institute relies heavily on its local partners. Each pre-workshop "diagnostic visit" concludes with a signed memorandum of understanding clearly stating the responsibilities of each party in the design and delivery of a particular workshop.

In order to give greater attention to both alumni and counterpart organizations in client countries, IDLI recently established a "Partner Relations" office to promote and maintain relations with cooperating organizations and alumni associations. Thus the Institute has extensive and broadening ties with the civil society around the world.

• **Lessons Learned**

From 1986 through 1999 the World Bank assisted 87 countries in over 45 specialized areas of legal and judicial reform. Messick (1999) reports that the World Bank, the Inter-American Development Bank and the Asian Development Bank have either

approved or initiated more than US\$500 million in loans for judicial projects in 26 countries, while USAID has spent almost \$200 million on similar projects.

With over 300 projects in its portfolio that deal with or include components for legal and judicial reform, the Bank's Legal Department has been able to compile a useful list of ten "lessons learned"—applicable to capacity building at to other elements of legal and judicial reform projects. In summary, they are as follows:

- Legal and judicial reform is a long-term process, normally to be implemented in stages - taking into account sequencing requirements. Unless the time frame for reform is taken to account at the outset, "donor fatigue" may too soon trigger a withdrawal of funding.
- Local ownership of the reform is critical to ensure its acceptance. Outsiders, no matter how well intentioned, cannot reform a society or an institution. While help can come from without, motivation must come from within.
- Commitment by the host government (Executive, Legislative and Judicial branches) is likewise important. If a judiciary lacks independence, it makes no sense to provide technical assistance on court management or other functions.
- Participation by local stakeholders (especially NGOs and citizens) is essential to get the reform right and to make it sustainable. In order to avoid a purely top-down approach, funding agencies should make it a point to invite the users' views and involvement.
- Legal transplants rarely work. If they are to take hold in the society, reforms must reflect past legal systems, local history and local culture.
- To be coherent, reform must include all the elements of the legal and judicial system. Just as trained judges cannot function without minimal support, it makes no sense to reform the judiciary where the laws are weak and the collateral institutions ineffectual.
- Economic growth increases the demand for a consistent legal framework and reliable legal tools. At the same time, foreign investment requires sound laws and fair and effective implementation.
- Evaluation is a continuing challenge. Reliable performance indicators are needed to measure project impact.
- If wasteful duplication and inconsistent action are to be avoided, the concerned development organizations must regularly coordinate their reform project activities.

- Partnerships with various private legal sector, academic and civil society groups are helpful.

Although the World Bank Legal Department compiled this list (“Initiatives in Legal and Judicial Reform,” 1999), it would seem to apply across the board to such projects regardless of funding source. From its experience, IDLI appreciates the importance of enlisting the participation of local NGOs as well as those directly concerned with the project (i.e. judges, prosecutors, private practitioners, professional associations, etc.). Indeed, the Institute has learned that a project is most likely to succeed when there is a broad sense of ownership in the target community.

It is interesting to note that some NGOs, such as the Lawyers Committee for Human Rights, are now monitoring the legal and judicial reform projects of the World Bank. For example, a recent report examines the collapse of the 1997 judicial reform project in Peru, while another assesses a similar project in 1995 in Bolivia. Significantly, the major criticism in both reports is the alleged failure of the Bank to take into account user views as expressed through civil society organizations. According to the Committee, the Bank limited its dialogue in the projects under review to the court establishment, without consulting non-governmental users of the judicial system.

Measuring impact of capacity building in the field of development law presents a continuing challenge to training institutions. Unless the funding agencies can demonstrate to their internal and external constituencies that development law training really works, there is a danger that they will abandon the field prematurely. As a longtime laborer in the vineyard, IDLI has seen three external evaluations of its work. Although more subjective than rigorous, they have been uniformly positive. In individual interviews, alumni reported increased responsibilities and better results in negotiations and disputes as a result of IDLI training.

Reliable statistics are not available to show whether there is a lesser reliance on foreign legal experts in developing and transition economies than in the past. However, the general impression is that such experts are called upon today for more specialized consultations and are subject to more discriminating management by local legal advisors than one or two decades ago.

The World Bank Conference on Legal and Judicial Reform in June 2000 brought together more than 500 reformers from all over the world to discuss common issues and future direction. While there was no consensus on priorities and methodology, the active participation of the World Bank President and group discussion in the many sessions demonstrated a shared sense of commitment to the topic.

Law and development is no longer a poor stepchild of economic development. It now takes a respectable seat in the main hall. Indeed, much of the capacity building for legal professionals in the years to come will be directed to legal and judicial reform. It remains to be seen whether the reform will continue to support business globalization at the high-end or find a new audience and mission.

4. Looking Ahead: Whither Development Law Capacity Building?

Given that the international preoccupation is and will remain for some time with legal and judicial reform, it is nevertheless important to consider other areas that warrant development law training and technical assistance. The following issues contain significant challenges for legal capacity building investments and are likely to attract donor interest and support in the future.

■ “Low-End” Globalization

Business globalization creates wealth. Yet the gap between rich and poor countries continues to widen, since the process is selective as to country and people within a country. Beyond trickle-down and social safety nets, a potentially powerful approach is to bring the wealth-creating dynamics of business globalization to lower income populations through “low-end globalization.”

Drawing from Hernando De Soto’s *The Other Path* (De Soto, 1986), a first step should be a careful review of how legal and judicial systems currently impede small and micro-businesses in targeted countries, precluding their entry into the formal legal system. With a check list of the legal constraints in hand, a development finance agency could encourage law-reformers in targeted countries to promote the participation of micro-entrepreneurs in global business through legal and judicial reform. Other elements in the strategy to promote globalization at the village and urban poor level are financial access, training access, information access and Internet access.

The role of development law capacity building will be to assist in the legal and judicial reform at the grassroots, an area generally neglected to date.

■ Rules-Based International Order

Establishment of the World Trade Organization (WTO) in the waning years of the last century has given the world something to applaud: a rules-based international system. Indeed, the WTO model could show the way for similar approaches to international investment, environment and corruption issues. Yet a rules-based system makes sense only when the policy-makers and advocates in the member countries know what the rules are, how to access them, how to defend their countries from charges of rule-breaking and how to assert their rights against other parties.

Capacity building in the field of international trade law is now being recognized as an important issue. The UK’s DFID, Switzerland’s SECO, UNCTAD and other development donor agencies are exploring new ways of building in-depth WTO legal expertise in the developing and transition economy countries. As noted above, IDLI has instituted the *International Trade Lawyers Course* on a regional basis. More

training is needed for legal advisors to trade ministries, other public sector legal advisors and for practicing lawyers who represent parties in trade disputes.

Many developing countries see only negative outcomes to date from WTO membership. To reverse that perception and obtain better deals under the WTO regime requires top-notch WTO legal expertise in developing country capitals.

■ Conflict Resolution

The risk of global conflict receded with the ending of the Cold War and the dismemberment of the Soviet Union, but local violence has increased. Civil conflict in the Balkans, the NIS and West Africa derived from ethnic, tribal, religious or language differences in the same country or region.

As in the case of commercial dispute resolution, win-win negotiation and mediation offer effective mechanisms for conflict resolution. In civil conflicts, they offer effective alternatives to violence. Although the techniques are relatively simple (and no different from those used in commercial mediations), they are not widely known. Hence, there is a compelling need for training in negotiation and mediation skills, especially in areas of potential or post-conflict. Here is a worthy cause for development law capacity builders.

■ Interdisciplinary Advising

These days there are few strictly *legal* or strictly *policy* issues. More typically, the two are closely intertwined. International trade law is one example of where interdisciplinary skills and information are required. Competition law, environmental regulation and energy law are others. Increasingly, we see law and policy as two sides of the same coin.

In the transactional context there are also areas of interdisciplinary intersection. Take project finance, or BOT (Build, Operate, Transfer) arrangements. Typically, such negotiations involve multiple parties, different disciplines, cross-cultural participants and negotiators with widely different levels of knowledge and experience. It is not surprising that a majority of such negotiations fail to reach agreement.

Development law capacity building needs to accord more attention to the teaching of integrated interdisciplinary topics.

5. Summary

If the history of “law and development” were to be charted, it would, like the stock market, show high peaks and deep valleys. From a low point in 1974, the movement experienced a boom in the late eighties and nineties. As suggested above, its changing fortunes are partly a factor of the mission of the moment: academic teaching, training

transactional lawyers or legal and judicial reform. The experience of IDLI's co-founders reflects both nadir and zenith.

While the current preoccupation with reform is likely to continue, new problem areas, such as "low-end globalization," conflict resolution or interdisciplinary advising are potential priorities for the future.

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