



INVESTMENT SUPPORT PROGRAMME FOR THE LDCs

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PROVIDING LEGAL AND PROFESSIONAL ASSISTANCE TO MAKE FOREIGN INVESTMENT WORK BETTER FOR SUSTAINABLE DEVELOPMENT

The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), thanks to a generous grant from the Government of Italy, has partnered with the International Development Law Organization (IDLO) to design an Investment Support Programme for Least Developed Countries (ISP/LDCs) intended to provide legal and technical advice and assistance to requesting LDCs on investment-related negotiations and dispute settlement, and to develop their capacity in these areas. The ISP/LDCs is to be managed by IDLO, in light of its treaty-based mandate and technical experience in the areas covered by the Programme.

The ISP/LDCs was first discussed at a side event during the 2016 Midterm Review of the Programme of Action for the Least Developed Countries, which reaffirmed the global commitment to address the special needs of the LDCs. Since then, the UN-OHRLLS and IDLO have developed the Programme, which will be presented at an event on 22 September 2017 at UN Headquarters, with the high-level participation of ministers, heads of Investment Promotion Agencies of the LDCs, and representatives of development partners of the LDCs as well as experts in this field.

The Programme is aimed at benefiting the Least Developed Countries (LDCs) which are listed below:

Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia.

Background

The commitment of the 2030 Agenda for Sustainable Development to "leaving no one behind" applies most emphatically to the least developed countries. If the Sustainable Development Goals' vision of promoting peaceful, prosperous and inclusive societies is to become a reality, the needs of the LDCs must be

prioritized. The instrumental role of foreign direct investment (FDI) for the realization of the SDGs for the LDCs is recognized in goal 10/target 10.b, which stresses the importance to encourage FDI to the LDCs in accordance with their national plans.

The forty-seven LDCs are the world's poorest and can benefit substantially from responsible and well managed

FDI to generate income, jobs and technological upgrading to advance their economic growth and sustainable development. Yet the LDCs do not often have the human or financial resources to participate effectively in investment-related negotiations and to secure the most favorable outcomes for their people and economies.

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

The Programme of Action for the Least Developed Countries for the Decade 2011-2020 (IPoA) recognizes the importance of FDI and articulates two twin goals:

- a. Attract and retain increased foreign direct investment in least developed countries, especially with the aim of diversifying the production base and enhancing productive capacity;
- b. Enhance initiatives to support investment in least developed countries.¹

The IPoA specifically calls on development partners to “support capacity-building in least developed countries, and at the regional level, as appropriate, aimed at improving their abilities to attract foreign direct investment, including the ability to negotiate mutually beneficial investment agreements.”² The IPoA also stresses the importance of private sector development to increase investment in the LDCs and calls for the provision of enhanced technical support to the private sector.³

At the 2015 Conference on Financing for Development in Addis Ababa, world leaders stated: “We note with concern that many least developed countries continue to be largely sidelined by foreign direct investment that could help to diversify their economies, despite improvements in their investment climates. We resolve to adopt and implement investment promotion regimes for least developed countries.” They specifically pledged to: “offer financial and technical support for project preparation and contract negotiation, advisory support in investment-related dispute resolution, ... as requested by the least developed countries.”⁴ The offer was further welcomed by development partners in the Political Declaration adopted at the 2016 Midterm Review of the IPoA.

The ISP/LDCs seeks to contribute to the realization of these objectives through the provision of legal and expert assistance to help requesting LDC governments and firms with resource constraints and under-resourced firms from LDC countries to increase sustainable FDI and maximize the benefits they derive from it.

DESCRIPTION OF THE PROGRAMME

The support to be provided by the ISP/LDCs will involve fielding an expert or a team of experts to assist beneficiaries in preparing for, and conducting, negotiations and participating in arbitral proceedings or alternative dispute resolution methods. The Programme will also arrange complementary training and capacity building activities on demand.

With these activities, the ISP/LDCs intends to help LDCs negotiate mutually-beneficial investment contracts and agreements and ensure effective representation in investment-related dispute resolution. The primary objectives of the ISP/LDCS are to enable LDCs to derive maximum benefit from existing investment opportunities, increase sustainable investment flows and promote greater economic diversification.

The Programme’s aspiration is to harness the services of lawyers and experts (e.g. in tax management, tendering and procurement, accounting and financial analysis, environmental management), who are ready to provide support to the LDCs on a “pro-bono” or reduced fee basis, including in the context of corporate social responsibility initiatives of the organizations to which they are affiliated, thus catalyzing the readiness of professionals worldwide to contribute their expertise to the sustainable development of the poorest members of the international community.

The successful marshaling of expert teams under the Programme will rest less on large funding and more on leadership presence in professional networks and the ability to organize rapidly and efficiently. These intangibles can best be captured through partnerships.

¹ Programme of Action for the Least Developed Countries for the Decade 2011-2020, paragraph 121.

² Id., paragraph 122(3)(b).

³ Id., paragraph 55.2(a) and (b).

⁴ Addis Ababa Action Agenda of the Third International Conference on Financing for Development”, paragraph 46.

The following lists are illustrative of the types of support that beneficiaries may request in the areas of investment-related negotiations and dispute settlement:

Investment-related negotiations

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

Investment-related dispute settlement

- Advising and/or representing the beneficiary in existing or potential arbitration, mediation or negotiation proceedings between the beneficiary and an investor, and in the enforcement (or challenge) of an award;
- Selecting arbitrators;
- Preparing submissions;
- Attending arbitration hearings; and
- Preparing and examining evidence.

In all cases, experts are to provide quality professional advice on issues under consideration, as well as information and analysis, to help the beneficiary assess options, decide upon its interests, priorities, and strategies, and weigh the trade-offs that may be involved when goals conflict. Experts deployed to provide assistance to a beneficiary will need to adhere to a set of provisions and guidelines on, among other things, independence, professional standards, bribery, conflict of interests and confidentiality.

The ISP/LDCs also aims to strengthen national capacity, through complementary on-demand training, and by drawing upon experts available in the country and region. Capacity building and tailor-made training will help the recipient countries to attract sustainable FDI.

All assistance under the Programme will be demand-driven, provided upon request, and designed for quick response. Typically, a small team of legal and other experts, as required, will be made available to the beneficiary to provide technical assistance and help achieve the most beneficial outcomes in investment-related negotiations or dispute settlement.

Beneficiaries

The Programme is designed to support the governments of the 47 LDCs, as designated by the United Nations General Assembly, and - for a period of at least five years after the date of graduation - any former LDC which has graduated from the LDCs category by decision of the Assembly. The Programme also intends to assist eligible private sector entities, which include under-resourced and/or small and medium-sized private sector entities of LDCs.

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

Programme Management

The ISP/LDCs is to be implemented as an IDLO programme. IDLO has a treaty-based mandate as well as technical and operational capability in the areas covered by the Programme, and has assisted developing countries improve their business and regulatory environment, including in such fields as contracts, commercial dispute resolution, and legal capacity development. IDLO has a lean infrastructure of about 80 staff (based at its Headquarters in Rome and its Branch Office in The Hague). IDLO's management plan emphasizes agility, flexibility and the ability to start up projects at short notice.

IDLO will establish a roster of individual experts as well as partnerships with law firms, professional associations, consulting firms, universities, research centers and non-governmental organizations willing to collaborate with the Programme.

It will promote complementarity with existing support initiatives that provide assistance to the LDCs in areas related to the Programme to avoid any duplication of efforts and promote synergies.

A multi-stakeholder Steering Committee will guide the ISP/LDCs by providing overall direction and advice to IDLO on ensuring the realization of programme objectives.

The Programme will have a light institutional structure and limited staff. For the initial two years, which will include the inception period of the Programme, the expected annual budget is estimated at USD 2 million, assuming some 12 requests for investment-related support, and 6 requests for complementary capacity building. IDLO will establish and administer a multi-donor fund for this purpose.

IDLO will develop a robust monitoring and evaluation system in line with international best practices to assess the responsiveness, effectiveness and quality of the advisory and capacity development support provided and will provide regular reports on the status of activities underway, results achieved, and any delays or difficulties encountered in implementation. Periodic evaluations will assess the relevance of the objectives and activities to actual country demands, the efficiency and effectiveness of the delivery, and the overall impact. The evaluation will also summarize the lessons learned and present recommendations to the Steering Committee on the sustainability of the ISP/LDCs.

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