

Presentation on UNCITRAL's International Colloquium on Public-Private Partnerships

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I. Introduction

[From the [discussion paper](#) (A/CN.9/782) prepared for the International Colloquium on Public-Private Partnerships]

In 2008, UNECE noted “Over the past fifteen years governments have been struggling to achieve economic development and competitiveness through improving their basic infrastructure. Increasingly governments are turning to the private sector for the financing, design, construction and operation of infrastructure projects. Once rare and limited, these public-private partnerships (PPPs) have emerged as an important tool for improving economic competitiveness and infrastructure services. They are increasingly being considered as a mechanism to fill an infrastructure ‘deficit’ in many UNECE countries.”

Evidence indicates that this trend continues, extending beyond the UNECE countries and well-established patterns in developed countries. Some estimate that the value of PPPs may exceed US\$ 1 trillion in the next five years in India alone; they are increasingly used in China and other countries in Asia and the Pacific, and Central and South America.

In the light of this increasing use of PPPs as a method of infrastructure development, UNCITRAL will be holding a Colloquium to consider possible future work on PPPs. At last year's Commission session, it was noted that, “developing a model law on public-private partnerships at the international level might be desirable in the light of the importance of the subject to developing countries; that the work in that area might in particular be justified in the light of the conclusions reached by States at the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, from 20 to 22 June 2012, that encouraged the use of public-private partnerships as a tool for economic development; and that UNCITRAL could benefit from the work in the same area being undertaken at the regional level.”

In fact, UNCITRAL has included procurement and infrastructure development in its work programme for most of the last 22 years, and its texts are recognised as key tools in the effective regulation of infrastructure development and related topics (see the [UNCITRAL website](#) for a general introduction of its work). [UNCITRAL texts in this area](#) address two main delivery models to the public: “public procurement” and “privately-financed infrastructure projects (PFIPs).”

II. UNCITRAL’s work in the field of public procurement and PFIPs

A. Revision of the UNCITRAL Model Law on Public Procurement

In 2004, the Commission entrusted its Working Group on Procurement (Working Group I) with the revision of the 1994 UNCITRAL Model Law on Public Procurement (the “1994 Model Law”), to reflect experience gained in its use and practices that were not current in 1994. The underlying principles of the 1994 Model Law were to be retained as it was a very successful text, having been adopted in some thirty States and inspiring many more (for the [status](#)). It has also been used by multilateral development banks as a tool for procurement reform. Most recently, UNCITRAL has been cooperating closely with EBRD.

The nature of procurement is that it involves discretionary decision-taking on behalf of government at all levels and OECD figures show that procurement spending may represent 10 to 20% of GDP and up to 50% or even more of total government spending. The nature of procurement necessarily involves a risk of abuse and the size of the market shows that potential losses could be significant. Procurement also involves very important projects (such as those in the health, education, infrastructure sector), which could have a major impact on economic performance and development. Accordingly, achieving “value for money” in procurement is critical.

Responding to these issues, the UNCITRAL Model Law on Public Procurement functions as a template for “domestic” procurement legislation. Its main objective: “to enhance efficiency and effectiveness” and “to avoid abuse” in national procurement processes. This objective is achieved by promoting participation and competition, integrity and transparency, as well as an objective, fair and equitable treatment of participants in the procurement process.

In 2011, the Commission adopted [the final text of the revised Model Law](#) (the “revised Model Law”). The revised Model Law introduces procurement tools and techniques that have emerged in the past fifteen years. These include two notable features, namely the use of information and communications technology in the procurement process; and framework agreements, which can

result in significant efficiency and administrative cost savings. The revised Model Law is presented in a more streamlined and user-friendly manner and reflects a shift in emphasis from a compliance-driven approach to one more focused on the actual outcome of the procurement process.

The revised Model Law allows government purchasers to take advantage of modern commercial techniques, such as e-procurement and framework agreements, to allow it to maximize value for money in procurement. The revised Model Law contains procedures to allow for standard procurement, urgent or emergency procurement, simple and low-value procurement, as well as large and complex projects. All procedures are subject to rigorous transparency mechanisms and requirements to promote competition and objectivity. All decisions and actions taken in the procurement process can be challenged by potential suppliers. While the government purchaser therefore has discretion in deciding what to purchase and how to conduct the procurement, that discretion is subject to safeguards that are consistent with other international standards - notably, those imposed by the UN Convention Against Corruption.

The revised Model Law also allows the enacting State to pursue its domestic policy objectives - such as promoting economic development through the support of SMEs - to the extent that the government's international commitments allow.

The revised Model Law has also been prepared with a view to supporting the harmonization of international standards in public procurement, and takes account of the provisions of the World Trade Organization (WTO) Agreement on Government Procurement, the European Union Directives on procurement and remedies, the UN Convention Against Corruption, the Procurement Guidelines and Consultant Guidelines of the World Bank and the equivalent documents of other international financing institutions (IFIs).

Although developing countries and States whose economies were in transition were the main users of the 1994 text, the revised Model Law reflects international best practice and is designed to be appropriate for all States.

B. A Guide to Enactment of the UNCITRAL Model Law on Public Procurement

A recent development is that, in 2012, the Commission adopted [the Guide to Enactment of the UNCITRAL Model Law on Public Procurement](#) (the “Guide to Enactment”). This Guide to Enactment was prepared to assist States using the revised Model Law as a template for their domestic legislation. The Guide to Enactment provides detailed recommendations on how to enact

and implement the Model Law, and discusses policy options and solutions that need to be tailored to suit local circumstances. Moreover, it provides an illustration of how it fits into the international regulatory system, just mentioned.

The Guide to Enactment is an indispensable tool for the implementation of the Model Law, and its breadth and depth mean that it is long ([the text](#) is 320 pages long). It has therefore been structured to allow readers with different interests to focus on the parts of the procurement legal framework and supporting architecture that are of most relevance to them.

C. PFIP Instruments

In 2000, [the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects](#) (the “Legislative Guide”) was adopted. The purpose of the Legislative Guide was to assist in the establishment of a legal framework favorable to private investment in public infrastructure. The advice provided in the Legislative Guide aims at achieving a balance between the desire to facilitate and encourage private participation in infrastructure projects, on the one hand, and various public interest concerns of the host country, on the other. The Legislative Guide contains [71 legislative recommendations](#), whose purpose is to assist in the establishment of a legislative framework. They are followed by explanatory guidance and notes that offer an analytical explanation of the financial, regulatory, legal, policy and other issues raised in the subject area. In 2003, the [Model Legislative Provisions on PFIPs](#) (the “Model Provisions”) was adopted containing 51 articles to supplement the Legislative Guide.

III. Future work on Public-Private Partnerships

A. Broadening the scope of the PFIP Instruments

Having completed the project of revising the 1994 Model Law, discussions began at the 2012 Commission session on possible future work in procurement and infrastructure development. One of the suggested topics was “Broadening the scope of the PFIP Instruments to include forms of private financing in infrastructure development and related transactions not currently covered in the PFIP Instruments” (see [A/CN.9/755](#), paras. 30 – 35).

Public-Private Partnerships (PPPs) have become one of the established ways of delivering infrastructure development, and were developed, as demand for such investment has come to exceed the financial resources available to the public sector to finance it. There are many

definitions in circulation but, [as explained by the World Bank](#), “[t]he term ‘public-private partnerships’ has taken on a very broad meaning, the key element, however, is the existence of a ‘partnership’ style approach to the provision of infrastructure as opposed to an arm’s length ‘supplier’ relationship ... Either each party takes responsibility for an element of the total enterprise and work together, or both parties take joint responsibility for each element. ... A PPP involves a sharing of risk, responsibility and reward, and is undertaken in those circumstances when there is value for money benefit to the taxpayers”. Hence it may be considered that the term “PPP” has broader connotations than PFIP in that non-financial contributions from the private sector could be involved. Nonetheless, a common understanding of PPPs and PFIPs is that the tools are broadly equivalent.

The Legislative Guide states, in its introduction, that “The Guide pays special attention to infrastructure projects that involve an obligation, on the part of the selected investors, to undertake physical construction, repair or expansion works in exchange for the right to charge a price, either to the public or to a public authority, for the use of the infrastructure facility or for the services it generates. Although such projects are sometimes grouped with other transactions for the “privatization” of governmental functions or property, the Legislative Guide is not concerned with “privatization” transactions that do not relate to the development and operation of public infrastructure. In addition, the Legislative Guide does not address projects for the exploitation of natural resources, such as mining, oil or gas exploitation projects under some “concession”, “licence” or “permission” issued by the public authorities of the host country.” It has been noted that such transactions may include the transfer to the private sector of common and natural resources or land, and there are reports of disregard of rights over such land, negative environmental consequences, and a lack of transparency in some of them.

Other donor agencies have also issued texts on PPPs: The OECD’s “Basic Elements of a Law on Concession Agreements” (2000) seeks to facilitate private sector investment in the infrastructure in the Black Sea/South East Europe region. The Basic Elements were produced by a group of experts convened by the OECD and the Istanbul Stock Exchange, resulting in a set of 18 key provisions for concession agreements. The EBRD’s “Core Principles for a Modern Concession Law” (2006) were issued “to identify and promote sound modern principles of concessions laws in the EBRD’s countries of operations’ and with the aim of protecting investors and the public sector. The Legislative Guide and Model Provisions were used as a primary source in drafting the Core Principles. All but one of the 10 Core Principles specifically refer to one or more of the recommendations in the Legislative Guide as a source. The OECD Basic Elements were also used.

The EU has not yet promulgated specific rules on PPPs, but has issued a series of texts on concessions. Nonetheless, several member states have expressed the view that there is a need for a common set of EU rules on PPPs, and there is a proposal for a new Directive on Concessions. Other agencies have issued guidance publications – e.g. European PPP Expertise Centre (EPEC, a joint initiative of the European Invest Bank) has issued a Guide to Guidance (EPEC PPP Guide), the World Bank has an online PPP in Infrastructure Resource Centre for Contracts, Laws and Regulation and the UNECE has issued a National PPP Readiness Assessment tool, for the benefit of government strategic and policy units, to assess their readiness for developing PPP capabilities and markets, and is part of a wider UNECE PPP Toolkit.

There is therefore a significant quantity of policy and related guidance available to States, yet most had been prepared before the global financial crisis (the notable exceptions being the EPEC Guide to Guidance and UNECE Readiness Assessment, which have been updated more recently). UNCITRAL is therefore considering whether it would be appropriate to update the PFIPs Instruments and to try to harmonize the plentiful policy guidance available. Concerns have been expressed to the Secretariat about the multiple PPP approaches and practices being developed and issued by different United Nations bodies, IFIs and other agencies. Also, experience indicates that States are seeking more concrete guidance, such as can be delivered in a model law, which provides a single set of policy recommendations with few options, rather than a legislative guide, which discusses the pros and cons of policy options.

Another related issue is that the scope of the existing legal texts and guidance varies. The definition of PPPs also, in the view of some, includes other ways of service delivery by governments, including outsourcing and the divestment of state-owned assets or enterprises for that purpose. A key feature is the provision of what were previously government services by third parties; the Legislative Guide does not address the provision of such services other than as part of infrastructure development.

As mentioned, the Legislative Guide is not concerned with “privatization” transactions that do not relate to the development and operation of public infrastructure, nor projects for the exploitation of natural resources, such as mining, oil or gas exploitation projects under some “concession”, “licence” or “permission” issued by the public authorities of the host country.” Many issues recently emerging as concerns from civil society – such as the use of agricultural land for mining, and associated questions of food security – arise through concessions over natural resources.

At a more technical level, there is no clear line demarcating public procurement and PPPs in many systems. An example is a Build-Operate-Transfer project, which can be treated as either public

procurement or PPP, depending on the precise financing mechanisms. States are seeking advice about whether they should regulate all infrastructure development project types in one law (i.e. covering public procurement and PPPs); where they are modernising a public procurement law, they often wish to address PPPs simultaneously. From the policy perspective, all such transactions involve the transfer of national assets (fixed assets or income) to the private sector, as part of the projects concerned. They should arguably thus all be subject to the same governance and other policy obligations, and the same rules regarding competition, transparency, objectivity in decision-making and so forth. Article 9 of the UN Convention Against Corruption addresses public procurement and the management of public finances, and imposes equivalent standards on all such transactions. While the procurement aspects of both types of financing model can be harmonized, PPPs raise issues that often do not arise in public procurement transactions.

The Legislative Guide states that successful privately-financed infrastructure projects should “achiev[e] a balance between the desire to facilitate and encourage private participation in [relevant] projects, on the one hand, and various public interest concerns of the host country, on the other”. These public interest concerns include fair treatment of users and the impact of the transaction on the broader economy and citizens; the private sector will be concerned with issues of pricing and disclosure, contractual terms, flexibility to meet changed conditions, nature of the project company and its rights, step-in rights where a concessionaire fails, changes in project ownership and control and so on. Hence, one of the issues that UNCITRAL will consider is whether a parallel, but separate, track should be followed for public procurement and PPP.

B. UNCITRAL International Colloquium on Public-Private Partnerships

UNCITRAL is holding a [colloquium](#) on its possible future work in PPPs from 2 to 3 May 2012 at the Vienna International Centre. The Colloquium will bring together experts from government, private sector, academia and the non-profit sector.

The [outline provisional programme](#) indicates the two fundamental questions that the colloquium intends to address: a) whether there is a need for a legal text on PPPs; and b) the scope of the recommended work on PPPs. Issues also expected to be discussed at the colloquium include possible minimum provisions, or core elements, of a legal text on PPPs and the possible form that a resulting work product could take.

Such minimum provisions would themselves include ensuring a stable and predictable legal and regulatory environment; requiring effective project planning, including the allocation of project

risks and government and donor support, providing for effective and efficient selection procedures, based on maximising competition in the circumstances so as to provide value for money and to avoid abuse and corruption, and terms and conditions of the project agreement and execution of the project contracted for.

Other important topics include whether a technical consolidation of the PFIPs Instruments and harmonization with other legal texts should be attempted; addressing technical issues in the various legal texts and guidance publications that are considered to be in need of modernisation, notably dispute resolution and unsolicited proposals; the scope of PPPs to be provided for (such as whether or not to address natural resource concessions); how to ensure that the government's socio-economic policy goals, some of which may operate to reduce competition and compromise value for money, or may have negative effects on the environment or local inhabitants, are transparently provided for and pursued.

The Colloquium will also consider the work of other agencies in PPPs – those involved primarily in capacity-building, such as the UNECE and EPEC; and experience in regulating and using PPPs at the national level. Such experience will be used to ensure that any resulting text from UNCITRAL is fully based on empirical evidence and practice, and so enhance its usefulness. Any experience from UN/CEFACT would be gratefully received, either at or before the Colloquium.

The colloquium is conducted on an informal basis and is open to the public. Interpretation in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish) will be available.

For information purposes, the Commission consists of 60 member States elected by the UN General Assembly (see [Composition of the Commission](#)). Other States may also participate as observers. To facilitate the decision-making of the Commission with respect to future work topics, the Secretariat was requested to organize the Colloquium. The Colloquium will produce a recommendation to the Commission on possible future work in the area of PPPs which the Commission itself will consider, along with other recommendations regarding future work and the overall priorities for UNCITRAL in the coming years (Vienna, Austria, 8-26 July 2013). If chosen as a future topic, [one of the six Working Groups](#) would be tasked with that work, most probably WG I.