

## Lance THOMPSON

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**De:** Caroline NICHOLAS <caroline.nicholas@uncitral.org>  
**Envoyé:** lundi 19 août 2013 17:52  
**À:** Caroline NICHOLAS  
**Cc:** Samira MUSAYEVA  
**Objet:** UNCITRAL - future work on PPPs

Dear all,

You have previously expressed an interest in UNCITRAL's (possible) future work on PPPs, and many of you participated in a Colloquium on this topic we held here in Vienna in May of this year. With apologies for the length of this email, you will find below a summary of the state-of-play on the topic, and an invitation to take part in the work from here on.

First, here is an extract from our 2013 Commission draft report (that is, the report of our plenary session), which authorises the UNCITRAL Secretariat to start work on PPPs, to prepare the topic for further discussion at next year's plenary:

"36. ... The Commission heard a summary of the results the Colloquium reported in document A/CN.9/779 (available at <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html>), organised by the Secretariat in May 2013 pursuant to the Commission's instruction to the Secretariat at its forty-fifth session. The Commission noted the agreed importance of the topic in securing resources for infrastructure and other development, at the international and regional levels and for States at all stages of development.

37. As regards the four tests [that should be satisfied for UNCITRAL to take up a topic], \*\* the Commission noted that the topic was amenable to harmonization and the consensual development of a legislative text, given developments in PPPs since the issue of the UNCITRAL texts on Privately-financed Infrastructure Projects (the PFIPs Instruments). The Commission also heard the Colloquium's conclusion that there was a lack of a universally accepted and acceptable standard on PPPs.

38. As regards UNCITRAL's mandate, it was recalled that the topic had already been the subject of legislative development within UNCITRAL, and it was noted that the work of other agencies in the field had been taken into account to avoid duplication of effort. It was observed that the PFIPs Instruments, although recognised as comprehensive and accurate when they were issued, were not always used as the source of choice when enacting legislation on PPPs. It was also agreed that the PFIPs Instruments might be in need of some updating and revision, given the development in the market for PPPs, and that the key elements of a legislative text on PPPs — drawing in large part on the PFIPs Instruments — were agreed.

39. However, noting the wide variation in terminology, scope and contents of existing texts at the national level as reported at the Colloquium, and some divergence of views as to whether a Model Law or other legislative text should be developed, it was considered that further preparatory work on the topic would be required so as to set a precise scope for any mandate to be given for development in a Working Group. In this regard, it was emphasized both that any legislative text should ultimately be developed through a Working Group and that the preparatory work should be undertaken in an inclusive and transparent manner that took account of the experience in all regions, the need to include both the public and private sector in consultations and multilingualism.

40. The Commission consequently agreed that the Secretariat would organize this preparatory work through studies, consultations with experts, and use up to one week of conference time previously allocated to Working Group I in the year to June 2014 for one or more Colloquia in cooperation with relevant international and regional bodies active in the field. Thereafter, a further report would be made to the Commission at its forty-seventh session."

Thus, over the next year, the Secretariat will be holding a series of expert meetings and Colloquia to address the scope of a future legislative text on PPPs and the policy issues that could be set out in a mandate for a Working Group, so that the Commission can assess whether to refer the topic to a Working Group starting in autumn 2014. I very much hope that many of you will be able to take part in this work.

In order to prepare our report to our Commission for summer 2014, an initial goal will be to identify (a) the key revisions needed to the UNCITRAL PFIPs Instruments (Legislative Guide, Legislative Recommendations and Model Legislative Provisions) to form the core of a future legislative text on PPPs, and (b) the additional elements that

should be included. The Simmons and Simmons report that was provided to the Colloquium (and is available at the above weblink) contains a helpful mapping of the PFIPs Instruments, and indicates a series of topics for which there is guidance but no legislative recommendation or model provision (or both). Unless any of you takes issue with that aspect of the Simmons and Simmons report (and no dissenting voice has been raised thus far), the scope is sufficiently clear for the recommendations concerned to be presented to a Working Group without further preparatory work.

Much more preparatory work is required on what additional issues should be included in a future legislative text, and this is where our consultations will be critical. The main additional issues or issues needing further review mentioned at the Colloquium for possible inclusion in a future legislative text and/or guidance are:

#### Scope issues

- PPPs without physical infrastructure development and other contractual arrangements (partnering, alliancing, institutional PPPs, long-term leases, leasing and management contracts)
- Whether to provide for issues arising in cross-border PPPs (issues of choice of law, conflicts of law, applicable law, supra-national institutions, extra-territorial application of standards, etc)
- Whether to include concessions over natural resources in the light of other bodies' work in some areas (such as mining concessions)
- Whether any other types of PPPs would require specific provision and, if so, whether they should be excluded from the scope of a future legislative text
- Ensuring consistency between PPP laws and other laws applicable to PPPs (tax and customs, insolvency, secured transactions, intellectual property, investment protection, land rights, etc) and that these other laws do not pose obstacles to PPPs
- Supporting anti-corruption and integrity measures eg through registries of project operators worldwide
- Providing for effective challenge mechanisms for investors and others, for example by allowing public procurement fora to accept PPPs challenges
- Providing for effective institutions to support PPPs

#### Project issues

- Transparency and accountability safeguards throughout the project cycle, and not just in the selection phase (including public disclosure of transfer of resources between the parties, better public communication and enhancing traceability)
- Allocation of powers, authority for a contracting authority to take all necessary steps
- Risk allocation, government guarantees and state support
- Social clauses and other measures promoting social responsibility and pro-poor projects
- Provisions seeking to prevent and resolve conflicts between a contracting authority and project operator, and to resolve disputes in the multiplicity of project parties and contracts
- Ensuring that the distinct features of PPPs (as compared with public procurement) are adequately addressed: eg, modifications and amendments to contractual obligations; sustained and sustainable performance obligations; accommodating the primary responsibility of the public sector for the delivery of services, in the context of the long-term participation of the private sector in the delivery of those services; encouraging innovation and creativity on the part of the private sector; allowing for project-finance payments and availability payments to the private sector and for private equity participation
- Unsolicited proposals
- Whether some restrictions on contractual freedom/party autonomy should be included (eg on tariffs) to protect the public interest and to make the contract negotiations more efficient

Here, it will be clear that we have several layers of issues to work through. First, the preponderance of opinion at the Colloquium was that the future legislative text would ideally be a Model Law – but with some expressing doubt that it would be possible to achieve the degree of consensus required. We need to identify from the above list those issues (a) that might not be amenable to consensus and so would hinder the development of a Model Law; (b) where options might be appropriate without compromising the nature of a Model Law; and (c) that are questions of guidance rather than law/regulation. Options are found in Model Laws, but if there are too many, the result is in reality a Legislative Guide with Model Provisions. If there are issues of pure guidance, a Guide to Enactment to a legislative text can address them to the extent that they need to be addressed to ensure that the legislative text functions as envisaged.

Secondly, items within (a) may alternatively affect the scope of the legislative text (eg natural resource concessions – in or out).

The third layer is then the technical recommendations on the items themselves (include yes/no, broad policy approach). Here, existing provisions and legislative solutions in various systems need to be researched. We noted

the wide variety in the scope and content of current laws, regulations and guidance on PPPs, that there are many “international” texts available to assist those drafting laws but no de facto international “standard”, and that many national laws/regulations do not take these available texts into account anyway. From a harmonization perspective, therefore, we have significant material from which to work. The Colloquium emphasized, however, that it may not be possible or even desirable to seek to harmonize all these texts, so we will be looking to identify examples of good (best?) practice to take forward as outline policy solutions (and for examples of good intentions that haven’t translated into good practice).

We will be looking at all three layers simultaneously, which means we will have to be disciplined and consider a matrix approach – bearing in mind that we are not looking to resolve the policy issues themselves, but to scope them sufficiently to set a mandate for resolving them.

The above list is obviously not exhaustive, and I would like to suggest an early conference call (eg week beginning 9 Sept) to discuss whether (a) others should be added and (b) how best to triage the issues to allow for constructive and productive discussions – considering that some issues may be more relevant in some regions/systems than others, and some may be noted as issues but not needing much further preparatory work.

In terms of logistics, we should also discuss how best to ensure inclusiveness and that experts in all regions are consulted. In principle, this indicates a meeting in each of the major regions (unless those from any particular region consider that a meeting elsewhere would be more appropriate), I hope in conjunction with the relevant regional development banks and UN agencies as well as the World Bank – so please consider whether your organisation may be able to facilitate our meetings.

As a starting point, Vijay Tata from the World Bank drew to my attention the possibility of a PPPs session at the 2013 Law, Justice and Development Week (see <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23384728~menuPK:2644004~pagePK:64020865~piPK:51164185~theSitePK:445634,00.html>). This would be an excellent opportunity to raise awareness of UNCITRAL work on PPPs, and to identify and flesh out policy issues and concerns – including the link between effective PPPs, development effectiveness and accountability in projects. The week is from 18-22 November. I will discuss with Vijay and his colleagues which of the above set of issues would be of interest from the World Bank perspective.

As a first step, therefore, please would you let me know whether you wish to be included in our work over the coming months and, if so, would be available for a conference call on 11 Sept (Wed) at 2pm Vienna time. This time is chosen to balance those in the different hemispheres. If not available on 11 Sept, please indicate whether 12 or 13 Sept at the same time would suit.

Many thanks for your ongoing cooperation, and looking forward to a fruitful year’s work,

Kind regards,

Caroline

\*\* the four tests developed by the Commission to identify whether or not a topic is appropriate for referral to a Working Group to develop a legislative text are:

1. Is it clear that a topic is likely to be amenable to harmonization and the consensual development of a legislative text?
2. Are the scope of a future text and the policy issues for deliberation sufficiently clear?
3. Is there a sufficient likelihood that a legislative text on the topic would enhance the law of international trade?
4. Legislative development should not be undertaken if so doing would duplicate work on topics being undertaken by other law reform bodies, and preparatory work to identify any areas of potential duplication should be undertaken before a topic is referred to a Working Group.

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