

PPP IN TRADE FACILITATION WORKING GROUP

CONFERENCE CALL

SEPTEMBER 4, 2013, 14:00 CET

Attendance

Present:

Lance THOMPSON, Conex (FR)
Paloma BERNAL TURNES, Georgetown (US)
Josephine BAIAMONTE, CBP (US)
Giovanna CHAPPINI CARPENA, ICE (IT)
Pier Alberto CUCINO, ICE (IT)
Maurice DIAMOND, Crown Agents (GB)
Guillaume LAURENCY, Bureau Veritas (FR)
Johan PONTEN, National Board of Trade (SE)
Jari SALO, Tieke (FI)

Absents:

Anna BELMONTE, ICE (IT)
Caroline NICHOLAS, UNCITRAL (AT)
Anders TORNQVIST, Comfact (SE)

Summary

(points that may require your attention are in red below)

PPP project – Draft text version 0.9

Comments during the conference call (selection):

- Definition of PPP is more outcome oriented rather than process oriented; should perhaps emphasize more the collaborative approach. A suggested addition was inserted.
- The scope of TF PPP examples:
 - There is not yet any text for Trade Corridors. Johan will propose some text for this.
 - Aligned Document. Some text was added; we should perhaps further develop how this pertains to PPP.
 - Mobile Trade. We should perhaps further develop how this pertains to PPP.
- Business Process Method Analysis in 2.2 (Policy) should perhaps be further developed. Paloma will propose some text for this.
- The environment (2.8) pertains clearly to “green development”. It was suggested to remove the section completely. However, as within the scope some infrastructure projects are addressed, we should look at the PPP Good Governance Guidebook to see if there are aspects which should be retained here. Lance will check this.

If you have any further comments or suggestions for this document, please be sure to submit these to the Project Lead, Lance (lance.thompson@conex.net) BEFORE the next conference call in two weeks.

Next step: Proposal for a UN/CEFACT Recommendation on PPP in Trade Facilitation

- What is the feeling of the participants of the conference call? Is a recommended practice pertinent here?
 - A consensus for yes... Add some guidance especially for specific activities. Guidance on TF PPPs would be an added value. The further study of the subject will definitely bring food for thought. Even if “stating the obvious” – it may be obvious for experts, but perhaps not for implementers.
 - Depending on the WTO negotiations in Bali, it may be a very timely moment for a UN/CEFACT Recommendation on TF PPPs
 - If you do not agree, please say so before the next conference call in two weeks.
- What should be the recommended practice...?

- Everyone should consider this question before our next conference call.
- Please look at existing recommendations to have an idea of how these are worded: http://www.unece.org/cefact/recommendations/rec_index.html
- One recommended practice may be something like: “Governments and those involved in international trade should actively consider implementing trade facilitation through Public-Private Partnership” (followed by a few examples like Rec33).
- Project leadership...
 - I (Lance) am happy to pass the project to someone with more expertise in this field, if there is interest of any of the active participants to become “Project Lead”.
 - If you would be interested in a role as “Project Lead” of a recommendation project on TF PPPs, please contact Lance (lance.thompson@conex.net) or Johan (johan.ponten@kommers.se).
- The current study on TF PPPs will be used as a “Background Paper” for a TF PPP project. Lance will work on a proposition for a TF PPP Project Proposal to present at the next conference call (and which would be the basis of a proposal at the Sardinia Forum).

Next conference call

The date and time of the next conference call was decided during the meeting. It will be:

- Wednesday September 18th at 13:00 CET (Paris & Geneva time)

Other points for your consideration:

22nd UN/CEFACT Forum in Sardinia

14-18 October 2013

- <http://www.unece.org/index.php?id=33036>
- The PPP meeting is planned for Thursday, October 17th.
- http://www.unece.org/fileadmin/DAM/cefact/documents/ITPD_Draft_Agenda_for_14-18_October_Forum_2013_rev.1.pdf
- If you are able to join the Working Group at the Sardinia Forum, please let Lance know as soon as you know (lance.thompson@conex.net).

UNECE International PPP Centre of Excellence (ICoE) – Future work on PPP Recommendation

Message from the UNECE Secretariat:

Many thanks for including me in your regular communication concerning the PPP work related to trade facilitation which you are leading. Unfortunately, I won't be able to join you in the conference call scheduled later on today but I wanted to update you on our PPP work related to the International PPP Centre of Excellence (ICoE) and its Specialist Centres, whose main role is to prepare international PPP best practice which after a rigorous UN process will become international PPP standards using a similar process as that developed by CEFAC.

Please find below a brief report of the first meeting of the ICoE held in Geneva on 22 June 2013, which you are free to disseminate among your network.

<http://www.unece.org/fileadmin/DAM/ceci/documents/2013/PPP/DefiningExcellenceinPPPs/ReportWEB.pdf>

I wanted in particular to draw your attention to paragraph 36 on page 4 concerning the development of international PPP standards through a validation process under the auspices of the UNECE ICoE. For more detailed information on the validation process, kindly refer to the discussion paper (page 14) prepared by the secretariat for this meeting (available at:

http://www.unece.org/fileadmin/DAM/ceci/documents/ICoE_PPP/ICoE/PaperRoleSC.pdf). Please also receive the link to the ICoE brochure just produced to further elaborate on the PPP standard setting process of the ICoE.

http://www.unece.org/fileadmin/DAM/ceci/documents/ICoE_PPP/ICoE/ICoE_Brochure_September_2013.pdf

I trust that this information would assist in your endeavours to prepare the terrain for a possible PPP standard in the area of trade facilitation.

Sixth Investment Arbitration Forum dealing with "Privately-financed infrastructure projects and dispute resolution"

Sixth Investment Arbitration Forum dealing with "Privately-financed infrastructure projects and dispute resolution" organised by the Chartered Institute of Arbitrators, the Instituto de Investigaciones Jurídicas of UNAM and other institutions and law firms, will take place at the Georgetown University Law Center on October 3-4, 2013. Speakers include, Patricia Sulser, the chief counsel of the International Finance Corporation (IFC) of the World Bank, the former minister for foreign relations of Peru and other distinguished experts. The programme will deal with dispute management, prevention and resolution by multilateral financing institutions, state contracts and investment arbitration, legal issues related to state contracts and commercial arbitration, and the use of the but-for premise to assess damages in investment and commercial arbitration. The programme may be found at <http://internationalarbitrators.org/Workshops/PFI.pdf>.

UNCITRAL Future work on PPP

Message from UNCITRAL Secretariat:

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,