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Planned and possible future work in procurement and infrastructure development

Note by the Secretariat

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I. Introduction

1. This Note has been prepared to enable the Commission's consideration of possible future work in procurement and infrastructure development at this forty-eighth session. It addresses two possible areas of legislative development: suspension and debarment in public procurement, and public-private partnerships.

II. Proposed future work in Procurement and Infrastructure development

A. Suspension and debarment in public procurement

2. Article 9(2)(f) of the UNCITRAL Model Law on Public Procurement (2011)[1] permits the exclusion of suppliers from public procurement proceedings if (among other things) they have been "disqualified pursuant to administrative suspension or debarment proceedings". The accompanying Guide to Enactment[2] notes that such an exclusion from future procurement may be temporary or permanent,[3] and is imposed commonly as a consequence of misconduct, corrupt activities or unethical behaviour (such as issuing false or misleading accounting statements or attempting to distort the procurement process through inducements or collusion). The Guide adds that alleged wrongdoers should be accorded due process rights,[4] and that, in some systems, commercial wrongdoing (such as failure to enter into a procurement contract or to fulfil contractual obligations) can also lead to sanctions against the supplier concerned.[5]

3. The Model Law does not provide any procedural rules for supplier exclusion. The Guide to Enactment does not further address suspension and debarment. Nonetheless, it is emphasized in the Guide that a key feature of an effective procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary: these mechanisms include reviewing and challenging procurement officials' decisions, audits and investigations, as well as sanctions and debarment procedures, which can arise under article 21 on the exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements, an unfair competitive advantage or conflicts of interest, or as breaches of the code of conduct required by article 26 of the Model Law, or as breaches of other obligations under the Model Law.[6] In addition, the Guide notes that the "enacting State should therefore have in place

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

[2] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

[3] Suspension refers to temporary measures, typically a year or less, whereas debarment refers to restrictions of up to three years or longer. Debarment has serious consequences, potentially taking a company out of the marketplace long enough to lose competitive standing in a field, but systems vary in their use of the terminology. See, also, Guide to Enactment, commentary on Administrative Support, para. 69.

[4] Guide to Enactment, commentary to article 9(2)(f).

[5] Guide to Enactment, commentary to article 17, para. 12.

[6] See, also, Guide to Enactment, commentary in the Introduction to Chapter VIII (Challenge mechanisms).

generally an effective system of sanctions against corruption by government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process, aimed at enhancing governance throughout the system".[7] It has been noted that "effective, proportionate and dissuasive" sanctions where a corruption offence is committed are also a baseline requirement of the United Nations Convention against Corruption.[8]

4. While there is general agreement that procedures for suspension and debarment are important elements to support the effective implementation of a procurement law and particularly to fight corruption,[9] there are considerable variations among suspension and debarment systems in practice. Indeed, it has been stated that in one country, "guidance on the subject is considerably fragmented across multiple orders and instructions by a number of oversight authorities [footnote omitted], with considerable scope for confusion amongst procurement officials and government contractors alike, potentially leading to inefficiency in application and achievement of desired outcome".[10]

5. This fragmentation is replicated among national and international systems more generally, as a review reported at a colloquium on the topic in 2012.[11] (The systems considered were those of the European Union, India, the United Kingdom of Great Britain and Northern Ireland, the United States of America (federal procurement system), and multilateral development banks). The differences range from the goals of suspension and debarment procedures, through the nature of the procedures to the available sanctions. At a recent meeting of the Organization for Economic Cooperation and Development (OECD) Meeting of the Working Party of the Leading Practitioners on Public Procurement,[12] when considering the implementation of the OECD's recently-adopted Recommendation on Public Procurement,[13] significant differences between systems in the European Union and Canada were also noted.

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[7] Guide to Enactment, commentary to article 21, para. 3.

[8] Article 30 of the Convention requires that each State party "make the commission of an offence established in accordance with [the] Convention liable to sanctions that take into account the gravity of that offence," and it is noted that suspension and debarment are among the appropriate sanctions. See, further, The United Nations Convention against Corruption, A Resource Guide on State Measures for Strengthening Corporate Integrity, United Nations Office on Drugs and Crime (UNODC), 2013, available at www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strengthening_Corporate_Integrity.pdf.

[9] See, for example, statement of World Bank President, Jim Yong Kim, in 2014: "Around the world, governments are creating and modernizing administrative bodies that can respond to claims of wrongdoing in public procurement or in the use of donor funds. They are a crucial component of the global movement to combat fraud and corruption," available at http://www.worldbank.org/en/news/press-release/2014/06/25/world-bank-publishes-data-lessons-learned-debarment-cases-2007.

[10] Verma, Sandeep, Sending Contractors on a Holiday: Proposed Rules for an Integrated and Seamless Approach in the Ministry of Defence to Debarment and Suspension of Erring Entities (May 23, 2014), at page 1. Available at SSRN: http://ssrn.com/abstract=2441040 or http://dx.doi.org/10.2139/ssrn.2441040.

[11] Colloquium on suspension and debarment: towards an integrative approach? http://globalforumljd.org/events/2012/100912_suspension.htm.

[12] 27-28 April 2015 at OECD Headquarters in Paris, France.

[13] Recommendation of the Council, 18 February 2015, C(2015)2.

6. Regarding the objectives of the procedures, and while all systems are designed to deter wrongdoing as well as to impose consequences, there is generally one of two discrete goals. On the one hand, the aim may be to protect the government customer from individuals and organizations with which it should not do business or to which it should not entrust public funds, whether the risk arises in terms of performance, reputation or both. On the other, the system may focus as a primary matter on the punishment of suppliers that do wrong.

7. Systems can also be what is termed "discretionary", or they may be "mandatory" or "punitive", largely reflecting these differences in goals. Mandatory systems require sanctions to be imposed on suppliers found guilty of wrongdoing, whereas discretionary systems do not require particular sanctions, but allow the sanctioning body to take account of the extent of performance risk and of possible or likely consequences for the procurement market if a supplier is excluded.

8. This issue takes on particular significance where the sanction involves exclusion for long period (one example was given of ten years or more), which is likely to drive a supplier with significant government business out of business. Where exclusion is not mandatory, alternative approaches such as self-cleaning (acceptance of culpability and setting up programmes to ensure appropriate standards in the future) can be found. Some systems feature mandatory exclusion for more egregious conduct, but allow discretion for lesser misconduct. Other consequences can include civil penalties and criminal convictions.

9. The evidential burden to establish wrongdoing extends from "adequate" evidence or a preponderance of the evidence, as assessed by the sanctioning body, to a requirement for a prior criminal conviction. The burden of proof to overturn decisions to suspend or debar through appeal may also be relatively low or extremely high.

10. This variety of practice has further consequences given an increasing emphasis on "cross-debarment". "Cross-debarment", refers to the ability to exclude a supplier suspended or debarred in one country or system from procurement in others. This question has involved considerable coordination efforts among the multilateral development banks, but more work is needed to allow national systems and those "international" systems to work effectively together. The colloquium referred to above noted that a rule under which a debarment in one country or system worked automatically to cross-debar the supplier concerned in all countries and systems would be too rigid and unworkable, but emphasised the need for a coherent approach. International infrastructure and development financing involves procurement using suppliers that may operate in many countries, and there is an increasing emphasis on cross-border procurement in policy and practice.

11. So far as due process is concerned, UNODC has noted that the severity of debarment, especially for individuals and smaller businesses, is such that "clear standards of conduct and procedural protections to prevent abuse are essential".[14] States have signalled their desire to implement appropriate rules in their national systems, so as to provide appropriate support to their procurement law and other rules, and to comply with their obligations under UNCAC.

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[14] A Resource Guide on State Measures for Strengthening Corporate Integrity, note 8 supra, at page 23.

12. Nonetheless, it is clear that there is no harmonised standard as a source material, and some States have signalled the need for a coherent transnational system. For example, the proposed new framework for the World Bank's procurement system will consider permitting Bank-funded procurement to use the country's own procurement system (as opposed to a requirement to follow the Bank's own procurement system) where, among other things, the borrower country applies (as appropriate) the Bank's debarment list.[15] In addition to supporting the consistent implementation of UNCAC's requirements,[16] convergence of systems is necessary to avoid fragmented systems in which different standards of conduct and sanction apply within one system (where some procurement is externally-financed) and among systems that need to work together. Consequently, it is submitted that a legislative text to facilitate appropriate procedures and safeguards for suspension and debarment procedures would assist significantly in this regard: similar options as would be needed were set out in Chapter VIII of the Model Law on Public Procurement, and the provisions concerned are being found useful in practice.

13. The Commission's statements of when a legislative mandate might appropriately be given have been considered on this topic. The first question is whether suspension and debarment procedures are likely to be amenable to harmonization and the consensual development of a legislative text. It is submitted that the variations in existing systems, on the information available, are more closely connected with whether the system is primarily punitive or discretionary, and on the associated consequences – that is, variations arise in the implementation and use of procedural rules. The core principles for the rules — that they should reflect UNCAC commitments, including on sanctions for procurement abuse that are "effective, proportionate and dissuasive," — do not appear to be disputed.

14. The Commission may therefore consider that there may be consensual legislative development, but that the scope of any future text and the policy issues for deliberation may need further elaboration. Given the importance of cross-debarment in public procurement, the Commission may also take the view that a legislative text on the topic would enhance the law of international trade so far as public procurement is concerned.[17]

15. However, the Commission has also emphasized that 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

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[15] See "Procurement in World Bank Investment Project Finance Phase II: Developing the Proposed New Procurement Framework", para. 44, available at https://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/materials/procurement_in_world_bank_investment_project_finance_-_phase_ii_0.pdf.

[16] The Implementation Review Group (a Working Group of the UNCAC Conference of States Parties) is considering, among other things, proposals "to identify challenges and good practices and to consider technical assistance requirements in order to ensure effective implementation of the Convention", which the Group will address at its sixth meeting, to be held in Vienna (25-26 June 2015). See, further, http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/1-5June2015/V1501966e.pdf.

[17] A/68/17, paras. 303-304.

group.[18] In this regard, initial consultations indicate that development of an UNCITRAL standard would not duplicate existing activities in other relevant reform bodies but would in fact complement them.

16. It is therefore recommended that the Commission authorise the Secretariat to explore the possible development of a legislative text in this area. Part of the preparatory work would involve further consultations with appropriate stakeholders — notably including the World Bank and other multilateral development banks, the UNODC and States — to test the assumptions and conclusions set out above, and to avoid duplication of efforts. The institutions referred to have indicated that they would both welcome and participate in a project to develop international norms and standards in this field, notably in the form of a legislative text that can be flexibly implemented.

B. Public-private partnerships (PPPs)

(a) Background and activity since Commission session in 2014

17. At its forty-seventh session, the Commission considered a report of a Colloquium held in March 2014, which had concluded that the UNCITRAL texts on Privately-financed Infrastructure Projects were highly-regarded, but that they were considered under-utilised and in need of updating. The Colloquium consequently recommended that the Commission provide a mandate for the development of a Model Law and accompanying Guide to Enactment on PPPs (and set out the scope of the work envisaged).[19] At that session, the views of member States on the recommendations were divided: some expressed support for them, and others did not.

18. While recognising that PPPs were a topic of importance to member States (and particularly to developing countries) and the donor community,[20] after discussion, the Commission declined to provide the mandate sought, but reserved the possibility to consider the matter afresh if and when Working Group resources became available. Two key factors that the Commission took into account were that (a) while the scope of a project to develop a legislative text on PPPs had been delineated at the 2014 Colloquium, legislative development on PPPs would involve a significant and lengthy project, and (b) the existing UNCITRAL texts on Privately-Financed Infrastructure Projects could be used to harmonize and modernize laws in this field at the national level. In this regard, the Commission did

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[18] Ibid.

[19] A/CN.9/821, paras. 120-121.

[20] The Commission heard that the Colloquium had "reaffirmed the potential of PPPs to make enormous contributions to sustainable economic and social development, and in particular to fill a significant infrastructure funding gap identified by many empirical studies and commentators. It considered that the resultant need was most acute in developing countries, and that PPPs with small private operators (such as MSMEs) could also support local and regional development. Experience with substandard and failing PPPs, it was recognized, underscored the need for an effective legislative model for States to use to develop best practices and standards so as to allow efficient and effective PPPs." A/CN.9/807, para. 13(g).

not accept the conclusions of the Colloquium, which had also recommended that a Model Law on PPPs be developed.[21]

19. The Commission also authorised the Secretariat to engage in limited preparatory work (a) to advance preparations for legislative development in PPPs, internally and using informal consultations, so as to ensure that a Working Group could take up the subject if a mandate were given, and (b) to assist the Commission with a further review of whether or not to take up legislative development in this subject-area, which the Commission would discuss further at this forty-eighth session.[22]

20. Accordingly, the Secretariat has engaged in limited virtual- and telephone-based consultations with experts and representatives of States and donor/reform organizations — primarily, the World Bank and regional development banks, the United Nations Economic Commission for Europe and the OECD. This section of this Note sets out the conclusions of these consultations on the above two matters, which are presented together to reflect that they are closely-linked.

21. The Secretariat therefore asked the experts and other participants (a) to provide information from their countries or regions of activity that would be of assistance in reforming the PFIPs texts, and (b) to review the provisions of the PFIPs texts in the light of the comments at the Commission session in 2014.

22. The participants provided significant information about PPP systems in various regions — in particular, in Africa, geographical Europe and north and south America. The information indicates emerging convergence in policy issues, but some differences in some regions, notably as regards the extent to which PPPs primarily take the form of concessions (rather than what are sometimes termed public-payment PPPs). Concession-type PPPs are primarily remunerated through third party charges, whereas in public-payment PPPs, the remuneration is more certain and derived largely from the public sector, so that the commercial risk profile varies between these two types of PPP. Nonetheless, it was agreed that there are many similarities in the planning, preparation and procurement of both types of PPP, but that the institutional, contractual and legal regimes exhibit some differences in practice. Consequently, it was considered practicable to identify the core elements common to both types of PPP, so that a revised legislative text could address elements relevant for all types of PPP.

23. The additional requirements for concession-based PPPs (which differ more from modern systems for the public procurement of large infrastructure projects, and public-payment PPPs) could thereby also be given appropriate focus. It was agreed that this approach would reflect the approach of the existing PFIPs texts, and implement the notion of “core PPPs” discussed at the 2014 Colloquium.[23] However, experts also advise that there has been an increase in public-payment PPPs (which were less common than concession PPPs in the period during which the PFIPs texts were developed), and a new text would reflect that the budgetary implications of these PPPs require additional commentary on project selection and value for money comparators.

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[21] A/69/17, para. 255 (c).

[22] Ibid, para. 260.

[23] A/CN.9/821, para. 27.

24. In addition, there was a clear understanding that some parts of the existing PFIPs texts needed simplification, and that some existing guidance could now be reflected in legislative language, to reflect market developments. While institutional PPPs could (and, in the view of the experts, should) be included, other novel approaches — such as project alliancing — would be more difficult to address appropriately, and it is recommended that they not be included.

25. The participants also reviewed the entire PFIPs texts to identify text that needed to be consolidated, amended, re-drafted and/or deleted, and where additional text or provision would be required. The conclusions of the 2013 and 2014 Colloquiums were also taken into account in this exercise. Available from the Secretariat is a tabular presentation of the conclusions as regards each subsection of the Legislative Guide, and each Legislative Recommendation and Model Legislative Provision.[24] A brief summary of the conclusions follows:

26. As regards "Introduction and background information on PFIP": amend the drafting to reflect modern approaches to the concepts of fundamental public interest, value for money comparators, sustainability and other terminological issues and definitions, and distinguish PPPs in which the project partner is responsible for delivering full or limited public services, so as to reflect the scope of core PPPs and modern practice.

27. As regards "Background information on PFIP": simplify the text and eliminate unnecessary discussion, and explain the differences between the two main types of PPP (as noted above), update to provide appropriate recent experiences, and include appropriate cross-references to the UNCITRAL Model Law on Public Procurement.

28. As regards "Other relevant areas of law": minor simplification only.

29. As regards "General legislative and institutional framework", revisions to balance more effectively the public and private interests; to support capacity on the part of the public authorities; to address preparatory measures and project selection; to broaden the scope of necessary institutional mechanisms and governance aspects of the relevant institutions (including, for example, competition authorities as well as PPP Units and Committees, which are very commonly found in States using PPPs, and as the Colloquium noted, require additional provision in any new legislative text).[25]

30. As regards "Project risks and government support": a more articulate discussion of three economic aspects of projects to be set out, and discussions of particular risks and risk-sharing; expand on the links between risk allocation, provision of guarantees, value for money and overall economic advantages of the project, and recommend on transparency from the public side.

31. As regards "Construction and operation: legislative framework and project agreement": address contractual forms, limitations on freedom of contract and minimal contractual requirements (with a possible broader scope of the project agreement); a more in-depth discussion of subcontracting arrangements and

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[24] Copies of the tabular presentations, which run to some 50 pages, are available currently in English only. The tables will be translated at a future time, following the decision of the Commission.

[25] A/CN.9/821, paras. 35-40.

liabilities, and of re-negotiation, re-financing and modification of contracts during the term of the project (including regarding contract specifications); clarify that the project agreement may extend to a group of documents.[26] Additionally, more clarity on the scope of the concessionaire's activity, on the different concepts of ownership (and acquiring ownership) of the project site, on tariffs and fees, and guarantees to complement them and mitigate political risks (some of which may be negotiable, and others treated as minimum legal guarantees). As regards operation of the infrastructure, more guidance is required on standards and obligations of the project party, execution of the public authority's instructions, and appropriate time limits for concessions. Greater transparency in terms of making the main terms of the project documents publicly available is recommended.

32. As regards "Duration, extension and termination of the project agreement": address time limits for projects; investment issues and the materialisation of risks; revise to ensure better linkage between modifications and termination.

33. As regards "Settlement of Disputes": make the guidance more practical; introduce more articulate recommendations on the use of arbitration and when submission to dispute boards may be a mandatory initial step; introduce emergency arbitration; expand guidance on national as compared with international forums for dispute resolution, and on ensuring independence of the forum, on choice of law, and on disputes between shareholders, lending parties, operational consortium partners, regulators and operators and contractors and subcontractors, as well as between the public authority and the project partner.

34. The tabular presentation identifies both where new legislative recommendations or provisions can be made, and where the existing guidance should be updated or revised, and it can be seen that while experience in PPPs in practice varies, there is a coherent set of suggestions that can be aggregated into a revised Legislative Guide with legislative recommendations and model provisions, with all three elements consolidated and presented together.[27]

35. The experts, after conducting this exercise, consider that the extent of work required to achieve this goal is not extensive, and with limited Secretariat oversight, could be undertaken in approximately one year. A project to develop a full Model Law was considered to involve considerably more resources and, given the uncertainty expressed at the Colloquium as to whether it would be feasible,[28] the experts and participants consider that including model legislative provisions or legislative recommendations in the body of a revised Legislative Guide would provide an appropriate balance at this stage between a user-friendly text, on the one hand, and acknowledged resource constraints on the other. In addition, the experts and participants recognise that the need for this type of revised UNCITRAL text in the short-term is greater than for a Model Law and Guide to Enactment in a longer time frame.

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[26] The views differed on whether some of the existing text was unnecessary and could be deleted.

[27] There is no separate consideration of the procurement aspects of PPPs, as there is consensus that this aspect will be conformed to the relevant provisions of the UNCITRAL Model Law on Procurement, as agreed at the 2014 Colloquium, see A/CN.9/821, paras. 90-95.

[28] A/CN.9/821, para. 122.

(b) Recommendations

36. During the consultations, several member States (both developed and developing countries), members of the donor community, and some regional organisations advised that they would welcome and use a modern legislative text on PPPs. The Secretariat has received a formal statement of support from one developing country for legislative development in PPPs. However, there remains a reluctance from some States to commit resources to the development of such a text in a Working Group. Various reasons have been given, the most significant of which are: public-sector budgetary constraints, a lack of experience in the field that would enable meaningful participation, and pressure on available human resources within States to focus on national PPPs projects rather than on the development of international norms and standards. On the other hand, experts working in the field and donor organisations are willing to volunteer their services to support work on PPPs in UNCITRAL, and to develop a revised Legislative Guide as discussed above.

37. On the basis that legislative development to produce a modern legislative text on PPPs would be feasible, the Secretariat has analysed recent guidance from the Commission regarding whether a project to such end would be beneficial and, if so, the form that such a project might take.

38. The Commission has regularly emphasised the importance of legislative development through formal negotiations in a working group, as the transparency, multilingualism and inclusiveness that the formal negotiation process involves supports the universal applicability and acceptance of those texts.[29] The Commission has also concluded that a balance of the formal approach and legislative development through Secretariat studies, assistance of outside experts and colloquia ("informal working methods") should be assessed in the light of the nature of the topic concerned.[30]

39. In the light of the conclusions on the nature and extent of the work identified in subsection (a) above, and the likely commitment of member States to any project to develop a legislative text on PPPs, the Commission may wish to consider how any mandate to revise the PFIPs texts might be undertaken. For example, a mechanism that would allow issues to be widely discussed during the development process may be appropriate, to encourage broad participation and the support of regional organizations including the multilateral development banks where possible. The goal of such a mechanism would be to ensure the inclusion of experience from all regions and reduce the impact of some of the other concerns about informal working methods that have previously been expressed by the Commission.

40. One way of achieving an appropriate balance could be through the submission of draft revisions to the existing Legislative Guide to one or more colloquia, as the Commission has previously contemplated (A/CN.9/807, paras. 48-49). In this regard, the Commission may recall that UNCITRAL can organise colloquia using

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[29] A/68/17, para. 300, noting the issues set out in A/CN.9/774, paras. 15-17.

[30] The Commission has also expressed concerns about some aspects of informal working methods, including that there may be less than full transparency, decreased multilingualism and inclusiveness, and possible dominance by specialized groups and interests (A/68/17, para. 301). See, also, A/72/16, para. 43, as reported in A/CN.9/774, para. 36; see also A/CN.9/752, paras. 35 and 37-40), and A/CN.9/807, paras. 19 and 33.

conference time (which includes translation resources), to the extent that conference time is available within UNCITRAL's allocation. In addition, it would be anticipated that any draft text would be submitted to the Commission for its consideration and possible adoption.