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**United Nations Commission
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Discussion paper

I. Introduction

1. The purpose of the Colloquium is to produce a recommendation to the United Nations Commission on International Trade Law (UNCITRAL) on possible future work in the area of PPPs. This paper is provided to the Colloquium to assist it in its deliberations and is structured to follow the Provisional Programme for the Colloquium itself.

A. Background

2. According to the United Nations Economic Commission for Europe (UNECE) in 2008, “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.”¹

3. Evidence indicates that this trend continues, extending beyond the UNECE countries and well-established patterns in developed countries (such as Australia, Canada, France, the United Kingdom of Great Britain and Northern Ireland and the United States of America). Information recently provided to the Secretariat estimates that the value of PPPs may exceed US\$ 1 trillion in the next five years in

¹ UNECE Guidebook on Promoting Good Governance in PPPs, Avant Propos, available at www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf.



India alone; they are increasingly used in China and other countries in Asia and the Pacific, and Central and South America.²

4. In the light of this increasing use of PPPs as a method of infrastructure development, this Colloquium is held to consider possible future work on PPPs in UNCITRAL, and following a discussion before the Commission at its 45th session in 2012 on the subject.³ At that session, the Commission 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;⁴ and that UNCITRAL could benefit from the work in the same area being undertaken at the regional level, such as a proposal from the European Commission for a directive of the European Parliament and of the Council on the award of concession contracts.”⁵ UNCITRAL has included procurement and infrastructure development in its work programme for most of the last 22 years, and its texts are recognized as key tools in the effective regulation of infrastructure development and related topics.⁶

5. If the Colloquium concludes that UNCITRAL should engage in work on PPPs, it should consider the terms of a recommendation to the Commission on the need for and scope of the work to be undertaken. The manner in which such recommendations are presented and considered is outlined in section II of this paper.

B. Source materials

6. This paper draws on the information on public-private partnerships (PPPs), concessions and similar project types available at the World Bank, Public-Private

² See, for example, www.eria.org/projects/PPP.html, www.adb.org/publications/public-private-partnership-infrastructure-projects-case-studies-republic-korea; http://ppp.gov.ph/?page_id=107; www.adb.org/offices/pacific/strategy; www.iadb.org/en/projects/project-description-title,1303.html?id=co-t1139; www.iadb.org/biz/ppt/0604grahamb.ppt#444.

³ A Note by the Secretariat, “Procurement and infrastructure development: possible future work”, A/CN.9/755, sections 2 and 3, was presented to the Commission. Available at www.uncitral.org/uncitral/commission/sessions/45th.html.

⁴ See the outcome document of the Conference, entitled “The future we want” (General Assembly resolution 66/288, annex), paras. 46, 71, 217 and 280 (d).

⁵ A/67/17, Report of the United Nations Commission on International Trade Law, 45th session, para. 115, available at www.uncitral.org/uncitral/commission/sessions/45th.html.

⁶ Following work in its Working Group I from 2000 to 2012, UNCITRAL adopted the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (2012), the UNCITRAL Model Law on Public Procurement (2011) and the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003). It adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000, drafted by the Secretariat and reviewed directly by the Commission). Following work in its Working Group V from 1981 to 1994, UNCITRAL adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), the UNCITRAL Model Law on Procurement of Goods and Construction (1993) and the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987).

Infrastructure Advisory Facility, International Finance Corporation and The Norwegian Agency for Development Cooperation’s “PPP in Infrastructure Resource Center for Contracts, Laws and Regulation” (www.worldbank.org/ppp) (“World Bank”); the European Bank for Reconstruction and Development (EBRD’s) web pages on concessions (www.ebrd.com/pages/sector/legal/concessions.shtml) (“EBRD”); the website of the European PPP Expertise Centre (EPEC, a joint initiative of the European Invest Bank (“EIB”), the European Commission, European Union Member States and Candidate Countries (www.eib.org/epec/g2g/index.htm) (“EPEC”); the Organization for Economic Cooperation and Development (“OECD”) web pages on concessions (www.oecd-ilibrary.org/governance/concessions_clp-10-5kmhbhp8v9mw); the European Union web pages on concessions (http://ec.europa.eu/internal_market/publicprocurement/partnerships/concessions/index_en.htm), the UNECE pages on PPPs (notably, the Guidebook on Promoting Good Governance in Public-Private Partnerships available at www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf), and other information on particular questions as noted below. Citations of commentary by these organizations refer to information available at the sources set out in this paragraph.

7. This paper also draws on the following materials, available from the Secretariat in English only (and to be made available on the UNCITRAL website in due course): Legal Analysis on Public-Private Partnerships regarding Model PPP Rules, June 2012, by Seungwoo Son (Visiting Scholar at UNCITRAL, 26 July 2011-25 July 2012, the “Son analysis”); Report regarding Model PPP Laws to the Third Session of the Team of Specialists on Public-Private Partnerships of the UNECE, 18-19 April 2011, by Simmons & Simmons LLP, London, United Kingdom (the “Simmons and Simmons report”); and an Executive Summary of the PPP Handbook in progress and of its related evaluation Index, February 20th, 2012, edited by Vincent Piron (economic and financial matters) and Marc Fritel (institutional and legal matters) (the “Fritel Executive Summary”).

8. Finally, this paper draws on information provided by experts to the Secretariat, during consultations held since the summer of 2012.

C. Terminology

9. Other than when quoting from a publication or other source, this paper will refer to all development projects with private financing as “PPPs” (the question of definitions is addressed in section II A.3 below).

II. Items for discussion

A. Topics relevant to a consideration of possible future work on PPPs

10. The Colloquium may wish to consider the following topics:

Whether there is a technical need for an UNCITRAL text on PPPs; and

The scope of future work to conclude any such text.

B. Is there a technical need for an UNCITRAL text on PPPs?

1. Enabling private participation in infrastructure development and provision of public services

11. Traditionally, the most commonly-cited objective of enabling PPPs is to allow private participation in infrastructure development and the often associated provision of public services. This objective includes the consideration that demand for such investment exceeds the financial resources available to the public sector to finance it, a consideration that has been thrown into greater relief since what is generally termed the “global financial crisis” arose in autumn 2007.

12. Enabling the participation of the private sector in such development, according to the EBRD, poses a variety of questions: “The outright sale to third parties of public assets is not an option given the resulting lack of competition. [Governments’] preferred alternative may be granting concessions or contractual/licensing rights to private sector entities, while retaining other public rights and ownership over certain assets. The challenge [Governments] face is to develop a legal regime that will encourage private investment in these sectors. When developing such a legal regime, [Governments] need to create an environment that encourages equity investment from international companies with sector experience. [Governments’] also need to deal skilfully with the specific concerns of the financial institutions that provide debt financing.”

2. Concerns at the national level and in the donor community that unregulated PPPs may be and ineffective and offer suboptimal results; the relative priority of PPPs and other issues of importance to the donor community and recipient States

13. Some countries have general or sector-specific PPP laws, or there is legislative provision enabling PPPs in other laws. The Son analysis notes that specific PPP laws have been introduced in Belgium, Italy, Poland, Portugal, Republic of Korea, Brazil and Spain.⁷ The Secretariat is advised that some other States are in the process of legislative work on PPPs (including China). However, it is clear that many States have no relevant legislation of general applicability (including Australia, the United Kingdom, and the United States at the federal level, all regular

⁷ The Son analysis notes that Portugal enacted DL 96/2003 to mandate Central PPP Unit within MdF, Parpublica, with responsibility for conception of models for PPP, evaluation, definition and launching of tenders, risk allocation, and control of execution. In addition, a major purpose of a new DL 141/2006 is to reinforce PPP management, but it still falls short of need to create effective Central PPP Unit (citing PPP in Portugal, MOPTC, 7 May 2008, at page 10). The Republic of Korea enacted the Act on Private Investment on Social Infrastructure in 1994 to promote private investment in the construction and management of social infrastructure. A few amendments of the law have been made to provide flexible legal means, to strengthen the supervising system by the Congress and the participation of citizens, and to protect competition in the overall process. Brazil enacted a PPP act in December 2004 designed to encourage investments for crucially needed infrastructure projects (citing C.V. Filho and J.B.Lee, Brazil’s New Public-Private Partnership Law: One Step forward, Two Step Back, 22(5) Journal of International Arbitration 419426 (2005)).

users of PPPs).⁸ Figures vary as to the proportion of PPPs that are being undertaken without a PPP law, but the proportion has been cited to be as high as 90 per cent.

14. Concerns have been expressed that PPPs represent a new area for financial, legal and Government institutions, and are not adequately handled as a result; there is a lack of understanding by stakeholders; many projects are bedevilled with disputes, and concerns are raised by civil society representatives (including in South and South-East Asia, Central and South America).⁹ Results in PPP transactions are mixed, according to reports from India, Canada, France, and the United Kingdom, among others.¹⁰ These issues, together with concerns about the quality of advice given in connection with PPP projects, have led (among other things) to public scepticism that value for money is being obtained through PPP projects, and more generally whether they are successful (an issue addressed in paragraph section C.2 and C.4 below).

15. Concerns have also been raised about the impact of a lack of uniform rules on the use of PPPs as a tool for infrastructure development and the provision of public services. The lack of legal certainty may increase transaction costs as standard terms may need to be negotiated on a project-by-project basis, which, it has been reported, can further discourage the use of PPPs and lead to widely varying project terms, with negative impacts on results and capacity. In several countries, it was noted, PPPs are designed “on the spot”, without any domestic guidance, and sometimes taking inspiration from any suitable provisions in public procurement law. In others, the topic has been effectively set aside thanks to the absence of an adequate legal framework. Here, the experts suggested that public efficiency would be enhanced through standardizing administrative procedures, while leaving enough flexibility to adapt the project agreements to the specific needs of each project.

16. It was reported to the Secretariat that a text addressing the legislative framework for PPPs would be an important tool not only for developing countries but also for developed countries, in which how to regulate PPPs remains a topic of considerable debate, despite many existing PPP projects. Additionally, some countries have very limited experiences in PPP, and the need for information and clarification on the subject is stated to be high.¹¹ On a related note, the Simmons and Simmons report records that investors may shy away from States without an adequate legal framework for PPPs.¹²

3. Description and/or definition of PPPs: an umbrella concept, or a clearly defined type of project?

17. As UNCTAD has noted, “The term public-private partnerships (PPPs) has become increasingly popular among the donor community. However, this covers a

⁸ Son, citing David W. Gaffey, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States*, 39 *Pub. Cont. L. J.* 351, 352-53 (Winter, 2010), the Simmons and Simmons report, p. 2; and Henrik Andersen et al., *Public-Private Partnerships 13, Asia Link* (2010). Son explains that Australia has passed project specific laws, and that the United States has some ad hoc provisions covering certain limited aspects of PPPs.

⁹ See, for example, examples cited in Nicholas, C: *Devising Transparent and Efficient Concession Award Procedures*, *Uniform Law review/revue de Droit Uniforme*, NS- Vol XVII, 2012.

¹⁰ Citations **.

¹¹ Son, citing Henrik Andersen et al, *supra*.

¹² Simmons and Simmons, Section 5.

very broad range of approaches, and if the record of advanced countries is any indication, an equally wide array of outcomes.”¹³

18. The term PPPs is traditionally considered to include the construction of physical infrastructure, with accompanying private investment in service delivery, but is emerging as a way of developing non-tangible infrastructure (IT) and providing public services without infrastructure development. The project finance market has changed significantly in the last decade, and particularly after the onset of the global financial crisis with new ways in which private sector participation is arranged.¹⁴ There is thus no clear understanding of the types of projects that may fall within a definition of PPPs, a point that is considered further in the next section.

4. Existing texts and guidance on PPPs at the international level — do they need to be modernized and harmonized?

19. The main legal texts at the international and regional level addressing PPPs, as reported to the Secretariat, in chronological order, are:

20. The United Nations Industrial Development Organization (UNIDO’s) “Guidelines for Infrastructure Development through Build-Operate Transfer Projects” (BOTs) (1996):¹⁵ these guidelines consider financial and legal issues in the development of BOT projects, and provide a basic orientation needed to design effective BOT strategies, essential practical information on the structure and procedures of BOT arrangements and are intended to help reduce the time and costs involved in developing and contracting BOT projects.

21. UNCITRAL’s Legislative Guide on PFIP (and Consolidated Legislative Recommendations, 2000) and Model Legislative Provisions on PFIP (2003) (the “UNCITRAL PFIP Instruments”):¹⁶ 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. The Model Provisions, issued subsequently, translate the advice given in the Legislative Recommendations of the Legislative Guide into legislative language (51 provisions).

22. The OECD’s “Basic Elements of a Law on Concession Agreements” (2000) seeks to facilitate private sector investment in the infrastructure and natural resource of transition countries. The Basic Elements were produced by a group of experts

¹³ See footnote 56 of the Report of the Secretary-General of UNCTAD to UNCTAD XIII — Development-led globalization: Towards sustainable and inclusive development paths, available at http://unctadxiii.org/en/SessionDocument/tdxiii_report_en.pdf.

¹⁴ Simmons and Simmons report, Executive Summary.

¹⁵ Available at www.unido.org/resources/publications/imported-publications/guidelines-for-infrastructure-development-through-build-operate-transfer-bot-projects.html. The Guidelines contain chapters on the following subjects: introduction to the BOT concept; phases of a BOT project; economic framework for BOT schemes; the Government’s role in providing for successful BOT projects; transfer of technology and capability-building through BOT projects; procurement issues and selection of sponsors; financial and economic appraisal of BOT projects; risk identification and management; financial structuring of BOT projects; the contract package; the project agreement; the construction agreement; operation and maintenance contracts; transfer of ownership; and factors that determine success.

¹⁶ Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

convened by the OECD and the Istanbul Stock Exchange to develop a set of 18 key provisions for concession agreements, designed to enable project finance to become a more viable option for infrastructure financing in the Black Sea/South East Europe region.¹⁷

23. The European Bank for Reconstruction and Development (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 UNCITRAL Guide and Model 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 UNCITRAL Guide as a source. The OECD Basic Elements were also used."¹⁸ (The UNCITRAL PFIPs Instruments, the OECD's Basic Elements and the EBRD's Core Principles are referred to collectively in the remainder of this paper as the "legal texts".)

24. The European Union 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 European Union rules on PPPs, and there is a proposal for a new Directive on Concessions.¹⁹

25. In addition to these legal texts, there are many guidance and interpretative documents, collectively referred to in the remainder of this paper as the "guidance publications", on PPPs. They include the European Commission (EC's) "Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships",²⁰ which seeks to address lack of legal certainty in relation to the involvement of private partners in such projects which, the EC notes, may undermine their success. The EPEC's "Guide to Guidance" (see "Source materials", section I.B above) seeks to identify the best guidance currently available from PPP guidelines worldwide, to assist public officials in implementing PPP projects and facilitate their understanding of the key issues and procedures involved in the procurement of PPP arrangements. Its main purpose is not the legal frameworks for PPP, although it does include a short Annex on this subject.²¹ The World Bank's PPP in Infrastructure Resource Centre for Contracts, Laws and Regulation,²² was designed as a resource for Government officials, project managers and lawyers involved in PPP infrastructure projects to address contractual and legal issues related to

¹⁷ See, further, the Simmons and Simmons Report, which notes that the UNCITRAL Guide and Model provided a basis ("point of departure") for the Basic Elements, which are available at www.oecd.org/LongAbstract/0,3425,en_33816563_33816964_33959803_1_1_1_1,00.html.

¹⁸ Simmons and Simmons Report. The EBRD Core Principles are available at www.ebrd.com/pages/sector/legal/concessions/core_principles.shtml.

¹⁹ See the documents available at http://ec.europa.eu/internal_market/publicprocurement/partnerships/public-private/index_en.htm, including the text of the proposal, the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM (2004) 327 final, 30th April 2004; and the Resolution on Public-Private Partnerships and Community Law on Public Procurement and Concessions (2006/2043(INI)), 26 October 2006.

²⁰ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:091:0004:0009:EN:PDF>.

²¹ Son, *supra*.

²² Available at <http://ppp.worldbank.org/public-private-partnership>.

infrastructure legal reform and PPP projects, with reference materials drawn from reform initiatives around the world. The UNECE National PPP Readiness Assessment tool²³ was developed for the benefit of Government strategic and policy units, to assess their readiness for developing PPP capabilities and markets, and is part of the UNECE PPP Toolkit. These latter two sources are regularly updated; the EPEC Guide to Guidance was last issued in 2011, and these three items are the only post-financial crisis guidance publication (none of the legal texts has been updated since first issued).

26. An initial issue for consideration, therefore, is whether there is a body of sufficient consistent, coherent and up-to-date advice to Governments and other parties on the legal aspects of PPP projects. Clearly there is a substantial volume of advice. However, and as the Simmons and Simmons report notes, “In conducting our preparatory research for this report, a number of respondents expressed concern over the multiple PPP approaches and practices being developed and issued by different United Nations bodies, multilateral bodies and agencies such as EPEC, and [multilateral development banks].”²⁴

27. In this regard, it should be noted that the scope of the legal texts and guidance publications varies. First, the UNCITRAL PFIPs Instruments focus on infrastructure projects alone, and exclude natural resources projects or concessions, whereas the OECD Basic Elements includes both. Many issues recently emerging as concerns — such as the use of agricultural land for mining, and associated questions of food security — arise through concessions over natural resources.²⁵ Secondly, the legal texts, generally speaking, only address concessions or transactions involving the construction of physical infrastructure. Hence concessions for the provision of services alone, which have been reported to the Secretariat as an emerging form of PPP, are generally not covered.

28. Thirdly, it is not clear in some systems where the line between public procurement and PPPs is placed. In a BOT Project (the subject of the UNIDO Guidelines, and the main model used in the Private Finance Initiative in the United Kingdom), and according to the World Bank, the project company or operator generally obtains its revenues through a fee charged to the utility or Government rather than tariffs charged to consumers. This function may qualify BOTs as public procurement in some (but not all) systems, but others recognize BOTs as a form of PPP. A feature of concessions (often regarded as the key type of PPP),²⁶ on the other hand, is that most or all revenue is derived from tariffs charged to consumers. (Broadly speaking, such concessions are excluded from the European Union Procurement Directive 2004/18/EC.)²⁷ The definition of “acquisition” in article 2 of the UNCITRAL Model Law on Public Procurement excludes concessions, but

²³ See www.unece.org/fileadmin/DAM/ceci/documents/2011/ppp/eArticles4/20.2_UNECE_National_PPP_readiness_self-assessment_english.pdf.

²⁴ Simmons and Simmons report, at 3.5.3.

²⁵ See, further, Fairer Mining Concessions in Africa: How Can this be Achieved?, available at www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AEB%20VOL%203%20Issue%203%20avril%202012%20BIS_AEB%20VOL%203%20Issue%203%20avril%202012%20BIS.pdf, and Nicholas, *supra* and the sources cited therein.

²⁶ See, further, the Frilet Executive Summary at Section 5.

²⁷ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:en:NOT>.

arguably not BOTs.) BOTs were cited as a major project type leading to the UNCITRAL Legislative Guide (as noted in its Preface), and are not explicitly addressed in the Model Law on Public Procurement or accompanying Guide to Enactment. Although the World Trade Organization's Agreement on Government Procurement (GPA) does not contain express provision on PPPs, and there is a divergence of views among commentators whether any PPP models are covered by the text, some States have included some BOTs in their coverage.²⁸

29. Fourthly, the texts do not address the outright sale or divestment of assets to the private sector for the ongoing provision of services (e.g. as has happened in the telecommunications and mobile communications markets), nor do they address disposal of publicly-held assets in any detail.

30. Consequently, an initial question for the Colloquium is whether harmonization of the main elements of the legal texts and guidance publications into one clear and comprehensive text on those legal aspects would be of assistance to Governments.

31. In this context, the Colloquium may wish to consider defining the PPPs transactions that any future work to such end may address. However, it has been reported to the Secretariat that attempting a definition of PPPs may be counterproductive, both because of the difficulty of trying to reach consensus, and because of the risk of new models emerging that fall outside any definition set out.

32. At the broader policy level, it has also been suggested that there should be a coherent approach to all methods of infrastructure development and provision of public services, whether conducted using public procurement, PPPs or even divestment. The policy goal behind the suggestion is that 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 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. In this regard, the United Nations Convention against Corruption, in its article 9 ("Public procurement and management of public finances") and article 12 ("Private Sector"), requires each State Party to take appropriate measures to promote transparency and accountability in the management of public finances and to prevent corruption involving the private sector, and to provide appropriate civil, administrative or criminal penalties for failure to comply with such measures.²⁹ The Colloquium may therefore wish to consider whether consistent recommendations for all transactions implying the management of public finances and national assets are required. A legal text of this broader scope would also need to address the choice between differing funding methods for a particular infrastructure project, where there is a choice (e.g. by reference to the public sector comparator), an issue that the Colloquium may wish to explore given a wide divergence of methods reported to the Secretariat.

²⁸ Including, for example, Japan, Korea and the European Union. See, also, The new text of the Agreement on Government Procurement, an analysis and assessment, A. Reich, *Journal of International Economic Law* 12(4), 989-1022, available at www.unpcdc.org/media/132243/ox.pdf.

²⁹ See, further, www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2012-August-27-29/Presentations/UNODC_Article_12_WG_Prevention_August_2012_FINAL.pdf.

5. Extent of existing national legislation on PPPs — is there a de facto standard?

33. The extent of dedicated national legislation on PPPs as reported to the Secretariat (see section 1 above) indicates that there is no emerging dominant form of national law that operates as a de facto standard. However, elements of existing laws could be used together with the legal texts and guidance publications to promote a harmonized approach. The Colloquium may wish to seek further information on current developments at both the national and international level in this regard.

6. Is the lack of dedicated PPPs legislation, or the existence of scattered legal provisions, an obstacle to efficient and effective PPPs? Would a text addressing the legislative framework for PPPs help remove those obstacles?

34. The Colloquium may wish to consider whether the absence of an adequate legislative framework for PPPs presents obstacles to efficient and effective PPPs by reference to information regarding current practice and performance. In particular, it is often stated that obstacles arise not only from the lack of a dedicated law but also from the lack of adequate institutions and capacity in undertaking the transactions themselves.³⁰

7. Harmonizing the legal framework for public procurement and PPPs, e.g. as regards procedures to award the contracts for infrastructure projects and other phases of the project cycle

35. Recalling the uncertain demarcation between projects that may fall within a State's definition of public procurement and those that do not (see section 4 above), experts reported to UNCITRAL that there may be merit in considering allowing States simultaneously to modernize all types of infrastructure provision and public service delivery models.

36. There are several aspects of this general point that experts have raised. The first is the procedure for awarding contracts (termed "selection procedure" in the UNCITRAL Model Law on Public Procurement and accompanying Guide to Enactment). Many countries now have a detailed legislative framework for public procurement contracts, and recent developments in many agencies active in public procurement reform mean that there is a greater degree of consensus on these procedures at the international level, reflected in increasing similarity in many examples of public procurement law. However, the selection procedures for PPPs per se — other than some BOTs in some cases — are generally not covered in public procurement laws. Nonetheless, in many countries, PPPs are considered to be a by-product of public procurement and Governments may seek to contract for PPPs under public procurement law. This approach raises significant concerns given the nature of PPP projects, which involve long-term contracts whose terms often cannot be set in advance and need to be negotiated or, at least, discussed with the parties to perform the contract.

37. The Simmons and Simmons report records that the UNCITRAL Legislative Guide's note that there was no then-existing procurement method suitable for PPPs, and refers to the later European Union Directive (2004/18/EC), which contains the "competitive dialogue" and other procurement methods allowing flexibility and

³⁰ Simmons and Simmons report, 3.5.2 and 3.5.3.

interaction between the procuring entity and suppliers. The UNCITRAL Model Law on Public Procurement, which is also a more recent text, has equivalent methods. Where a State's public procurement law has not been updated to provide for selection procedures including interaction in the selection phase, the Government may seek to use less flexible procurement methods, which are less suitable for the complexity of PPPs. For this reason, it has been suggested that States may be interested in developing a PPP law in parallel with efforts to update their public procurement legislation, to ensure that there is harmonization between methods and to allow for selection method(s) appropriate for the different types of projects, however they may be financed.

38. In this regard, the Colloquium may wish to consider whether any future work on PPPs should examine a critical issue reported to the Secretariat: the need to ensure effective competition, even in a limited or concentrated market as PPPs may be. The Guide to Enactment to the UNCITRAL Model Law on Public Procurement addresses this question, noting that "In certain circumstances, such as the procurement of highly complex items ... competition is best assured by limiting the number of participants. This apparently paradoxical situation arises where the costs of participating in the procedure are high — unless the suppliers or contractors assess their chances of winning the ultimate contract as reasonable, they will be unwilling to participate at all", and refers to two procurement methods designed to accommodate the procurement of such highly complex items — restricted tendering and request for proposals with dialogue.³¹ It was also noted in this regard that where there is already an effective and up-to-date public procurement law, a PPP law could refer to its selection procedures (and, indeed, institutions to build upon the existing capacities where appropriate).

39. The scope of regulation of selection procedures in a PPPs law also provides an example to indicate that the appropriate level of regulation is an issue to be considered. For example, whereas a law may typically recommend the use of a committee to evaluate proposals, a question for further consideration may be whether the law should regulate the committee's operation and organizational statutes, member credentials and duties and other governance aspects, or whether these issues are better left to supporting guidance.

40. Many public procurement laws do not address procurement planning and the post-selection contract execution and management phase of the procurement cycle. Commentators have noted both the elevated governance and performance risks in these phases in public procurement and recommended that they be better provided for in the legislative framework as well as at the practical level, bearing in mind also the requirement in article 9(2) of the United Nations Convention against Corruption for effective and efficient systems of risk management and internal control.³² Reports also indicate, however, a lack of international consensus on the execution requirements and relevant contract clauses. Nonetheless, the legal texts and guidance publications on PPPs referred to above all emphasize the critical need for appropriate attention to these aspects of PPPs; addressing them in parallel for

³¹ See paragraph 19, on page 46, for example.

³² These phases, in the opinion of Transparency International and others, are "increasingly exposed to corruption" (Transparency International Handbook, "Curbing Corruption in Public Procurement", 2007, available at www.transparency.org/global_priorities/public_contracting/tools_public_contracting/curbing_corruption_in_pp_handbook).

public procurement and PPPs may be effective and efficient for States: convergence of procedures would also allow the governance requirements of the United Nations Convention against Corruption to be fulfilled in a harmonized fashion for all relevant aspects of infrastructure development and associated public service delivery.

41. The planning phase of the project cycle includes, in the PPPs context, risk allocation and Government support, setting Government policy objectives as appropriate (for example, whether preferences will be used to support particular sectors of the economy), and balancing public and private sector needs — fair treatment of users, pricing, disclosure, contractual terms, flexibility to meet changed conditions, project company and rights, step-in rights, change in project ownership and control. Most of these elements are not provided for in public procurement procedures.

42. PPP contracts involve not only long term projects, a feature that they may share with some public procurement contracts, but also the financing of significant investments. This financial execution is considered to raise the most significant differences between PPP and public procurement contracts, and was a topic of considerable debate during the UNCITRAL deliberations on the Legislative Guide. What could be recommended as minimum requirements in a PPP law may therefore require further consideration.

43. Consequently, provisions on PPPs would need to address a greater range of issues than is required for the public procurement legislative framework. Given this, and the difficulties in organizing different teams within the Government and stakeholders with possibly conflicting interests, experts have recommended a cautious approach to modernizing all aspects of public procurement and PPPs together.

C. The scope of any recommended work on PPPs

44. If the Colloquium is minded to recommend to the Commission that it mandates the development of a harmonized legal text on PPPs, the Colloquium may wish to consider the following main elements for possible inclusion which experts have raised with the Secretariat.

45. These main issues that experts have identified are generally covered, albeit with different levels of detail, in the EBRD Core Principles, the OECD Basic Elements and the UNCITRAL PFIPS Instruments. Of these three texts, the UNCITRAL PFIPS Instruments, taken together, are the most detailed, and can be taken as a checklist to identify whether a legal system is adequate for PPPs. The Colloquium may wish to recommend an assessment of the range of general policy and legislative areas in all the legal texts and guidance publications referred to above and together with national equivalents, to identify the core elements that are necessary to support the delivery of PPP projects and assess whether all are present in the UNCITRAL PFIPS Instruments. This is the approach of the EPEC “Guide to Guidance” and, as the Simmons and Simmons report notes, of the UNECE PPP Toolkit. It “includes a PPP Readiness Assessment Tool that is based upon a similar ‘check-list’ of general policy and legislative areas [footnote omitted]. The UNECE PPP Toolkit is a living document, that is progressively benchmarked against similar

publications to achieve a degree of harmonisation across the IDBs, EPEC and United Nations. In any future review of the UNCITRAL Guide, there is an opportunity to align and cross-benchmark these ‘enabling’ policy and legislative areas with the UNECE PPP Readiness Assessment Tool as part of this wider harmonisation initiative.”³³

1. Possible minimum provisions, or core elements, of a legal text on PPPs

46. The first key area, highlighted in the existing legal texts, is a stable and predictable legal and regulatory environment. There is a high degree of accord that it should include:

- (a) Clear constitutional, legislative and institutional framework (general and sector-specific as necessary);
- (b) Clear rules for private sector participation;
- (c) Fairness, transparency and accessibility of concession rules and procedures;
- (d) Accounting treatment, transparency in and access to books and records;
- (e) Consistency with the State’s legal system;
- (f) Interaction with other laws;
- (g) Scope of authority to award concessions and enter into contracts;
- (h) Administrative coordination between public authorities (e.g. for issuing licences and permits);
- (i) Authority to regulate infrastructure services;
- (j) Transparency throughout the project; and
- (k) Consequences of corrupt practices.

Many of these issues are already addressed in the PFIPs Instruments, and other legal texts, though not all address all issues, notably the consequences of corrupt practices.

47. The second key area, also recommended by all experts and addressed in the legal texts and guidance publications, is to ensure effective project planning, including the allocation of project risks and Government and donor support. The World Bank notes that there is a broad set of potential risks to be taken into account in PPPs. At the systemic level, it includes the risks arising where an adequate legal and regulatory framework is absent and from the ongoing nature of the Government responsibility for the provision of services, and that the development, procurement and ongoing costs in PPP projects are likely to be greater than for traditional public procurement processes (elements that may be included in the public sector comparator or other valuation methods used for choosing infrastructure development methods, as noted above). At the project level, the World Bank refers to the financing issues arising in a PPP project, and the need to identify contingencies to be addressed in the contract. Noting that it is impossible to identify and provide for such contingences, and that unforeseen issues and events will

³³ Simmons and Simmons report, section 3.5.3.

inevitably arise in such long-term contracts, renegotiations and project changes or even terminations should be planned for. Some elements can be addressed in the PPP project agreement, which involves the question of risk allocation. This question is addressed in the legal texts and guidance publications, together with the issue of Government support should the regulatory burden or economic circumstances change. The UNCITRAL Legislative Recommendation 12 States that no unnecessary statutory or regulatory limitations should be on the ability to agree on risk allocation for a PPP project, but it has been reported to the Secretariat that this provision has led to (a) too little flexibility in concessions laws so far as the private sector is concerned;³⁴ and the contrary view (b) that it provides inadequate guidance. The Colloquium may wish to recommend that a thorough review of practice in this area form part of any future work on PPPs.

48. The third key area, addressed in the preceding section, relates to the selection procedures. In essence, the core principles and procedures mirror those that are widely-accepted in the public procurement context, i.e.:

- (a) Fairness, transparency and competition as guiding principles;
- (b) Mandated procedures for: pre-selection, participation of consortia, methods and techniques (single-stage, two-stage, single-source, negotiations); comparison and evaluation of proposals;
- (c) Transparency requirements (terms of announcements, evaluation criteria, clarifications and modifications);
- (d) Confidentiality;
- (e) Contract award notices;
- (f) Record-keeping; and
- (g) Remedies and challenges (provisions also required by the United Nations Convention against Corruption).

49. The fourth key area is the project agreement. As regards the scope of issues on the project agreement and operation of the project, experts have recommended that the provisions should address the following elements:

- (a) The concession agreement terms and conditions;
- (b) Governing law, and jurisdiction;
- (c) Binding force, validity of the concession contract;
- (d) Party autonomy;
- (e) Organization of the concessionaire, ownership of assets, acquisition of rights in the project site, easements, financial arrangements, security interests, assignments and transfers of the contract or controlling interests in the concessionaire;
- (f) Operation of the infrastructure, compensation for changes in legislation and stabilization clauses (for international PPP);
- (g) Duration, extension and termination of the project contract;

³⁴ The Simmons and Simmons report, section 3.5.1.

(h) Changes to the project contract including the substitution of the concessionaire; and

(i) Rights of third parties such as step-in rights, rights of banks, investors, subcontractors, users.

50. Again, many of these issues are already addressed in the PFIPs Instruments, and other legal texts, but there is a light-touch approach. UNCITRAL Legislative Recommendation 40 indicates that the law might identify relevant provisions for the project agreement, but does not set out what they should be. Commentators have noted that the general emphasis in the legal texts is on the main contents of legislative provisions to enable the use of PPPs, rather than on the structure of PPP projects and the terms of the project agreements. This situation is to be contrasted with that in some reported domestic legislation, and it has been suggested to the Secretariat that there may be benefit in reconsidering the level of provision in any future legal text (including to promote certainty and administrative efficiency, and so to address the concerns about unregulated PPPs, as noted in section B.2 above). Some experts, including in the Simmons and Simmons report, advocate a need for an appropriate level of flexibility to negotiate contractual terms that are appropriate for the relevant project and to avoid excessive legal rigidity in the law.³⁵ Others indicate likely demands for guidance and perhaps model clauses from States and others with little experience in negotiating PPP projects, particularly where commercial demands for such items as stabilization clauses are robust, and given that incentives and performance requirements need to be clearly set out in the project agreement (World Bank). Focus should be on performance requirements that are output based and relatively easy to monitor. It is thus clear that any future work on PPP on this aspect would need to resolve divergent views on this topic, as well as the contents of any recommended or mandatory clauses; as the Simmons and Simmons report points out, there will be implications for the choice of law for the PPP at issue.³⁶ The Colloquium may wish to consider this issue in some detail, as it may have a significant impact on the feasibility of achieving consensus on a significant aspect of any future legal text.

2. Harmonization and consolidation of the legal texts and guidance publications

51. When setting the scope of any future work on a legal text, the question of harmonization and consolidation of the various elements of the UNCITRAL PFIPs Instruments and the other legal texts and guidance publications, raised in section B.4 above, will be relevant. At this more technical level, the Simmons and Simmons report identifies a series of items that are not covered in the UNCITRAL Model Provisions but are addressed in the Legislative Recommendations, including questions of general application such as permitting concessions for both new and existing infrastructure facilities; the jurisdiction of contracting authorities and the scope of awarded concessions; ensuring coordinated public sector approvals; ensuring appropriate separation of roles between regulatory bodies and service providers, and the independence of those regulatory bodies; requiring transparency measures and independent review in regulatory processes and decisions; and appropriate dispute resolution mechanisms. As regards the arrangements for

³⁵ Ibid., section 3.5.1.

³⁶ Ibid.

PPP projects, Simmons and Simmons note that monitoring and approval mechanisms for the infrastructure and major subcontractors; freedom of choice of law governing contractual relations and force majeure and remedies following default are among the issues that should be considered for inclusion in any future legal text. The Simmons and Simmons report additionally records that domestic preferences and compensating bid costs, discussed in the guidance, do not feature in either the Legislative Recommendations or the Model Legislative Provisions but are noted as relevant issues in the Legislative Guide; that the remedies provisions do not address relief, and that the question of sovereign immunity which is critical for enforcement of obligations and a key determinant of legal certainty should be addressed (these points were also underscored in expert consultations). The Simmons and Simmons report also suggests that questions of jurisdiction, risk allocation, choice of law, contents of the contract, termination, change in control, security interests, environmental protection and anti-corruption measures may benefit from being strengthened in any new text on PPPs.

52. The legal texts all refer to other areas of law that need to be taken into account (notably on procurement, secured transactions, environmental protection, anti-corruption and sanctions, arbitration and insolvency). The Colloquium may wish to recommend that the commentary on this topic in the UNCITRAL PFIPs Instruments be reviewed, to ensure that it is sufficiently up-to-date.

53. Experts also recommended that three further topics, ensuring the economic equilibrium of the venture to ensure successful, sustainable PPPs; equitable contract law issues; and how to evaluate proposals in PPPs where there is no price paid by the Government, should be considered for inclusion in any future work. The latter question will be relevant when considering whether a PPP offers or has offered value for money to the Government concerned, one of the issues by which a PPP may be determined to be successful (for another, see the section below).

3. Dispute resolution and unsolicited proposals

54. Two other areas of significant concern raised with the Secretariat during consultations are remedies and dispute resolution, both pre-contract and during the project execution; and the treatment of unsolicited proposals. While these topics are addressed in the PFIPs instruments, it has been suggested that more detailed provisions that also take account of experience in the years since those instruments were issued are required.

55. The question of dispute resolution was noted as an issue by the Commission in 2012.³⁷ In particular, it was noted that disputes in PPPs were sometimes

³⁷ See “Procurement and infrastructure development: possible future work”, Note by the Secretariat, A/CN.9/755, paras. 27-28 (available at www.uncitral.org/uncitral/commission/sessions/45th.html). The paper notes that, “the contents of any future text in this area could include ‘provision in agreements and regulations for regular information exchange between regulator and operator; ‘early warning’ systems as problems arise, possibly standing machinery (analogous to contract review boards, or other standing provision for the application of independent expertise) to tackle problems in their incipiency by assuring legitimate implementation of regulations by the regulator and good faith compliance by the operator’. Allied to these provisions, it was recommended that the dispute-settlement machinery (to include the selection of the members of the relevant body, and ensuring

addressed to the International Centre for Settlement of Investment Disputes (ICSID), but that UNCITRAL should develop a national system for dispute prevention and settlement, building on the dispute-settlement provisions in Chapter VI of the Legislative Guide, and considering the appropriate forum. The Commission noted that “oversight and domestic dispute settlement, it was emphasized that those topics should be considered together, consistent with the approach to them taken at the 2007 UNCITRAL congress entitled ‘Modern Law for Global Commerce’, that developing local capacity to handle disputes arising from public-private partnerships should be considered, that the development of a model law on those subjects could contribute significantly to the development of such capacity and that the topics should include dispute preventive mechanisms and, in that regard, should be aimed at developing regulations that were responsive to the needs of the private sector by providing an opportunity to investors to comment on the development of rules and regulations that were applicable to them.”³⁸

56. As regards unsolicited proposals, UNCITRAL Legislative Recommendation 30 provides that (as an exception to mandated selection procedures), “the contracting authority may be authorized to handle unsolicited proposals pursuant to specific procedures established by the law for handling unsolicited proposals, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced by the contracting authority,” and then continues with procedures for determining their admissibility (such as special non-competitive procedures for dealing with proposals claiming to involve new concepts or technologies). The guidance elaborates on the policy issues concerned; it has been reported to the Secretariat that both the policy approach and Recommendation should be reconsidered in the light of practice since the UNCITRAL PFIPS Instruments were issued.

57. The Commission noted that other issues not currently addressed in the UNCITRAL PFIPS Instruments but worthy of consideration for future work on PPPs included preventing a contractor from selling the subject of a concession to another entity without the consent of the Government.³⁹

4. What type(s) of PPPs should be addressed?

58. In the light of the discussion on the varying scope of the legal texts and guidance publications, the Colloquium may wish to make recommendations on the types of PPPs that could be addressed in any future work on PPPs. First, there may be issues arising in specific sectors that may merit particular treatment.⁴⁰ Secondly, there may be classes of such PPPs that would raise issues of such difficulty that their inclusion could delay the production of an agreed text on PPPs, and for this reason should be separated out for a separate project, if to be addressed by UNCITRAL at all. An example given that the Colloquium may wish to consider is the use of concessions for oil and gas development.

competence) and related administration should be and seen to be independent of politics and short-term Government policy.”

³⁸ A/67/17, Report of the United Nations Commission on International Trade Law, 45th session, para. 118, available at www.uncitral.org/uncitral/commission/sessions/45th.html.

³⁹ See A/67/17, *ibid.*, para. 119.

⁴⁰ See, for example, the documents for different sectors at World Bank.

5. Pursuit of socioeconomic policy goals through PPPs

59. A further issue raised with the Secretariat is the question of transparency in developmental policy goals for which private investment in infrastructure projects and public service provision is harnessed, and by which a PPP may be classed as “successful” or otherwise. Elements of this issue include how such goals should and may be articulated, how to address conflicting policy goals, and how such goals should be balanced against the commercial requirements of the private sector concessionaire and its investors and financiers. Some of the concerns raised regarding natural resource concessions regarding the environmental impact and impact on local and indigenous peoples highlight the delicacy involved in addressing these issues. In the UNCITRAL Model Law on Public Procurement, the pursuit of socioeconomic policies through procurement is subject to rigorous transparency mechanisms, and a requirement that such policies be set out in law or regulation.⁴¹ The Colloquium may wish to recommend that any future work should consider this issue.

60. More generally, States may wish to encourage and facilitate private sector investment (much of which will come from overseas) to enhance the potential for economic and social development, and its sustainability. The Simmons and Simmons report notes that States with a demonstrably effective legal framework to support PPPs “will be better placed to compete for such capital than a country which is not”.⁴² The Colloquium may wish to consider the extent to which the investment climate for PPPs should be addressed in connection with the development of any future legal text.

6. Options for any future text on PPPs

61. UNCITRAL’s mandate is based on the notion of removing obstacles to international trade by harmonizing laws relating to the conduct of business activities in the context of international trade. This mandate is implemented in a flexible and functional way. It issues a range of types of legislative texts including conventions, model laws, legislative guides and model provisions. A convention establishes binding legal obligations; a model law recommends a legal text for domestic enactment (with recent examples being accompanied by a guide to their enactment, to assist in their implementation and use); legislative guides reflect principles or legislative recommendations in circumstances where there may not be consensus or a single approach or model rule; and model provisions include elements to be incorporated into future conventions or other legal texts.⁴³

62. It has been reported to the Secretariat that the UNCITRAL PFIPs Instruments are underused and under recognized, and their good policy advice remains inadequately understood. One reason advanced for this situation is that it arises because Governments look for a comprehensive set of model legislative provisions, rather than for policy guidance and explanations. In addition, it is often reported to

⁴¹ See articles 8-11 of the Model Law, and commentary on socioeconomic policies in the Guide to Enactment.

⁴² Simmons and Simmons, Section 5.

⁴³ For a more detailed discussion of UNCITRAL’s texts and working methods, see “A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law”, available at www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf.

UNCITRAL that capacity-building is enhanced by a clear legislative framework, contained in as few sources as possible. These considerations indicate that a Model Law would be a desirable text on PPPs.

63. UNCITRAL's text on public procurement — the Model Law on Public Procurement — is complemented by one of UNCITRAL's more extensive Guides to Enactment, which was considered by the Commission and adopted in 2012.⁴⁴ It thus provides both model legislative provisions, and a detailed explanation of the policy choices made; in the few instances of options in the text, an explanation for choosing among them is provided. The existing UNCITRAL PFIPs Instruments comprise both a Legislative Guide and Model Legislative Provisions; they are thus designed to provide a set of possible legislative solutions to certain issues, with some variants depending on policy considerations, but not always a single set of model solutions for those issues. The texts discuss the advantages and disadvantages of different policy choices, assist the reader in evaluating different approaches in the particular national context, and so provide a standard against which Governments and legislative bodies can review the adequacy of existing legislative framework, but they do not set out single set of model legislative provisions addressing all legal aspects of PPPs projects as a Model Law would do (and even were all elements consolidated, many policy options would remain).

64. On the other hand, a considerable difficulty in crafting a model law is that there will be substantial differences among the legal systems in States that may consider basing their laws on an international model and there may not be consensus on some of the policy issues. In the PPPs context, any model will need to take account of the other relevant areas of law (as noted above, these include public procurement, secured transactions, environmental protection, anti-corruption and sanctions, legal and alternative dispute resolution and insolvency). Many of these issues are addressed by other UNCITRAL texts, but clearly deliberating on and agreeing a model law would take longer time than — for example — updating and consolidating the UNCITRAL PFIPs instruments; particularly if such a Model Law were to be accompanied by a detailed up-to-date Guide to Enactment.

7. Coordination and cooperation with other agencies engaged in PPP reform and support

65. In order to ensure the appropriate levels of coordination and cooperation, to ensure mutual support, and to avoid any duplication of effort, the Colloquium may wish to hear about current activities of agencies involved in PPP reform and support, including the multilateral development banks and the UNECE (which has opened an International PPP Centre of Excellence in the Philippines). Similarly, it

⁴⁴ The Guide to Enactment explains “both the objectives of the Model Law (as set out in its Preamble) and how the provisions in the Model Law are designed to achieve those objectives. The Guide is thus intended to enhance the effectiveness of the Model Law as tool for modernizing and reforming procurement systems, particularly where there is limited familiarity with the type of procurement procedures the Model Law contains.” The Guide to Enactment also notes that “the Model Law is a framework law in that it provides only essential principles and procedures, this Guide discusses the need for regulations, rules and additional guidance to support legislation based on the Model Law, identifies the main issues that should be addressed therein, and discusses the legal and other infrastructure that will be needed to support the effective implementation of the text.”

may wish to hear the experience of States in PPP legislative and capacity-building experience.

8. Further information on UNCITRAL procedures (Secretariat information)

66. At the Colloquium, the UNCITRAL Secretariat will provide information, as required, on the following items that may assist the Colloquium in making its recommendations:

- (a) Working methods and the likely time frame for any recommended work on PPPs;
 - (b) Preparation of a report for the Commission, with recommendations for any future work on PPPs;
 - (c) Priorities among UNCITRAL activities;
 - (d) If a mandate for such work is given, preparation for a Working Group using expert consultations;
 - (e) Ensuring broad representation from all regions and all parties to PPP transactions; and
 - (f) Time necessary for preparatory work.
-