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Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Note by the Secretariat

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I. Introduction

1. UNCITRAL developed its texts on privately financed infrastructure projects in two stages. The first stage started in 1997 and finished in 2001 with the publication of the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*¹ (hereafter the “*PFIP Legislative Guide*”). The second stage, which followed immediately, was completed in 2003 with the Commission adopting the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects*.² (hereafter the “*PFIP Model Provisions*”).

2. When adopting the model legislative provisions, at its thirty-sixth session (Vienna, 30 June–11 July 2003), the Commission asked the Secretariat “in due course” and subject to availability of resources to consolidate both texts “into one single publication and, in doing so, to retain the legislative recommendations contained in the *PFIP Legislative Guide* as a basis of the development of the *PFIP Model Provisions*.”³

3. In 2003, the Commission also started working on an update of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Commission completed that work with the adoption of the Guide to Enactment of the Revised Model Law in 2012. The revised Model Law includes a new procurement method for the procurement of complex items and services (“Request for Proposals with Dialogue”), which is inspired by (but not identical with) the selection provisions in the *PFIP Legislative Guide*.

4. At its twenty-first session (New York, 16–20 April 2012), Working Group I (Procurement) agreed that work “on harmonizing the provisions governing the procurement-related aspects of the UNCITRAL instruments on privately financed infrastructure projects (PFIPs) with the Model Law was necessary.”⁴ The Working Group further suggested that UNCITRAL might:

(a) Consolidate the UNCITRAL PFIPs instruments;

(b) Identify other topics that need to be addressed in those instruments (such as natural resource concessions, which were sometimes granted as reimbursement or compensation for private infrastructure development, oversight, promoting domestic dispute resolution measures rather than using international dispute resolution bodies as the first port of call, and defining the public interest for the purposes of such transactions);

(c) Broaden the scope of the instruments by covering forms of public-private partnerships not currently covered;

(d) Prepare a model law in that area (noting that the *PFIP Legislative Guide* contained discussions on a number of important issues that were not reflected in the recommendations of that Guide or in any of the *PFIP model legislative provision*).

5. The Commission considered these proposals at its forty-fifth session (New York, 25 June–6 July 2012), but did not endorse them, requesting instead the Secretariat to convene a colloquium to discuss the issues further.⁵ After considering the outcome of the 2013 colloquium, at its forty-sixth session (Vienna, 8–26 July 2013) the Commission took the view that “further preparatory work on the topic would be

¹ United Nations publication, Sales No. E.01.V.4.

² *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, paras. 12–171 (see *Yearbook of the United Nations Commission on International Trade Law 2002*, part one). The *PFIP Model Provisions* appeared as United Nations publication, Sales No. E.01.V.4 (both publications also available at http://www.uncitral.org/uncitral/en/uncitral_texts.html).

³ *Ibid.*, para. 171.

⁴ *A/CN.9/745*, para. 39.

⁵ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 120 (see *Yearbook of the United Nations Commission on International Trade Law 2012*, part one).

required so as to set a precise scope for any mandate to be given for development in a working group".⁶

6. The Secretariat continued to report annually to the Commission on the progress of its consultations with various stakeholders. At its forty-eighth and forty-ninth sessions in 2015 and 2016, recognizing the key importance of PPPs to infrastructure and development, the Commission decided that the Secretariat should consider updating where necessary all or parts of the *Legislative Guide*, and involve experts in the process.⁷ At its fiftieth session in 2017, the Commission confirmed that the Secretariat (with the assistance of experts) should continue to update and consolidate the *PFIP Legislative Guide*, the accompanying Legislative Recommendations (2000) and the PFIP Model Legislative Provisions (2003),⁸ and should report further to the Commission at its fifty-first session in 2018.⁹ The Secretariat has since organized and convened the Third International Colloquium on Public-Private Partnerships (Vienna, 23–24 October 2017).¹⁰

7. Section II below summarizes the main conclusions arrived at during the last colloquium, and in the course of the consultations held by the Secretariat in the last five years. Section III of this Note sets out, for the Commission's consideration, the proposals of the Secretariat on both the scope and nature of the proposed amendments to the *PFIP Legislative Guide*, as well as the process for implementing them.

II. Outcome of consultations conducted by the Secretariat

8. In order to assess the likely extent of necessary updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the Secretariat has held consultations with experts in policy, law reform and practice in PPPs on the provisions of the *PFIP Legislative Guide* and the *PFIP Model Provisions*.¹¹ The experts also took note of the conclusions from two colloquiums considering the PFIPs texts held in May 2013 and March 2014 (both of which had recommended revisions to the PFIPs texts),¹² and the Commission's consideration thereof.¹³

9. The consultations starting in September 2016 were conducted through written exchanges, virtual meetings and two in-person meetings, one held in Washington, D.C., on 5–7 December 2016 (contemporaneously with the Global Forum on Law, Justice and Development, which considered various aspects of PPPs),¹⁴ and one held in Vienna on 6–7 March 2017.

10. The main conclusion of the experts is that most of the recommendations of the PFIPs texts reflect good policy and practices, and remain relevant. However, limited revisions to update the PFIPs texts are considered necessary, in order to take into account developments in practice since the existing Legislative Guide was issued

⁶ Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 327–331.

⁷ *A/70/17*, para. 362; *A/71/17*, paras. 359, 360 and 362.

⁸ The UNCITRAL Legislative Guide, with Legislative Recommendations, and Model Legislative Provisions are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

⁹ *A/72/17*, para. 448.

¹⁰ The documents presented at the colloquium and a summary report of the discussions are available in the English language in the colloquium website (<http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2017.html>).

¹¹ The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

¹² Report of the UNCITRAL colloquium on PPPs (Vienna, 2–3 May 2013), *A/CN.9/779*, paras. 73–85, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html; and Possible future work in Public-Private Partnerships (PPPs) Report of the UNCITRAL colloquium on PPPs, *A/CN.9/821*, available at <http://www.uncitral.org/uncitral/commission/sessions/47th.html>.

¹³ See *A/68/17*, paras. 329–331; *A/69/17*, paras. 255–260.

¹⁴ See <http://www.globalforumljd.org/events/2016/law-justice-and-development-2016-law-climate-change-and-development>.

in 2000. First, the term “public-private partnerships” has become the term generally used to describe the arrangements considered in the PFIPs texts, and should be used to replace “privately-financed infrastructure projects”. In addition, referring to PPPs would avoid confusion with the “Private Financing Initiative” in the United Kingdom of Great Britain and Northern Ireland and also allow the importance of service delivery through PPPs to be placed on a par with the infrastructure development that precedes service delivery.

11. Second, objectives and requirements of the United Nations Convention against Corruption¹⁵ should be fully reflected in the PFIPs texts, given the extent of ratification of that text.¹⁶ The requirements, contained in articles 9(1) and 9(2) on public procurement and public financial management respectively, are that systems should be based on principles of transparency, competition and objectivity in decision-taking. It is recommended that the PFIPs texts should be expanded as regards good governance throughout the life cycle of PPPs, and recent developments should be considered, for example those encouraging greater transparency in PPPs through open contracting and open data as well as transparency in procurement procedures.

12. The experts also agreed that an earlier instruction from the Commission to the Secretariat to consolidate the PFIPs texts should be implemented as part of the updating process. The PFIPs texts, as and when updated, should therefore present commentary, legislative guidance, legislative recommendations and model legislative provisions, as appropriate, on each aspect of PPPs covered. Legislative recommendations should form the central scoping provisions (and could be integrated in laws governing PPPs at the national level), but commentary on issues of implementation and use would be necessary to ensure that the legal framework functions as intended, and so should be included (reflecting the approach of the existing PFIPs texts). Thus, updated PFIPs texts would take the form of a single Legislative Guide containing all guidance, recommendations and model provisions.

13. The above considerations have been essentially confirmed at the Third International Colloquium on Public-Private Partnerships, held in Vienna on 23–24 October 2017.¹⁷

III. Proposed updates to the UNCITRAL Legislative Guide

14. In light of the considerations and preliminary conclusions set out in paras. 8–13, and after an assessment of the comments received and materials compiled over the years, the Secretariat invites the Commission to consider amending the *PFIP Legislative Guide* in the manner proposed below.

(a) Consolidating the Legislative Recommendations and the Model Provisions

15. The Secretariat proposes to consolidate the *PFIP Model Provisions* and the Legislative Recommendations contained in the *PFIP Legislative Guide*. In doing so, the Secretariat invites the Commission to revisit the decision originally made in 2003 and to retain only the *PFIP Model Provisions*. The Secretariat believes that 15 years after the adoption of the *PFIP Model Provisions*, the practical value of the Legislative Recommendations as *travaux préparatoires* is relatively limited, and the existence of two sets of guiding materials drafted in similar, but not identical language, appears confusing. Alternatively, the Commission may wish to retain those 13 Legislative Recommendations that appear in part one of the publication containing the *PFIP Model Provisions*, but for which no corresponding model legislative provision was drafted. However, the Secretariat has doubts as to the usefulness of retaining those legislative recommendations, considering their level of generality and the fact that

¹⁵ Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

¹⁶ See https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf.

¹⁷ See <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2017.html>.

their content is already stated either in the notes in the *PFIP Legislative Guide* or in footnotes to the *PFIP Model Provisions*.

16. With a view to facilitating the consideration of this matter by the Commission, the annex to this Note contains a comparative table of existing Legislative Recommendations and Model Legislative Provisions, which summarizes the deliberations of the Working Group, at its fourth session (Vienna, 24–28 September 2001), in respect of each one of them.

(b) Title and terminology

17. The Secretariat proposes to change the title of the *PFIP Legislative Guide* to “*UNCITRAL Legislative Guide on Public-Private Partnerships*” and to substitute the term *Public-Private Partnerships* (or “PPPs”) for *Privately Financed Infrastructure Projects* (or PFIP) throughout the text.

18. At the same time, the description of the scope and subject matter of the Guide, in particular — but not only — in the Introduction, should be amended to reflect the broader range of projects that are structured as PPPs. In particular, this means making it clearer that the Guide covers not only transactions that involve the construction and operation of infrastructure facilities used by the project company to provide a service directly to the public under a concession issued by the Government, but also the construction, refurbishment, or expansion of facilities which the private partner maintains and operates, but which the contracting authority or other entity uses for one of its core activities. The experts have felt that the Guide, as currently drafted, does not seem to cover or pay sufficient attention to those cases of so-called “non-concession PPPs”.

19. Following the changes mentioned in the preceding paragraph, a few terms currently used in the Guide, in particular the terms “concession” and “concessionaire”, will no longer adequately reflect the revised coverage of the Guide. Except where the context requires their use in a narrow meaning, the Secretariat proposes to replace them with the more general terms “PPP project” and “Private Partner”, respectively.

(c) Reflecting the underlying principles of the United Nations Convention against Corruption

20. The *PFIP Legislative Guide* preceded the United Nations Convention against Corruption and did not reflect the latter’s underlying principles, to which a short mention is made in chapter VII (“Other relevant areas of the law”) of the Guide. Given the importance of the Convention, and the extent of its ratification,¹⁸ the Secretariat proposes to amend and expand the discussion of “General guiding principles for a favourable constitutional and legislative framework” in chapter I (“General legislative and institutional framework”) of the Guide. In particular, the revised text should elaborate on the requirements contained in articles 9(1) and 9(2) of the Convention to the effect that public procurement and public financial management systems be based on principles of transparency, competition and objectivity in decision-taking.

(d) Expanding the advice on project preparation

21. The Secretariat proposes to expand chapter II (“Project risks and government support”) by adding a discussion on the need for a thorough assessment of a project’s viability as a PPP, including the tests used to verify its economy and efficiency (so-called “value-for-money” analysis). The Secretariat also proposes to expand Section D (“Administrative coordination”) of chapter I (“General legislative and institutional framework”) and integrate it into the revised chapter II, which could be renamed “Project planning and preparation”). In doing so, the Secretariat will be mindful of the view expressed by the Commission, when considering future work in

¹⁸ See https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf.

the area of public procurement at its forty-fifth session (New York, 25 June–6 July 2012), that procurement planning raised many questions of public law (e.g. the budget law and regulations of a given State) that are outside the purview of UNCITRAL.¹⁹

(e) Aligning Chapter III (“Selection of the Concessionaire”) with the 2012 UNCITRAL Model Law on Public Procurement

22. As indicated above, the *PFIP Legislative Guide* focused on infrastructure projects that included the construction or expansion of facilities that the concessionaire would subsequently operate, but either for use by the public, or to support the provision of goods or services to the public. The paradigm type of project covered by the *PFIP Legislative Guide* was intended to ensure cost recovery primarily from the revenue generated by the facility. Direct payment by the Government was envisaged only as a supplement to or (on exceptional situations) as a substitute for payments by the users or customers of the facility. The prevailing view within the Commission at the time was that selection of the concessionaire for such projects was not technically speaking “public procurement”, as the resulting goods or services would not be paid by the Government, but a type of administrative decision for project development to which procurement law did not apply. Consequently, the *PFIP Legislative Guide* could not simply refer the reader to the procurement methods provided in the then UNCITRAL Model Law on Procurement of Goods, Construction and Services. Since those procurement methods were found to be in many respects inadequate for the selection of a concessionaire, there was a need to devise a specific selection procedure for the *PFIP Legislative Guide*.

23. Accordingly, the *PFIP Legislative Guide* did not cover other forms of PPP which involved payments by the Government (such as deferred payment for facilities built and managed by the private sector but occupied by public bodies), even if they were at the time known to exist. The Working Group and the Commission assumed that government procurement and general government contract law would adequately cover those PPPs.

24. Unlike the 1994 model law, the more recent UNCITRAL Model Law on Public Procurement offers a wider range of procurement methods, including, in particular one method provided in its article 49 (“request for proposals with dialogue”) that was developed on the basis of the selection procedures recommended in chapter III (“Selection of the concessionaire”) of the *PFIP Legislative Guide*.

25. Aligning the two texts requires a number of purely formal adjustments, such as incorporating as many cross references to the UNCITRAL Model Law on Public Procurement and its Guide to Enactment as possible, or eliminating from the *PFIP Legislative Guide* any unnecessary duplication of material contained in the procurement texts. More importantly, however, aligning the two texts requires a number of substantive decisions, which the Commission will have to make.

26. The first question is whether, as regards the types of PPPs originally covered by the *PFIP Legislative Guide* (i.e. mainly “concession-type PPPs”), the recommended selection method is still generally adequate. Alternatively, if the Commission now finds that method to be inadequate, the Commission should decide whether to simply replace it with a reference to the methods provided in the UNCITRAL Model Law on Public Procurement (in particular the request for proposals with dialogue), or whether to devise an entirely new method.

27. Similarly, as regards the types of PPPs not originally covered (i.e. “non-concession PPPs”), for which the method in chapter III of the *PFIP Legislative Guide* was not conceived, the Commission should consider a number of options. The Commission could, for example, (a) adapt the method of chapter III; (b) adapt the method in article 49 of the UNCITRAL Model Law on Public

¹⁹ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 109 (see *Yearbook of the United Nations Commission on International Trade Law 2012*, part one).

Procurement; or (c) recommend the use of that method (or any other method of the Model Law) as it currently exists.

28. On the basis of its preliminary assessment, the Secretariat submits that, as regards the types of PPPs referred to in paragraph 26 above, the method of chapter III of the *PFIP Legislative Guide* is still valid, subject to some simplification to avoid unnecessary duplication of the UNCITRAL Model Law on Public Procurement. As regards the types of PPPs referred to in paragraph 27 above, it appears to the Secretariat that, by default, the method in article 49 of the UNCITRAL Model Law on Public Procurement (“request for proposals with dialogue”) seems to be generally adequate, however some flexibility could be given to the contracting authority to choose another method provided in the Model Law.

29. Lastly, the Secretariat proposes to amend Section E (“Unsolicited proposals”) of chapter III to emphasize the exceptional nature of the procedure set forth therein and the need for ensuring transparency and competition in the award process.

IV. Conclusions and next steps

30. The addenda to this note will contain revised drafts of the introduction and of chapters I, II and III of the *PFIP Legislative Guide* reflecting the changes proposed in paragraphs 15–29 above, for review and consideration by the Commission.

31. The revised texts in those addenda will set out the portions of the *PFIP Legislative Guide* that the Secretariat proposes to revise substantially, and indicate which portions it proposes to retain essentially as they are currently drafted, subject to amendments intended to (a) adjust the text to the new terminology indicated in paragraphs 17–19 above; and (b) eliminate or update, as appropriate, explanatory material that is dated or that otherwise unnecessarily link the advice contained in the *PFIP Legislative Guide* to the historical context in which it was originally formulated.

32. As regards the remaining chapters, the Secretariat believes that most comments received over the years are concerned with options for risk allocation or contract remedies, or the choice of dispute settlement methods that do not affect the policies expressed in the *PFIP Model Provisions*. The same holds true for most of the comments made at the third Colloquium.²⁰ In some instances, it could indeed be useful to amend the advice contained in the Guide to accommodate some of those additional options. Generally, however, the Secretariat would not advocate any amendments beyond what is strictly necessary. The reason for this conservative approach is that the *PFIP Legislative Guide* is addressed to legislators and not to contract drafters. The advice it contains on contractual matters is mostly of an enabling nature and aims at reminding the legislator of the need for preserving the flexibility needed by the contracting authority to find appropriate contract solutions. To that end, the *PFIP Legislative Guide* should be adequately informative, but needs not to offer an exhaustive discussion of contract practice.

33. The Secretariat would request the Commission to consider whether it generally agrees with the course proposed for updating the *PFIP Legislative Guide*. The Secretariat would further request the Commission to review, revise at it sees fit, and, if it so wishes, approve in principle the revised chapters contained in the addenda to this note. Lastly, the Secretariat would seek a mandate from the Commission to proceed with the necessary terminological and technical adjustments to the remainder of the *Guide*, with the assistance of outside experts, as appropriate, with a view to publishing the consolidated revised version later this year.

²⁰ The report of the colloquium is available (in English only) at <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2017.html>.

Annex

Legislative Recommendations not transformed into Model Legislative Provisions

Legislative Recommendations of Chapter I, “General legislative institutional framework”	
<p>Recommendation 2 (identification of competent public authorities)</p> <p>Recommendation 3 (eligible types of projects)</p> <p>Recommendation 4 (eligible infrastructure sectors)</p> <p>Recommendation 5 (geographical coverage of concessions; exclusivity)</p>	<p>The Working Group considered recommendations 2–5, on the scope of authority to award concessions, as a unitary set. As a general remark, it was recalled that all those recommendations served the purpose of recommending legislative clarity both as to the identification of the authorities empowered to award concession agreements and as to the scope of such powers. Accordingly, support was expressed for the view that all the aspects addressed in recommendations 2–5 might be reflected and dealt with in a single model legislative provision. (A/CN.9/505, para. 93–96).</p>
<p>Recommendation 6 (coordination of issuance of licences and permits)</p>	<p>The Working Group felt that the issue did not necessarily lend itself to be dealt with in legislation. The Working Group noted that many countries considered such coordination as a matter of administrative practice (see A/CN.9/505, para. 98). Model Provision 3 mentions this matter in footnote 4.</p>
<p>Recommendation 7 (separation between regulatory powers and provision of infrastructure services)</p> <p>Recommendation 8 (independence and autonomy of regulatory bodies)</p> <p>Recommendation 9 (transparency of regulatory processes and decisions)</p> <p>Recommendation 10 (impartial review of regulatory decisions)</p> <p>Recommendation 11 (settlement of disputes among public service providers)</p>	<p>The general view was that the recommendations dealing with the authority to regulate infrastructure, the nature and functions of regulatory bodies were not suitable to be translated into legislative language. Therefore, they should remain outside the scope of the model legislative provisions (see A/CN.9/505, para. 102).</p>
Legislative Recommendations of Chapter II, “Project risks and government support”	
<p>Recommendation 12 (contracting authority’s freedom to allocate project risks as required)</p>	<p>The Working Group agreed that the recommendation had an educational rather than a prescriptive character and therefore was not suitable for a model legislative provision (see A/CN.9/505, para. 104).</p>

Government support (see chap. II, “Project risks and government support”, paras. 30–60 of the Guide)	
<p>Recommendation 13 (identification of public authorities authorized to provide financial or economic support to PFI projects)</p>	<p>The Working Group noted the complexity of the issues and the various policy options mentioned in the Guide. The Working Group agreed tentatively to request a provision within square brackets (see A/CN.9/505, paras. 106–108). However, the Working Group eventually retained the substance of the recommendation as a footnote to model provision 3 (see A/CN.9/521, paras. 37–38).</p>
Construction works (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 69–79 of the Guide)	
<p>Recommendation 52 (review of construction plans and approval of construction works)</p> <p>Recommendation 54 (reporting and monitoring)</p> <p>Recommendation 56 (Approval of major subcontracts)</p> <p>Recommendation 57 (choice of law I contracts entered into by the concessionaire)</p> <p>Recommendation 58 (d)–(e) (force majeure and remedies following default)</p>	<p>The Working Group was of the view that these recommendations dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable. The topic is however included in the list of matters to be addressed in the project agreement pursuant to model legislative provision 28 (see A/CN.9/505, paras. 138, 142, 146 and 148).</p>