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### Possible future work in the area of public-private partnerships (PPPs)

### Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013)

Note by the Secretariat

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## I. Introduction

1. At its forty-fifth session, in 2012, the Commission noted that further consideration of desirability and feasibility of future work in the area of PPPs would require additional research and a detailed study by the Secretariat. It therefore agreed that holding a colloquium to identify the scope of possible work and primary issues to be addressed would be helpful. The Secretariat was requested, in preparation for a colloquium, to define the possible topics for discussion at the colloquium, using the provisions of the UNCITRAL instruments on privately financed infrastructure projects<sup>1</sup> (the UNCITRAL PFIPs instruments) and drawing on the resources of other bodies and the deliberations at the forty-fifth session of the Commission. It was expected that the results of the colloquium would be presented to the Commission for its consideration. In that regard, it was also agreed that it would be essential to define a clear mandate for any future work in that area.<sup>2</sup>

2. The colloquium was held in Vienna, from 2 to 3 May 2013. It brought together experts from government, intergovernmental and international non-governmental organizations, private sector and academia. The discussion at the colloquium focused on two main issues: (a) whether there was a need for UNCITRAL work in the area of PPPs; and (b) if so, the scope of such work.

3. Under the first issue the following aspects were discussed: (a) experience with the use and regulation of PPPs since 2003 when the Commission last worked in the related area of privately financed infrastructure projects (PFIPs); (b) experience with the use of the UNCITRAL PFIPs instruments; and (c) particular factors that justify UNCITRAL work in the area of PPPs.

4. Under the second issue the following aspects were discussed: (a) which type of PPPs should be addressed in UNCITRAL work; (b) approaches to regulating PPPs; (c) which form(s) UNCITRAL work should take; and (d) considerations to be taken into account in the organization of UNCITRAL work in the area of PPPs.

5. This note transmits for consideration by the Commission a summary of the discussion and main conclusions reached at the colloquium.

## II. Summary of the discussion at the colloquium

### A. The need for UNCITRAL work in the area of PPPs

#### 1. Experience with the use and regulation of PPPs since 2003

##### (a) Use of PPPs

6. It was noted that during the recent decade, in particular since the beginning of the financial crisis, there has been a growing interest in PPPs as an efficient means of resource mobilization for the provision of public services. PPPs have gained

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<sup>1</sup> The UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects (2000) and the Model Legislative Provisions on Privately-Financed Infrastructure Projects (2003), available at [www.uncitral.org/uncitral/texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/texts/procurement_infrastructure.html).

<sup>2</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 120.

popularity also in the context of preparation of major public events (e.g. the Olympic Games). PPPs have thus increasingly been used and new forms of PPPs have emerged.

7. A shift has occurred in many jurisdictions as regards policies that underlie the use of PPPs. Previously, a lack of or insufficient public resources for the delivery of public services was the main driving force for the use of PPPs. Currently, there is a widespread recognition that private sector finance is not the only factor that makes PPPs attractive, other factors being the ability of the private sector to offer innovative, creative and efficient solutions to public needs.

8. Whereas the concept of a “public-private partnership” was earlier considered to be a policy term found only in long-term development programmes or visions at the national level, since 2005 the concept has been defined and regulated in several jurisdictions.

9. Experience with PPPs has been mixed: some PPPs have been very successful, others less so, while some others have failed completely. A number of studies have been launched by international financial institutions and other entities to analyse the causes of PPPs’ failures. The conclusion seems to be that problems with the implementation of PPPs are very specific and depend on the context and experience of countries where PPPs have been implemented.

**(b) Regulation of PPPs**

10. Some jurisdictions would require specific legislation enabling PPPs; others would not. Recent studies into the extent of regulation of PPPs, such as one into European Bank for Reconstruction and Development (EBRD) countries of operation, showed a wide variety in both how PPPs were regulated and in the scope of legislation.

11. A trend in a number of countries is to regulate PPPs by statute, sometimes in the absence of any prior practical experience with using them. In a few jurisdictions, efforts to legislate on PPPs have been undertaken only at the local/municipal level and not on the national/federal level; in others, legislation at both levels may exist. Only in a few cases was it thought that legislative efforts have resulted in a coherent and comprehensive legislative framework that facilitates, rather than creates obstacles to, the conclusion and successful use of PPPs. The adoption of PPPs-specific legislation in some countries has led to inconsistencies in the legislative framework. In some countries, the adopted PPPs laws exist only on paper, and are not used in practice. In some jurisdictions, the adoption of a PPPs law resulted in the appearance of three and more legislative acts that regulate the same issues (e.g. a law regulating public procurement, law regulating concessions and a PPPs law) and that may conflict with each other.

12. The existing texts on PPPs at the international and regional levels were recalled.<sup>3</sup> It was noted that not all States take them into account when drafting PPPs laws.

13. In some jurisdictions, PPPs are regulated through regulations or guidance rather than by statute. In other countries, PPPs are not specifically regulated at all.

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<sup>3</sup> See, further, A/CN.9/782, Section II.B.4.

PPPs in these countries may be created and implemented under the existing legal framework, i.e. using a combination of other laws in the State, such as the public procurement or concessions law. It was observed that this approach does not always produce the desired results if, for example, the stringent requirements of a public procurement law or concessions law are transposed without any modification to suit PPPs. In particular, a focus on price as the dominant evaluation criterion common in public procurement law might be excessive and inappropriate in the context of PPPs. Limitations on negotiations usually embedded in a public procurement law, it was said, would also not allow for sufficient flexibility in the PPPs context.

14. In some jurisdictions, in the absence of a specific legal framework on PPPs, rules regulating PPPs have been adopted on a project-by-project basis; the creation of a PPP may then be subject to cumbersome approvals in legislative bodies or municipal authorities, and may require feasibility studies to be first approved by the Government.

15. The Commonwealth of Independent States (CIS) was cited as an example of a regional effort to prepare a model law on PPPs.

16. Laws regulating PPPs vary in scope and level of detail. Some laws contain a definition of the term “public-private partnership” while others leave the term undefined. An observed trend is to encompass in a PPP law a wide range of arrangements through which the private sector can engage in the provision of public services. Some PPPs laws are very detailed in regulating various aspects of PPPs (said to be at the risk of over-regulating them), while others are very general and may contain gaps in regulating important issues. Most regulate contractual relationships arising from PPPs and call for the establishment of a PPP unit with a variety of functions and roles. The accumulated experience in some jurisdictions with the implementation of PPPs and the role of creditors in the process have led to adjustments in the existing legislative framework with the view to making laws more workable and PPPs created under them “bankable”.<sup>4</sup> The scope of the draft model law currently being discussed in the CIS Inter-Parliamentary Assembly covers production-sharing and revenue-sharing agreements.

17. Another trend observed has been to include PPPs among subjects of negotiation for accession to the Agreement on Government Procurement of the World Trade Organization (GPA).<sup>5</sup> If PPPs are part of a country’s GPA commitments, the principles of national treatment and most-favoured-nation clauses will apply to them.

18. The link between the quality of PPP regulation and the quality of implementation was discussed at length. In some jurisdictions, it was observed, successful PPPs have been implemented without any specific legislative framework.

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<sup>4</sup> This term may be used to describe a project that is acceptable to institutional investors and hence one in which contractors are likely to participate.

<sup>5</sup> The plurilateral Agreement on Government Procurement of the World Trade Organization (the GPA), negotiated in parallel with the Uruguay Round in 1994, and entered into force on 1 January 1996. On 15 December 2011, negotiators reached an agreement on the outcomes of the renegotiation of the GPA. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113). Both texts are available at [www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

In other jurisdictions, where PPPs failed, the lack of appropriate legal framework could have been a contributing factor. At the same time, PPPs have also failed in some cases in jurisdictions that have in place an adequate legal framework applicable for PPPs. The absence of practical experience with the implementation of PPPs could have been a contributing factor to the failures in such cases. It was recognized that there could be many contributing factors to successes or failures of PPPs, including the political will and interest of the host country in a project and capacity and quality of engagement of all parties to the project. While it was difficult to illustrate a direct causal link between the quality of legal framework applicable to PPPs and their failure or success, it was undisputed that an inadequate legal framework creates barriers to the creation and successful use of PPPs.

## **2. Experience with the use of the UNCITRAL PFIPs instruments**

19. According to some speakers, no legal instrument existing at the national, regional or international level, including the UNCITRAL PFIPs instruments, can be considered as a de facto standard or model available to States for PPPs legal reform. Other speakers considered that the UNCITRAL PFIPs instruments could be seen as such a model, and examples of laws on PPPs in CIS countries, Eastern Europe, North Africa, China and Mongolia, enacted on the basis of the UNCITRAL PFIPs instruments, were provided. EBRD reported that it used the UNCITRAL PFIPs instruments for assessing legislation on PPPs in thirty-four countries of its operation and consider them a useful benchmark tool. The utility of those instruments was highlighted in particular because they deal with issues beyond the selection of the project operator — a relatively straightforward stage where the main principles of sound public procurement apply. The point was made that not all States and not all institutions or individuals using the UNCITRAL PFIPs instruments acknowledge this fact.

20. Some speakers pointed out that, despite their use by some States and organizations as a benchmark for law reforms, there is no widespread awareness about the UNCITRAL PFIPs instruments. They have proved to be a useful source of information but mainly for experts and academia from countries and institutions that have extensive experience with PPPs. For others, especially in countries that do not have any or much experience with PPPs, they are excessively complex and do not reflect the immediate needs and realities on the ground, so they have proved to be of limited utility for legislators and regulators. They do not reflect regional particularities, particularities of PPPs in various sectors (water, health, roads, etc.) and do not allow countries to graduate from simple forms of PPPs to more complex ones. They tend to overwhelm readers with complex concepts, not taking into account that readers may not yet comprehend even simple concepts in the context of PPPs such as what would constitute State support measures, and what would be considered risks on the parties as opposed to their liabilities or obligations.

21. Some speakers raised a concern that while the UNCITRAL PFIPs instruments addressed the majority of PPPs — PFIPs — they failed to address some other forms of PPPs that became widespread since 2003 (such as partnering and alliancing). Others considered that the UNCITRAL PFIPs instruments might only seem to be outdated in that respect but were prepared intentionally with a limited scope and with a main focus on infrastructure development. Certain projects were excluded from coverage by choice (such as oil and gas concessions and institutional PPPs). It

was also an informed choice to address only the core issues of PFIPs and guide enacting States as regards other branches of law where reforms would be necessary for the legal framework applicable to PFIPs to be coherent and comprehensive.

22. In response to the concerns about the complexity of the UNCITRAL PFIPs instruments, it was explained that the complexity of projects necessitated dealing with complex issues. The lack of capacity in some countries to implement PPPs should not mean that the quality of UNCITRAL texts should be jeopardized by taking a very simplistic approach to treating issues that are not simple; nor should the role of those instruments be downgraded to one of a simply educational nature. The UNCITRAL instruments need to reflect best practices in regulating PPPs. It was also pointed out that complaints about complexity may be valid as regards the UNCITRAL Legislative Guide on PFIPs, but not as regards the UNCITRAL Model Legislative Provisions on PFIPs. The former is indeed long and complex, but this is justified as the Guide is an analytical tool that explains various options and the implications of each. The latter, the UNCITRAL Model Legislative Provisions on PFIPs, however, is a short and simple text providing guidance to States as regards the core provisions to be included in their laws on PFIPs.

### **3. Particular factors that justify UNCITRAL work in the area of PPPs**

23. As the discussion summarized in section 1 above demonstrates, more States have started regulating PPPs and more definitions of this concept appear. Much confusion currently exists as regards terminology, the appropriate scope of a law on PPPs, its content and interaction with other areas of law, political aspects and policy considerations (trade, governance and employment). Poor laws enable poor projects, in particular leading to excessive transaction costs because of the need to prepare and negotiate complex contracts that would have to address the gaps and inconsistencies in the existing legal framework. This does not facilitate efficient use of public, private or development assistance resources. Institutional reforms that have accompanied legislative efforts have added even more complexity since they have led to the proliferation of State institutions dealing with issues of PPPs. This problem, it was noted, did not exist before 2003 when only a few national institutions entrusted with issues of PPPs, such as PPPs units (a common term for agencies handling policy and practical issues in PPPs), existed.

24. The view was that the international community, i.e. international, regional and subregional institutions, has not been effective in guiding States as regards legislative or institutional reforms in the area of PPPs. The situation is characterised by uncoordinated rule-making, technical assistance and capacity-building and inconsistent results and confusion. There was an urgent need therefore, according to the speakers that raised this issue, to achieve an integrated approach by all organizations that produce model laws on PPPs or guidelines on how to prepare and implement a national law on PPPs.

25. UNCITRAL was therefore urged to tackle all these difficulties faced by States in preparing a coherent law on PPPs. With its mandate to coordinate activities of various organizations preparing legal texts in the area of international trade law, UNCITRAL could ensure that the international community would start speaking in one language on the basis of an UNCITRAL model. The current situation is the reverse, and the UNCITRAL PFIPs instruments are not adequate to change it.

Speakers considered that it is appropriate now to analyse why this is so and how to redress the situation.

26. PPPs have increasingly been used in various forms and various contexts and it is most likely that they will be used in an even wider array of contexts and forms. A survey of PFIPs and PPPs legislation worldwide indicated that PPPs laws contained some elements not found in PFIPs laws, including the UNCITRAL PFIPs instruments, arising from the distinct features of non-infrastructure-related PPPs. It was therefore argued that the scope of the UNCITRAL PFIPs instruments should be expanded by regulating some or all types of PPPs not currently covered.

27. As PPPs have proved to be an extremely effective tool under some circumstances and an undesirable tool under other circumstances, it was thought that an analysis of lessons learned from their implementation would assist in identifying factors that have contributed to the successes and failures. Safeguards against abuses and common mistakes would need to be provided accordingly. Some safeguards not found in the UNCITRAL PFIPs instruments would need to be added, and some that are found in those instruments would need to be rephrased or revised in order to reflect practice.

28. It was noted in this regard that the UNCITRAL PFIPs instruments currently lack some important safeguards and provisions, such as on social clauses and other measures promoting social responsibility and pro-poor projects. As suggested at the UNCITRAL congress “Modern Law for Global Commerce” (Vienna, 9-12 July 2007),<sup>6</sup> provisions aimed at anticipating and minimizing disputes between the contracting authority and a project operator should also be developed as a way of effectively handling continued relations between the core contracting parties to PPPs. Such preventive mechanisms may include regular meetings, alerts about possible changes in legislation and regulations and establishment of standing commissions in various sectors ready to intervene into disputes.

29. Some safeguards included in the UNCITRAL PFIPs instruments have not been sufficiently set out. For example, those aimed at transparency and accountability should be applicable not only at the stage of the selection of the project operator but throughout the project. The need for public disclosure of information about the movement of resources from the State to the project operator and vice versa was specifically highlighted. Anti-corruption measures should be strengthened, for example by discouraging one-to-one meetings and instead encouraging the use of public media and modern means of communication for better traceability of operations.

30. Another area to be developed in the UNCITRAL PFIPs instruments, it was added, is effective dispute resolution. The UNCITRAL PFIPs instruments do not address in detail the complexity of dispute resolution mechanisms that are usually involved in PPPs and crucial role that the choice of governing law and dispute resolution forum plays in effective dispute resolution. Different clusters of agreements may refer to various arbitration rules and governing laws and places for resolution of disputes. Their interaction with each other should be explained.

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<sup>6</sup> See the Proceedings of the Congress, chapter V; available from [www.uncitral.org/pdf/english/congress/09-83930\\_Ebook.pdf](http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf).

31. The view was also expressed that the UNCITRAL model legislative provisions and relevant provisions in the Guide addressing dispute resolution could be more balanced in treating various forums for dispute resolution — international arbitration as opposed to domestic dispute settlement. Dispute resolution through international arbitration has in many cases not led to effective outcomes, most importantly regarding the enforcement of international arbitral awards. This is despite the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958 (the New York Convention)<sup>7</sup> that are binding on the prevailing majority of States. Proliferation of international arbitration forums, cases and rulings, coupled with proliferation of investment treaties, have complicated dispute settlement through international arbitration. A shift towards emphasizing the importance of effective domestic dispute settlement and the need to build local capacity for such purpose may be needed in the UNCITRAL PFIPs instruments.

32. Such a shift, if it were to take place, was recommended without jeopardizing the enabling environment for international arbitration. In particular, the contracting authority should be allowed by law to agree to international arbitration under a PPP contract; in many legal systems, this approach is currently not possible although the legal framework may generally allow for international arbitration. UNCITRAL was urged in any future work on PPPs also to address other obstacles towards achieving effective settlement of disputes arising from PPPs: (a) the necessary experience, skills and expertise of the judiciary to address complex issues in PPPs; (b) inefficiencies in court systems; (c) lack of independence; (d) accessibility (procedures may discriminate against foreign investors as opposed to national entities); and (e) reluctance at the domestic level (for a variety of reasons) to enforce international arbitral awards despite international obligations on States to do so under the New York Convention and other multilateral and bilateral treaties. Issues of sovereign acts and sovereign immunities should also be addressed in more detail, it was noted, as there had been cases of abuse where sovereign immunity defences and exemptions had been invoked.

33. Unsolicited proposals were identified as another area where more specific guidance by UNCITRAL is needed. The UNCITRAL PFIPs instruments allow unsolicited proposals to be considered with caution and subject to some transparency safeguards, but in practice this area was assessed as flawed and abuses were considered common, especially in countries without institutional and transparency safeguards. It was suggested that the provisions on this subject could be considerably strengthened, using positive experience accumulated since 2003 in the regulation of unsolicited proposals worldwide. The main approach was to preserve competition while protecting intellectual property rights and encouraging creativity and innovation. Caution was, however, voiced against detailed regulation of this controversial subject. Any regulatory text on this subject would by necessity be accompanied with extensive explanatory notes. It was also noted that the notion of unsolicited proposals depends on the definition of PPPs: when the focus in this definition is on the delivery of public services, the likelihood and justification for unsolicited proposals are minimal since the private sector cannot define better than

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<sup>7</sup> United Nations, *Treaty Series*, vol. 330, No. 4739. Also available at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (accessed May 2013).

the public sector what public needs are. It was added that the concept of unsolicited proposals should, however, not be confused with other related concepts, such as private sector proposals.

34. Some speakers considered that some other provisions of the UNCITRAL PFIPs instruments, in particular on risk allocation, government guarantees and State support measures, should be further elaborated, as there is much confusion in practice on those issues. Some other provisions of the UNCITRAL PFIPs instruments were considered to convey incorrect messages or to give the wrong impression, and needed therefore to be rephrased.

35. Other factors that some speakers noted might affect any decision of UNCITRAL to undertake the work in this area, include developments in the international arena, such as the entry into force of the United Nations Convention against Corruption (New York, 31 October 2003).<sup>8</sup> This text contains provisions relevant to PPPs. Developments in UNCITRAL itself, in particular new legislative standards in the areas of public procurement, insolvency law and security interests, may necessitate the revision of some provisions of the UNCITRAL PFIPs instruments.

## **B. The scope of any possible work by UNCITRAL on PPPs**

36. As further elaborated in the sections below, there was no disagreement among speakers that, in the light of the above-referred facts, guidance from UNCITRAL on issues of PPPs is needed urgently and should be provided. Views varied as regards the form that such guidance should take — a model law or expanded and revised legislative guide, legislative recommendations and model provisions. While there was strong support for a model law, some speakers were not convinced that the preparation of a model law was desirable or feasible. Various considerations, including the time that would be allotted by UNCITRAL to its work in the area of PPPs, if any, would influence the eventual decision by the Commission on the extent and the form of any contemplated work in that area.

### **1. Which type of PPPs should be addressed in UNCITRAL work?**

37. There was consensus that achieving a common understanding of PPPs would be essential in order to define accurately the scope of the work. There was no disagreement that the concept of PPPs must be kept flexible to cover all possible forms of private sector involvement in the provision of public services. This approach would lead to an umbrella concept, which in turn could be divided into subcategories, rather than a strict defined term of PPPs.

38. For such purpose, UNCITRAL would need to identify similar features attributable to PPPs that UNCITRAL would regulate and that make them distinct from related forms of public-private engagements that would fall outside the scope of the intended exercise. The presence of physical infrastructure, it was said, should not be considered as an indispensable criterion attributable to PPPs that UNCITRAL would regulate. Views varied on whether possible future work by UNCITRAL in

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<sup>8</sup> United Nations, *Treaty Series*, vol. 2349. Also available at [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

this area should encompass partnering and alliancing, institutional PPPs and long-term lease, leasing and management contracts as well as natural resources concessions.

39. The colloquium had a preliminary consideration of the distinct features of PPPs that UNCITRAL should regulate, in particular as compared to public procurement and natural resources concessions.

40. In a public procurement project, it was noted, the Government is expected to finance the project from the start. Regardless of whether the payment to the supplier or contractor is made in the beginning or in the end of the project or in instalments, there are consequences for the public budget; an increase in public debt would be visible. In the PPPs context, it is usually the private sector, not the Government, that is expected to finance the project from the start, although sources of financing of the project at later stages of the project implementation are varied. The impact of PPPs on the State budgeting processes was observed to be less clear; it has been identified by experts as an area where guidance by UNCITRAL should be provided, taking into account that short-term budgeting cycles in many jurisdictions do not accommodate the long-term nature of PPPs. Risk allocation was considered as another feature that differentiates PPPs from public procurement: performance risks in public procurement are primarily borne by the public sector, unlike PPPs in which project risks were allocated between the private and public sectors. Doubt was, however, expressed that such a strict risk allocation scheme remains true in all cases of public procurement and PPPs.

41. Most natural resources concessions, it was explained, involve the exploitation of public wealth/goods, rather than the delivery of public services, with the result that concessions have less direct impact on the public than PPPs. It was argued that this feature of concessions should not justify their exemption from sound procurement principles of competition, transparency and accountability, especially since public wealth should be exploited for the benefit of all and there are examples of concessions (e.g. exploitation of hydro resources) involving or impacting delivery of public services. Another distinct feature of such concessions, at least those in the mining sector, it was said, is that they did not presuppose the continuous engagement of public authorities in the implementation of the project; public authorities usually participate in profit-sharing and other type of ancillary arrangements.

42. The following main distinct features of PPPs were identified by some speakers: (a) the long-term participation of the private sector in the delivery of public services; (b) the PPP arrangement is amenable to modifications and adjustments over time; (c) such life-cycle considerations of the project as sustainable and sustained performance matter most (in particular because the need to provide uninterrupted services to the population); (d) the primacy of the government authority that remains responsible to the public for delivery of services throughout the project and afterwards; (e) an opportunity for innovation and creativity on the part of the private sector; and (f) various schemes for project finance payment to the private sector for the services delivered.

43. The long-term participation of the private sector in the delivery of public services and the government's remaining responsible to the public for the delivery of public services were identified by some speakers as the key distinct features of

PPPs. Those features, it was said, have short- and long-term implications on the structure, contract formation and clauses and implementation of the project. As individuals are the ultimate beneficiaries of PPPs, and the public interest has a higher stake in PPPs than in other public-private transactions, the law regulating PPPs should limit the freedom of parties to agree terms. For example, a contract should provide for necessary safeguards in the case of termination, in order to ensure continuity of public services. The law should also address such sensitive issues as non-discrimination in the provision of public services and fair profit-sharing. Some other speakers pointed out that some public procurement contracts also involved long-term delivery of public services by the private sector; public procurement should not be reduced to supplier purchasing as a consequence of the introduction of PPPs.

44. As regards mining concessions in particular, a strong view was expressed that UNCITRAL should not contemplate regulating such a heavily political and internationally sensitive sector, which remains largely self-regulating (mining codes apply to them and in some jurisdictions they may operate under special regimes approved by the legislative body). The point was also made that, unlike PPPs that UNCITRAL should regulate, these natural resource concessions do not have a direct impact on the immediate needs of individuals.

45. UNCITRAL was invited to look into PPPs with the participation of State-owned enterprises and new forms of PPPs linked to availability payments or infrastructure projects as private equity. It was also pointed out that cross-border PPPs should receive closer attention by UNCITRAL in the light of their emergence in some subregions and the likelihood of their gaining more popularity, in particular in the context of subregional and regional economic integration. They may face particular issues: applicable law, conflicts of law, supra-national institution, extra-territorial application of standards and so forth.

## **2. Approaches to regulating PPPs**

46. It was suggested that UNCITRAL should aim at formulating general principles that regulate the common elements of PPPs. No PPP model should be singled out for regulation but a broad spectrum of PPPs should be addressed. Restricting an UNCITRAL text in this way to a high-level general framework level, adaptable to local circumstances, was said to be essential to make UNCITRAL work on PPPs feasible and useful — otherwise, the project would be too lengthy and complex to meet the urgent need for a more general UNCITRAL standard on PPPs. It was added that regulating specific elements of all PPPs would be useless because they would in any event be defined by local culture and the needs of each project.

47. The goal of any regulation, it was said, should be to enable and facilitate a variety of forms of PPPs for the delivery of better public services and sustainable development.

48. It was agreed that the work must define its boundaries, noting that not all issues are susceptible to legal solution. UNCITRAL should for example not try to regulate policy matters that underlie the use of PPPs or issues that are embedded in constitutional law (e.g. the primacy of collective property over private property). UNCITRAL should focus on categories of issues that need a legislative solution, such as allocation of powers and risks, and legal obstacles (e.g. authority and

capacity to enter into PPPs, and inconsistencies of PPPs policy and laws with other related branches of law (insolvency, taxation)), and on basic standards and safeguards at which investors will look to ensure that the project is bankable (e.g. step-in rights, transparency and other sound procurement principles, safeguards against expropriations).

49. In regulating PPPs, the focus should be on enabling appropriate projects and reducing transaction costs, some of which could be minimized or avoided through an adequate legal framework. For example, including core principles regarding tariffs in law or regulations could save the need to hold lengthy negotiation with local authorities.

50. A balance between academic rigour and a pragmatic approach was urged. Such practical aspects as how public sector remains responsible to the public and engaged throughout the project should be addressed, as should such trends as new ways of urbanization, combating fraud and managing identity. With respect to the latter, establishing a global transparency registry that would track each company record in implementing PPPs worldwide for the benefit of Governments that would be able to consult the registry was suggested for consideration by UNCITRAL. Concern was voiced that the risk of commercial fraud in developing countries is real and tools must be provided by the international community to combat this economic crime internationally.

51. UNCITRAL was also encouraged to be clear as to which aspects should be addressed in primary legislation and which aspects in regulations or guidance notes, so as to ensure an adequate level of predictability and security of the legal framework applicable to PPPs. This approach would also ensure that the basic legal framework on PPPs would not depend on the government or one minister, and a change in government would not therefore have a direct impact on the formation and implementation of PPPs. Currently, these risks are present in some countries because fundamental issues affecting PPPs are delegated there to regulations or guidance. This approach, however, would not mean that all fundamental issues would need to be addressed in a single legislative act — laws addressing customs, taxation, investment protection, land rights, insolvency law, security interests and so forth were noted also to be relevant.

52. A legal framework on PPPs should therefore be capable of interacting with other laws applicable to the project. In particular, it was noted that some level of harmonization between public procurement and PPPs laws should be achieved, by cross-references where necessary, since certain provisions might be equally applicable in the public procurement and PPPs contexts. Examples given included challenges before an independent body and remedies available to aggrieved investors. An UNCITRAL text on PPPs would have an added value to the extent that it would regulate specific features of PPPs requiring flexibility beyond that normally allowed by public procurement legislation, and so as to avoid creating disincentives and obstacles to PPPs.

53. It was emphasized that UNCITRAL could not avoid dealing with issues of institutional reforms in order to address practice: institutions intended to support PPPs should be compatible and coherent; the tendency to create additional bureaucracy should be avoided, as it would add an unnecessary level of complexity. In this regard, it was noted that putting in place more flexible structures would be

desirable (e.g. an advisory board on policy issues with its precise composition designed to reflect the sector in which a PPP is undertaken).

54. It was added that UNCITRAL should advocate a gradual approach to introducing PPPs in jurisdictions that do not have experience with them (from simple PPPs to complex ones), and should provide options for States at different capacity level. Even in the presence of a sound legal framework, it was noted, PPPs would not be used if the society and public authorities were not ready for them.

55. It was added that issues of terminology should be addressed, and that any future text should be drafted in plain language to assist the reader.

### **3. Which form(s) should UNCITRAL work take?**

56. A model law as the form of an UNCITRAL text on PPPs was preferred by many speakers, especially in the light of all facts set out above. It was acknowledged, however, that the nature of the social contract in States is very different and needs in regulating PPPs are therefore also very different. As a result, not all countries would need or would want to enact a law on PPPs. Where such need and will exist, a UNCITRAL model law would provide States with an internationally accepted model, readily available and easy to use for enactment of a national law on PPPs. Without such model, the risk of adoption by States of ill-considered legislation on PPPs was said to be high. With such a model, States would be able to focus on local particularities that necessitated adjustments to the model. An UNCITRAL model law would thus provide the necessary level of confidence to policymakers and legislators that their law enacted on the basis of the UNCITRAL model reflected best international practices. This in turn would send a positive signal to the private sector as regards the adequacy and stability of the local legal framework applicable to PPPs.

57. The following features of a model law were suggested: it should not be overly complicated; it should be flexible; it should include best practice on which international consensus existed, disputed or controversial issues should not be included in its provisions; it should cover all core provisions applicable to all types of PPPs regulated by the model law and should cross-refer to other branches of law where necessary; the law should define the main PPP-related terms used in the law; the law should address the obligations of the parties to the PPP, State support obligations and measures, monitoring mechanisms, including the participation of civil society, compensation in case of termination, international arbitration and step-in rights. It should also require the PPP contract to address these issues if the law itself does not prescribe a specific solution to them. The law should be clear which mandatory provisions must be crafted individually for each project and should identify any minimum requirements applicable to them. The UNCITRAL Model Legislative Provisions on PFIPs, which addresses many of the enumerated points, should become the basis for such a model law.

58. Other options considered for possible work of UNCITRAL in this area were to update, revise and expand the scope of the UNCITRAL PFIPs instruments. It was recalled that when the UNCITRAL PFIPs instruments were prepared, governments were cautious about working in areas that were not in the core competence of UNCITRAL (issues of bilateral relations, politically sensitive areas, domestic institutions). It was queried whether Governments would be less reluctant to do so

at present. A model law that required reaching a high level of specificity, comprehensiveness and harmonization in these areas would therefore not be an option.

59. In addition, it was suggested that the complexity of the subject and the need to preserve as much flexibility as possible in order not to stall innovation in PPPs, indicated providing more general analytical guidance such as that contained in the UNCITRAL Legislative Guide on PFIPs. It was noted that the latter identifies legal obstacles to PFIPs, explains implications if those obstacles are not addressed by States and points out to non-legal obstacles that are also to be dealt with. By providing this analytical information, the Guide empowers policymakers and legislators with choices in legislative and institutional reforms.

60. In response, those that preferred the preparation of a model law considered that updating, revising and expanding the scope of the UNCITRAL PFIPs instruments would not bring the main desired result from the exercise — preparation of a simple easy-to-use model for legislators. It was considered essential for UNCITRAL to prepare such an international model, which in turn should be accompanied by supplementing materials, such as commentaries to provisions of the model law, guidance on specific issues that raise most difficulties in practical implementation of PPPs and policy papers.

61. Some speakers were convinced that the model law would not be able to provide one solution to all issues of PPPs to be included in a model law. It was therefore emphasized that while the text of the law may be desirable, accompanying guidance (such as that provided in the Guide to Enactment of the Model Law on Public Procurement)<sup>9</sup> would be absolutely necessary in order not only to equip those that will implement the law with the capacity to do so but also provide them with explanations for possible deviations from the model or as regards options contained therein. Such explanatory guidance would also include discussion on any controversial issues on which a consensus did not emerge.

62. It was suggested that the UNCITRAL Legislative Guide on PFIPs could be updated in parallel with the preparation of a model law and the resulting updated text could become the basis for drafting a guide to enactment that would explain the provisions of the model law and would provide more detailed technical guidance to ministries and other Government departments that used PPPs. The approach to drafting such a guide should, it was urged, be carefully considered from the perspective of the intended end-users of the text, to avoid certain mistakes in the current Guide. While being specific and detailed, the guide should remain simple and easily understood by the intended readers. Complex terms should be avoided, examples and illustrative explanations should be included and various ways of presenting what is expected to be the lengthy material in a user-friendly way should be considered (e.g. the guide could be broken into sections and accompanied by annexes that would for example describe specific features of PPPs per sector). Preparing a glossary of PPP-related terms was also suggested. A set of essential contractual terms (akin to rules and procedures of the International Federation of Consulting Engineers (FIDIC)) could also be included in the guide as an annex or

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<sup>9</sup> Adopted by the Commission at its forty-fifth session, in 2012. *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 46. Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2012Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html).

otherwise, which could be of value to contracting parties that could incorporate them by reference in their PPPs contracts, saving the need for negotiating them. This set could also be used as a checklist of core provisions that should be included in the contract.

63. In support of the work on a model law and its guide to enactment and other supplementary materials, it was argued that a shift from the existing model legislative provisions and legislative guide to a model law with the guide to its enactment would result in a big difference for enacting States. It was acknowledged that both options provide only for non-binding guidance since States are not bound to enact their law on the basis of UNCITRAL models and may adjust UNCITRAL models to local circumstances as they deem appropriate. Although the difference may eventually be only in names of instruments and ways of presenting them, not their substance or nature, the form would make a difference in that an easy-to-use model would be more seriously considered and widely used by local policymakers, legislators and assistance-providers.

64. In response to the question why a model law was not prepared in 2003, it was explained that at that time there was no consensus on the definition of PPP and there was no much demand for a model law since PPPs was considered a policy concept not to be regulated by law. These factors have changed since 2003 as explained in chapter II.A above.

#### **4. Considerations to be taken into account in the organization of UNCITRAL work in the area of PPPs**

65. For any work on PPPs, it was stated that it would be essential to identify the best or sufficiently good practices in regulating PPPs to provide impartial advice. UNCITRAL might face difficulties in this regard, given vested interests and institutions that represent them, including some private sector consultants and financial institutions. For example, where they are advisors to governments in legislative reforms and providers of technical assistance and capacity-building, and at the same time PPP financiers or project operators, they will have an inherent conflict of interest. It would be equally important to identify poor practices, many of which have been replicated by international consultants and advisors to Governments.

66. UNCITRAL was encouraged to make use of the significant information on PPPs accumulated by various institutions that include databases of contracts, PPP laws and other laws related to PPPs worldwide, surveys of PPPs and results of assessment of PPP legal framework in a number of countries, databases of PPPs experts, advisors, specialists and local focal points. Tools that allow tracing results of various PPPs, investment volumes, renewable energy aspects and data on PPPs grouped per sector were also highlighted.

67. While other international and regional instruments regulating various aspects of PPPs should be consulted in any possible work by UNCITRAL in this area, UNCITRAL was encouraged not to try to achieve harmonization among all such instruments in the light of their diverse scope, focus and purpose. UNCITRAL should instead take a critical look at different texts from the perspective of their utility to its work (whether there would be any added value in using them as the

basis for its work or simply for reference). The point was made that UNCITRAL work in this area might necessitate those other instruments to be updated or revised.

68. The importance of bearing in mind what can be achieved within a reasonable period of time was emphasized, taking into account the complexity of issues intended to be addressed. Views varied as regards the volume of work involved. Some considered that the preparation of a model law or an expanded guide should not require much time, as most issues are already addressed in the UNCITRAL PFIPs instruments, while others were of the view that a considerable amount of work remained to bring the existing texts up to date and in order to prepare a model law. While adding clarity to the core elements that have already been addressed in the UNCITRAL PFIPs instruments might be not so time-consuming, the addition of new elements and clarity regarding scope and terminology would require substantial work. The point was also made that preparing a short simple instrument — which should be the goal of the work of UNCITRAL in this area — is considerably more difficult than preparing a large complex instrument. It was emphasized that the current UNCITRAL Legislative Guide on PFIPs to be useful for intended beneficiaries must be rewritten in a simple language and restructured.

69. It was underscored that an intergovernmental forum (the Commission and its working groups) would develop any texts to be prepared by UNCITRAL. Studies and preliminary drafts to be prepared by the Secretariat would be essential to expedite the work of the intergovernmental body. Involvement of experts in the Secretariat's preparatory work and allowing sufficient time for the preparatory work would be needed for producing studies and drafts of adequate quality.

70. It was also noted that deliberations should be as inclusive and comprehensive as possible to achieve a balanced representation of various views and interests and hence a satisfactory result (in addition to member States and observer States, participation of professional associations, academia and civil society organizations would be required). Close cooperation between UNCITRAL and international and regional institutions working in the area of PPPs should to be ensured. The process of preparation of texts would allow local specialists and international experts to exchange ideas, knowledge and experience so as to achieve consensus on what constitute internationally accepted best practices in regulating PPPs.

71. It was agreed that any further work by UNCITRAL in this area and results emanating from that work would be important for technical assistance and local capacity-building by UNCITRAL and others.

### **III. Conclusions**

72. It was agreed that PPPs are increasingly used worldwide not only as means of resource mobilization from the private sector for public needs, but also as a means of delivering better services to the public, drawing on the creativity, innovative forces, expertise and competitive advantages of the private sector. PPPs were considered to be an essential mechanism to achieve sustained and sustainable development and to contribute to poverty alleviation, as they involve joint efforts by the public and private sectors — which to be successful must take into account numerous considerations, including the direct impact of the project on end-users — individual citizens.

73. It was also considered that PPPs could be advantageous given the greater efficiency of the private sector as compared with the public sector in project development and implementation.

74. It was recognized that PPPs have become a legal concept, and the subject of legislation in many jurisdictions and that an inadequate legal framework regulating PPPs has contributed to the failures of PPPs in some jurisdictions. An adequate legal framework would not address all failures, but would provide a system under which PPPs could be undertaken. However, putting an adequate legal framework in place is not a simple task in the light of the complex and intricate issues that it must address.

75. National efforts to design such a framework would benefit from international support in the form of an easy-to-use model, which is currently unavailable. The UNCITRAL PFIPs instruments cannot be considered as such — despite the recognition that their content is good — because of their limited scope, and their length and complexity that make them useful for international experts and specialists rather than for local policymakers, legislators or regulators. In addition, the multiplicity of international guidance on PPPs, not all of it consistent, makes the task of those engaged in legal reform more difficult.

76. There was unanimity that, in the light of the developments in the regulation of PPPs and the experience with the use of the UNCITRAL PFIPs instruments described in chapter II.A above, UNCITRAL should evaluate its PFIPs instruments to assess how to ensure that they continue to reflect best practices in regulating PPPs. The prevailing view was that the time was also appropriate for UNCITRAL to seek to provide to the international community a model law on PPPs, accompanied by an appropriately detailed guide to enactment.

77. This task is in line with both the overall UNCITRAL mandate and the role of UNCITRAL to identify best practices in regulating a particular commercial transaction and to prepare a legal text that reflects them appropriately.

78. Such considerations as time to be allotted for the project and that harmonization cannot be achieved on all aspects of PPPs would affect the scope of such a project. While the work in this area might be considered as an urgent endeavour with the implication that the project should be developed quite quickly, the magnitude of efforts if the scope of the UNCITRAL PFIPs instruments is to be expanded and clarified is not to be underestimated.

79. Such future work would build on the UNCITRAL PFIPs instruments and work already accomplished, in particular because many concerns about practice with the regulation and implementation of PPPs raised at the colloquium are already addressed in the UNCITRAL PFIPs instruments. It remains to be analysed whether advice they contain remains sufficiently accurate and thorough.

80. The awareness about the content of the UNCITRAL PFIPs instruments should be increased to allow for such critical analysis. The goal should be the identification of gaps and needs for improvement — such as in accuracy or thoroughness — in those instruments, reasons for the existing gaps (intentional choice, new developments or experience accumulated in the use of the instruments). Where such gaps or needs are found, the goal would be to identify how and within what time

frame improvements can be made, and which gaps would remain in any event and why.

81. Should the analysis envisaged in the previous paragraph indicate that there was insufficient consensus to provide a model law with a limited number of options to enacting States, it was agreed that there would remain considerable value for the international community in further work on the UNCITRAL PFIPs instruments in their current form.

82. UNCITRAL should consider the importance of not only the ultimate result of its work in this area but the process that would lead to that result. The value of the work suggested above in increasing awareness about the UNCITRAL PFIPs instruments and as technical assistance and local capacity-building tools should not be underestimated. This work would also support the fulfilment of another mandate of UNCITRAL — coordination of the work of organizations active in the field of international trade law and encouraging cooperation among them. Close coordination and cooperation of law-making, technical assistance and capacity-building efforts by various institutions and individuals are necessary in the area of PPPs to stop the current trend of formulating conflicting rules, providing inconsistent advice and replicating bad practices. While harmonization by UNCITRAL of all the existing texts that provide guidance on PPPs will be difficult or impossible to achieve, by preparing a standard in the area of PPPs UNCITRAL would encourage the international community to start speaking in one voice on issues of PPPs.

83. It was agreed that the complexity of the issue involved would require significant preparatory work before presentation of a resulting text for consideration by an intergovernmental body. In order to ensure that such a text would be universally applicable in the context of the many entities that are parties to PPPs, participation should be as inclusive as possible, and efforts to ensure inclusivity should be undertaken.

84. It was considered that any mandate for future work in the area of PPPs could usefully include the following elements:

(a) To develop a legal text on PPPs, comprising a model law (or, if that were not feasible, model legislative provisions) and accompanying policy and practical guidance;

(b) To allow for flexibility, innovation and creativity, which will facilitate the realisation of sustainable development and related socioeconomic goals;

(c) To distil and identify best practices from existing texts and practices for PPPs, by identifying gaps in the UNCITRAL PFIPs instruments, by revising elements that have become outdated, and by including issues that were not previously amenable to regulation, but have become so as the market has matured;

(d) To address the core provisions applicable to common forms of PPPs, and to consider whether further work is required on other forms of PPPs (such as partnering and alliancing) or specific market sectors, and whether any forms of PPPs should be excluded from the scope of a legal text on PPPs;

(e) To address entire life-cycle of PPPs, including project planning and management;

(f) To identify any significant international obligations that would affect national regulation of PPPs (such as the United Nations Convention against Corruption);

(g) To analyse the extent to which key procedures to ensure transparency and competition, as expressed in the UNCITRAL Model Law on Public Procurement,<sup>10</sup> should apply to PPPs procedures, so as to promote the core values of ensuring value for money and the avoidance of abuse; and

(h) To balance analytical rigour and empirical analysis with a pragmatic approach, so as to ensure the timely issue by UNCITRAL of a text on PPPs that will be of practical utility for legislators in countries at different levels of capacity and experience as regards PPPs.

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<sup>10</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, annex I. Also available from [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html).