



# General Assembly

Distr.: General  
11 April 2016

Original: English

---

## United Nations Commission on International Trade Law

Forty-ninth session

New York, 27 June-15 July 2016

### Possible future work in procurement and infrastructure development

Note by the Secretariat

#### Contents


	<i>Paragraphs</i>	<i>Page</i>
I. Introduction . . . . .	1	2
II. Proposed future work in Procurement and Infrastructure development . . . . .	2-19	2
A. Suspension and debarment in public procurement . . . . .	2-9	2
B. Public-private partnerships (PPPs) . . . . .	10-19	3
III. Conclusions . . . . .	20-22	6

---

\* Reissued for technical reasons on 27 April 2016.

V.16-02092 (E) 250416 260416



Please recycle 

## **I. Introduction**

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

## **II. Proposed future work in Procurement and Infrastructure development**

### **A. Suspension and debarment in public procurement**

2. At its forty-eighth session, the Commission agreed on the importance of suspension and debarment in supporting the effective implementation of a public procurement law and in fighting corruption, and considered whether UNCITRAL might issue a legislative text on the topic to support the UNCITRAL Model Law on Public Procurement.<sup>1</sup>

3. The Commission noted that the UNCITRAL Model Law on Public Procurement<sup>2</sup> permits the exclusion of suppliers pursuant to administrative suspension or debarment proceedings, but that the Model Law did not provide any procedural rules for the process. It also noted that there remain considerable variations among suspension and debarment systems in practice, as regards the objectives, procedures and outcomes.<sup>3</sup>

4. The Commission instructed the Secretariat to report to the Commission at its 2016 session on the results of exploratory work to assess the feasibility of developing a harmonized UNCITRAL text on the subject, the extent to which such a text would provide an appropriate solution to the issues concerned, and the extent of the demand for such a text.<sup>4</sup>

5. In terms of the feasibility of developing a harmonized UNCITRAL text on suspension and debarment, there appears to be limited reduction in the divergences in approach previously reported to the Commission.<sup>5</sup> Some emerging examples of differences include whether bribery leads to a mandatory debarment or whether a supplier that has been found to have engaged in bribery can take steps to avoid debarment; whether a bribery conviction in one State would be sufficient to debar a supplier in another State; in the extent of detail in applicable regulation on procedure, and in the standard and burden of proof required for a sanction to be applied.

6. On the other hand, there is evidence of convergence in some areas. As regards processes, there is increasing consensus on definitions of sanctionable conduct and on compliance processes designed in part to assist in identifying such conduct. As

---

<sup>1</sup> A/70/17, para. 362.

<sup>2</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 192 and annex I, available at [www.uncitral.org/uncitral/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html).

<sup>3</sup> A/70/17, para. 362; see, also, A/CN.9/850, paras. 4-12.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

regards the consequences of sanctionable conduct, there is some development towards enabling cross-debarment through a flexible approach (such as that recognition of sanctionable conduct in one jurisdiction need not trigger automatic debarment in another, but might lead to further investigation).

7. Against these indications and the background of consensus on the critical importance of transparency in the process, the need for due process when sanctions are being considered, and for cooperation between international bodies and national authorities, it appears that an UNCITRAL text might provide an appropriate solution to many issues in need of resolution for effective suspension and debarment systems. Many States are also seeking advice and assistance on the establishment of a national system, and indicate that they would welcome an UNCITRAL text reflecting international best practice for that purpose.

8. It may therefore be concluded that convergence on elements of an UNCITRAL text on suspension and debarment is emerging, and that there is a level of demand for such a text. However, it is also clear that further convergence on the key parameters for a suspension and debarment system would enhance the feasibility and success of an UNCITRAL text in this area. Events discussing suspension and debarment systems at the international level also indicate that dialogue facilitating such convergence is ongoing.<sup>6</sup>

9. The Commission may therefore consider that legislative development in UNCITRAL in this area is not presently feasible, but the developments towards convergence as noted above indicate that the item should be retained on its agenda.

## **B. Public-private partnerships (PPPs)**

10. At its forty-eighth session, and in light of the importance of the topic for development and in the context of the Sustainable Development Goals, the Commission decided that the possibility of developing a legislative text on PPPs would be kept on the Commission's agenda. The Secretariat was instructed to follow the topic to advance preparations should the Commission decide to undertake work in this area and report further to the Commission in 2016.<sup>7</sup>

11. Accordingly, the Secretariat has continued to observe the activities of other bodies active in PPPs, primarily the World Bank and regional development banks, the United Nations Economic Commission for Europe (UNECE) and the Organisation for Economic Cooperation and Development, and has continued to encourage the use of the existing UNCITRAL texts on Privately-Financed Infrastructure Projects (PFIPs) in PPPs reform. In these activities, the Secretariat has continued to gather feedback on areas in which the PFIPs texts are considered to

---

<sup>6</sup> Examples include the "Third Suspension and Debarment Colloquium, 2015", held at the World Bank Headquarters, Washington, on 16 December 2016 ([www.worldbank.org/en/events/2015/11/05/third-suspension-and-debarment-colloquium-2015](http://www.worldbank.org/en/events/2015/11/05/third-suspension-and-debarment-colloquium-2015)) and "Towards Convergence in Transatlantic Procurement-Markets", held at King's College, University of London on 26 October 2015 ([www.kcl.ac.uk/law/newsevents/eventrecords/Towards-Convergence-in-Transatlantic-Procurement-Markets-.aspx](http://www.kcl.ac.uk/law/newsevents/eventrecords/Towards-Convergence-in-Transatlantic-Procurement-Markets-.aspx)).

<sup>7</sup> A/70/17, para. 363.

function well and, where appropriate, areas in which they may be in need of updating or amendment.<sup>8</sup>

12. These activities indicate that developments in three areas of PPPs should be brought to the attention of the Commission.

### **Procurement in PPPs**

13. First, and as reported to an UNCITRAL Colloquium on PPPs held in March 2014,<sup>9</sup> an area of ongoing focus is the procurement of the concession or other project mechanism and the selection of the project partner. At the 2014 Colloquium, it was noted that there are overlapping public procurement and concessions laws in many jurisdictions. As consistency between PPPs laws and other relevant laws has been recognized as critical for the success of PPP projects, this fragmentation raises concerns.<sup>10</sup>

14. It was also recognized that traditional tendering procedures are generally unsuitable for both PPPs as well as for traditional (i.e. publicly-funded) procurement of complex infrastructure. When developing the UNCITRAL Model Law on Public Procurement,<sup>11</sup> Working Group I adapted and updated the selection procedure in the UNCITRAL PFIPs texts to provide a procurement method called Request for Proposals with Dialogue, which is available for the procurement of complex items and services (such as infrastructure projects).<sup>12</sup> The 2014 Colloquium concluded that procurement in the PPPs context would require interaction between the public authority and potential bidders, and that ensuring that any negotiations were subject to appropriate safeguards would be critical, and that these matters were provided for in the Model Law on Public Procurement.<sup>13</sup>

15. The activities in the organizations referred to above include addressing the procurement-related aspects of PPPs,<sup>14</sup> and demonstrate that many States are addressing PPPs as part of work to modernize their procurement systems. The

---

<sup>8</sup> The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP, available at [www.uncitral.org/uncitral/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html).

<sup>9</sup> For the proceedings of this Colloquium, which considered the Commission's discussions of an earlier colloquium in 2013, the results of an exercise to map current PPPs legislation, some preliminary findings on the main topics that might be included in any future legislative text on PPPs and the form that such a text might take, see [www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html).

<sup>10</sup> See A/CN.9/819, paras. 77-92, and A/CN.9/821, para. 69.

<sup>11</sup> Footnote 2, *supra*.

<sup>12</sup> See articles 30 and 49 of the UNCITRAL Model Law on Public Procurement, *ibid*. The 2014 Colloquium noted reports that the Request for Proposals with Dialogue combined many features of the selection method in the PFIPs Instruments, two-stage tendering (itself a well-tryed and tested method used by the MDBs) and the EU's Competitive Dialogue procedure and was itself therefore a harmonized method. See, further, A/CN.9/821, para. 90.

<sup>13</sup> See A/CN.9/820, paras. 15-20, and A/CN.9/821, paras. 90-95.

<sup>14</sup> See, for example, the work of the UNECE Committee on Innovation, Competitiveness and PPPs, Team of Specialists on PPPs on "Developing international standards and best practices in PPPs", and its "draft Charter on Zero Tolerance to Corruption in PPP Procurement", available at [www.unece.org/fileadmin/DAM/ceci/documents/2015/PPP/TOS-PPP/ECE\\_CECI\\_PPP\\_2015\\_CRP2.pdf](http://www.unece.org/fileadmin/DAM/ceci/documents/2015/PPP/TOS-PPP/ECE_CECI_PPP_2015_CRP2.pdf), and the "Draft Checklist of Zero Tolerance to Corruption in PPP Certification Elements", available at [www.unece.org/ppp/forum2016.html#](http://www.unece.org/ppp/forum2016.html#/).

incorporation of an appropriate selection procedure is vital, and so it is suggested that an UNCITRAL text providing a selection procedure that is harmonized with Request for Proposals with Dialogue as provided for in the Model Law on Public Procurement could contribute considerably to improving practice in the conclusion of PPPs. The 2014 Colloquium considered that the limited tailoring appropriate to the PPPs context (so as to accommodate changes in the contract terms during the project period, for example) would not pose consistency issues between publicly-funded procurement of complex infrastructure and procurement in PPPs.<sup>15</sup>

### Terms of the project agreement

16. The second area is the terms of the concession or project agreement. This issue was also considered at the 2014 Colloquium,<sup>16</sup> which concluded that the extent to which contents of the agreement are prescribed by law varied among States, and that legislative provision could enhance consistency and reduce the scope and length of negotiations, balanced with the need for flexibility in negotiations to suit the project at hand. However, the Colloquium concluded that this was one area in which significant additional work to identify areas for harmonization would be required.<sup>17</sup>

17. Since the issue of the PFIPs texts, some States have issued model clauses for PPPs contracts,<sup>18</sup> but they are considered to vary widely. In 2015, the World Bank issued a “Report on Recommended PPP Contractual Provisions”,<sup>19</sup> noting that the variety of PPPs transactions means that a harmonized contract at the international level is not a realistic goal, but that certain legal issues are encountered in the overwhelming majority of PPPs contracts in practice, so that there is a commonly-encountered solution that can be identified. The areas concerned focus on changes and events that may arise in the course of the project which, by its nature involves long-term contracts — such as changes in law, force majeure, refinancing, termination, among others. These issues are also addressed in Section IV. A of the PFIPs Legislative Guide (which sets out guidance for “General provisions of the project agreement”). The work of the other organizations noted above<sup>20</sup> also suggests that

<sup>15</sup> See A/CN.9/820, paras. 15-20, and A/CN.9/821, paras. 90-95.

<sup>16</sup> See A/CN.9/820, paras. 35-40, and A/CN.9/821, paras. 102-107.

<sup>17</sup> See A/CN.9/821, para. 107.

<sup>18</sup> Examples include “Standardisation of PFI Contracts”, HM Treasury (UK), Version 4 (March 2007), available at [http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/ppp\\_standardised\\_contracts.htm](http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm); and a draft “Standardisation of PF2 Contracts”, HM Treasury (UK), 2012, available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/221556/infrastructure\\_standardisation\\_of\\_contracts\\_051212.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221556/infrastructure_standardisation_of_contracts_051212.pdf). a “Standard Form Public Private Partnership (PPP) Project Agreement”, National Infrastructure Unit of New Zealand, October 2013, available at [www.infrastructure.govt.nz/publications/draftpppstandardcontract](http://www.infrastructure.govt.nz/publications/draftpppstandardcontract); and A Guide to the PPP contract (“Les Contrats de Partenariat: Guide Méthodologique”), France, 2011, available at [www.economie.gouv.fr/files/directions\\_services/ppp/GuideContratPartenariat.pdf](http://www.economie.gouv.fr/files/directions_services/ppp/GuideContratPartenariat.pdf).

<sup>19</sup> The 2015 Edition is available at <http://ppp.worldbank.org/public-private-partnership/library/wbg-report-recommended-ppp-contractual-provisions>, and it is understood that the 2016 edition will include alternative recommendations to the contractual language outlined in the 2015 Report in order to recognize that different types of provisions may be required in different types of legal systems, including in common law versus civil law systems.

<sup>20</sup> For example that of the European PPP Expertise Center (EPEC), which has issued a “Guide to Guidance”, available at [www.eib.org/epec/g2g/](http://www.eib.org/epec/g2g/), and other tools at [www.eib.org/epec/library/](http://www.eib.org/epec/library/), addressing (among other things) the issues discussed.

recent experience would allow the guidance in Section IV.A to be updated by reference to current practice, and that a harmonized solution is now feasible.

#### **Post-award disputes**

18. The third area is settlement of disputes in PPPs, which is addressed in Section VI of the PFIPs Legislative Guide. At the 2014 Colloquium,<sup>21</sup> it was suggested among other things that the guidance should be updated to reflect the increasing use of dispute avoidance mechanisms, and of relatively informal settlement methods such as dispute boards,<sup>22</sup> as well as to provide guidance on disputes between shareholders, lending parties, operational consortium partners, regulators and operators and contractors and subcontractors (that is, in addition to guidance on disputes between the public authority and the project partner).<sup>23</sup>

19. Issuing harmonized standards for the dispute resolution process can both contribute to the stability of the contractual relationship and to the conclusion of the project agreement. In addition, as some disputes in PPPs may involve regulators or government bodies and the exercise of discretion in their settlement, an appropriate legislative or regulatory framework to ensure appropriate procedures for this type of dispute should also reduce the risks in the projects concerned. At the 2014 Colloquium, it was considered that agreeing legislative solutions on the outstanding issues would again be feasible.<sup>24</sup> The publications on contractual provisions referred to in the previous paragraph also indicate that dispute prevention and resolution provisions are commonly addressed in modern PPP contracts, so that there is evidence of increasing consensus on approaches that a legislative text should include, both to prevent and settle disputes.

### **III. Conclusions**

20. The Commission in 2015, while recognising the importance of PPPs, expressed concern that the scope of the possible legislative development then under consideration might exceed UNCITRAL's resources.<sup>25</sup>

21. As regards suspension and debarment in public procurement, the Commission may wish to confirm that the Secretariat should continue to monitor developments, and should report to the Commission on a periodic basis.

22. In light of the developments regarding PPPs set out above, the Commission may wish to consider whether a modular approach to legislative development in PPPs might enable the Commission to fulfil the indicated need for updating some aspects of the PFIPs texts within the constraints of UNCITRAL's limited resources. If so, it may wish to consider whether UNCITRAL might undertake sequential legislative development on the above aspects of PPPs.

---

<sup>21</sup> See A/CN.9/820, paras. 41-51, and A/CN.9/821, paras. 108-113.

<sup>22</sup> The subject of a session at the World Bank-hosted Law, Justice and Development Week, 2013 — see <http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Dispute%20Resolution%20Board%20Foundation%20-%20Dispute%20Boards%20in%20PPP%20Transactions%20by%20Kurt%20Dettman.pdf>.

<sup>23</sup> See A/CN.9/821, para. 112.

<sup>24</sup> See A/CN.9/821, para. 113.

<sup>25</sup> A/70/17, para. 363.