United Nations A/CN.9/755

General Assembly

Distr.: Limited
11 June 2012

Original: English

United Nations Commission on International Trade Law
Forty-fifth session
New York, 25 June-6 July 2012

Procurement and infrastructure development: possible future work*

Note by the Secretariat

I. Future Work

A. Introduction

1. At the sessions of Working Group I in 2010-2012, the Working Group exchanged preliminary views on possible topics for future work related to public procurement, which might be presented to the Commission for its consideration in due course. The Report of the Working Group's 21st session (A/CN.9/745, paras. 38-41) noted the following issues as possible relevant topics:

(a) Aspects of public procurement that were not addressed in the UNCITRAL Model Law on Public Procurement (adopted by the Commission at its forty-fourth session in 2011),[1] such as the contract administration phase of procurement, suspension and debarment, rules on corporate compliance and sustainability and environmental issues. At a previous session, the Working Group had stated that procurement planning was also a relevant aspect of public procurement, not currently addressed in the Model Law;[2]

(b) Harmonization of the provisions governing the procurement-related aspects of the UNCITRAL Legislative Guide on Privately-Financed Infrastructure

---

* This document was submitted less than ten weeks before the opening of the session because of the need to engage in informal consultations on work of other bodies in related fields prior to finalizing this document.

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

[2] A/CN.9/718, para. 138. The Working Papers for and Reports of Working Group I sessions are available at www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

V.12-54043 (E)

Projects (the Legislative Guide on PFIP) (2000) and Model Legislative Provisions (2003) with those of the Model Law;

(c) Consolidation of the Legislative Guide and the Model Legislative Provisions (together, the UNCITRAL PFIPs instruments);

(d) Identification of other topics that should be addressed in a modern text on PFIP (such as oversight and promoting domestic dispute resolution measures, rather than using international dispute resolution bodies); and

(e) Broadening the scope of the current UNCITRAL PFIPs instruments in any future text, to cover forms of private financing in infrastructure development and related transactions not currently covered, such as public-private partnerships (PPPs) that might not include infrastructure development, concessions over natural resources and the private provision of services previously provided by Government.

2. This Note addresses each of these possible topics in turn.

B. Background information on topics proposed for possible future work

1. Aspects of public procurement not addressed in the UNCITRAL Model Law on Public Procurement

(a) Contract management/administration

3. As the Working Group has noted, there are three main phases of the procurement cycle: (1) planning and budgeting prior to commencing a procurement procedure, (2) the selection of suppliers and (3) contract management and administration.[3] This is an approach taken by other agencies in procurement reform and commentators, and is reflected in the Principles annexed to the OECD Recommendation on Enhancing Integrity in Public Procurement, which define the procurement cycle as ranging from needs assessment to "contract management and final payment".[4] The United Nations Convention Against Corruption (2003, "UNCAC") article 9 (2), provides that a procurement system must ensure adequate internal control and risk management, a requirement that is clearly not limited to phase (2).[5]

4. The Working Group decided, however, that the scope of the Model Law would not be expanded to phase (3), and would address only limited aspects of phase (1). (In this regard, the Model Law reflects the scope of much national and other

---

[3] A/CN.9/WG.I/XIII/INF.2 para. 31, before the Working Group at its 13th session. Terms for this phase of the procurement cycle include contract management, contract execution and contract administration. If future work on this topic is undertaken, a consideration of terminology might be included in its scope. This note will use the term "contract management", as it has the broadest scope among these terms.

[4] OECD Principles for Integrity in Public Procurement, 2009, Definitions, page 126, available at www.oecd.org/document/25/0,3746,en_2649_34135_42768665_1_1_1_1,00.html.

[5] Article 9 (2): "2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: … (d) Effective and efficient systems of risk management and internal control …". The text is available at www.unodc.org/unodc/en/treaties/CAC/.

international procurement legislation.) In particular, the Working Group noted that budgetary legislation (procurement planning) and contract law (contract administration) might be a more appropriate forum than a procurement law.[6] Nonetheless, the Working Group considered that all three phases were integral parts of the procurement cycle,[7] and that the Guide to Enactment that accompanies the Model Law should consider them in some detail.[8]

5. The main objectives of the contract management phase are ensuring performance of the contract, i.e. that the goods, construction or services under the procurement contract are provided in the requisite quantity and quality, at the agreed price, and on time, and avoiding abuse. These objectives track those of value for money and avoiding abuse in the procurement process itself. As recently noted by Transparency International and others, this phase of the procurement cycle, and procurement planning, are "increasingly exposed to corruption",[9] perhaps as a result of reforms to regulate the selection phase. Abuses observed in practice include theft of assets prior to deployment, deficient supervision in some cases arising from collusion between contractors and supervising officials, false accounting, cost misallocation, etc.[10]

6. What is required to ensure contract performance varies depending on the complexity of what has been procured: from taking delivery and effecting payment for simple procurement through to a detailed programme involving engineers, surveyors, project managers, auditors and so on in complex cases.

7. The draft Guide to Enactment to the Model Law addresses contract management in the following manner: "[t]he contract management stage, if poorly conducted, can undermine the integrity of the procurement process and compromise the objectives of the Model Law of equitable treatment, competition and avoidance of corruption, for example if variations to the contract significantly increase the final price, if sub-standard quality is accepted, if late payments are routine, and if disputes interrupt the performance of the contract. Detailed suggestions for contract administration in complex procurement with a private finance component are set out in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) […]: many of the points made in that instrument apply equally to the management of all procurement contracts, particularly where the contract relates to a complex project."[11]

8. The solutions advised both in the Legislative Guide and other texts to mitigate contract performance risks include appropriate provision in the terms of the project

---

[6] See, for example, A/CN.9/590, para. 13, and A/CN.9/595, paras. 80-82, considering A/CN.9/WG.I/WP.42, paras. 36-48.

[7] Ibid.

[8] A/CN.9/590, para. 13.

[9] Transparency International Handbook, "Curbing Corruption in Public Procurement", 2007, available at www.transparency.org/global_priorities/public_contracting/tools_public_contracting/curbing_corruption_in_pp_handbook.

[10] OECD Principles for Integrity in Public Procurement, supra, at page 69, and "A Guide to best practices for contract administration", Office of Federal Procurement Policy (OFPP), 1994, available at www.gsa.gov/graphics/fas/BestPracticesContractAdministration.pdf.

[11] Guide to Enactment of the UNCITRAL Model Law on Public Procurement, part I, General remarks, "Implementing the principles of the Model Law to all phases of the procurement cycle: procurement planning and contract management", para. 27, in A/CN.9/WG.I/WP.79/Add.1.

agreement (which should address ownership of assets, financial arrangements, security interests, assignments, review and approval of plans, variation of project terms, monitoring powers of the government entity, operation of infrastructure, and general contract arrangements such as sub-contracting, liabilities and guarantees, changes in conditions, and breaches and remedies). The Legislative Guide also addresses the duration, extension and termination of the project agreement and prevention and settlement of disputes. Other guidance recommends the use of project management tools such as work performance schedules, the identification of responsibilities for each task (such as delivery and inspection), a clear understanding of the authority of government personnel and reporting lines, and defined payment procedures, communication and record-keeping tools.[12]

9. If it decides that future work in this field would be appropriate, the Commission may also consider whether regulation would need to take into account the legal framework for contract management as set out in the procurement contract (the terms of which are not regulated in the Model Law); if so, it may be difficult to address contract management without addressing contract terms. Standard procurement of general contract terms are stipulated by many procuring entities, including the United Nations,[13] and the World Bank,[14] and specialist contracts that can be adapted to particular requirements are issued by, among others, the International Federation of Consulting Engineers (FIDIC, which has issued a set of construction contracts).[15]

10. A further view is that the public procurement cycle should be considered to be at an end only at "the end of the useful life of an asset or the end of a services contract".[16] This approach is reflected in the laws of certain countries, which include disposal of public assets within their procurement law.[17] The Commission may therefore also wish to consider whether issues of publicly-owned asset disposal should be considered (the issue of divestment of national resources is also discussed in the context of the scope of the PFIPs instruments, below).

(b) Procurement planning

11. Noting the importance of this phase of the cycle, the Working Group considered that it might be more feasible in the Model Law and/or the Guide to deal with the issues of procurement planning than contract management.[18] In this regard, it recalled that the Model Law does address certain aspects of procurement planning, such as the definition of the terms and conditions of the procurement

---

[12] See, for example, OECD, supra, at pages 70-73, OFPP, supra, Best Practices in Contract Management, Dr. Rene G. Rendon (available at www.ism.ws/files/Pubs/Proceedings/GGRendon.pdf, citing Gregg A. Garrett, Rene G. Rendon, Contract Management: Organizational Assessment Tools, National Contract Management Association, 2005).

[13] See www.un.org/Depts/ptd/conditions.htm.

[14] For goods procurement as an example of such terms, see http://go.worldbank.org/SOTGACP3U0.

[15] See www.fidic.org/.

[16] Review of Civil Procurement in Central Government, Peter Gershon, 1999, reproduced in "Getting value for money from procurement", National Audit Office, United Kingdom, available at www.nao.org.uk/Guidance/vfmprocurementguide.pdf.

[17] See, for example, the Kenya Public Procurement and Disposal Act 2005, the Uganda Public Procurement and Disposal of Public Assets Act, 2003 and the Nigeria Public Procurement Act, 2007.

[18] A/CN.9/595, paras. 80-82.

(including statement of needs and specifications under article 10), who may participate (articles 8 and 9), how the winner will be determined (article 11) and choice of procurement method and means of solicitation (Chapter II). It also encourages the publication of information on forthcoming procurement opportunities (article 6, such as in the form of procurement plans). The Guide also notes that, "[t]he benefits of [advance notices] accrue generally through improved procurement management, governance and transparency. Specifically, [they encourage] procurement planning and better discipline in procurement and can reduce instances of, for example, unjustified recourse to methods designed for urgent procurement (if the urgency has arisen through lack of planning) and procurement being split to avoid the application of more stringent rules. The practice can also benefit suppliers and contractors by allowing them to identify needs, plan the allocation of necessary resources and take other preparatory actions for participation in forthcoming procurements".[19]

12. Needs assessment and planning and budgeting in the broader sense are not otherwise addressed in the Model Law or Guide. On needs assessment, the OECD states that avoiding information asymmetries between the private sector and the procuring entity, which can facilitate corruption, involves market research and perhaps interaction with the market; it continues that the need itself should be assessed against defined objectives and benchmarks, and that transparency measures should feature in this process. As regards planning and budgeting, the OECD recommends assessing the procurement in the light of the strategic priorities of the relevant organisation, setting realistic time-frames and budget estimates, preparing a business case, ensuring the appropriate division of decision-making in the process, and preparing for the transparency requirements of the procurement procedure itself.[20] These points are echoed in the Legislative Guide.[21]

(c) Suspension and debarment

13. Suspension and debarment (also termed "blacklisting") of suppliers or contractors are sanctions available to procuring entities. One view of the aim of such measures is to ensure that governments deal only with potential suppliers or contractors that will fulfil their legal and contractual obligations, by excluding those that have failed to observe those obligations in the past; others include that a debarment regime is part of the appropriate sanctions regime to support procurement procedures. Debarment removes a supplier's or contractor's eligibility for government contracts for a fixed period of time where misconduct or other illegal behaviour is established; suspension generally means a temporary exclusion, for example while allegations of misconduct are investigated.

14. The Technical Guide to the United Nations Convention Against Corruption notes that public procurement agencies or similar bodies should address debarment

---

[19] Draft Guide to Enactment, part I, General remarks, "Implementing the principles of the Model Law to all phases of the procurement cycle: procurement planning and contract management", para. 26.

[20] OECD Principles for Integrity in Public Procurement, supra, at pp. 55-57.

[21] See, for example, the PFIP Legislative Guide, Chapter II, Selection of the Concessionaire, part A.4 "Preparation for the selection proceedings".

policies and procedures,[22] as an aspect of compliance with the provisions of its Article 9 on Public Procurement and the Management of Public Finances.

15. Article 21 of the Model Law addresses the exclusion of a supplier or contractor from the procurement proceedings on the grounds of attempted or actual inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest; it provides an exhaustive list of grounds for the mandatory exclusion of a supplier or contractor from the procurement proceedings, for reasons of abuse rather than as a result of qualification information or from the contents of a submission per se. It does not address exclusion of the supplier or contractor from future procurements, i.e. debarment, unlike many other systems, including those of the multilateral development banks.

16. At the international and regional level, examples of debarment systems can be found. The World Bank debarment system is based on an administrative process under its Sanctions Committee Procedures. The multilateral development banks have also entered into an Agreement for Mutual Enforcement of Debarment Decisions (effective July 2011).[23] Article 45 of the 2004 EU Public Procurement Directive and article 39 of the 2009 EU Defence Procurement Directive provide the basis for debarring, or mandatorily excluding, companies convicted of corruption, fraud, money-laundering and participation in a criminal organization from public contracts.

17. National systems in all regions address debarment, though not all through primary legislation on public procurement. For samples of debarment regulation from each region, see Argentina (Decree No. 1023/01, Article 28); the USA (Federal Acquisition Regulation Subpart 9.4—Debarment, Suspension, and Ineligibility); Czech Republic (Decree of Government of the Czech Republic dated 25 October 2006 No. 1199), Nigeria (Section 6(1)(e) of the Public Procurement Act 2007); in Singapore, the authority to debar arises under the Prevention of Corruption Act, and is exercised by the Standing Committee on Debarment.[24]

18. If the Commission considers that UNCITRAL should engage in work on debarment and related issues, it may wish to provide guidance on the possible scope of such work, such as addressing issues of due process requirements, ensuring consistency in application, ensuring proportionality and fairness, considering mandatory and/or discretionary debarment, whether the debarment function, should be centralized, transparency, time periods (and how to apply to be removed from a blacklist),[25] and "self-cleaning".[26]

---

[22] At page 79, "II.7. Preventing the misuse of procedures regulating private entities"; text available at www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

[23] For further details, see http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984.

[24] See ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, Anti-corruption policies in Asia and the Pacific: Thematic review on provisions and practices to curb corruption in public procurement, Self-assessment report Singapore, available at www.oecd.org/dataoecd/53/54/35054589.pdf.

[25] See, for example, Transparency International's "Recommendations for the Development and Implementation of an effective Debarment System in the EU", 2006, available at www.eib.org/attachments/strategies/TI_EU_debarment_recommendations.pdf.

[26] A process whereby suppliers that would otherwise have been excluded from procurement because of convictions for bribery and certain other offences, are permitted to participate in the

(d) Rules on corporate compliance

19. The Model Law regulates the actions of the Government and procuring entity, but not those of the supplier or contractor, other than providing sanctions for effectively proscribed behaviour under article 21 of the Model Law. It was suggested to the Working Group, based on emerging approaches being considered in one State, that norms and standards should be applied to the supplier or contractor. The aim, it was noted, was to alert suppliers to the potential for prosecution for fraud and corruption in procurement, and to encourage them to follow defined preventive measures (reflecting the obligations on the procuring entity and the scope of article 21 of the Model Law as described above). While the Working Group did not consider that it was appropriate to extend the scope of the Model Law in this way, the Commission may wish to consider the issue, perhaps in the context of debarment and self-cleaning (see above) and ensuring sub-contractors' compliance.

(e) Sustainability and environmental issues

20. It has been observed that "[s]ustainable procurement is a national and international agenda item. This can be seen in the recommendation from the Johannesburg Earth Summit that 'relevant authorities at all levels should promote procurement policies that encourage the development and diffusion of environmentally sound goods and services'".[27] The United Nations Environment Programme, for example, engages in partnerships with partnerships with various organizations such as the World Bank, the International Training Centre of the International Labour Organization, the League of Arab States and the International Council for Local Environmental Initiatives, and national governments, to promote sustainable procurement.[28]

21. The Working Group did not take up a suggestion to include "sustainable procurement" as an objective of the Model Law.[29] It did, however, consider that the increasing attention paid to the topic may indicate future work in the area would be appropriate.[30]

22. The draft Guide to Enactment addresses the topic as follows: "[t]he Commission has noted that there is no agreed definition of sustainable procurement, but that it is generally considered to include on a long-term approach to procurement policy, reflected in the consideration of the full impact of procurement on society and the environment within the enacting State (for example through the promotion of life-cycle costing, disposal costs and environmental impact). In this regard, sustainability in procurement can be considered to a large extent as the application of best practice as envisaged in the Model Law. For this reason, sustainability is not listed as a separate objective in the Preamble, but addressed as an element of processes under the Model Law. The term sustainable procurement

---

future, on the grounds that they have taken measures to remedy the consequences of their actions.

[27] Quotation from "Sustainable procurement — making it happen", UK Government, available at www.idea.gov.uk/idk/aio/69979.

[28] For further detail, see www.unep.fr/scp/procurement/.

[29] The suggestion was made in intersessional consultations — see A/CN.9/WG.I/WP.71, para. 32(a).

[30] A/CN.9/713, para. 142.

can also be used as an umbrella term for pursuit of social, economic and environmental policies through procurement, such as "social" factors: employment conditions, social inclusion, anti-discrimination; "ethical" factors: human rights, child labour, forced labour; and environmental/green procurement. The Model Law's flexibility in allowing socio-economic policies to be implemented in this way are discussed in detail in [the commentary to articles 8-11]".[31]

23. The Commission may wish to consider whether further legislative work is required in this field, or whether the Model Law already contains the required tools, as supplemented by the above commentary in the Guide to Enactment; in the latter case, it may wish to take steps to bring the approach of the Model Law to those agencies active in this area.

2. Harmonizing the procurement-related provisions in the UNCITRAL PFIPs instruments and relevant procurement methods in the Model Law on Public Procurement

24. The Working Group has noted the importance of consistency between the Model Law and the PFIPs instruments.[32] In the Legislative Guide, it is noted that the method of selecting the concessionaire is based on the "principal method for the procurement of services" under the UNCITRAL 1994 Model Law on Procurement of Goods, Construction and Services.[33] The (2011) Model Law no longer contains this procurement method, but a method for procurement of complex subject-matter, called "Request for Proposals with Dialogue" (article 49), includes certain features of the features of the selection of the concessionaire under the Recommendations and commentary in the Legislative Guide, including the process of pre-selection. Common features of this selection process and article 49 of the Model Law include an initial, open publication, a pre-selection procedure, prescribed contents of invitations to participate, minimum technical standards, and pre-disclosed evaluation criteria. Nonetheless, the provisions of article 49 and the Recommendations are not identical; the former are more detailed and impose additional requirements (such as regards evaluation criteria). The Commission may therefore wish to update the Legislative Guide on selection of the concessionaire to reflect relevant provisions of the Model Law.

3. Additional provisions for a modern text on PFIP

(a) Oversight

25. The combination of mandated procurement procedures and requirement for a record of each procurement process (under article 25 of the Model Law) is designed to facilitate the oversight of the procurement process. Recommendation 38 of the Legislative Guide provides that an equivalent record should be kept for the selection process. The Legislative Guide also considers regulatory oversight of the selection process, contract approval, monitoring obligations and compliance with contract terms, licence conditions, etc., sanctions, and dispute settlement.[34] As regards the operation of the infrastructure and facility, the Legislative Guide provides that the

---

[31] Draft Guide to Enactment, General remarks, supra, at paras. 34-44.

[32] A/CN.9/713, para. 142.

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

[34] See chap. I, "General legislative and institutional framework", paras. 30-53.

contracting authority or an independent regulatory agency may exercise the relevant oversight function, particularly where legal requirements for the provision of public services and changes in regulation (which may affect the viability of the project) may be contemplated.

26. The Legislative Guide notes that "an exhaustive discussion of legal issues relating to the conditions of operation of infrastructure facilities would exceed [its] scope".[35] In the context of the possibility of regulatory change, and the use of contractual mechanisms such as stabilization clauses that are sometimes used to address them (and which have attracted much negative comment),[36] the Commission may wish to consider exploring oversight issues in more detail.

(b) Promoting domestic dispute resolution measures

27. At its 2007 Congress entitled "Modern Law for Global Commerce", UNCITRAL was urged to identify (a) the necessary elements of a sound national regime for the prevention and resolution of disputes between regulator and operator in the concession environment and (b) relevant best practices. The aim in undertaking work in this area, it was said, was to address the observed inability of countries properly to "handle the disputes arising from regulation of increasingly privatized sectors of the economy, once thought to be core responsibilities of government", and the consequent disincentive to private investment in those sectors. Although the International Centre for Settlement of Investment Disputes (ICSID) might be able to take on some such disputes, it was considered that promoting local engagement in the relevant recipient State was an important consideration.

28. It was suggested that UNCITRAL should develop a national system for dispute prevention and settlement, building on the dispute-settlement provisions in Chapter VI of the Legislative Guide, and considering the appropriate forum. The contents of any future text in this area could include "provision in agreements and regulations for regular information exchange between regulator and operator; 'early warning' systems as problems arise, possibly standing machinery (analogous to contract review boards, or other standing provision for the application of independent expertise) to tackle problems in their incipiency by assuring legitimate implementation of regulations by the regulator and good faith compliance by the operator". Allied to these provisions, it was recommended that the dispute-settlement machinery (to include the selection of the members of the relevant body, and ensuring competence) and related administration should be and seen to be independent of politics and short-term government policy.[37]

---

[35] See chap. IV, "Construction and operation of Infrastructure …", Section I, "operation of infrastructure", para. 80.

[36] See, for example, "Stabilization Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights", 2008, available at www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf and "Freezing government policy: Stabilization clauses in investment contracts", R. Howse, 2011, available at www.iisd.org/itn/2011/04/04/freezing-government-policy-stabilization-clauses-in-investment-contracts-2/.

[37] See pages 351-363 of the Proceedings of the Congress of the United Nations Commission on International Trade Law held on the Occasion of the Fortieth Session of the Commission,

4. Consolidating the UNCITRAL PFIPs instruments

29. In 2001, the Commission requested the Secretariat to consolidate in due course the text of the UNCITRAL PFIPs Instruments into one single publication and, in doing so, to retain the legislative recommendations contained in the Legislative Guide as a basis for Model Legislative Provisions then being developed.[38] If the Commission decides to engage in this consolidation exercise, it may also wish to ensure that all issues discussed in the Legislative Guide are reflected in its Recommendations and Model Legislative Provisions (the commentary in the Legislative Guide is broader in scope than the Recommendations and Model Legislative Provisions).

5. Broadening the scope of the PFIPs Instruments to include forms of private financing in infrastructure development and related transactions not currently covered in the PFIPs Instruments

30. Public-private partnerships (PPPs) have become established ways of delivering infrastructure development. There are many definitions in circulation but, as explained by the World Bank, "[t]he term 'public-private partnerships' has taken on a very broad meaning, the key element, however, is the existence of a 'partnership' style approach to the provision of infrastructure as opposed to an arm's length 'supplier' relationship ... Either each party takes responsibility for an element of the total enterprise and work together, or both parties take joint responsibility for each element. ... A PPP involves a sharing of risk, responsibility and reward, and is undertaken in those circumstances when there is value for money benefit to the taxpayers".[39] Hence it may be considered that the term "PPP" has broader connotations than PFIP in that non-financial contributions from the private sector could be involved. Nonetheless, a common understanding of PPPs and PFIP is that the tools are broadly equivalent.

31. The definitions of PPPs also, in the view of some, include other ways of service delivery by governments, including outsourcing and the divestment of state-owned assets or enterprises for that purpose. According to one report, "PPPs have evolved to include the procurement of social infrastructure assets and associated non-core services. PPPs have extended to housing, health, corrective facilities, energy, water, and waste treatment".[40] A key feature is the provision of what were previously government services by third parties; the Legislative Guide does not address the provision of such services other than as part of infrastructure development.

32. The Legislative Guide states, in its introduction, that "The Guide pays special attention to infrastructure projects that involve an obligation, on the part of the selected investors, to undertake physical construction, repair or expansion works in

---

Vienna, 9-12 July 2007, available at www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

[38] At its 35th session; see A/58/17, para. 171.

[39] The World Bank, 2003. See, also, http://ppp.worldbank.org/public-private-partnership/.

[40] New South Wales Treasury (2009): New South Wales Public-Private Partnerships — An Evolution, cited in Public-Private Partnerships, Literature Review — Draft, G. Palmer, Aid Delivery Methods Programme, 2009 (available at www.dpwg-lgd.org/cms/upload/pdf/PublicPrivatePartnership__Lit__Review.doc).

exchange for the right to charge a price, either to the public or to a public authority, for the use of the infrastructure facility or for the services it generates. Although such projects are sometimes grouped with other transactions for the "privatization" of governmental functions or property, the Guide is not concerned with "privatization" transactions that do not relate to the development and operation of public infrastructure. In addition, the Guide does not address projects for the exploitation of natural resources, such as mining, oil or gas exploitation projects under some "concession", "licence" or "permission" issued by the public authorities of the host country."[41] It has been noted that such transactions may include the transfer to the private sector of common and natural resources or land, and there are reports of disregard of rights over such land, negative environmental consequences, and a lack of transparency in some of them.[42] The reports also indicate a significant increase in projects involving the disposition of land and other natural resources.[43]

33. It has been observed that many of the recommendations of the Legislative Guide would apply to these excluded transactions; indeed, the OECD's "Basic Elements of a Law on Concession Agreements", developed with the Istanbul Stock Exchange, and regional experts, addresses all types of concessions.[44] Given the increasing significance of relevant transactions, the Commission may wish to consider whether the scope of the Legislative Guide should be expanded to accommodate them. It may also wish to take into account the envisaged scope of the proposal from the European Commission for a Directive on concessions.[45]

34. The Commission may recall that the Legislative Guide states that successful infrastructure projects should "achiev[e] a balance between the desire to facilitate and encourage private participation in [relevant] projects, on the one hand, and various public interest concerns of the host country, on the other".[46] The Commission may consider that these elements and the appropriate balance between them requires additional elucidation should the scope of the Legislative Guide be expanded to include the items currently not addressed and identified above. In this regard, identifying the relevant public interest and public interest concerns may

---

[41] See Introduction and background information on privately financed infrastructure projects, para. 8.

[42] See Uniform law Review, NS — Vol. XVII 2012, Devising Transparent and Efficient Concession Award Procedures, C. Nicholas, and the various sources referred to therein.

[43] See, for example, S. Haralambous, H. Liversage and M. Romano, The Growing Demand for Land Risks and Opportunities for Smallholder Farmers, Discussion Paper prepared for the Round Table organized during the Thirty-second session of IFAD's Governing Council, 18 February 2009, available at www.ifad.org/events/gc/32/roundtables/2.pdf and Rachel Nalepa, The Global Land Rush: Implications for Food, Fuel, and the Future of Development, Pardee Papers, No. 13, May 2010, available at www.bu.edu/pardee/files/2011/08/PP13_GlobalLandRush.pdf.

[44] Ibid., at page 3. The text of the OECD Basic Elements of a Law on Concession Agreement is available at www.oecd.org/dataoecd/41/20/33959802.pdf.

[45] The text of which is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0897:FIN:EN:PDF.

[46] See Introduction and background information on privately financed infrastructure projects, para. 8.

require particularly careful treatment: as has been noted, any "judgement about the 'value' placed on public policy outcomes",[47] is likely to be subjective.

35. In this context, the Commission may wish to note that UNIDROIT is considering possible future work in related areas: with IFAD and FAO on the issue of contract farming, and more generally international guidance on land investment contracts, taking account, in particular, of the UNIDROIT Principles of International Commercial Contracts.

6. Additional matters

36. The Commission may consider that the brief description of some of the issues set out above requires further elaboration in order to set the appropriate mandate for any future work; if so, it may wish to instruct the Secretariat to conduct a more detailed study into relevant norms, standards and practice, and to address the feasibility and desirability of work by the Commission in the fields concerned. It may also wish to consider whether holding a colloquium would assist in developing the appropriate scope of any future work.

37. The Commission may also wish to assess the appropriate scope and form of any future text in these areas. The Commission may wish to consider the extent to which the issues identified above are amenable to regulation; it may consider some would be more appropriately addressed through guidance on best practice. In this regard, the Working Group at its 21st session considered that certain issues of importance to public procurement and related activities went beyond the scope of a legal text and policy guidance such as in a Guide to Enactment, including as regards implementation and use of the text concerned (see, for example, the issues considered in paragraphs 6-9, 12, 17 and 34 above). The Working Group has therefore contemplated additional documents to support the Model Law on Public Procurement, including a glossary of terms in the Model Law and accompanying Guide to Enactment.[48]

38. The Commission may also wish to consider how further information might be collected and made available with respect to enactment, implementation, interpretation and use of the Model Law. As regards interpretation, the 1994 Model Law was rarely enacted without tailoring to local circumstances, and this approach is expected for the 2011 Model Law. Hence the use of CLOUT as a tool may be of limited assistance.

39. In the insolvency arena, the "UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective" (2011) and the "UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation" (2009) support the Model Law concerned: a similar approach, and encouraging contributions through the UNCITRAL website and expert consultations may support the Model Law on Public Procurement.

---

[47] Illidge, R. and Cicmil, S. [2000] From PFI to PPP: Is risk understood? available at www1.uwe.ac.uk/bl/bbs/trr, at page 2.

[48] A/CN.9/745, para. 36.