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"A call for reinforcing and harmonizing the arbitration rules for effective Private-Public Partnerships issues."

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SUMMARY

This topic is divided into three interconnected Sections:

- (i) Existing texts and guidance on PPPs at the international level – do they need to be modernized and harmonized?
- (ii) Possible minimum provisions, or core elements, of a legal text on PPPs.
- (iii) Dispute Resolution.

"The fox knows many things, the hedgehog knows one big thing", Isaiah Berlin.

The international market is dominated by jurisdictions governing treaties, agreements and contracts between parties. For example, at the Rio Conference in 1992, the UN Framework for Climate Change elaborated rules reinforcing the Kyoto Protocol (article 10, §c). In 2008 the Conference of Poznan defined the Strategic Program for World Fund for Environment, and revised the Technology Transfer on Climate Changes (as per UNFCCC, 2009a). The trend was followed by the Agreement on Trade-Related Aspects of Intellectual Property Rights; Trade-Related Intellectual Property Rights Settlement; the Marrakesh Agreement, and many others. The World Intellectual Property Organization and its Committee for Development of the Intellectual Property (CDPIP) articulate rules, and revamp provisions.

Eventually, the International Centre for Settlement of Investment Disputes (ICSID), an autonomous international institution was founded. It was established under a convention for protecting investments and resolving disagreements between States and nationals of other States with over one hundred and forty member States. The Convention sets forth ICSID's mandate, organization and core functions with the primary purpose of providing facilities for conciliation and arbitration of international investment disputes.

But in practice there are still hurdles with Private-Public Partnerships (PPPs.)

International meetings and workshop events are extremely expensive both economically and ecologically and further erode the credibility and legitimacy of the international organizations concerned.

- How many of the countless international meetings of the last decades, have achieved real outcomes?
- Should we condemn those who are skeptical of what was promised and of what was achieved?
- Why do such programs not work as expected?
- Why are the intellectual property rights, copy rights, conventions, and others rules still under fire?

SYNOPSIS

Today PPP's are one of the key elements for development and job creation. However, building agreements, contracts, laws, rules and provisions pertaining to PPPs are complicated, lengthy, and costly as regards the legal documentation. This situation is difficult particularly when entrepreneurs from Less Developed Countries (LDC's) are embarked in a venture requiring the technical assistance from industrial countries. In general LDC's have no legal instruments to protect themselves against possible abuses from the party that delivers the technology and the know-how. There is a critical need for elaborating a platform for facilitating such practices.

Most African countries have no model laws or well-articulated texts pertaining to a particular PPPs project. It is not the lack of specialists to write such texts, but the lack of funding for conducting and validating such programs. This paper recommends the standardization of applicable laws and matrix for PPP's, as a full part of the Millennium Development Goals (MDG's). Yet, it ensures appropriate issues from Research & Development, as well as, planning for conveying and executing investment proposals both for the private, and the public sector.

We need an international arbitration court of PPP's where the balance should be 50-50 between north and south, and the arbitrators should be members of our Team Of Experts (TOS).

Poverty of the poor is permanent danger to the rich.

Although the outright transfer techniques should be reframed and standardized in legal terms, there are still many hurdles. In the search of solutions, it may be a good idea to focus on the current international system and its fragmentations around regional configurations.

Let’s improve some significant niches of the international legal provisions by enriching legal texts, treaties and agreements. Such a platform will transcend legal value, as well as meeting the aspirations of the international community. It supports the Convention of the OECD Mutual Administrative Assistance in Tax Matters, especially its modified Article 13, §5 that addresses abuses in double taxation. It also addresses Article 25 that provides for mandatory binding arbitration when a dispute cannot be solved under the usual Mutual Agreement Procedure. And other revised Articles of the current OECD Models.

We should keep in mind that States and intergovernmental organizations are the only subjects of law, and enjoy international legal personality. Thus, because of its holistic mission, the new “Unit” must be equipped with the skills and the capacities, as well as, sufficient funding for accomplishing its mission.

BACKGROUND

The current chain of laws protecting PPP’s by way of treaties and arbitration needs drastic improvements for many reasons. Some say it needs more legitimacy. Others say that the system lacks integrating human rights in the principles. In our opinion, harmonization in this regards should be based on two focal points: (i) explore LDC’s realities in order to alleviate the called “aid”, (ii) understand the global market culture for reshaping the map.

- At the first level, human rights considerations, especially economic and social rights, can be brought to bear by way of the systematic integration for treaties and agreements interpretation between partners. But it till leaves an excessive discretion to arbitrators.
- At the second level, efforts should be made to recast investors’ legitimate expectations under foreign investment contracts by including a human rights audit as part of the due diligence.

This should be conducted by the company transferring its know-how and technology. It should include commitments and domestic methods (acceptable) for implementing the whole process.

The primary objective of this audit would thus be to fully include the prospective LDC’s international obligations as part of the body of the global market accepting applicable law and thus creating a better map of the landscape of an investor’s legitimate expectation.

ABSTRACT

In order to respond proactively to how likely the preparation before a set of policy proposals for a legal text on the legal framework for the PPP’s in all regions can be adequately represented; we should reinforce and harmonize the existing arbitration rules.

It should lead to launching the International Court of Justice for Public and Private Partnerships (ICJPPP’s), with a specific budget. Prior that, the most important stage is “building a Model Convention for PPP (MCPPP)”, under the auspices of the United Nations Commission on International Trade Law Arbitral Rules (UNCITRAL.) The MCPPP will operate like the International Court of Justice (ICJ).

- The mission of this special unit will be offering innovative, proven strategies from countries that have successfully coordinated the agendas of early relief, economic recovery and reconstruction, and longer-term development. Alongside infrastructure considerations, our TOS will integrate the stakeholders to create the right environment for investments and growth, the importance of donor coordination, job training, and education, and the role of women, the diaspora, and start-ups in creating the social contract between a state, enterprises, and the community. The MCPPP will offer compelling and original ideas, analysis, and solutions.
- The purpose of the ICJPPP will be to “serve the background for a course of justice in international contracts and agreements on technology transfer between partners.”

- The objective is initiating an international commission on legal contracts and agreements on technology transfer. The ambition is overcoming the problems of legal binding the States together by transparent treaties, political, economic or military.

However, prior to providing the guidelines for a realistic MCPPP, the focus should be on the jurisdiction and the adaptability of rules and procedures.

- The goal of the ICJPPP will be “preventing, and guaranteeing the rights and respect of the obligations pertained with the agreements on technology transfer to both parties engaged in a PPP deal.”

There is a need to develop common criteria for the evaluation of core functions and obligations, while recognizing that flexibility is needed. It will give room to the TOS work with experts from LDC’s in order to reconcile and share information with the international standards. For example, the TOS can review the 1993 FAO Compliance Agreement and Code of Conduct for Responsible Fishery, the Kobe meeting used by NEAYC in its 2006 performance review, the OECD norms, as well as other RFMOs (Regional Fisheries Management Organizations.)

For ethical reasons, the criteria and performance review of the TOS in building a Model Convention for PPPs should be based on: (i) Human rights - focus on women, minorities, and the diaspora; (ii) Transparency about international cooperation, prioritizing cooperatives; (iii) Legal analysis, review and assessment of past and current Agreements between nations; (iv) Conservation and management; (v) Implication of independent judges. Arbitrators should be the TOS members.

This will enable LDC’s decide independently upon the methodology, criteria and frequency of reviews.

IMPACT

Significantly, one of the biggest impacts will be involving women. The TOS will reinvigorate broken promises by involving rural women and cooperatives.

Small-scale women farmers are the backbone of Africa's food system, but, as corporations buy up huge swathes of rural land, they are losing out at every turn.

Actually this paper looks at the great challenges facing women small-scale farmers, and also gives a highlight of ignored Heroes who perhaps show us where to go next.

It is unfortunate finding from recent research that the promises of development benefits from corporate land-based investments are not materializing. Instead unequal power relations, including widespread gender discrimination, have resulted in many rural women losing access to land and being pushed into greater poverty due to such investments.

Men are also affected, but the failure to listen to rural women and involve them in decision making leaves them with more of the negative outcomes and fewer, if any, benefits. This has serious implications for people's right to food, given the important role women play in food production. The Food and Agriculture Organization and others have shown that women produce most of the world's food and "are primarily responsible for preparing, storing and processing food". These investments, or 'land grabs', are happening on an alarming scale and are becoming a substantial driver of human-rights violations and rural poverty.

The Diaspora is the driving force for investments in LDC's. Each year the Diaspora contributes billions of Dollars to the economies of the homeland. These aggregate remittances count in billions of US Dollars per year, but they respond essentially to emergency assistance in different social areas such as food, health care, education, housing, etc. At the macroeconomic level, these transfers represent an important part of the GDP of the country of origin and they impact the payments balance. The Diaspora is equipped with a solid educational background coupled with a thorough long experience, and high ethical values in international affairs. Some entrepreneurs in the Diaspora willing to participate into PPP's but they are exposed to serious problems because of their status.

The TOS should seize such opportunity and facilitate the integration of the Diaspora in the development process. Such experts are effective and less expensive than the expatriates.

SECTION I: Existing texts and guidance on PPPs at the international level - do they need to be modernized and harmonized?

Here a brief evolution of the current rules, provisions, and laws influencing PPPs legal texts inflows. *(source: European Community webpages.)*

I. In 2008 the commission published the rules applicable to Institutionalized Public-Private Partnerships (IPPP) (2008/c91/02 – Official Journal C 91 of 12.4.2008: (i) Provisions on public procurement and concessions were clearly established. (2) Steps for creating a PPP platform also where defined.

But there are no specific rules governing the creation of an IPPP in Community law. However, the principles of fair treatment and the prohibition of discrimination on grounds of nationality derived from Article 43 of the Treaty establishing the European Community (EC Treaty) on freedom of establishment and from Article 49 EC on the freedom to provide services apply to the fields of public procurement and concessions. Among the rules, it was required that participants must comply with the EC rules.

II. In 2006, the Commission services will also conduct an in-depth analysis of the impacts of a possible legislative initiative on concessions. The final decision whether or not to take this measure, and on its concrete shape, depends on the result of this impact assessment.

III. In 15 November 2005 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on public-private partnerships and Community law on public procurement and concessions [COM(2005) 569 final - Not published in the Official Journal]. The focus was on “dialogue” between partners, but no new rules, no new legal text. It stated that community law is neutral as regards whether public authorities choose to provide an economic activity themselves or to entrust it to a third party.

If public authorities decide, however, to involve third parties in conducting an activity, community law on public procurement and concessions may come into play.

IV. In April 30, 2004 the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327) was published. The objective was launching a debate on whether a specific legal framework should be drawn up at European level. They help implement the European Initiative for Growth and trans-European transport networks.

PPPs are characterized by:

- the duration of the relationship between the partners;
- the method of funding the project;
- the role of the partners in the definition of objectives, design, completion, implementation, and funding;
- the distribution of risks.

The Green Paper distinguishes two types of PPP:

- PPPs of a purely contractual nature.
- In this case, the partnership is based solely on contractual links and may fall within the scope of European Directives on public procurement.
- PPPs of an institutional nature.
- These PPPs involve cooperation within a distinct entity and may lead to the creation of an ad hoc entity held jointly by the public sector and the private sector or the control of a public entity by a private operator.

Again, there was no specific legal framework for PPPs at European level. The Green Paper therefore seeks to examine whether the Treaty establishing the European Community (EC Treaty) and its secondary legislation is suitable and sufficient to cope with the particular challenges posed by PPPs.

This analysis looks at both the selection of the private partner and the implementation of the partnership.

Any act whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles of the EC Treaty. With regard to the freedom of establishment and the freedom to provide services (Articles 43 to 49), these principles encompass transparency, equality of treatment, proportionality and mutual recognition. The EC Treaty thus applies to PPPs.

V. In April 2000 the Commission has adopted an Interpretative Communication on Concessions under Community Law which explains the scope and content of the EC Treaty principles applicable to the award of concessions. There is still a need to provide legal certainty on concessions.

Yes, they urgently need to be modernized and harmonized.

THE CORE REASONS:

Given the spectrum of legal texts on PPP’s and the related agreements and treaties, it became critical now to improve them for many reasons:

- The United Nations Organization has become an intricate structure where some organizations and divisions have almost the same mission statement. There is an emergency need for addressing this by creating special units for revamping the general indications, conveying them into specific schemes and provide new international standards.
- Fighting unemployment crisis is an international concern. We need dialogue and commitment of both the private and the public sectors, within new scope and paradigms. Taking a new stance will contribute in alleviating unemployment and its side effects around the globe.
- While pushing the legal aspects, other sectors are directly affected: (i) it underlines the desirability of promoting inflows of foreign investment to developing countries on acceptable conditions, thereby complying with the MDG’s, (ii) preventing side effects of financial instruments, including transfer pricing affecting international economic relations,

(iii) eventually this court will prevent and solve tax issues. It will fix the retention of greater so called "source country" taxing rights under a tax treaty.

Basically there are two core reasons for supporting the initiative for launching the Model Convention for PPP:

1. World affairs are dominated by exchange between nations, prioritizing "aid" from North to South. Since 2000 there is a big shift in aid allocation. In an article published by Devex Editor on 03 April 2013, "Aid spending falls 4 percent in 2012", *the OECD blamed the decrease on the continuing financial crisis, especially in the euro area, which has prompted several EU member state governments to tighten their development budgets... Data for 2012 show that although total net ODA (Official Development Assistance) fell, along with a fall in core contributions to multilateral institutions, aid for core bilateral projects and programs actually rose by two percent in real terms. However, bilateral aid to sub-Saharan Africa fell by almost eight percent in real terms compared to 2011; aid elsewhere on the African continent fell by almost 10 percent; and bilateral net ODA to the group of LDC's also fell by 12.8% in real terms.*

Good remarks indeed, but how about the main causes of the "continuing financial crisis", i.e. unethical business practices still in force, and often performed by some government bodies of the DAC (Development Assistance Committee)? The current upheaval should force us to establish robust PPP rules and epitomize non written agreement.

2. Despite gesticulations, intellectual property right is the trigger for effective technology and know-how transfer proposals, including research and development. It is critical to clarify and to define the agreements about the rights for using existing technologies, as well as the property of invention, and patents. Specifically when dealing with PPP's and international affairs we must to speak and understand the same language and concepts.

For example, many specialists from LDC's rebuff statements about "Aid" because its premise is false and obsolete. For them, "Aid" sounds like a misleading concept somehow entertaining economic and financial bondage. They advocate that "Aid" must be banished from the compendium. Bilateral "Aid" should simply read "investment". At the end of the day it makes more sense: (i) it entices development schemes for leveraging the capacities building in LDC's, (ii) the ODA will be scrutinized with new perspectives and paradigms.

And the team of experts should name problems such as corruption, human rights violations and the lack of transparency; however, it fails to present effective solutions.”

CONCERNS FROM THE CIVIL SOCIETY.

Our current laws must be completed with some work on the measurement of economic integration. The reason is that the existing models imply a static analysis. They are not easily adapted to take into account the dynamics of economic integration. Therefore:

- The TOS should provide important case study evidence of the relationship between services trade policy-making and development challenges, including regulatory and institutional dimensions.
- Our lawyers should disseminate an insightful new Background and Guide on PPPs coalitions in LDCs by prioritizing Africa where poverty is a permanent danger to the rich countries.

The Diaspora and representatives of women organizations should be invited to participate in negotiations and the transformation of the local and the international “System” in place. The benefits will be multiple and will impact the immigration too. The transition should start now. It will convert the current economic, trading and financial system directed by predators and swindlers and some States at their command, toward an economy of public ownership under democratic and international control.

I. In a statement made about PPPs current rules, Prof. Christoph Stueckelberger of GlobEthics Net in Geneva indicated: *“one of the obstacles for PPPs is in my experience the different speed and administrative barriers: companies are used to decide quickly, public administration very slow due to democratic or bureaucratic mechanisms. Needs compromise: accelerated procedures from public sector and understanding of companies for democratic procedures and gains it brings to companies A new standard could probably be helpful: The Integrated Reporting just now launches the consultation on a new reporting system, integrating financial, social and environmental reporting with the goal to facilitate and make more meaningful the complexity of modern reporting. Ten stock markets and many associations already reacted very positive. <http://www.theirc.org/>”*

II. In his provocative book, “The Globalization Paradox: Democracy and the Future of the World Economy (Norton 2011),” Dani Rodrik raised three concerns in one: hyper-globalization, democracy and autonomy. He called it the “trilemma”, i.e. a tradeoff between national autonomy and rules that promote globalization. Dani Rodrik of Harvard’s Kennedy School is a leading public scholar, who has made tremendous contributions to the study of the economics of development and trade. His book provides a sharpened and well-documented critique of globalization and world affairs.

III. Prof. Joel P. Trachtman made an astonishing statement about PPPs: *“However, a contractual perspective on international law - recognizing that states use international law to make exchanges of policy autonomy in ways that enhance each consenting state’s welfare - suggests that there is no real tradeoff between national autonomy and international legal rules that promote globalization. Instead, these rules may be seen as an expression of national autonomy. Furthermore, international law does not necessarily need the same types of democratic credentials that national law requires, because states consent to international law through their national democratic processes...”*

There is a democracy deficit in the formation of international law.

IV. On the way to the new paradigms... Most governments and the UN should revisit current PPPs as governed by hidden protectionism and transform it into “Responsible and Ethical framework”, i.e. a kind of Social Capitalism. Such an approach may involve the large-scale reorganization of the economy, the transfer of trillions from the coffers of predator classes’ of no social utility to the public welfare. This change will involve PPPs toward a productive and innovative economy based on Agri-business, Ethical Banks, Education and Research, Energy, Etc. Yet, Social Capitalism could replace the everyday terror of dismissal with the security that brings confidence, assurance and respect to the workplace. This shift should be at the heart of the vision of 21st of all the UN organizations, and to share it with other governments, and stakeholders.

Such an audacious vision includes for example, nationalizing the banks and eliminating Stock Exchanges Houses (including, Wall Street); redesigning financial institutions to create productive employment, to serve social welfare and to preserve the environment, etc.

CONCLUSION

Despite hundreds legal texts issued by respected international organizations and respected consulting firms, balancing PPP's interests between partners is still in limbo. Many countries lack the required foundation and the capacities to enter into the arena of regional and the international market because of inadequate aspects of the current rules and regulations pertained with the PPPs endeavors. All of these facts and other niches of the legislation in force and the protection of treaties, agreements, and legal texts should be implemented. We need a new direction with new perspectives.

This is a momentum when the world economy clearly needs an immediate boost and the global trading system needs urgent reinforcement. To provide the stimulus required, the TOS needs to explore fresh approaches to rekindling progress in global negotiations on services. The TOS calls on all UNCITRAL and WTO members to activate the existing negotiating mandate and launch early negotiations for a new international services agreement and laws with a specific Budget. It is critical for the TOS keeps enticing PPPs reinforce its laws about technology transfer and know-how. Harmonizing the laws, building models about new paradigms will shift the whole system and move it to a new dimension with new perspectives. A robust international legal entity will be the safeguard and the cornerstone for PPP's, the engine for financing projects. “Building a Model Convention for PPPs (MCPPP)” with a special budget, under the auspices of the UNCITRAL will make a big difference. This is the first step prior launching the International Court of Justice for Public and Private Partnerships (ICJPPP's).

Prof. Joel P. Trachtman believes there are economists who think like a hedgehog and those who resemble the fox. Economists like Keynes, Stiglitz and Rodrik are foxes, while Ricardo, Hayek, Friedman, Stanley Fisher or Robert Lucas are hedgehogs. I continue to encourage the TOS members to live up to their commitments; however, “maintaining aid is not the issue, especially in today's fiscal climate and PPP's.” It is my hope that the trend will be reversed by our TOS before the 2015 deadline for achieving the MDG's. This is essential if aid must be alleviated from the international compendium to play its part in helping achieve the Goals. Time has come to put together a team of doers (i.e., Entrepreneurs), facilitators (lawyers), and governments for establishing a new era of PPP's. Such a combination of positive factors and synergy impacts creativity and innovation in the private and the public sectors, and will result in job creation.

SECTION II: Possible minimum provisions, or core elements, of a legal text on PPPs.

THE CHALLENGE:

Broadly, we are likely in the typical case of «substantial right» with the intellectual property rights. It is very complicated for harmonizing and adapting PPP’s legal texts and provisions.

Among the core difficulties:

- First we must identify the link between the human rights to intellectual property. The transfer of technologies and the innovative process and development are ambiguous.
- Secondly, the intellectual property and development are not linear; each country has its standards and realities. Establishing a differentiation matrix is not easy because of lack of perfect level of protection. In order to prevent disputes, one of the avenues could be a unique law aiming to reduce the length and the duration of protection of patents. Flexibility is recommended in other areas, including clean technologies, and utilities because they are inalienable public goods.
- Thirdly, the protection of PPPs agreements is proportional to the level of development of a given country (Hamdan-Livramento, 2009).
 - Some measures might sound more or less optional and compulsory. Countries like the US fear becoming victim of «robbery» of their technology and know-how because of the limitations of the intellectual property rights. They call for protectionism.
 - The reality is that today the international system favors developed countries delivering the technology. In general before entering into a PPP agreement, LDC’s are forced to accept patents, sign mandatory licensing, and rude terms and conditions dictated by the company transferring the technology.
 - Although patents encourage the social well-being and reward creativity, they must also entice Foreign Direct Investments through technology transfer. So, efforts should be in protecting invention and transfer rights in the beneficiary country.

The core challenge remains “how to revisit laws and make them acceptable by all for protecting PPP’s agreements and the related documents.” In other

words, how *addressing the weaknesses of previous attempts on PPP’s rules, regulations and provisions.*

HERE ARE SOME ELEMENTS FOR BUILDING PROVISIONS:

1. "Globalization" is a process driven by transportation and communications technologies brought billions of new participants into the global economy that we once thought of as being defined by the United States, Canada, "Old" Europe, and Japan. Not surprisingly, that tectonic shift has had an immense impact on those original OECD economies, with a huge amount of personal suffering for many. Our governments can no more isolate our public from the process.
2. Our view of the impacts of globalization is tainted by our mental construct of measuring such impacts based on national boundaries; we tend to forget that (a) those boundaries are essentially artificial (that is, created by man and subject to change), and (b) even within those national boundaries, "globalization" (in the sense of technology bringing communities into contact) has, is and will take place in a way that has deleterious effects on some.
3. The key challenge of national governments now is to manage the change globalization brings, trying to maximize the benefits and minimize the costs even as the boundaries that define the remit of those governments have eroded significantly; this is the main reason why the Lutweiler "Wisemen's Group" that led to the Uruguay Round focused on the need for domestic programs that help adversely affected individuals to adapt to the change;
4. Revisiting "Capitalism," which is ultimately a system of economic governance based on maximizing profit with less care about human values. The pursue of profits need adjustments for rules to regulate interactions between individuals such that might and wealth do not per se make right.
5. Internationally-agreed rules, including through the UNCITRAL (and the WTO), are an essential part of addressing this challenge.
6. This rules-based system works best when motivated by democratic governments, which does not mean governments that reflect merely the fears of those that will be "harmed" by the change that globalization brings, but governments whose leaders convince their publics that they must adapt to it.

7. Where governments do not lead/reflect their people basic aspirations, neither the international community universal values, we should use the international rules we've reinforced or created through our present endeavor with the TOS.

THE TOS PPP MODEL

To make it work we propose integrating and validating the following matrix:

1. Reduce the contradictions:

- Language disparity: select the language, definition of terminology and terms, compatibility.
- Compatibility of contractual documents: preparatory provision, grouping of contracts.

2. Elaborate principles for interpretation:

- Professional community;
- Type of Contracts and Agreements: international, bilateral, multilateral, etc.

3. Legal framework: Re-define the public sector and the private; Sovereign laws of the country where the plan is carried out; Economics; Stability and compensation, Protecting the investor.

4. Institutional framework: Establish and review transparency, Compliance and governance; Data base for PPP projects; Feasibility; Follow up and Supporting team.

5. Review and improve the local institutional framework for PPP's: Establish and review transparency, compliance and governance; Committee for selection and evaluation of programs, Feasibility, follow up and supporting team.

PROVISION

The main features of the new generation of the TOS model will therefore be articulated under the following linkages:

- International minimum standard: each party shall accord to a covered investment treatment in accordance with the customary international minimum standard of treatment of physical and moral persons, including fair and equitable treatment and full protection and security.
- National treatment and most-favored nation treatment: each party shall treat to an investor of the other party treatment no less favorable than it treats, in like circumstances, to its own investors or to investors of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.
- Expropriation: a party may not nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalization or expropriation except for public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation which must be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place and must not reflect a change in value occurring because the intended expropriation had become earlier known.
- Transparency: each party shall insure that its laws, regulations, procedures, and administrative rulings of general application respecting a matter covered by the BIT are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.
- Corporate Social responsibility: each party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties.

These principles address issues such as labor, the environment, human rights, community relations and anti-corruption.

- Health, safety and environmental measures: investment protection should not be pursued at the expense of other public policy objectives (health safety or environment) and it is inappropriate to encourage investment by relaxing health, safety of environmental measures.

The TOS should also emphasize on the need for declaration of a Standard Memorandum of Mutual Understanding (SMOU) between parties involved in a PPP’s deal.

- Data Adequacy Status must be available to enable negotiations and commitments in cross-border supply to be commercially meaningful to parties involved.
- Eventually the TOS should advocate to governments of LDC’s provide stable business climate in order to attract more investments from industrial countries.
- The diaspora should be integrated into the process, and cooperatives of women should be encouraged.

CONCLUSION

In order to anticipate minimum provisions, or core elements of a legal text on PPPs we need a spectrum of measures. One of them is rethink, redefine and readapt globalization into a more humane form, and ipso facto “transform” capitalism.

“When deeds speak words are useless” (Xhosa, South Africa.) The current system has proven its limits and has generated circumstance of a global and a devastating crisis. We can see and enjoy the some sun-shine, and we inhale the same air... The problems deriving from our passivity in fixing ineffectiveness’s including reinforcing and harmonizing the arbitration rules for effective PPP issues are multiples: unemployment, criminality, terrorism, wars, corruptions, etc. Our elites have something to do with this passivity. The momentum has come for making things more complete and more inclusive. To that end, the role that UNCITRAL is playing in providing this platform and allowing it to stray well beyond the rational limits of discussing the TOS initiative for launching the MMPP and the ICJPPPs must be celebrated.

Let give kudos to all on the quality of the comments, and the thoughts they stimulated.

SECTION III: DISPUTE RESOLUTION.

The benefit of having face to face meetings can never be substituted by video conferencing or blogs, or other multimedia means. Today PPPs rules and agreement are likely in limbo. In one hand the developing world seek exemptions from international commitments to protect their policy space to allow domestic enterprises and their impoverished economies to flourish. In the other hand the rich countries are exercising their policy space rights in the area of information and communication technology, agriculture, and infrastructure. The point is how consolidating such approaches. We should not condemn, but seek workable reforms and strengthen them to do better than before. It is an essential element of our global economic order.

Let's clarify some common confusion that perhaps led or might lead to disputes.

1. UNDERSTANDING THE SAME TERMINOLOGY.

What is “globalization”? The traditional business school definition has been that globalization enables corporations to seek capital where it is cheapest, produce or outsource where it is most cost-effective and sell where it is most profitable. This has been perceived as an essential component in improving corporation profitability. *“Globalization should be pursued as the mechanism to optimize sustainable welfare and progress of all citizens in each country, in a fair and transparent manner, aimed at enabling each country to realize its full growth potential, based not only on known natural and human resources, but also all dormant resources,” Pradeep S. Mehta, Secretary General, CUTS International.*

Given legal rules that states agree to, with nuanced mechanisms to restrict protectionism while allowing non-protectionist measures, it is difficult to see how there is even a necessary trade-off between democracy and globalization. If you want globalization, you cannot have democracy unless it is global democracy depicted by Rodrik.

2. ABOUT INTERNATIONAL CONFERENCES.

Let wonder as to whether the outcomes from international conferences and forums will bind all member states do what they feel is their best interest,

which may be entirely different than what they have agreed together in the final declarations. Even under WTO agreements, member states often do not do what is required of them to do in spite of its binding nature. For instance on investment policy: At Midrand in June, 1996, Governments adopted a statement but in practice the rich member states did not bother about what was agreed. Instead, they launched a campaign at both WTO and OECD to put pressure on LDCs to participate in further discussions. The OECD negotiations fell flat on their face due to stiff opposition by the civil society and some of the OECD members. Whatever was agreed at Singapore, December, 1996, and Doha, fell flat at Cancun in September, 2003. In Sao Paulo in June, 2004 a great deal of time was spent on resolutions...

3. ABOUT THE CURRENT TRADE FRAMEWORK.

The current Trade System has demonstrated conclusively, that it thrives through the degradation of tens of millions of workers and rejects the endless pleas for reform and regulation. Consequences are non-quantifiable in Africa and in other poor countries. The “System” cannot be harnessed to raising living standards or ensuring employment free of fear of large scale, sudden and brutal firings. The System, as we experience it over the past decade and for the foreseeable future, is in polar opposition to social equality, democratic decision-making and collective welfare.

Since the “System” generates predators, and since ‘reforms’ and regulations have dismally failed, it is time to consider a fundamental systemic transformation that begins via the international community, through reinforcement of PPPs by creating a specific institutions. Again, poverty of the poor is a permanent danger to the rich. We do not preach socialism, we encourage a responsible system (“Social Capitalism”) involving the all stakeholders, including the Diaspora and Representatives of women associations.

4. ABOUT POLICY FORMULATION

How can a country jump into policy formulation if there is no or poor sustainable local trading network inside the country? It is a new era of proactive dialogue, for redefining the role of the governments in today international trade. I agree with those who suggested that the key role for the government should be to “clear up the ground” for businesses to trade more efficiently, e.g. by reducing administrative burdens and improving

transport and information networks. The Diaspora should be included in poor economies, in order to play an active role as “Job Creators, and Investment Advisers”. Going to this direction will impact the industrial development policy to lift up the country's productive capacity. In order to do it PPPs governing rules and laws is the trigger.

5. ABOUT RICH COUNTRIES MAKING THE FUNDING.

On the point about the fact that rich countries are funding it, is something which I take issue with. No one is doing any favors, and the contributions are made according to what they can afford and do it because of their moral responsibility. Let me also disabuse that developing countries should contribute more than what they are already doing. Even if the contributions are not in cash, they do contribute hugely in kind and through cerebral resources.

One cannot ignore the realpolitik of running any big intergovernmental organization, like with all multilateral issues, so there is no point in getting entangled with that. However, no one is preventing UNCITRAL from becoming a lean and mean organization. This is something which the TOS and UNCITRAL secretariat can address.

6. ABOUT RISKS.

There are three major risks with the new platform for an effective ICJPPP:

1. Pronouncement: What happens after the International Court of Justice releases a pronouncement? We should include mechanisms and scenarios by reviewing the diplomatic initiatives taken by States as well as by other members of the Court's audience' such as international organization. Both judgments and advisory opinions should be covered.

2. Mutual Understanding: An examination of the issues on which competent authorities have had difficulties reaching an agreement shows that these are typically matters of treaty interpretation or of applying the arm's length principle underlying Article 9 and paragraph 2 of Article 7 of the OECD Tax Model.

Therefore, the focus should be on speaking and understanding the same language and terminology: Implementation, compliance, dispute resolution,

diplomatic means, Judgments, advisory opinions, pre-adjudicative phase, negotiations, implementation clauses and agreements, mixed commissions, trust fund to assist States in the settlement of disputes through the ICJ, register of damage caused by the Wall, etc.

3. Procedural and evidentiary rules for reinforcement: We need to establish rules that will govern the arbitration process and that have not already been provided in the agreement or the Terms of Reference. Then the Arbitrators (i.e., the members of the TOS) will develop these rules on an ad hoc basis.

In doing so the TOS members are free to refer to existing arbitration procedures, such as the International Chamber of Commerce Rules which deal with many of these questions.

CORE RESOLUTIONS

Only in special situations would the panel be allowed to investigate factual issues which had not been developed in the PPP agreement. This will allow comparing the relational dynamics afferent to each type of the Court’s jurisdiction.

WHAT THE PPPs CAN DO...

There is a common understanding that “the crises” threatens to reinforce poverty as we know it. Between the year 2007 and 2009 the “system” in Europe and the United States suffered a severe crisis that hit the foundations of its financial system and threatened to bankrupt its ‘leading sectors’. The consequences are worst in LDCs, and PPPs procedures are affected. Meanwhile, the ‘crises of capital’ has been converted into a strategic advantage for furthering the most fundamental interests of capital: enlargement of profits, consolidation of capitalist rule, the greater concentration of ownership, deepening of inequalities between capital and labor, and the creation of huge reserves of labor to further augment their profits.

The following recommendations to the UN should be considered because of the need of the restoration of laws governing PPPs. I also reecho some inputs of Pradeep S. Mehta, Secretary General, CUTS International, during an online debate after the 13th quadrennial conference of the United Nations Conference on Trade and Development (UNCTAD) was held in Doha:

- For trade to serve as an engine of inclusive growth and development, the PPPs negotiation must remain open, transparent, inclusive, non-discriminatory and rules-based.
- In a time of fragile economic recovery, trade protectionism remained a risk, and efforts to fight all forms of protectionism should continue. Meaningful trade liberalization would also require addressing non-tariff measures and aim to reduce and eliminate other arbitrary or unjustified trade barriers
- We commend TOS as the focal point of the UNECE/UNCITRAL for the integrated rules, laws and provisions about PPPs. It impacts ethics on trade and development and interrelated issues in the areas of finance, technology, investment and sustainable development.
- We recognize the need to make our common economic life more conducive to progressive structural change, more productive of inclusive and sustainable growth and development and more effective in fostering broad-based inclusion in a new and more robust social contract. A new diligence on PPPs is one of the core solutions.
- The winds of change blowing in many parts of the world today attest to the desire of populations for responsive policies that foster participatory and inclusive approaches to development towards achieving prosperity for all.
- By working to maximize the opportunities arising from globalization in international trade and investment, we have sought to promote economic growth and development with particular attention to reducing the inequalities between us and within our nations, and to improving our capacities to fulfill common purposes and exercise more effective and responsible stewardship of our natural and planetary resources.
- Above all, we have sought to fulfill, individually and collectively, our peoples' aspirations to live in peace and to enjoy in fullness lives that are rich and diverse, and ever more stable and secure.

CONCLUSION

This is a momentum when the world economy clearly needs an immediate boost and the global trading system needs urgent reinforcement. To provide the stimulus required, the TOS needs to explore fresh approaches to rekindling progress in global negotiations on services. The transition should start now. It will convert the current economic, trading and financial system directed by predators and swindlers and some States at their command, to an economy of public ownership under democratic and international control.

Our current laws must be completed with some work on the measurement of economic integration, and describe how we measure trade liberalization.

The TOS calls on all UNCITRAL and WTO members to activate the existing negotiating mandate and launch early negotiations for a new platform of PPPs about international services agreement and laws. Endorsing this will enhance awareness as to the panoply of diplomatic initiatives that can be taken following a pronouncement of the Court, as well as, to the complexity of the implementation process of PPPs at large.

Thanks for your time and your consideration,

Bernard Nyembo.