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**Report to the Third Session of the Team of Specialists on Public-Private
Partnerships 18-19 April 2011 regarding Model PPP Laws**

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1. Executive Summary

The key points of our Report may be summarised as follows:

- (A) There are a number of existing publications available from international bodies which are useful sources of guidance to lawyers responsible for drafting national legislation to create a legal framework to support the development and implementation of a PPP programme.
- (B) The UNCITRAL Legislative Guide to Privately Financed Infrastructure Projects and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects do not constitute and do not purport to be a Model Law and, as far as we are aware, there is nothing in existence which can be viewed in the true sense as a Model Law relating to PPP.
- (C) The OECD and the EBRD have each published documents, building on the UNCITRAL Model Legislative Provisions, which summarise “core principles” or “basic elements” of a concessions law that would be relevant to PPP projects.
- (D) Any legal framework for PPP will need to rely on other areas of law, in particular those relating to insolvency and secured transactions, and for which there already exist Legislative Guides and Model Laws developed by UNCITRAL and/or the EBRD. However, no PPP law can be comprehensive in covering all the areas of the law which may have some relevance to the conclusion of a transaction to implement a PPP project, and greater clarity regarding the application of other, potentially conflicting laws would be helpful.
- (E) There is also a substantial body of guidance available internationally on public procurement procedures (and ongoing work in this area) which may be applied in the area of PPPs.
- (F) Furthermore, there will inevitably be substantial differences between the legal systems of the countries that might consider basing their PPP laws on an international model. We therefore remain to be convinced that the benefits of a Model PPP Law would outweigh the time and effort required to develop it or offer a material advantage over the UNCITRAL Guide and Model, if updated and used together with the other materials referred to above.
- (G) Whether or not the development of a Model PPP Law is regarded as worthwhile, it seems that any legal system needs to satisfy a number of “Core Principles” (similar to those developed by the OECD and the EBRD) in order to create a legal framework within which PPP projects can be implemented properly.
- (H) It would appear that the level of global awareness of the existence of the UNCITRAL Guide and Model is low and they do not seem to have been widely relied upon directly as a source of guidance or detail in the drafting of national PPP laws.
- (I) 10 years have elapsed since the UNCITRAL Guide was published. PPP has developed significantly over that period and the Global Financial Crisis has also intervened and significantly affected the international project finance market with consequent results for the PPP sector. It also does not focus to any real extent on projects which do not involve the capital investment of private finance. It is therefore appropriate now to consider updating the UNCITRAL Guidance and Model Legislative Provisions to reflect developments in the PPP market as well as the changing needs of these countries who

might seek to rely on the Guidance and Model Legislative Provisions as a resource in developing their own PPP programmes.

- (J) The UNCITRAL guide represents a useful basis for assessment of the readiness of a government's legal, policy, regulatory and financial frameworks to support PPPs.
- (K) The questionnaires developed by the EBRD also represent a useful basis for assessment of the readiness of a national legal system to support PPPs.
- (L) We would recommend that:
 - (1) steps are taken to improve the level of awareness internationally of the UNCITRAL Guide and Model Legislative Provisions;
 - (2) the UNCITRAL Guide and Model Legislative Provisions are updated;
 - (3) UNECE consults with other international organisations (and in particular the International Development Banks, EPEC, and UNCITRAL) to establish the extent of work being undertaken in other areas relevant to PPPs, in particular public procurement, to minimise duplication of effort; and
 - (4) the UNECE PPP Readiness Assessment Tool be benchmarked against the UNCITRAL Guide and EBRD questionnaires.

2. Introduction and Scope

The Cooperation and Partnerships Section of the Economic Cooperation and Integration Division of UNECE has requested us to review the UNCITRAL Legislative Guide to Privately Financed Infrastructure Projects (“the UNCITRAL Guide”) and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (“the UNCITRAL Model”) in the light of developments in the PPP market since the UNCITRAL Guide and the UNCITRAL Model were published in 2001 and 2003 respectively and to report to the Third Session of the Team of Specialists on Public-Private Partnerships in relation to the potential development of a Model Law on PPP (“Model Law”).

In carrying out this work, we have consulted with a number of government and institutional representatives (listed in Appendix A to this Report) on these issues including their experience of the UNCITRAL Guide and Model, and we are grateful to them for contributing their time and their views, which we have found helpful.

We have approached this assignment from our perspective as legal advisers since the mid-1990s to both public sector and private sector clients active in PPP in the United Kingdom as well as various international markets. Our focus has been to identify what we believe to be the main practical issues facing countries wishing to develop a framework for PPP and a sustainable pipeline of viable projects capable of attracting international investment as well as satisfying wider public sector objectives. We have also sought to take into account the needs and circumstances of a wide range of countries, legal systems and markets, in particular those which are at an early stage in developing PPP.

It is beyond the scope of our assignment and this paper to include a detailed review of the UNCITRAL Guide and Model. What we have done is to express our considered views, taking into account the feedback of governments and relevant institutions, on the extent of current use and awareness of them, to identify some areas where they might usefully be developed further as well as some issues relevant to the question of developing a Model Law. We have also identified some possible next steps for consideration by the Team of Specialists and we hope that this paper will assist the Team of Specialists in deciding how to proceed on these matters.

3. Review of Existing Materials

3.1 The UNCITRAL Legislative Guide and Model Legislative Provisions

The UNCITRAL Guide was published in 2001 with the purpose of assisting in the establishment of a legal framework favourable to private investment in public infrastructure and seeking to balance the facilitation and encouragement of private participation in infrastructure projects on the one hand and public interest concerns on the other. It specifically does not seek to provide a simple set of model solutions to address the concerns of the public and private sector but to *“help the reader to evaluate different approaches available and to choose the one most suitable in the national or local context”*¹.

The Guide covers privately financed infrastructure projects as a whole and although it contains only one specific reference to PPPs² the issues it covers are clearly and directly relevant to those forms of PPP which involve the raising of capital (debt or equity) to finance public infrastructure projects. The Guidance is extensive (running to over 200 pages) and detailed and the information it contains provides useful background for any government seeking to develop a PPP programme and needing to improve its understanding of the issues involved and the concerns of the private sector that will need to be addressed. The Guidance contains 71 recommended legislative principles whose purpose is to assist in the establishment of a legislative framework. The Recommendations are set out at the beginning of the Guide and each Recommendation is cross-referenced to the relevant paragraphs of the Guidance which are intended to be read in conjunction with the Recommendations.

The Model Legislative Provisions were prepared as an addition to the Guide based on the Recommendations and published in 2003. The UN General Assembly requested that, subject to resources, the UNCITRAL Guide and Model should be consolidated into one single publication and recommended that:

*“all States give due consideration to the [Guide and Model] when revising or adopting legislation related to private participation in the development and operation of public infrastructure.”*³

There are 51 Model Provisions covering 57 of the Recommendations, for

- (A) the general and legislative framework, including authority to enter into contracts (Model Provisions 1 - 4)
- (B) the procedures for issuing tenders, running tender processes and selection of contractors (MPs 5 - 27)
- (C) the contents of the contract, including the creation of security interests over project assets and cash-flows (MPs 28 - 42)
- (D) the duration, extension and termination of the contract including compensation (MPs 43 - 48)
- (E) the settlement of disputes (MPs 49 - 51)

In relation to (C) to (E) most of the Model Provisions do little more than to identify the matters which ought to be provided for in the contract and do not specify in any detail what these provisions should say. This is consistent with Recommendation 40 (*“the law might identify the core terms to be provided in the project agreement which may include those terms referred to ... below”*) and the Guidance which advises limiting the scope of these provisions regarding

¹ See paragraph 4 of the Chapter 'Introduction and background information on PFI projects' of the UNCITRAL Guide.

² See paragraph 56 of the Chapter 'Introduction and background information on PFI projects' of the UNCITRAL Guide.

³ UN General Assembly Resolution 58/76, 9 December 2003.

the contract to those strictly necessary on the grounds that this deprives the parties of the necessary flexibility to negotiate an agreement that takes into account the needs and peculiarities of a specific project.⁴

It acknowledges that this is an intermediate approach and that in some countries a “minimalist” approach is taken, merely referring to the need for an agreement, and that the laws of other countries contain extensive mandatory provisions specifying the content of the clauses to be included. There is more detailed discussion of contractual issues in the Guidance but, in general, it consists of identifying issues and options rather than making specific recommendations even on issues which have great commercial significance, such as compensation on termination. On the basis that the purpose of the Guidance is to inform those drafting PPP laws, rather than contracts, this may be understandable, and it is more appropriate for the detail of contracts to be developed through policy, rather than legislation. However, countries developing PPP programmes will need to develop contracts and some more detailed guidance on appropriate contractual terms would no doubt be welcome, and is currently available from various sources.

It is also fair to say that 10 years have elapsed since the UNCITRAL Guide was published, and that PPP has developed significantly over that period, both in countries in which PPP markets had already developed at that time as well as in countries which have since adopted PPP as an element of their policy for developing public infrastructure. The Global Financial Crisis has also intervened and significantly affected the international project finance market with consequent results for the PPP sector.

It is therefore appropriate to consider updating the UNCITRAL Guidance and Model to reflect developments in the PPP market as well as the changing needs of these countries who might seek to rely on the Guidance and Model as a resource in developing their own PPP programmes.

Some suggestions of specific areas where the Guidance might usefully be updated or extended is set out below in Section 3.5.

3.2 The OECD Basic Elements

The UNCITRAL Guide and Model provided a basis (“*point of departure*”) for work undertaken by a group of experts convened by the Organisation for Economic Co-operation and Development and the Istanbul Stock Exchange to develop a set of “basic elements” for concession agreements to enable project finance to become a more viable option for infrastructure financing in the Black Sea/South East Europe region. Like the UNCITRAL Guide and Model, the OECD Basic Elements do not purport to be a model law, but rather to provide a “*source on which countries might draw in shaping their laws*” and to “*offer a point of reference for the negotiation of actual concession agreements*”. On the other hand, the Basic Elements cover both natural resources projects as well as infrastructure.

The Basic Elements are more concise than the UNCITRAL Model Legislative Provisions (10 pages and 18 Clauses) but cover much the same ground. The approach is more “minimalist”, both in relation to the contractual terms and more generally in, as far as possible, avoiding being prescriptive. They also contain a provision dealing with the effect on the contract of corrupt practices in relation to the award of the concession, as well as a “stabilisation” clause providing protection against the consequences of future legislation. The Basic Elements are supplemented by (6 pages of) Explanatory Notes.

⁴ See paragraph 4 of Chapter IV of the UNCITRAL Guide.

3.3 The EBRD Core Principles

The European Bank for Reconstruction and Development published in 2006 a set of “Core Principles” *“to identify and promote sound modern principles of concessions laws in the EBRD’s countries of operations”* and with the aim of protecting investors and the public sector. The UNCITRAL Guide and Model were used as a primary source in drafting the Core Principles. All but one of the 10 Core Principles specifically refer to one or more of the Recommendations in the UNCITRAL Guide as a source. The OECD Basic Elements were also used.

The Core Principles are concise, considerably shorter than the UNCITRAL Guide and Model but also with some explanatory notes. They also have the benefit of a more recent history, even though this still pre-dates the Global Financial Crisis.

The EBRD has also undertaken (most recently in 2008) some interesting analysis of concession laws and legal frameworks for PPPs in each of the EBRD countries of operation including benchmarking against international best practice, in particular the UNCITRAL Guide. The analysis was conducted on behalf of the EBRD by Gide Loyrette Nouel on the basis of 50 questions covering 7 core areas corresponding broadly to the 5 areas of the UNCITRAL Model Legislative provisions described at 3.1 (A) to (E) above. The results of this analysis are available on the EBRD website but probably the most relevant aspect, as far as UNECE is concerned, is the list of questions that were prepared for the purposes of assessing the degree of compliance with “international standards” for PPP Laws, as well as the process of assessment and use of the results.

3.4 The EPEC “Guide to Guidance”

The European PPP Expertise Centre was established by the European Investment Bank, the European Commission, EU Member States and Candidate Countries to strengthen public sector expertise in PPP. It has recently (February 2011) published version 2 of its “Guide to Guidance”, which seeks to identify leading guidance currently available from PPP guidelines worldwide, with the objective of assisting public sector officials in implementing PPP projects and understanding the key issues involved. Its main purpose is not the legal frameworks for PPP, although it does include a short Annex on this subject, which does not make reference to the UNCITRAL Guide, the OECD Basic Elements or the EBRD Core Principles.

3.5 Areas for updating the UNCITRAL Guide

3.5.1 *Recommendations not covered in the Model Provisions:*

In Part Two (Model legislative provisions) of the UNCITRAL Model, there are 51 Model Provisions covering 57 of the Recommendations⁵. The following Recommendations are not covered in Part Two of the UNCITRAL Model:

- Recommendation 3: PFI concessions are permissible for both new and existing infrastructure facilities
- Recommendation 5: the jurisdiction of contracting authorities and the scope of awarded concessions

⁵ Part One (Legislative Recommendations) of the UNCITRAL Model sets out Recommendations 1 to 13 and omits Recommendations 14 to 71 inclusive, which on the other hand are set out in full in the UNCITRAL Guide.

- Recommendation 6: public sector approvals for PFI projects should be institutionally coordinated
- Recommendation 7: regulatory bodies for infrastructure services should not provide infrastructure services
- Recommendation 8: regulatory bodies for infrastructure services should have autonomy from political interference or inappropriate pressures.
- Recommendation 9: regulatory processes and decisions for infrastructure services should be public
- Recommendation 10: regulatory decisions for infrastructure services are subject (at request) to independent and impartial review
- Recommendation 11: special procedures for managing disputes between public service providers
- Recommendation 12: contracting authority's freedom to allocate project risks as required
- Recommendation 13: identification of public authorities that can provide financial or economic support to PFI projects
- Recommendation 52: monitoring and approval of construction works for the infrastructure facilities
- Recommendation 54: monitoring of the operation of infrastructure
- Recommendation 56: general contractual arrangements – approval of major subcontracts
- Recommendation 57: freedom of choice of law governing contractual relations
- Recommendation 58 (d)-(e): force majeure and remedies following default⁶

Furthermore, neither the Recommendations nor Part Two of the UNCITRAL Model appear to address the following additional issues that are discussed in the UNCITRAL Guide:

- Domestic preference ⁷: the law should clarify the degree to which foreign entities may be disadvantaged in any PPP procurement. This issue is critical to PPPs, which typically look towards international best-practice expertise and foreign investment. The UNCITRAL Model Procurement Law provides a mechanism for assessing the margin of preference to be afforded to national goods and services, where such preferential treatment is permitted.
- Bid costs ⁸: the law should clarify the circumstances in which bidders for PPP projects can be compensated. PPPs use multi-phase procurement processes and typically involve complicated or complex programs, leading to significant bid costs which are at risk should the government client cancel the tender.

⁶ Part J, paragraph 141 of Chapter IV of the UNCITRAL Guide refers to Chapter 18 of the *UNCITRAL Legal Guide on Drawing Up Contracts for the Construction of Industrial Works* (1988) ("UNCITRAL Contracts Guide") as providing a discussion of the remedies used in construction contracts for complex industrial works, that are not otherwise discussed in the UNCITRAL Guide.

⁷ See Part B, paragraphs 43 to 44 of Chapter III of the UNCITRAL Guide.

⁸ See Part B, paragraphs 45 to 46 of Chapter III of the UNCITRAL Guide.

- Review of unsuccessful bids ⁹: the UNCITRAL Model Procurement Law provides a mechanism for establishing an appropriate review system. However, it does not specify the potential outcomes of any such review system, for example whether any successful review could result in the granting of appropriate remedies, such as rescission of the awarded contract or damages.
- Sovereign immunity ¹⁰: the issue of sovereign immunity is critical to the effectiveness of any contract with a government client, and to the certainty of any contractors or investors in being able to enforce the terms of that agreement. If there are circumstances in which the government client can claim sovereign immunity against a contracting party's claim, then these should be highlighted in the law.

We recommend that these issues should be considered for incorporation into either or both of the Recommendations and the Model Provisions.

Jurisdiction

Of particular relevance to the development of a PPP law is Recommendation 5: "*The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned...*" The UNCITRAL Guide correctly recognises that PPP laws should permit a degree of flexibility in enabling a government to award exclusive concessions in those sectors where open competition is not economically viable, or is otherwise not in the public interest ¹¹. The sensitivity of PPP projects in particular to changes in demand that may be occasioned by the subsequent authorisation of a rival public utility or service mean that PPP financiers will require certainty as to the extent and nature of any exclusivity.

Allocation of Risk

Also of particular relevance to the development of a PPP law is Recommendation 12: "*No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project*". In conducting our preparatory research for this report, a number of respondents highlighted the difficulties that relatively inflexible concession laws had caused for government clients. Whilst rigidity is a necessary characteristic of concessions agreements and PFIs, governments should be free to select from the full range of different PPP contracting strategies (each with differing levels of risk allocation and flexibility), and to further customise these strategies as appropriate on a case-by-case basis. This will ensure that the government client receives the best value for money, through the most effective and efficient allocation of project risk.

Choice of Law

Recommendation 57 states that "*The concessionaire and its lenders, insurers and other contracting partners should feel free to choose the applicable law to govern their contractual relations, except where such a choice would violate the host country's public policy*". Although this is implemented to a certain extent through Model Provision 29, this only relates to the law applicable to the concession contract itself, and not to the other contracts relating to the Project. In particular, in developing countries that may not have a robust legislative framework in accordance with the UNCITRAL Model, PPP contracting parties may wish to choose governing laws and jurisdictions from more mature PPP markets with similar legal systems. In

⁹ See Part I of Chapter III of the UNCITRAL Guide, and Model Provision 27.

¹⁰ See Part B, paragraphs 33 to 35 of Chapter VI of the UNCITRAL Guide.

¹¹ See Part C, paragraphs 20 to 22 of Chapter I of the UNCITRAL Guide.

practice, it is our experience that this is often already done in the area of arbitration, where the contracting parties submit to the jurisdiction of a recognised neutral foreign body.

Based upon the EBRD's 2008 assessment of concession laws for 29 Eastern European countries, a majority of these concession laws do not provide for the prevalence of PPP laws over relevant other national laws. As such, PPP contracting parties are often subject to legislative regimes that may be spread over multiple instruments – and indeed the UNCITRAL Guide recommends that governments should seek to summarise these applicable statutory and regulatory texts¹². In circumstances where this wider, over-riding legislative framework is also less mature, there may be a compelling case for PPP contracting parties to select the project's governing laws and/or jurisdiction from a national or state government with a more mature supporting legislative framework.

Contents of the Contract

Model Provisions 28 to 51 include a number of provisions regarding the contents of the Contract, which implement Recommendations 40 to 71 and are supplemented by Chapters IV to VI of the UNCITRAL Guide. The question of how much detail (on the contents of the Contract) it is necessary or appropriate to include in the law itself is a matter on which views may differ according to the background of the legal system of the relevant country. The more detail that is included in the law, the more rigidity is built into the legal framework, potentially denying the benefit of the flexibility to negotiate contractual terms that are appropriate for the relevant project. As mentioned above in Section 3.1, this point is acknowledged by the Guide, but we would suggest that this balance should be addressed in any review of the UNCITRAL Guide and Model with a view to reducing the level of detail in the Model Provisions and revising the UNCITRAL Guide accordingly. In the context of that general observation, we would make the following comments on the provisions of the Model Provisions which relate to the contents of the contract.

Termination

Model Provisions 44 to 46 relate to termination rights. Model Provision 44 (b) provides for a right of termination for the contracting authority “for compelling reasons of public interest”. Although this is expressed to be subject to payment of compensation as agreed in the contract, the relevant note in the UNCITRAL Guide¹³ suggests that this compensation may not be to the full extent as that payable on termination for breach by the contracting authority. This is a very significant point for the private sector and the circumstances in which “public interest reasons” might be a ground for paying less compensation on termination than on default (or voluntary termination) by the contracting authority and the amount of any reduction will be the subject of considerable scrutiny, in view of the inability of the private sector to manage “public interest” risk issues.

Model Provision 45 sets out the contractor's rights of termination, including where the parties have failed to reach agreement on a revision of the contract (a) following a change in law or economic/financial conditions or (b) where the contractor's costs have substantially increased, or the value received for performance of the contract has substantially diminished, as a result of the acts or omissions of the contracting authority. The procedure for resolving disputes under the contract ought to be capable of dealing with a failure to reach agreement on such matters and, if that is the case, then it may not be appropriate to allow the contractor a right of termination.

Model Provision 46 allows either party to terminate the contract “in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's

¹² See Part A, paragraph 8 of Chapter IV of the UNCITRAL Guide.

¹³ See Part E, paragraph 49 of Chapter V of the UNCITRAL Guide.

reasonable control”. This is very wide as drafted and would typically be more narrowly scoped and covered in more detail in the contract.

Change in Control

Model Provision 37 restricts any transfer of a controlling interest in the contractor without the consent of the contracting authority. Although this is subject to any contrary provision in the contract, the UNCITRAL Guide¹⁴ recommends a more cautious approach to restrictions on the transferability of shares in the contractor. This is another sensitive point for private sector investors, particularly in the context of the long term nature of PPP contracts, who may wish to be able to recycle capital for other projects by selling their shares.

Security Interests (to go after Change in Control)

Model Principle 35(3) of the UNCITRAL Model states that “No security... may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [the enacting State].” We find the scope of this provision unclear and, as it potentially limits the rights created/confirmed under Model Provision 35(1) to create security interests over project assets, it is a matter of concern for lenders. We think this requires clarification. It is also worth noting that the effectiveness of the rights to create security interests and the enforcement of those rights will also depend on the legal frameworks relating to insolvency and the enforcement of security interests. For countries where these legal frameworks are less developed, it may be useful for drafters of PPP laws also to have regard to the Legislative Guides and Model Laws already developed by UNCITRAL¹⁵ and the EBRD¹⁶.

Environmental Protection Regulation & Bribery/Anti-Corruption Measures

These issues are referred to in the UNCITRAL Guide¹⁷ although not covered by any specific Recommendation or Model Provision. Given the developments in legislation in these areas over the last 10 years, it may be worth reviewing these sections of the guidance to reflect better current law and practice.

3.5.2 *Market advances not reflected in the Model Provisions:*

PPPs and PFIs

At the time of the UNCITRAL Guide’s development in 2001, there was little consideration of the distinction between PFI (involving the use of private finance to fund capital investment) and the broader family of PPPs. Whilst there are still many variants on the precise definition of a PPP, there does appear to be a broad consensus amongst the IDBs¹⁸ and multilateral bodies¹⁹ as to the different types of procurement arrangements that lie within the PPP classification, and that a historical focus of PPP guidances on concession agreements and PFI has been unrepresentative of this broader category of PPPs. It also appears acknowledged that governments will utilise PPP to deliver public assets and utilities for a variety of reasons, and that are not exclusively restricted to finance. Nonetheless, there is a high degree of commonality amongst these different types of PPPs as regards their enabling

¹⁴ See Part G, paragraphs 66 and 67 of Chapter IV of the UNCITRAL Guide.

¹⁵ UNCITRAL (1997) *Model Law on Cross-Border Insolvency*; UNCITRAL (2004) *Legislative Guide on Insolvency Law*; and UNCITRAL (2007) *Legislative Guide on Secured Transactions*.

¹⁶ EBRD (2004) *Model Law on Secured Transactions*; and EBRD (2010) *Core Principles of an Insolvency Law Regime*.

¹⁷ See Part B, paragraphs 42 to 44 and 50 to 52 of Chapter VII of the UNCITRAL Guide.

¹⁸ For example, refer to Policy Research Working Paper 5173 ‘*Understanding Options for Public-Private*

Partnerships in Infrastructure’ (2010) World Bank, Finance Economics & Urban Department, Finance and Guarantees Unit.

¹⁹ For example, refer to United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) Transport Division ‘*Public Private Partnerships in Infrastructure Development: A Primer*’ (2008).

legislative and policy frameworks, with the higher degree of due diligence that PFIs are subjected to by lenders providing an appropriate best-practice benchmark for all PPPs. Part 5 of this report discusses the ‘core principles’ that we suggest should be common to laws covering both PPP and PFI.

Where existing model PFI guidances such as the UNCITRAL Guide prescribe recommended contractual provisions, these may need to be expanded in relation to wider forms of PPP, to include both non-finance based and relational contracting approaches such as partnering²⁰, project alliancing²¹ and derivatives thereof. PFI and concession agreements are relatively inflexible structures, with investors requiring predictable utility and/or service demand levels over the long-term so as to ensure the project’s bankability. However, in complex projects the types and levels of required usage or service may be emergent and unpredictable – in such circumstances, different contractual structures are required that permit long-term and flexible collaboration (such as through risk sharing and flexible output/payment specifications), but still maintain the appropriate governance, change control, and transparency processes necessary to support private financing. This is an area that could usefully be addressed in any review of the UNCITRAL Guidance.

PPP Units

Whilst the UNCITRAL Guide’s Recommendations 6 to 10 inclusive identify the need for an independent, autonomous and empowered institutional mechanism for the regulation and coordination of PPP contracting authorities, at the time of the UNCITRAL Guide development there was also relatively little consideration of formalised PPP institutional structures such as PPP Units. The subsequent global trend towards such structures could now be addressed in the UNCITRAL Guide and Model (pursuant to Recommendation 6), to further clarify operational issues such as:

- within which ministry or department the PPP Unit be located,
- what types of projects will be regulated by the PPP Unit,
- the monitoring and/or control functions of the PPP Unit, and the relationship between the PPP Unit and any procurement authorities, and
- whether the PPP Unit is cross-sector, and the relationship between the PPP Unit and sector-specific departments.

Similarly, Recommendation 13 identifies the need to identify those public authorities that are able to provide financial or economic support to PFI projects, and to clarify the manner of this support. A central role of any PPP law is to establish a clear institutional framework within which PPPs are planned, procured, and delivered.

3.5.3 Harmonisation:

In conducting our preparatory research for this report, a number of respondents expressed concern over the multiple PPP approaches and practices being developed and issued by different United Nations bodies, multilateral bodies and agencies such as EPEC, and IDBs.

²⁰ Although the Partnering process is discussed in the UNCITRAL Guide (see Part VI B(2)(b)), this is done solely within the context of dispute resolution. The purpose of the Partnering process is to establish a project culture of good faith to deliver mutually shared objectives, and supported by mutual issues-identification and resolution processes.

²¹ For a definition of project alliancing, refer to the Department of Finance and Treasury, Victorian Government, Australia ‘*Project Alliancing Practitioner’s Guide*’ (2006).

By way of example, the UNCITRAL Guide provides a form of due diligence, against which governments are able to assess their degree of maturity across a range of general policy and legislative areas that are necessary to support the delivery of PPP projects, and also to contextualise these policy and legislative areas in light of each government's unique national and local circumstances. The UNECE PPP Toolkit, which is a key deliverable of the UNECE PPP Initiative, includes a PPP Readiness Assessment Tool that is based upon a similar 'check-list' of general policy and legislative areas²². The UNECE PPP Toolkit is a living document, that is progressively benchmarked against similar publications to achieve a degree of harmonisation across the IDBs, EPEC and United Nations. In any future review of the UNCITRAL Guide, there is an opportunity to align and cross-benchmark these 'enabling' policy and legislative areas with the UNECE PPP Readiness Assessment Tool as part of this wider harmonisation initiative.

As an extension of this theme, there is also an opportunity to harmonise further the UNCITRAL Model with ongoing developments in other relevant areas of law, such as anti-corruption and procurement. For example, as the first step for any government in developing PPP laws, the World Bank recommends the development of PPP regulations within that government's existing procurement framework. There has been significant recent global development in procurement laws, and UNCITRAL is currently revising its model procurement law²³. As consequence of these recent developments, statements in the UNCITRAL Guide such as "*no international legislative model has thus far been specifically devised for competitive selection procedures in privately financed infrastructure projects*"²⁴ need to be updated (for example, to reflect Directive 2004/18/EC of the European Parliament and Council²⁵). If the UNCITRAL Model Procurement Law is updated to reflect more complex procurements such as PPP, then the UNCITRAL Model could simply cross-refer to the relevant provisions of the UNCITRAL Model Procurement Law.

In any event, we recommend that any review of the UNCITRAL Guide and Model should include a mapping of its contents as against other relevant PPP and procurement guidances, in a manner similar to that undertaken in the EPEC "Guide to Guidance". Whether the objective of the UNCITRAL Guide is to be a compendium of all PPP guidances, or rather to be a road-map of existing guidances with additional supplemental information as necessary, remains a strategic decision for UNCITRAL.

3.5.4 Humanitarianism:

The UNCITRAL Guide and Model provide a framework to facilitate the delivery of PPP projects. However, these documents remain silent as to the purpose of these PPP projects – in particular, whether these PPP projects are delivered for the benefit of all stakeholders (including most importantly the public end user). Should the UNECE PPP Initiative include an overall humanitarian objective of increasing the quality of life for citizens globally, then any review of the UNCITRAL Guide and Model undertaken as part of this Initiative should address the issue of how to ensure that PPP projects are delivered in a manner that meets this humanitarian objective, while also satisfying the requirements of private sector investors and the wider public sector. This is a delicate and difficult issue to effect in practice without unduly restricting the sovereign right of national governments to set and implement policy, and without knowing more about the strength of feeling within the UNECE about recognising these

²² These areas include: public governance, policy, capacity-building, legal framework, whole-of-life project delivery, sustainable development, project management, and finance.

²³ United Nations Commission on International Trade Law (1994) *Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment* (the "UNCITRAL Model Procurement Law").

²⁴ See Part A, paragraph 19 of Chapter III of the UNCITRAL Guide.

²⁵ <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:HTML>>

humanitarian objectives, we do not feel it appropriate at this stage to do more than flag this issue for consideration.

3.6 Overview

The materials referred to above, in our view, contribute a valuable and relevant source of guidance on appropriate legal frameworks for PPP and a useful starting point for drafting legislation in this area. It is worth noting that the World Bank has not itself published anything on PPP laws, although the World Bank's PPP in Infrastructure Resource Centre website does provide links to sample PPP and sector-specific legislation and regulations from a number of countries globally, as well as checklists and sample clauses for key PPP contractual terms. The Asian Development Bank provides some general guidance on PPP regulations as part of its 2008 PPP Handbook.

From our enquiries, the level of awareness of the existence of the UNCITRAL Guide and Model is low and it does not seem to have been relied upon directly as a source of guidance or detail in the drafting of PPP laws to any material extent. This is an issue which ought to be addressed if the UNCITRAL Guide and Model are to be updated. Further work is only worth undertaking if it is likely to be useful to countries that have yet to develop legal frameworks for PPP.

4. The Value of a Model Law on PPP

The UNCITRAL Guide and Model do not constitute and do not purport to be a Model Law and, as far as we are aware, there is nothing in existence which can be viewed in the true sense as a Model Law.

The concept of a Model Law according to UNCITRAL is as follows²⁶:

“A model law is a legislative text that is recommended to States for enactment as part of their national law. A model law is an appropriate vehicle for modernization and harmonization of national laws when it is expected that States will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary or desirable. It is precisely this flexibility that makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered, and promotes greater acceptance of a model law than of a convention dealing with the same subject matter. Notwithstanding this flexibility, in order to increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, States are encouraged to make as few changes as possible when incorporating a model law into their legal system. Model laws are generally finalized and adopted by UNCITRAL at its annual session, as opposed to adoption of a convention, which requires the convening of a diplomatic conference. This factor may make preparation of a model law less expensive than the preparation of a convention, unless the convention is adopted by the General Assembly performing the function of a diplomatic conference, as has been the case for most of the recent conventions.”

On the other hand,

“...it is not always possible to draft specific provisions in a suitable or discrete form, such as a convention or a model law, for incorporation into national legal systems: national legal systems often use widely disparate legislative techniques and approaches for solving a given issue, States may not yet be ready to agree on a single approach or common rule, there may not be consensus on the need to find a uniform solution to a particular issue, or there may be different levels of consensus on the key issues of a particular subject and how they should be addressed. In such cases, it may be appropriate not to attempt to develop a uniform text, but to limit the action to a set of principles or legislative recommendations. In order to advance the objective of harmonization, and offer a legislative model, the principles or recommendations would need to do more than simply state general objectives. The text would provide a set of possible legislative solutions to certain issues, but not necessarily a single set of model solutions for those issues. (T)he text could ... be used to provide a standard against which Governments and legislative bodies could review the adequacy of existing laws, regulations, decrees and similar legislative texts in a particular field and update those laws or develop new laws.”²⁷

It is against this background that the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, which complement the UNCITRAL Guide, were issued in 2003. It is true that the legal systems of countries that have developed PPP programmes and implemented PPP projects cover a wide range. In the UK for example, the legal framework within which PPP projects are initiated and tendered by the public sector and contracted with the private sector is governed by various aspects of the legal system and not by an overarching law which makes specific provision for PPP projects. Specific laws were introduced to address problems with the legal powers of local authorities and other public bodies separate from central government, but contracts for over 800 PPP projects have been signed without a

²⁶ The UNCITRAL Guide “Basic facts about the United Nations Commission on International Trade Law”, paragraphs 34 - 36.

²⁷ The UNCITRAL Guide “Basic facts about the United Nations Commission on International Trade Law”, paragraphs 40 - 41.

PPP law covering the general legal framework for PPP. This is largely due to the common law system which affords significant freedom to parties to negotiate the terms of contracts and so the constraints within which PPP contracts are negotiated are determined primarily by policy, rather than the law.

On the other hand, in countries whose legal systems are based on the civil law system, one tends to see a more prescriptive approach taken in relation to establishing the legal framework for PPP. PPP contracts in common law jurisdictions are generally more detailed than in civil law jurisdictions, where contracts entered into by public bodies are subject to the body of public administrative law which has a much greater influence than in common law jurisdictions and the degree of freedom available to public bodies to negotiate the terms of contracts is less than is the case for equivalent bodies in most common law jurisdictions.

Furthermore no PPP law is likely to be comprehensive in covering all the areas of law which may have some relevance to the conclusion of a transaction to implement a PPP project. The rights and obligations of the parties involved in a PPP project will be affected by laws such as those relating to property, company law, tax, environmental protection, intellectual property, insolvency law and parties will expect to conduct legal due diligence on these aspects of the relevant country's legal system and their potential impact on the project before entering into binding commitments. It is unrealistic to expect any PPP law to address all the questions which may avoid the need for such due diligence, although it is fair to say that the necessary scope of such due diligence and the degree of assurance that parties to a PPP project may gain from it may be affected by the extent of detail contained in a PPP law, with potential savings in terms of time and cost.

The level of detail that it may be appropriate or necessary to include within a PPP law in any country will therefore be affected by the legal systems and tradition of that country as well as the maturity of the other laws in all the areas referred to above. This will clearly vary considerably between the countries who might consider basing their legislation on a Model Law. Against this background it would seem that the objective of drafting of a Model Law (in the sense of that term as used by UNCITRAL) would be at least regarded as highly ambitious and possibly unrealistic, given the need for international consensus to be reached on the exact terms of any Model Law.

There is also the question of what value would be added (from the perspective of a country seeking to develop legislation to support a PPP programme) by a Model Law. We can see that a Model PPP Law drafted in clear language, with the accreditation of an internationally recognised body that would inevitably result from the adoption of a Model Law, would carry considerable weight and represent a valuable starting point for the lawyers tasked with drafting legislation in any given country, and it has been suggested to us that such a Model PPP Law may be of particular assistance to countries in Central Asia and South-East Europe. However, given the factors referred to above, it may not be possible to achieve the degree of harmonisation that would normally be expected in relation to a Model Law. It is worth noting that the European Union, a leading force in the harmonisation of national laws, has not considered it appropriate to seek to harmonise the legislative framework for PPPs²⁸.

We would suggest that the UNCITRAL Guide and Model in principle could equally provide a similarly valuable resource to drafters of legislation and we remain to be convinced that the benefits of a Model PPP Law would outweigh the time and effort required to develop it or offer a material advantage over the UNCITRAL Guide and Model, if updated and used together with the other materials referred to above.

²⁸ See Commission Communication on Public Private Partnerships – Frequently asked questions Memo/09/509 19.11.09.

5. Core Principles

Whether or not the development of a Model Law is regarded as worthwhile, it seems that any legal system needs to satisfy a number of "Core Principles" in order to create a legal framework within which PPP projects can be implemented properly. The following is a list of those which we have identified:

- (A) identify/establish the entities responsible for the implementation of the PPP programme;
- (B) confirm/grant power to Contracting Authorities to enter into PPP contracts / PFI Concession Agreements which are binding on the relevant State/Municipality body;
- (C) as far as possible permit Contracting Authorities to negotiate or amend the terms of PPP contracts / PFI Concession Agreements, if necessary within limits or guidelines specified in the law;
- (D) identify/clarify/amend any potentially conflicting provisions of other national laws;
- (E) confirm/provide for fair and transparent tendering and selection procedures;
- (F) confirm/provide for enforceable remedies, either through the courts or international arbitration; and
- (G) provide for the State to provide financial support for or guarantees of the Contracting Authority's obligations in relation to PPP contracts / PFI Concession Agreements.

There is an additional core principle that is relevant to PFI projects:

- (H) confirm/provide for the validity of security interests granted by the Contractor over its assets or cash-flow and to grant step-in rights to its lenders.

Whether these Core Principles are addressed in a single law covering PPPs generally, or within a specific sector, is a subsidiary issue, in our view. Although there may be some benefit if all are covered in a single law, the key question is whether they are satisfied, in some way, under the laws of the relevant country. If not, then material problems are likely to arise (and will emerge at the stage of legal due diligence by bidders, if not before) with the result that the process of attracting interest in projects from international investors will become more difficult, as defects in the legal framework will be seen as an important factor by financial institutions and sponsors in deciding which markets to prioritise for investment. Sources of capital for infrastructure projects operate in international markets and, particularly, since the Global Financial Crisis, there is competition among countries to attract capital investment from these sources. A country which is able clearly to demonstrate a legal framework to support PPPs (by reference to these "core principles" or otherwise) will be better placed to compete for such capital than a country which is not.

We acknowledge that the above Core Principles closely follow the EBRD "Core Principles for a Modern Concessions Law" and draw from the OECD "Basic Elements of a Law on Concession Agreements" as well as the UNCITRAL Guide and Model. They could be developed further in terms of detail but we believe that the key issues of concern to potential investors can be brought under one or more of these principles. Those comments we have received as part of our preparatory work have been generally favourable in support of the proposed Core Principles, and have included the following additional observations:

- that in relation to Core Principle (A), the establishment of a PPP Unit may not of itself ensure the development of a pipeline of PPP projects;
- that the purpose of Core Principle (G) is not to facilitate the implementation of unprofitable projects, but to enhance the credit rating of the relevant Contracting Authority and that this should be clarified; and
- that there may be scope for an additional Core Principle that existing procurement procedures should be used for PPP projects, and which should include independent approvals in regards to each proposed PPP project's technical, strategic, and fiscal feasibility.

It may be said that the objective of any purported Core Principles should address not only the concerns of private sector investors, but also the public policy context which will be relevant to any PPP. The first of the EBRD Core Principles covers this. This will enable public sector officials to understand clearly the policy within which they are expected to operate and implement the programme. This does not mean that the policy is set down in the PPP law itself, rather to confirm the existence of a relevant policy context to the PPP and establish how that policy is set and promulgated (for example approved by the relevant part of government). This could be addressed by adding a further core principle:

- (l) establish / confirm the public policy framework and governance structure within which the PPP programme is to be implemented.

The Core Principles referred to above are reasonably clear and their purpose should be self-explanatory. One which is worth some further discussion is Core Principle (D), as this touches on something which is a key concern for international investors. Bidding for international projects is a risky business. Risk is accepted as an inherent part of PPP but the key is to identify, understand, allocate and manage the risks in a project in the most appropriate way. The process of identification and understanding the relevant risks is crucial and is informed by various sources, such as the information provided by the public authority as part of the tender process, including in particular the contract and the relevant PPP laws. Bidders are used to assessing these documents, but the process of identifying other potentially relevant laws is more uncertain.

This could be addressed by a provision in the PPP law that its provisions prevail over other laws to the extent that these conflict with or are inconsistent with a specific provision of the PPP law. In any event, it would be useful for countries developing PPP to identify potentially conflicting legislation at an early stage in the legislative process, if only so that this information can be made available to the private sector and thereby reduce duplication of effort and costs in legal due diligence.

6. Next Steps

Based upon our research and analysis as contained in this Report, we would recommend that the UNECE Team of Specialists on PPP should consider and decide upon the following issues in relation to the concept of a model PPP law:

- whether it is appropriate, having regard to the needs of prospective users, to develop a model PPP law, and in any event, whether UNECE should develop guidance on PPP laws, for example a 'guide to guidance'-style document that directs potential legislators towards existing publications;
- whether to encourage UNCITRAL to revise the Guide and Model to:
 - ensure that further Recommendations are incorporated into the Model Provisions,
 - update the Recommendations and Model Provisions in line with market developments,
 - harmonise the Recommendations and Model Provisions with other relevant laws and guidances, and
 - align the Recommendations and Model Provisions with the strategic objectives of the UNECE PPP Initiative;
- whether the suggested "Core Principles" reflect the necessary elements a legal framework within which PPP projects can be implemented properly, and if so, whether these "Core Principles" should be incorporated into the UNECE PPP Toolkit;
- whether the UNCITRAL Guide and Model should be formally incorporated into the UNECE PPP Toolkit, and if so, the manner in which this will occur, as well as the steps that could be taken to increase the international awareness of the UNCITRAL Guide and Model; and
- whether the UNECE PPP Toolkit should incorporate other PPP legal guidances, questionnaires and models as developed by EBRD, ABD, EPEC and World Bank.

7. Conclusion

It is clear to us that there is a substantial volume of guidance on PPP available from a wide variety of sources and that, for public officials in countries embarking on the development of a PPP programme, it may be a challenge to identify what materials are likely to be the most useful source of practical help, either in drafting legislation to create appropriate legal frameworks or in implementing procurements for specific projects. There is also the potential for overlap of effort between organisations seeking to promote knowledge and understanding of PPPs among countries seeking to use PPPs as a means of developing their infrastructure. This is an area where, in our view, the focus of efforts going forward should be to harmonise and build upon what has already been achieved and the lessons that have already been learned in addressing the needs of countries seeking to develop legal frameworks to facilitate their PPP programmes. We hope that this report will have raised awareness of some of the principal sources of useful information and guidance, and identified some areas where further work and co-ordination could be useful.

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APPENDIX A

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APPENDIX B

Details of materials reviewed for the purposes of preparing this Report.

Asian Development Bank (2008) **PPP Handbook**

<<http://www.adb.org/Documents/Handbooks/Public-Private-Partnership/default.asp>>

European Bank for Reconstruction and Development, Legal Transition Team (2006) **Core Principles for a Modern Concessions Law**

<<http://www.ebrd.com/pages/sector/legal/secured/core/coreprinciples.shtml>>

European Bank for Reconstruction and Development (2010) **Core Principles of an Insolvency Law Regime**

<<http://www.ebrd.com/downloads/legal/insolvency/principle.pdf>>

European Bank for Reconstruction and Development (2004) **Model Law on Secured Transactions**

<<http://www.ebrd.com/pages/sector/legal/secured/core/modellaw.shtml>>

European PPP Expertise Centre (2010) **A Guide to Guidance: Sourcebook for PPPs**

<www.eib.org/epcc/resources/guide-to-guidance-en.pdf>

OECD Multilateral Centre for Private Sector Development, Istanbul (2000) **Basic Elements of a Law on Concession Agreements**

<www.oecd.org/dataoecd/41/20/33959802.pdf>

United Nations Commission on International Trade Law (1987) **Legal Guide on Drawing Up Contracts for the Construction of Industrial Works**

<http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1988Guide.html>

United Nations Commission on International Trade Law (2004) **Legislative Guide on Insolvency Law**

<http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html>

United Nations Commission on International Trade Law (2007) **Legislative Guide on Secured Transactions**

<http://www.uncitral.org/uncitral/en/uncitral_texts/payments/Guide_securedtrans.html>

United Nations Commission on International Trade Law (2000) **Legislative Guide to Privately Financed Infrastructure Projects**

<http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFI.html>

United Nations Commission on International Trade Law (1997) **Model Law on Cross-Border Insolvency**

<http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>

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<http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html>

United Nations Commission on International Trade Law (2003) **Model Legislative Provisions on Privately Financed Infrastructure Projects**

<http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2003Model_PFI_P.html>

United Nations Commission on International Trade Law (2007) **The UNCITRAL Guide: Basic facts about the United Nations Commission on International Trade Law**

<http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf>

United Nations Economic and Social Commission for Asia and the Pacific, Transport Division (2008) **Public Private Partnerships in Infrastructure Development: A Primer**

<www.unescap.org/ttdw/ppp/trainingmaterials/PPP_Primer.pdf>

World Bank **PPP in Infrastructure Resource Centre**

<www.worldbank.org/ppp>

World Bank, Finance Economics & Urban Department, Finance and Guarantees Unit (2010) **Policy Research Working Paper 5173: Understanding Options for Public-Private Partnerships in Infrastructure**

<<http://elibrary.worldbank.org/docserver/download/5173.pdf?expires=1302695802&id=id&accname=guest&checksum=7409B8DA9BCB23D82076E8C7A78D80B4>>

World Bank and Inter-American Development Bank (1998) **Technical paper no. 399: Finance, Private Sector, and Infrastructure Network Concessions for infrastructure**

<rru.worldbank.org/Documents/Toolkits/concessions_fulltoolkit.pdf>

APPENDIX C

Glossary of acronyms used in this Report.

ADB means the Asian Development Bank

EBRD means the European Bank for Reconstruction and Development

EPEC means the European PPP Expertise Centre

IDB means International Development Banks (collectively referring to the ADB, EBRD and the World Bank)

OECD means Organisation for Economic Development and Cooperation

PPP means a Public-Private Partnership

UNCITRAL means the United Nations Commission on International Trade Law

UNECE means the United Nations Economic Commission for Europe

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