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Updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

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November 19, 2018

Mr. Jose Estrella-Faria (joseangelo.estrella-faria@un.org)
United Nations Commission on International Trade Law

Re: Revision of the Legislative Guide on Privately Financed Infrastructure Projects

Dear Mr. Estrella-Faria:

We write as members of the Intergovernmental Expert Group on Public Private Partnerships to express certain views with respect to the ongoing revision process of the Legislative Guide on Privately Financed Infrastructure Projects undertaken by the United Nations Commission on International Trade Law (UNCITRAL) Secretariat under guidance of the UNCITRAL Commission.

1. Placing the Legislative Guide in the current global context¹

Private sector financing and PPPs in particular are the cornerstone of many national and regional infrastructure plans. For example, 47 percent of the investments under the COSIPLAN-IIRSA plan in Latin America have been reported as privately financed or structured as PPPs. It is also obvious that private sector participation and PPPs are the lynchpin of the Programme for Infrastructure Development in Africa or PIDA. As countries, international organizations, MDBs and others mobilize to plan and develop infrastructure and to bring the private sector into these investments at an unprecedented rate and scale, however, there is also growing concern that all aspects of sustainability are not receiving adequate attention and may be neglected or undermined in the process.

Recognizing that financing infrastructure needs for developing countries will require a fundamental reorientation of their core business, the World Bank Group and other multilateral development banks (MDBs) are moving to prioritize and maximize the role

¹ For a more thorough discussion of issues identified in this section, *see* Office of the United Nations High Commissioner for Human Rights and the Heinrich Böll Foundation, “The Other Infrastructure Gap: Sustainability,” (2018) (forthcoming) (Executive Summary *available at* <https://www.ohchr.org/Documents/Publications/InfrastructureGapSummary.pdf>); *see also* Brooke Skartvedt Guven “Blended Finance in 2017: Advancing financing for development but not a panacea,” in *The Yearbook on International Investment Law and Policy 2017*, Oxford University Press (eds. Lisa Sachs and Lise Johnson) (forthcoming).

of private finance for development purposes.² In 2017, the G20 set in place a Roadmap to Infrastructure as an Asset Class, and in July 2017, endorsed a set of ‘Principles of MDBs: strategy for crowding-in Private Sector Finance for growth and sustainable development’ that further strengthens the World Bank Group and other MDBs’ framework for increasing private investment to support development objectives.³ These recent and ongoing developments propose to significantly alter how financing for development, including through PPPs, is conceptualized and implemented, with drastic implications for how and under what circumstances governments should promote, facilitate or prohibit PPPs and how to best regulate them to ensure that they contribute to sustainable development objectives.

In the 15 years since the UNCITRAL Legislative Guide was drafted, empirical evidence in the intervening years raises concerns about the actual development benefits of these kinds of contractual arrangements, particularly in light of the increasingly apparent financial, fiscal, environmental, and human rights costs. As a general matter, whether and

² For example, in 2015 the World Bank Group introduced its “Billions to Trillions” approach to development finance. *See* World Bank and IMF Development Committee, ‘From Billions to Trillions: Transforming Development Finance’ (April 2 2015). <http://pubdocs.worldbank.org/en/622841485963735448/DC2015-0002-E-FinancingforDevelopment.pdf>. This was followed by the March 2017 “Cascade Approach” to leverage the private sector for growth and sustainable development. World Bank and IMF Development Committee, ‘Forward Look A Vision for the World Bank Group in 2030 – Progress and Challenges’ (March 24 2017) *available at* <http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23745169/DC2017-0002.pdf>. In turn, this was followed by the July 2017 “Maximizing Finance for Development: Leveraging the Private Sector for Growth and Sustainable Development” agenda. *See* Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries, ‘Maximizing Finance for Development: Leveraging the Private Sector for Growth and Sustainable Development’ (19 September 2017) http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23758671/DC2017-0009_Maximizing_8-19.pdf. For more information on Maximizing Finance for Development see The World Bank, ‘Maximizing Finance for Development (MFD)’ *see* <http://www.worldbank.org/en/about/partners/maximizing-finance-for-development>.

³ *See* G20 – IFA WG, ‘Principles of MDBs’ strategy for crowding-in Private Sector Finance for growth and sustainable development’ (April 2017) *available at* http://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Featured/G20/G20-Documents/principles-on-crowding-in-private-sector-finance-april-20.pdf?__blob=publicationFile&v=2. The Group of 20 (G20) member countries in October 2018 received the Report of the Eminent Persons Group on Global Financial Governance which calls for bold reforms to harness complementarities and synergies in the development system. Report of the G20 EPG on Global Financial Governance (Oct. 2018) *available at* <https://www.globalfinancialgovernance.org/report-of-the-g20-epg-on-gfg/>. While a core part of these proposed reforms look to improvements in investment climates of host-countries, they also call for enhanced collaboration among international financial institutions (IFIs) and development partners, embarking on system-wide insurance and diversification of risk, the creation of infrastructure investments as an asset class, and the mobilization of significantly greater private sector participation in advancing financing for development purposes. PPPs will be a core part of these initiatives.

under what circumstances a PPP may be the optimal solution to advance infrastructure investment, development and/or management remains unclear and highly context specific, with benefits often questionable and costs well documented.⁴ It is also now apparent that many countries do not have the capacity to properly implement PPPs,⁵ that this capacity takes years to properly develop, that such capacity is not present even in many developed economies,⁶ and that not all proposed PPPs are rigorously evaluated or have the appropriate structure to advance a specific project,⁷ or larger sustainable development objectives.⁸ The failure to implement a PPP correctly can have massive and long-lasting financial as well as human and environmental costs that cannot be ignored when considering legislative or contractual guidance on these arrangements.

In 2015, through adoption of Agenda 2030 and the sustainable development goals (SDGs), the United Nations and each of its member states identified sustainable development—including its economic, social, environmental, and governance dimensions—as a key global priority.⁹ These agreed priorities include the financing of sustainable, accessible, affordable and resilient quality infrastructure, which some estimate will require US\$ 90 trillion in investment between now and the year 2030. This

⁴ *E.g.* European Court of Auditors, “Public Private Partnerships in the EU: Widespread shortcomings and limited benefits” (March 20, 2018), *available at* <https://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=9917>; *see also* The World Bank Group, “Government Objectives: Benefits and Risks of PPPs” *available at* <https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives>; *see, also*, J. Luis Guasch, “Granting and Renegotiating Infrastructure Concessions: Doing it right” (The World Bank, 2004) *available at* <http://documents.worldbank.org/curated/en/678041468765605224/Granting-and-renegotiating-infrastructure-concessions-doing-it-right>; *see also* J. Luis Guasch, Jean-Jacques Laffont and Stéphane Straub, “Infrastructure Concessions in Latin America” (World Bank Policy Research Working Paper 3749, October 2005) *available at* <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3749>.

⁵ *See* UNCTAD. Trade and Development Report (2015), Chapter VI. *Available at*: https://unctad.org/en/PublicationsLibrary/tdr2015_en.pdf

⁶ The European Court of Auditors 2018 report states “Implementing successful PPPs requires considerable administrative capability that can be ensured only through suitable institutional and legal frameworks and long-lasting experience in the implementation of PPP projects. We found that these are available in only a limited number of EU Member States.” *Supra* note 4.

⁷ World Bank Support to Public-Private Partnerships: Lessons from Experience in Client Countries FY02-12. *Available at*:

http://ieg.worldbankgroup.org/sites/default/files/Data/reports/ppp_eval_updated2_0.pdf

⁸ The Economist, Intelligence Unit, Infrascope PPP Index, *available at* <http://infrascope.eiu.com/>; Antonio Estache and Caroline Philippe, “The Impact of Private Participation in Infrastructure in Development Countries: Taking Stock of about 20 years of Experience,” No ECARES 2012-043, Working Papers ECARES, Université Libre de Bruxelles (2012) *available at*

<https://www.ifc.org/wps/wcm/connect/9619d7004db7542d8443a4ab7d7326c0/INR+Note+2++The+Impact+of+Private+Participation+on+Infrastructure's+performance.pdf?MOD=AJPERES>.

⁹ *See* United Nations. *Transforming Our World: The 2030 Agenda for Sustainable Development* (A/RES/70/1) (2015).

level of finance will require an additional US\$ 1.5 trillion per year to be directed to infrastructure investment in developing countries.

In order to address these financing gaps, the 2015 Addis Ababa Action Agenda (the Addis Agenda) identifies the critical role that the private sector can play in ensuring that financial resources are targeted toward development objectives.¹⁰ In fact, the Addis Agenda identified the following principles (the Addis Principles) for the effective governance of blended finance, including PPPs (the Addis Principles):¹¹

- Careful consideration given to the structure and use of blended finance instruments;
- Sharing risks and reward fairly;
- Meeting social and environmental standards;
- Alignment with sustainable development, to ensure “sustainable, accessible, affordable and resilient quality infrastructure”;
- Ensuring clear accountability mechanisms;
- Ensuring transparency, including in public procurement frameworks and contracts;
- Ensuring participation, particularly of local communities in decisions affecting their communities;
- Ensuring effective management, accounting, and budgeting for contingent liabilities, and debt sustainability; and
- Alignment with national priorities and relevant principles of effective development cooperation

Other similar principles emerged around the same time. For example, another UN agency, the Economic Commission for Europe (UNECE), has set forth ‘Guiding Principles on People-First Public-Private Partnerships for the United Nations Sustainable Development Goals’ focused on procedural (e.g. information, participation and transparency) rights and with an emphasis on poverty eradication and more equitable income allocations,¹² while the OECD Development Assistance Committee created the ‘Blended Finance Principles for Unlocking Commercial Finance for the Sustainable

¹⁰ United Nations, ‘Addis Ababa Action Agenda of the Third International Conference on Financing for Development’, (27 July 2015), *available at* http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf. The Agenda was endorsed by the United Nations General Assembly (UNGA), UNGA Res 69/313 (July 27 2015) UN Doc A/RES/69/313.

¹¹ Motoko Aizawa. A Scoping Study of PPP Guidelines. DESA Working Paper No. 154 (2018). Available from: http://www.un.org/esa/desa/papers/2018/wp154_2018.pdf

¹² *Available at*

https://www.unece.org/fileadmin/DAM/ceci/documents/2018/PPP/Forum/Documents/Revised_Guiding_Principles_for_People-first_PPPs_in_support_of_the_UN_SDGs-Part_I.pdf; *also see:* https://www.unece.org/fileadmin/DAM/ceci/documents/2017/PPP/Activity_ECE-CityU/Geoffrey_Hamilton-UNECE_People-first_PPPs.pdf

Development Goals.¹³ These new sets of principles suggest a reorientation in the approach to PPPs will be necessary to respond to the globally recognized challenges surrounding PPPs since their first emergence in the 1980's.

2. UNCITRAL as an UN body has a critical role to play with respect to the Legislative Guidelines

As the Secretariat, under guidance of the Commission, advances its mandate to update the Legislative Guide, it is instructive to consider UNCITRAL's role as a UN body and its duty to further the objectives set forth in the UN Charter, the human rights framework, and the SDGs.

If the SDGs are to be achieved, private sector investment—and the legal frameworks that govern it—will need to play a supportive role.¹⁴ This must be accomplished in accordance with a clear orientation toward sustainable development with the underpinning of the broader human rights framework. The update of UNCITRAL Legislative Guide presents an important opportunity for the UN to align its own position on privatization across and within its many bodies. By establishing greater coherence across UN entities on these issues, the Secretariat could also benefit from the expertise and experience of other UN bodies and mandate holders, many of whom have worked or are working on PPPs and related issues.

For example, in addition to work of the Office of the High Commissioner on Human Rights and the UN Special Rapporteur on Extreme Poverty and Human Rights' work described below, UNECE is currently developing a model concession law, aligned with its Guiding Principles on People first PPPs, mentioned above. The Secretariat should consider joining forces with UNECE and benefit from their insights on how to promote PPPs that put public interest at the center of the PPP selection and implementation process. The United Nations Conference on Trade and Development (UNCTAD) has advocated for the case of aligning investment with sustainable development through its Investment Policy Framework for Sustainable Development,¹⁵ and has called for “more exacting and encompassing policy measures to address global and national asymmetries in resource mobilization, technological know-how, market power and political influence caused by hyperglobalization that have generated exclusionary outcomes, and will

¹³ Available from: <https://www.oecd.org/dac/financing-sustainable-development/development-finance-topics/OECD-Blended-Finance-Principles.pdf>

¹⁴ *See, e.g., id.*, at 21 (setting forth Goal 10 and its targets); *see also* Johnson, Space for Local Content and Strategies: A crucial time to revisit an old debate (GiZ, July 2016) *available at* <https://academiccommons.columbia.edu/doi/10.7916/D8V40VRC>; UN Committee for Development Policy, Policy Note: Expanding Productive Capacity: Lessons learned from graduating least developed countries (UN Department of Economic and Social Affairs, December 2017) (discussing the contributions FDI can make to the SDGs) *available at* <https://www.un.org/development/desa/dpad/publication/expanding-productive-capacity-lessons-learned-from-graduating-least-developed-countries/>.

¹⁵ *Available at:* https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

perpetuate them if no action is taken.”¹⁶ UNCTAD has also considered risks resulting from the intersection of investment law and PPPs.¹⁷ As the Secretariat is already aware, the UN Department of Economic and Social Affairs (UNDESA) has strongly advocated the integration of the economic, social and environmental dimensions of sustainable development in development finance, and already urged UNCITRAL at its last Expert Group meeting in November 2017 to align the updated Legislative Guide with the Addis Principles.

In sum, UN bodies and experts have raised extensive and profound concerns about the risks of PPPs, as well as concerns about PPPs missing the opportunities to advance the SDGs and help realize human rights, and have made suggestions on how to ensure careful use of investments structured as PPPs. There is recognition within the UN that PPPs too often result in lopsided outcomes that favor the interests of investors at the expense of the state and people, and may not advance the SDGs in a rights-respecting manner. To the extent PPPs continue to be used, a fundamental reorientation of their purpose and structure is required.

3. The updated Legislative Guide on Privately Financed Infrastructure Projects should be a unique and timely resource to states

As described in the Note by the Secretariat, document A/CN.9/939, the UNCITRAL Secretariat, under the guidance of the UNCITRAL Commission, is in the process of preparing proposed updates to the UNCITRAL Legislative Guide. Through various consultations that the Secretariat has conducted during this process, experts have concluded, and the UNCITRAL Secretariat has accepted, that “most of the recommendations of the PFIPs texts reflect good policy and practices, and remain relevant. However, limited revisions to update the PFIPs texts are considered necessary, in order to take into account developments in practice since the existing Legislative Guide was issued in 2000.”¹⁸ The Secretariat is preparing amendments to (1) consolidate the Legislative Recommendations and the Model Provisions, (2) change/substitute titles and terminology, (3) update the documents to reflect the underlying principles of the United Nations Convention against Corruption, (4) expand the advice on project

¹⁶ *E.g.* Trade and Development Report 2017: Beyond Austerity – Towards a Global New Deal (United Nations publication, Sales No. E.17.II.D.5).

¹⁷ *See* mapping of PPP-related investment claims at <http://investmentpolicyhub.unctad.org/Pages/mapping-of-ppp-related-isds-cases>. For an analysis of the impact of the intersection of investment law and PPPs see Brooke Skartvedt Guven and Lise Johnson, “PPPs and ISDS: A Risky Combination,” UNCTAD Investment Policy Hub Blog (24 May 2018) *available at* <http://investmentpolicyhub.unctad.org/Blog/Index/65>; *see also* Lise Johnson, “The Impact of Investment Treaties on Governance of Private Investment in Infrastructure,” Robert Schuman Centre for Advanced Research Studies, Research Paper No. RSCAS 2014/32 (2014) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411575.

¹⁸ A/CN.9/939 ¶ 10.

preparation, and (5) align Chapter III (“Selection of the Concessionaire”) with the 2012 UNCITRAL Model Law on Public Procurement.¹⁹

We agree that the above issues should be addressed in any update to the Legislative Guide. However, as described above and more specifically in the following section of this letter, we express concern that this extremely limited mandate ignores fundamental and wide-ranging issues, empirical evidence, and normative developments that must be included in any update to the Legislative Guide.

It is in this vein that we acknowledge that it may be possible to update the UNCITRAL Legislative Guide to account for the extensive developments related to PPPs that have advanced over the intervening 15 years since its publication, even though we question whether the fundamental rethinking of how PPPs are conceptualized and implemented is possible within the current structure and framework of the Legislative Guide. It is with concern that we note that the proposed updates to the Legislative Guide as framed by the UNCITRAL Secretariat do not dedicate comprehensive attention to understanding or integrating the broader impacts of PPPs on climate change objectives, on all stakeholders (particularly those whose infrastructure usage needs and patterns may differ from those of more dominant aspects of society, such as women, the poor, or the disabled), and the disparate outcomes of PPP projects and how those outcomes may vary based on economic and institutional structures of the host country.

140 jurisdictions around the world already have PPP or concession laws on their books.²⁰ As far as we are aware, no systematic analysis of these PPP laws exists. Although UNCTAD has a comprehensive web-based resource for investment laws from over 100 jurisdictions,²¹ no comparable body of research is available for PPP laws. The closest resource may be the Economist Intelligence Unit’s *Infrascope*, which publishes indicators for effective PPPs by country. In addition, limited regional resources exist. For example, an ASEAN PPP Guidelines contains a brief ‘Summary of PPP Framework/ Experience in the ASEAN Member Countries’,²² and a project of TradeLab and Monash University’s International Economic Law Clinic recently reviewed PPP laws of 18 jurisdictions of Sub-Saharan Africa. The latter study indicates that sustainability content in such PPP laws is generally insufficient.²³

Considering the vintage of some of the PPP laws, some countries should be ready for updates of these PPP laws. These countries are important “client” countries of the updated Legislative Guide, just as the other countries that are currently without PPP laws

¹⁹ A/CN.9/939 ¶¶ 14-29.

²⁰ Available at: <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concession-laws>.

²¹ Available at: <http://investmentpolicyhub.unctad.org/InvestmentLaws>.

²² Available at: http://www.eria.org/ASEAN_PPP_Guidelines_Full_Report.pdf.

²³ An unpublished project report of TradeLab and the Monash University’s International Economic Law Clinic, October 2018. It found that the PPP laws fail to sufficiently mention relevant environmental and social standards, sustainable development, community participation, and alignment with national development plans, among other factors.

and are considering a new law on the topic. A comprehensive review of existing PPP laws would be an invaluable source of information for these countries; equally, such a review could have played (and should play) a key role in UNCITRAL's efforts to update the Legislative Guide by offering lessons learned on the successes and failures of PPPs from around the world. In the absence of such empirical data and reflections on experiences, UNCITRAL's advice to countries, as they consider the next generation PPP laws, should draw from the latest principles and initiatives at the UN level and elsewhere discussed in sections 1 and 2 above that reflect the insights on how to improve PPPs. These principles and initiatives reflect the views of different stakeholder groups, including states.

UNCITRAL faces a unique opportunity to respond to the expectations placed on PPPs to enable countries to promote sustainable development and achieve the SDGs – not only to achieve Goal 9 on Industry, Innovation and Infrastructure, but in fact all of the SDGs. Indeed, the SDGs are interlinked and interdependent and must be implemented as an indivisible whole. As such, efforts to achieve more easily monetized SDGs cannot come at the expense of less quantifiable but no less critical goals, including, for example, those related to climate, the environment, ecosystems, gender equality, reduced inequality, or building peace, justice and strong institutions. But of course, the world will neither meet the SDGs nor meet the climate goals under the Paris Agreement without sustainable infrastructure. By rebalancing and reorienting the Legislative Guide, UNCITRAL can better guide countries on how to realize one of the important options available to them to finance much needed infrastructure that minimizes risks and create benefits, while also bearing in mind how infrastructure fits into the broader SDG objectives. This opportunity to offer a unique and timely Legislative Guide that is fit for the new generation of PPPs must not be missed.

To meet this challenge, the Legislative Guide must rebalance its approach away from a primary focus on creating a regulatory environment that is favorable to investors, and toward advice on how to help states attract private investment while protecting states' right and interest, including their right and duty to regulate in order to create multiple public benefit and public good. Not all investment is desirable investment, and when the proper processes are not followed and appropriate legal and policy frameworks are not in place, investment can harm rather than benefit host societies. A revised Legislative Guide must acknowledge the recurrent problems associated with PPPs that have been identified by stakeholders around the world and are increasingly evidenced empirically, including those of large fiscal and non-fiscal costs associated with PPPs. The new principles on PPPs and blended finance are helpful in setting the right orientation for updating the Legislative Guide.

Legislators and practitioners have already access to several PPP contractual models that cater to the needs of investors; for example, the World Bank's Guidance on PPP Contractual Provisions²⁴ and FIDIC contract forms accommodate the interests of

²⁴ Available at: <https://ppp.worldbank.org/public-private-partnership/library/guidance-on-ppp-contractual-provisions-2017-edition>. We note that this Guidance is referred to several times in revised Chapter I of the Legislative Guide as a resource for states, but reiterate that this World

investors but do not sufficiently focus on the needs of states.²⁵ As the Argentine G20 has focused on tools to standardize investments in infrastructure, one can expect additional contractual tools to standardize investor protection in PPP contracts to be forthcoming. As such, when states seek a model law or contract that will present a sustainable and rights respecting approach to PPPs (taking account of the broad interests of the state, including its citizens and society at large) states currently face a serious information gap. This gap must be filled urgently.²⁶ We need a document that clearly explains the state's rights and interests, while placing PPPs in the context of broader public policy discourse that is taking place and some innovations designed to address these public policy challenges.

We encourage the Secretariat, should it continue towards finalizing the update of the Legislative Guide, to proceed with deliberate attention to the global public policy discourse as it relates to PPPs and into which this Legislative Guide would be delivered. We encourage due attention to and consideration of the wide-ranging evidence of environmental, climate, social, human rights, financial, fiscal, and governance impacts of PPPs that now form a critical part of the discourse in other fora and to systematically and consistently address these issues throughout the Legislative Guide. An updated Legislative Guide that does not adequately account for these developments will be unhelpful at best, and could be harmful to the stated development objectives of UN member states at worst.

4. Additional updates that should be included in the Legislative Guide

In this Section, we set forth the following broad issue areas that should be systemically addressed in the proposed update in order to ensure that the update reflects the broader public policy issues and the orientation toward sustainable development under discussion in multiple fora:

a. Sustainable development and the SDGs

As noted in the earlier sections of this letter, sustainable development should be at the heart of PPP selection and implementation, and for this reason, the Legislative Guide should provide guidance to legislators on how to realize this vision of development and to help countries achieve the SDGs. This means sustainable development and the SDGs should be “mainstreamed” and be clearly explained as an opportunity and responsibility of PPPs throughout the whole of the PPP lifecycle. The draft chapters of the Legislative

Bank Guidance has been subject to ongoing criticism for its failure to take the interests of both states and a broader set of stakeholders into account (see following footnote).

²⁵ For a critique of the 2017 version of the World Bank Guidance, see Foley Hoag, “Summary Comments on the World Bank Group’s 2017 Guidance on PPP Contractual Provisions,” (Sept. 17, 2017) available at <https://us.boell.org/2017/09/15/summary-comments-world-bank-groups-2017-guidance-ppp-contractual-provisions-0>.

²⁶ One available resource is IISD (2017). *Contracts for Sustainable Infrastructure*. Available at: <https://www.iisd.org/library/contracts-sustainable-infrastructure-ensuring-economic-social-and-environmental-co-benefits>

Guide miss the opportunity to provide this much needed guidance for states. For example, Chapter IV (PPP Implementation: legal framework and PPP contract) is entirely silent on the topic, and conveys the sense that sustainability is unrelated to PPP implementation. In other places, references are made to financial or environmental sustainability but not to the social and human rights aspects. There should be a comprehensive reorientation of all of the chapters in order to place the Guide in the context of the current global discourse on PPPs and the role that they are expected to play to further the SDGs. Without such a reorientation, the Legislative Guide could simply repeat the advice of other numerous outdated guidance on PPPs without adding value.²⁷

b. Public vs. Private nature of PPPs

The draft chapters proposed for the Legislative Guide continue to portray the governance of PPPs as, for the most part, a binary contractual arrangement under private contract law between a contracting authority and a private partner. Although the Introduction chapter states that ‘The advice provided in the *Guide* aims to achieve a balance between facilitating PPPs and protecting the public interest,’ and provides some discussion of what this means in theory (including for example, discussion of the public interest and transparency), the scope of the public interest and public policy issues is narrowly drawn throughout the remaining chapters and insufficiently elaborated in context.²⁸ In contrast, the chapters provide detailed explanations on how states can facilitate and protect the interest of the private partner.

This tendency can be observed in Chapter IV, which emphasizes the freedom and flexibility of contracts, while generally underplaying the fundamentally public nature of infrastructure and its role in sustainable development, and the public sector responsibilities associated with it. While briefly noting certain advancements in transparency practices, Chapter VI (Settlement of Disputes) is drafted as if dispute resolution of PPPs were purely a private international law matter. When a government is involved in an investment dispute, even when such dispute is contractual, the public nature of government obligations must be accounted for, as further elaborated below.

Similarly, Chapter VII (Other relevant areas of law) identifies a narrow range of laws with mostly commercial orientation as relevant to PPPs, while insufficiently or inappropriately describing other relevant areas of the law. For example, the Chapter correctly identifies consumer protection law as being relevant in PPPs, but it describes

²⁷ See Aizawa (2018).

²⁸ One exception to this comment is the treatment of unsolicited proposals in Chapter III. We commend the Secretariat for taking up this difficult topic that has eluded the attention of many other organizations involved in PPPs. Although we feel that the likelihood of innovation in new technologies and products benefiting a country and the PPP officials’ ability to closely analyze such technologies and products are generally overvalued, and would have preferred that any guidance on this (or any other) topic be first informed by a systematic empirical study on unsolicited proposals. Nonetheless, it is a welcome development that this topic is explicitly included in Chapter III as needing special attention of PPP officials.

measures to protect consumers' rights as hindering the investors' right to be paid for services rendered (paragraph 46 of Chapter VII).

The draft chapters' focus on the bilateral relationship between the contracting parties means they do not take into account the important role and interests of other stakeholders, especially those stakeholders who are outside the bilateral relationship between the contracting parties, such as the affected communities, consumers of infrastructure services, taxpayers, citizens, and the population at large.²⁹ Those references to such stakeholders appear almost as an afterthought.

Even when privately financed, the owners, investors, and financiers of infrastructure assets must realize that they are custodians of public assets. The contracting authorities have the right and duty to regulate, which they cannot derogate or delegate, and have the obligation to ensure transparency of PPP information, effective participation of the public, and accountability of PPP decision makers. These obligations of a state are not merely based on evolving practice, but are fundamental aspects of the international human rights framework and thus are international legal obligations of states. The private partner should refrain from exploiting its unique position of being entrusted with public infrastructure building, ownership or operation, while discharging its responsibility to respect human rights. This public orientation in PPPs should be apparent in the Legislative Guide from the beginning to the end.

c. Transparency, participation, accountability and remedy

Transparency, participation and accountability are well-recognized governance principles, as well as human rights principles. Members of the public have a right to appropriate information about PPPs, including public access to PPP contracts, or at least the key terms of contracts, as well as the right to participate in consultation meetings to voice their views. Affected indigenous peoples and communities have the right to provide or withhold free, prior, and informed consent to proposed PPPs. People are also entitled to hold public officials to account for their infrastructure planning and implementation decisions. States must take appropriate steps to ensure, through judicial, administrative, legislative or other means, that when negative impacts occur, those affected have access to effective remedy.³⁰ Public ombuds and other grievance mechanisms in relation to PPPs should be available to aggrieved parties.

Although the draft chapters address transparency in various places, the commentaries often focus on transparency issues relevant to the contracting parties and not to the broader stakeholder groups; for example, Section 6 of Chapter IV (Disclosure Requirements and Transparency Obligations) is written from the viewpoint of the contracting parties and ends with an admonishment not to burden the private partner with excessive reporting requirements. Similarly, Section (k) (Arbitration) of Chapter VI

²⁹ Aizawa (2018); also see UNECE's Guiding Principles for People first PPPs.

³⁰ Paragraph 25 of the United Nations Guiding Principles on Business and Human Rights.

Available at:

https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

(Disclosure Requirements and Transparency Obligations) refers to the “growing trend toward transparency on investor-State dispute settlement, which is encouraged by the [Mauritius Convention].” While the Mauritius Convention is an important step, it is merely a procedural mechanism by which states commit to realizing their preexisting human rights obligations in a specific context.³¹ The important governance and human rights concepts of transparency, participation and accountability must be described from the perspective of the public throughout the Legislative Guide.

d. Empirical evidence-based assessment of contexts in which PPPs may be desirable

PPP is a broad concept that can be used to describe a wide variety of contractual structures in many sectors. While the Legislative Guide is appropriately of a more general nature, the benefits and risks of PPPs are different in different sectors, and therefore the desired legislative policies and frameworks may vary to a certain extent. For example, the costs and benefits of PPPs in more traditional sectors such as transportation (roads, tunnels, bridges, rail, mass transit, ports, airports) and power and energy (generation assets, distribution systems), will differ from PPPs in water and waste (bulk water treatment, water distribution and sewage, solid waste management), and may significantly differ from PPPs in more social sectors including education (school facilities, services), health (hospitals, other health facilities and services), agriculture (irrigation, drainage, agro-investment), prisons, and urban housing. Moreover, the appropriateness of implementing a PPP in any one of these sectors will be highly context dependent. It may be valuable to integrate into the Legislative Guide more attention to these particular issues, including questions that policy-makers may wish to consider when determining the desirability of a PPP in a specific context.

We note, for example, that Chapter I (General legislative and institutional framework) Section (C) Scope of authority to enter into PPPs section (1) (Authorized agencies and relevant fields of activity) suggests that it is desirable for legislation to identify those sectors for which a PPP may be awarded, but then goes on, without noting the significant public policy implications, that “where this is not deemed feasible or desirable, the law might identify those activities, which may not be the subject of a concession...” It is well understood that the differences between opt-in versus opt-out legal frameworks and policy measures can have serious implications on the public interest, particularly as such choice creates incentives to have or not have focused discussions and public debate based on empirical evidence surrounding the desirability of PPPs in specific sectors. In this and other areas, the Legislative Guide should holistically incorporate and identify points at which empirical evidence should be considered in the context of government decision-making.

³¹ The Mauritius Convention (2014), which entered into force in 2017, has only five state parties. See http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

e. Objectives of investment and PPPs

As mentioned above, in conceptualizing the objectives of investment in PPPs, various principles and guidelines have been developed to help policy-makers to ensure that legal and policy frameworks support investment and investment processes consistent with sustainable development objectives. Such thinking could usefully be included in updated Legislative Guide. In addition to the principles and initiatives described in Section 1, see, for example: G7 Ise-Shima Principles for Promoting Quality Infrastructure Investment,³² OECD's Getting Infrastructure Right,³³ draft South-South Principles on International Investment for Sustainable Development,³⁴ Stockholm Statement - Towards a new consensus on the principles of policy-making for the contemporary world,³⁵ Rethinking International Investment Governance; Principles for the 21st Century.³⁶

We note more specifically that Section 1 of Chapter VII suggests that investment promotion and protection provisions of investment law be aligned with PPP law. We suggest a fundamental revision of this section based on current understandings of the role of investment facilitation and investment law. Regretfully, this section focuses on what kinds of promotion, facilitation, and protection are desirable from the perspective of a private investor and project promoter. For example, recommendations of liberalizing capital controls fail to note IMF guidance on situations in which capital controls may be desirable from a macroeconomic, let alone public policy, perspective.

Similarly, the Legislative Guide, to the extent it will discuss investment promotion, should include a broader discussion of how countries may determine what kinds of investment they may wish to promote, based, for example, on work that the OECD is doing on quality investment, and then determine what kinds of promotion strategies may be desirable to attract this kind of investment. Investment incentives and local content policies, for example, can be strategically used to this end, but the ability of countries to engage in this kind of strategic policymaking may be precluded by terms of investment treaties.³⁷

Moreover, investment facilitation is also increasingly a focus of broader aspects of investment policymaking. When a sustainability lens is brought to this discussion and the pros and cons of facilitation are considered from the perspective of a wider group of stakeholders, investment requirements that may seem unduly burdensome in the eyes of

³² Available at <https://www.mofa.go.jp/files/000196472.pdf>.

³³ Available at <https://www.oecd.org/gov/getting-infrastructure-right.pdf>.

³⁴ Available at <https://www.iisd.org/sites/default/files/uploads/investment-sustainable-development-views-global-south.pdf>.

³⁵ Available at <https://www.wider.unu.edu/news/stockholm-statement---towards-new-consensus-principles-policy-making-contemporary-world>.

³⁶ Available at <http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf>.

³⁷ "Rethinking Investment Incentives: Trends and Policy Options," Columbia University Press (eds. Ana Teresa Tavares-Lehmann, Perrine Toledano, Lise Johnson and Lisa Sachs) (July 2016); Johnson, *supra* note 16..

the regulated may, from a broader perspective, be crucial for ensuring that projects are developed with input from impacted and interested stakeholders and that resulting investments benefit people and planet.³⁸ Investment policy should be discussed from a broad and coherent perspective.

With respect to bilateral investment treaties (BITs), paragraph 5 should account for current trends relating to bilateral investment treaties. For example, in 2017 more bilateral investment treaties were terminated than signed. In recent years countries have terminated a wide range of treaties and, when new agreements are signed, significant changes are made to those treaties (e.g. inclusion of investor obligations; narrowing the scope of substantive standards) to attempt to rebalance the benefits and obligations of these agreements. The investor-friendly nature of old-generation treaties has led to the current legitimacy crisis of these agreements, which, among other places, is being considered within UNCITRAL's own Working Group III's works on ISDS reform. Please see subsection (I) below in this letter for further discussion on dispute settlement.

Furthermore, we advocate evidence-based guidance. From this perspective, statements such as “[t]he existence of such an agreement between the host and the originating country or countries of the project sponsors may play an important role in their decision to invest in the host country,” should be stricken. While the existence of a BIT certainly impacts the corporate structure of the ultimate investment by employing the use of treaty-shopping or “round-tripping”, empirical evidence does not demonstrate that the existence of a BIT impacts the ultimate decision to make an investment.³⁹ At the same time, BITs have serious costs to host countries that can significantly undermine sustainable

³⁸ Jesse Coleman, Brooke Guven, Lise Johnson and Lisa Sachs, “What do We Mean by Investment Facilitation,” CCSI Blog (February 21, 2018) *available at* <http://ccsi.columbia.edu/2018/02/22/what-do-we-mean-by-investment-facilitation/>.

³⁹ Some studies find evidence of a correlation between investment flows and investment treaties, while others do not. It is important to note, however, that not all studies are of the same quality. Lauge N Poulsen discusses a number of them and their results in Lauge N Poulsen, ‘The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2009-2010* (Oxford University Press, 2010) 539-574 (hereafter, Poulsen, ‘The Importance of BITs’). Most studies on the connection between investment treaties and investment flows have looked specifically at whether the conclusion of such treaties had an impact on flows of foreign direct investment (FDI) (as opposed to other types of international investment). As has been remarked by several scholars, these types of studies are problematic for a number of reasons, including that data on FDI flows is often inaccurate or inadequately disaggregated, and that, even if one were to find correlation between investment treaties and FDI flows, it would be extremely difficult to establish that the treaties actually caused those investments. See Poulsen, ‘The Importance of BITs’; Emma Aisbett, ‘Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus causation’ in Karl P. Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 395; Jason W Yackee, ‘Bilateral Investment Treaties, Credible Commitment, and The Rule of (International) Law: Do BITs promote foreign direct investment?’ (2008) 42 *Law and Society Review* 805.

development objectives.⁴⁰ Such costs and benefits from the perspective of states, and an evidence-based discussion of them, must be addressed in this section and throughout the Legislative Guide.

f. Human rights

The human rights impacts of PPPs can be multidimensional and profound. In a forthcoming publication, “The Other Infrastructure Gap: Sustainability”, with respect to which both of the undersigned made significant contributions, the extensive environmental and human rights gaps relating to mega-infrastructure are identified and analyzed.⁴¹ This publication is critical because it places infrastructure investment within the current geopolitical context, grapples with current factors driving infrastructure investment, and proposes targeted solutions to both mitigate negative consequences and to make infrastructure investment work for sustainable development purposes.⁴² Recommendations for policy makers include the regular practice of human rights due diligence, by both public and private sector actors, not only at the outset of the PPP life cycle, but also throughout the course of PPP as necessary.

The UN Special Rapporteur on extreme poverty and human rights, Philip Alston, in October 2018, issued a detailed report examining the extensive human rights impacts of privatization including the systemic elimination of human rights protections and the further marginalization of the interests of low-income earners and those living in poverty in developing and also in developed countries.⁴³ The Special Rapporteur traces the evolution of decades of privatization, noting that in the early 2000s, when the UNCITRAL Legislative Guide was drafted, PPPs were seen as a favored mechanism of correcting market failures and creating markets for investment.⁴⁴ In the intervening years,

⁴⁰ Lise Johnson, Lisa Sachs, Brooke Guven and Jesse Coleman, “Costs and Benefits of Investment Treaties: Practical Considerations for States,” CCSI Policy Paper (March 2018) available at <http://ccsi.columbia.edu/files/2018/04/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf>.

⁴¹ Office of the United Nations High Commissioner for Human Rights and the Heinrich Böll Foundation (2018) (forthcoming), *supra* note 1.

⁴² Solutions, specifically targeted toward policy-makers, states, MDBs and IFIs, and other non-state actors, as appropriate, include: (1) Enhance information disclosure, consultation, participation, and accountability in infrastructure projects, including appropriate grievance redress mechanisms, (2) Ensure project selection and design are consistent with the host country’s national development plan and international human rights and environmental commitments, (3) Integrate human rights criteria within universal standards for sustainable, accessible, affordable and resilient quality infrastructure, (4) Ensure that all relevant public and private actors involved in infrastructure carry out human rights due diligence to inform and improve decision making, (5) Address the environmental and human rights risks associated with the investor protection regime comprised of international investment agreements, national investment laws and State-investor contracts, (6) Address the environmental and human rights risks associated with the efforts to attract private investment in infrastructure, (7) Integrate a gender perspective and address discrimination.

⁴³ UN Doc A/73/396.

⁴⁴ UN Doc A/73/396 ¶ 8.

significant evidence has emerged about the human rights impacts of PPPs. The Special Rapporteur considers these years of experience with PPPs in drawing his conclusions as to their impacts. Global civil society has also been increasingly critical of the negative social, human rights, environmental, governance, fiscal and financial impacts of public private partnerships.⁴⁵

Considering these critiques, Chapter VII should refer to the international human rights framework and areas of domestic law that protect and promote human rights (including but not limited to labor, health, safety and security, corporate governance, antitrust, and immigration laws, and laws and procedures that promote disclosure of information, public consultation, accountability of decisions makers, and grievance mechanisms) as relevant to PPPs. Similarly, Chapter IV should encourage both the contracting authority and the private partner to carry out human rights due diligence in order to identify and take appropriate steps to avoid or mitigate negative impacts throughout the life of the PPP.

g. Labor

PPPs are frequently justified on the basis that they will promote economic growth and create jobs. Since jobs can be one of the central social co-benefits of PPPs, close attention to the number and types of jobs that PPPs can create, including long-term local jobs, and the quality of jobs, such as working conditions, protection of the workforce, and labor conditions in the supply chain, is necessary. Although all countries have enacted a wide range of domestic labor laws, PPPs, especially those with foreign investors, should adhere to international labor standards, including the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.⁴⁶ Taking these aspects into account, references to labor in Chapter IV should be strengthened; furthermore, Chapter VII's failure to reference labor and occupational health and safety laws must be rectified.

h. Climate Change

In 2015, the Paris Agreement on Climate Change embodied universal consensus on the need for states to take steps to hold the increase in global average temperature well below 2°C above pre-industrial levels. The effects of climate change do and will continue to have a disproportionate impact on already vulnerable groups and individuals, and on countries with limited resources and fragile ecosystems. In order to promote the kinds of infrastructure investments that will adequately and appropriately support climate change adaptation and mitigation, a fundamental reorientation of the global economy and how investment is conceptualized is necessary. Government policies and legislative frameworks governing infrastructure investment, including PPPs, can be used to shape the extent to which such investment contributes to ameliorating, or exacerbating, climate

⁴⁵ See e.g. Public-Private Partnerships Global Campaign Manifesto (launched in 2017 with 152 signatories in 45 countries) available at <https://eurodad.org/files/pdf/1546821-world-bank-must-stop-promoting-dangerous-public-private-partnerships-1536152729.pdf>.

⁴⁶ Available at <https://www.ilo.org/declaration/lang--en/index.htm>.

change, loss of biodiversity, energy transitions, resources constraints, and other environmental challenges. Policies and legal frameworks can be used to promote advancements on climate goals, protection and resilience, and to avoid undesirable climate impacts.

It is absolutely critical that any updated Legislative Guide address and advance, in a holistic and comprehensive manner, the role that PPPs can and should play in adapting to and mitigating climate change in a way that promotes the objectives of the Paris Agreement. Considering states' commitments to address climate mitigation and adaptation, the Legislative Guide should contain advice on how states should embed climate consideration in PPPs, from the choice of projects and technology, climate risk assessment, to appropriate allocation of climate risks. It is becoming increasingly possible to anticipate changes in climate and their effects; as a result, not all climate risks should be shouldered by the contracting authority, and the private partner should explore the use of available insurance products, among other things. Disputes around the impacts of climate change on PPPs should be flexibly resolved. Any general change in law and policy to address climate mitigation and adaptation should not trigger the obligation of states to pay compensation to private partners pursuant to stabilization clauses in PPP contracts.

i. Environment

While various draft chapters refer to the imperative of environmental protection, the references are insufficient or inaccurate in certain places.

Chapter III (Contract Award) mentions environmental considerations in multiple places. One such reference in Section C (Procedures requesting proposals), paragraph 2 (Content of the request for proposals) (a) (i) (d) (Environmental Impact), should clearly require that: (i) the result of the environmental and social impact assessment, which will include high level recommendations on impact mitigation or management measures, must be translated into project-specific environmental and social action plan by the bidder; (ii) this action plan must be costed out; (iii) such cost must be included in the overall financial proposal of the bidder; and (iv) the winning bidder must be required to covenant its action plan in the PPP contract. A reference to compliance with applicable national environmental law or international environmental standards is insufficient. Without this explicit link between the environmental and social impact assessment outcome and the specific action plan that the bidder must prepare, cost out and include in the financial proposal, the environmental and social impact assessment could be reduced to a mere theoretical study that fails to provide a solid basis for the winning project's overall environmental and social mitigation measures for the life of the project.

Another example is paragraph 43 of Chapter VII. The paragraph focuses on environmental permits that must be obtained upfront, but does not refer to the ongoing respective responsibilities of the private partner and contracting authority. These are the private partner's environmental obligations for the duration of the PPP (either by operation of environmental law or under the environmental action plan that results from

the process of environmental and social impact assessment, including monitoring and reporting) and the contracting authority’s obligation to support, monitor and oversee the environmental performance of the private partner. These activities should not be left to the operation of the applicable environmental law alone, which will not be specific enough and may not extend to issues that were negotiated between the contracting authority and the private partner. Furthermore, the list of multilateral environmental agreements (MEAs) referred to in paragraph 44 of Chapter VII is a partial list that does not take into account the full scope of relevant MEAs. The list should refer to the United Nations Environmental Programme list of MEAs.

Furthermore, the Legislative Guide notes that investors in PPPs will frequently use a corporate structure including a limited liability special purpose vehicle. While this is a corporate model that permits greater financial leverage and thus more investment, it can also be a risk to host states and societies when the private partner is responsible for large-scale environmental disaster but the off-shore nature of the private partner’s corporate family and limited liability nature of the investment make it difficult to gain standing in foreign courts or to enforce damage awards from local courts. Planning and a robust legal and regulatory framework can decrease risks to host societies, and these types of recommendations should be included in the updated Legislative Guide.⁴⁷

j. Sovereign debt and fiscal burden

Many countries around the world are currently facing situations of sovereign debt distress. IMF research found that 40 per cent of low-income developing countries face “significant debt-related challenges”, up from 21 per cent just five years ago.⁴⁸ Evidence demonstrates that PPPs, when correctly reflected on balance sheet, can significantly impact government balance sheets through explicit and contingent liabilities, credit enhancements and other risk mitigation actions that benefit the investor. Renegotiation and litigation risk are often difficult to quantify *ex ante*. Moreover, incentives granted to investors can negatively impact government fiscal space. The process by which a PPP tender occurs and the transparency of, information generated by, and broader public participation in the contracting process can also impact the short and long-term government decision-making and fiscal burden. The Legislative Guide could usefully explain the various factors and processes that can positively and negatively impact the

⁴⁷ Including, e.g. (1) ensuring contractual obligations to comply with performance standards (either domestic or foreign law, or IFIs) (2) requiring submission of technical experience and capability and appointment of technical advisors (3) financial security (including from parent companies) (4) independent EIAs and ongoing assessments (5) human rights impact assessments (6) ring-fencing revenues, fees or tariffs (7) trainings on industry practice (8) ensuring enforcement capacity (9) considering instances in which “piercing the corporate veil” is desired (10) establishing environmental courts or training specialist judges. *See* Columbia Center on Sustainable Investment and Ashurst, “Preparing Legal Frameworks for Environmental Disasters: Practical Considerations for Host States,” (*forthcoming*).

⁴⁸ IMF. Macroeconomic Developments and Prospects in Low-Income Developing Countries—2018.

financial and fiscal outcomes of PPPs, and suggest the use of appropriate fiscal risk assessment process and public disclosure of contingent liabilities arising from PPPs.

k. Tax

Chapter VII, Section 9 on taxation should be updated to account for varying practices and needs of different economies, for example, with respect to tax stabilization clauses and alternatives to such approaches that may similarly address concerns about the risk profile of an investment. This section should be updated to reflect current advancements and sustainable development-oriented practices with respect to the use of tax havens, transparency of beneficial ownership interest, base erosion and profit shifting, the use of tax incentives, and prevention of tax treaty shopping. The Legislative Guide should also address ways in which the contracting parties equitably share the windfall benefits of the PPP. For the fiscal aspects of stabilization, *see* subsection (m) below.

l. Updates to norms on dispute resolution

As a general matter, Chapter VI is drafted as if dispute resolution of PPPs were purely a private international law matter. When a government is involved in an investment dispute, even when such dispute is contractual, the public nature of government obligations must be accounted for. This includes, for example:

- concerns surrounding mediation or settlement of disputes without public oversight;⁴⁹
- government obligations (whether based in domestic or international normative or legal frameworks) to and the rights (including information and effective participation and property rights, among others) of non-disputing parties who may not be party to a dispute resolution process but whose rights may be impacted by its outcome (particularly with respect to mediation, settlement, or arbitration);⁵⁰ and
- public policy considerations of contractual and dispute resolution language and location when such language is not the dominant language of the host country and when a dispute is being resolved in a location outside of the host country, when such languages and location make it difficult for the host government and/or other

⁴⁹ Lise Johnson and Brooke Skartvedt Guven, “The Settlement of Investment Disputes: A Discussion of Public Accountability and the Public Interest,” *Investment Treaty News* (March 13, 2017) available at <https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/>.

⁵⁰ *See e.g.*, Lorenzo Cotula and Mika Schröder “Community perspectives in investor-state arbitration,” IIED Land, Investment and Rights Series (2017) available at <http://pubs.iied.org/pdfs/12603IIED.pdf>.

stakeholders to adequately and effectively participate in and/or monitor contractual and dispute resolution processes and outcomes;

Moreover, there are currently much broader criticisms of some of the processes described in the draft proposed updates to the Legislative Guide, including arbitration, which must be addressed in any updated Legislative Guide. For example, UNCITRAL's Working Group III has recently concluded that, with respect to investor-state arbitration (ISDS), there are identified problems relating to (i) consistency, including coherence, predictability and correctness of the outcome of ISDS, (ii) arbitrators and decision-makers, and (iii) costs and duration, and has decided that reform of ISDS is desirable in light of these concerns. That Working Group will discuss concerns surrounding third-party funding and other broader concerns of ISDS in its April 2019 session.⁵¹ These kinds of procedural concerns relating to investor-state arbitration also apply to some extent to contractual arbitration involving states.

While a few proposed changes aim to address developments in the nature of investment dispute resolution over the past 15 years, a more fundamental reorientation of this chapter should follow.

m. Stabilization of laws

Stabilization of laws has been a standard fixture in PPP contracts, and in certain countries, in investment laws. This practice can have a serious negative impact on the host country, as documented in several studies.⁵² Chapter IV's treatment on the subject appears not to reflect the current thinking around how to introduce some criteria to limit stabilization. For example, the increased insight into the different nature and consequences of fiscal stabilization compared to non-fiscal stabilization is leading to a recognition that these should be treated differently, and that the former type of stabilization should be considered while latter type should be strongly discouraged. Such advance in the debate around stabilization should be mentioned instead of offering commentary on the existing practice of shielding the private partner from risks associated with change in laws. Any such discussion on fiscal stabilization should be coordinated with discussion of taxation in Chapter VII.

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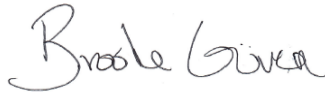
⁵¹ UNCITRAL's Working Group III has limited its mandate to procedural concerns and not substantive concerns or solutions. Much criticism of ISDS goes well beyond that which is being discussed in UNCITRAL and relates to: the impact of ISDS on inter-and intra-national inequality; the rights, interests and access to justice of third-parties; the negative impact that investment law may have on the development of the rule of law and jurisprudence in domestic legal systems; the right and duty of host and home state governments to regulate in the public interest; the fiscal and financial impacts of awards; among others.

⁵² Such as IFC's report on Stabilization Clauses and Human Rights (2009), *available at*: <https://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>; also see OHCHR (2018).

We close our submission by noting that an updated Legislative Guide is the first step in ensuring broader and more widespread transparency, participation and accountability of PPPs. However, given its critical importance in this process, the Legislative Guide too should be open to such processes. We thus strongly encourage the Secretariat and the Commission to engage in a meaningful process of public engagement, which should, at a minimum, include an open comment period on any draft Legislative Guide, with time set aside for further revisions to meaningfully incorporate public input.

We look forward to elaborating further on these matters and integrating these suggestions into the Legislative Guide in greater detail at the upcoming Intergovernmental Expert Group Meeting on Public Private Partnerships, scheduled from 26 to 30 November 2018, as well as in ongoing work and discussions.

Respectfully submitted,



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