



*Discussion paper prepared by the International Centre of Excellence  
Concessions/PPP 'Policies, Laws and Institutions' in France.*

**DEVELOPMENT OF UN STANDARDS FOR REGULATING CONCESSIONS AND OTHER PPPs**

**I- Background**

In parallel to the work program of the specialized Centers of Excellence and of the work program of the International Centre of Excellence created in France specialized globally in “Policies, Laws and Institutions”, UNECE is developing project teams aiming at designing universal standards that countries could adopt on an voluntary basis for facilitating the development of pipelines of projects.

This discussion paper intends to clarify the role, relationships and synergies between the existing Centers of Excellence and the project teams for developing the standards.

In the absence of an official definition, we understand that the objectives of the standards is not to duplicate existing literature, guidelines, policy papers or templates but to address, based on empirical evidence and in a pragmatic, professional **and excellency** manner the common understanding of real issues faced by either the public or private sector impeding or preventing development of pipelines of projects for essential infrastructure services.

By definition, standards are not limited to a specific project but they are designed for addressing issues which are common to several projects and not taken care of sufficiently in existing regulations and practices in most developing countries leading to a waste of time and money for all stakeholders

We understand that the UNECE objective in developing standards derives from the G20 conclusions namely in Cannes resulting itself of many years of aggregation of empirical evidence in the developing world concluding that learning by doing was not an option for developing pipelines of essential infrastructures services projects in developing countries. We also understand that UNECE objectives by developing those standards is to boost the implementation of new infrastructures by the way of PPP giving access to knowledge of key factors of successes and key factors of defaults.

Those conclusions strongly supported by private and public practitioners experienced in the developing countries have been progressively endorsed by the IFIs. It is recognized nowadays that many of the issues occurring at various stages of a PPP project (should it be concession , PFI , DBFO etc ...) from initial planning up to completion including renegotiation and dispute resolution are similar irrespective of countries or regions and of institutional legal systems.

The benefits of aggregating lessons learnt from around the world to resolve those issues and to design best practices are therefore immense. The resulting universal standards which could derive from the exercise of identification and innovative formulation of holistic set of best practices which could become standards have been qualified 'Gold standards' by the G20.

Our understanding of the ambition of UN in developing the Centres of Excellence is to permit the formulation of a complete set of best practices addressing all the practical issues identified and also to permit to formulate standards meeting the requirements of quality, neutrality, simplicity and efficiency.

This exercise is so far unique since if it is properly carried out and well disseminated, those standards would have a real chance to be endorsed and effectively implemented in developing countries.

The existence and use of those standards will then play a major role for bridging the infrastructure gap in essential public services in developing countries and will contribute strongly to the achievement of the Post 2015 objectives and the 2020 targets.

The challenges must not be underestimated. For reaching those very ambitious goals which may represent one or two additional percentage points of world growth (Brisbane G20), it is essential to aggregate the forces of the existing and future Centers of Excellence with the work in progress in the international community in order to help the project teams to develop their standards.

It is equally important to guarantee a professional, transparent and neutral proceedings in the organization of the project teams and to take into account realistically the timing and financial constraints. This challenge alone may necessitate the drafting of a project team charter including ethical provisions based on various examples in order to avoid critics down the road on lack of professionalism and conflicts of interest.

## II- Definition of standards: expected outcomes

In our views:

- **Standards are not another research or policy paper** proposing guidelines or best practices.
- **Standards are closer to norms deriving from return of experience** which then become part of the conditions to fulfill for planning, preparing, procuring, drafting contract conditions, benefiting from an appropriate investment and legal security climate, developing partnership relationships, organizing efficient dispute avoidance and dispute resolution system (which are some of the key conditions necessary for delivering pipelines of sustainable projects). Such as norms they have to be updated on a regular basis.

In order to reach those outcomes with real chances to be endorsed by the stakeholders and implemented in the countries on a voluntary basis, the standards should be:

- 1) Formulated in a very simple and clear manner and in plain language avoiding as much as possible technical or legal expression and cross references.
- 2) Prescriptive in such a way that if they are endorsed in a particular country or region they can easily become a binding obligation sanctioned either contractually or by the applicable regulations.

In our experience with drafting regulation and standards, the standard making process has many similarities with a law making process. As such, all the science of the law making process (referred to as 'legistic') deserves to be known by the team developing the standards.

Although legistic is a young science it proposes a methodological approach which, based on empirical evidence and lessons learnt in developing countries, facilitate the process of designing good and applicable regulations: one of the landmark example of implementation of legistic in developing countries is the design and implementation of the OHADA Uniform Acts which are in force for more than ten years with a good track record in 17 countries of Francophone Africa. Another set of relevant empirical evidence of legistic can be found in the process of securitization of major

composite infrastructure and mining projects which has been developed during the last 20 years notably in Africa and sanctioned by legislative changes.

### **III- Scope of the standards and related project team focus**

As indicated above, we understand that the exercise of designing standards organized by UNECE is not based on particular country or region situation or a particular set of issues such as for instance preparation, implementation, institutional framework, investment climate, etc.

Since in the real world all those issues are interrelated, and in many situations similar across frontiers legal system and sectors, the intended scope of standards could be to cover eventually all the issue in a holistic and coordinated manner.

This holistic approach has a lot of merits in our view for speeding up the process of developing projects around the world.

It is unique by comparison with the work stream developed around the world by other institutions or regions. As such, it is not competing with any other projects but will facilitate cross fertilization in the interest of all.

The question of prioritization and allocation of tasks to Centers and teams really able to address them with the level of Excellency required for the success and with limited resources and timeframe of UNECE becomes a major consideration for the real future of those standards.

Since the objective is to propose set of standards which could as quickly and efficiently as possible be effectively used for developing pipelines of projects, the strategy of prioritization for developing standards needs to take into account both the complexity and timing of this exercise and the optimum benefit of a particular set of standards over another.

For instance, it is much easier to develop quickly a comprehensive set of standards for PFI or availability payment PPP with recovery of the investment entirely from public funds and with a limited mandate to contribute to the public service than for the Concessions and PPP family with recovery coming entirely or mostly from end users and with a full delegation of the public service.

Another line of divide very traditional in the legal and contractual world is to distinguish standards valid for all sectors of industry and services and others which are specific to some industries or sectors.

At this early stage, several project teams have been already organized to design sector specific standards (health, road, Rail ...). Another pilot project team has been set up for designing standards valid for all sectors in the area of Zero Tolerance to Corruption in procurement.

We understand that another one is under consideration for some other aspects of procurement.

Those pilot projects which are for some of them in existence for more than one year have been full of useful lessons and in our view the following ones are among the most important:

- 1) It would be a waste of time and counterproductive to request to a project team specialized in a specific sector to deal with issues and related standards which are identical or similar to all sectors. For instance, most of the issues and standards for Zero Tolerance to Corruption are identical or similar to all sectors and therefore will be better designed by a team only dedicated to them and aggregating empirical evidence, issues and practices from all sectors and not limited to one or two sectors.
- 2) On the other hand, it would be a waste of time and effort to request to the team addressing issues more or less similar to all sectors to develop further standards specific to a particular sector.
- 3) Project teams should focus on what are the specificities of the sector that have to be taken in to account in order - at each and every stage of the PPP process - to boost the PPP pipeline in that sector and make them a success.

#### **IV- Relationship between project teams developing standards and specialized Centres of Excellence**

Based on lessons learnt in the last twelve month, those relationships deserve to be clarified and better organized. It is clear that a lot of synergies can be developed for having a better chance to meet the UNECE objectives for instance by avoiding duplication of research materials, countries and project experience, synthesis of issues and formulation of best practices, etc.

In our view those synergies should be actively organized at a very early stage of the organization of any project team. This would permit to fine tune the scope or the activity of the project team and the one of the specialized Centre of excellence in the interest of all.

A good example of those early exchanges for fine tuning the respective scope of work between project teams and specialized Centers could be for instance the relationships to develop between the specialized Center in 'Policies, Laws and Institutions' having a worldwide jurisdiction on matters which are common or similar to all projects (and which deserve to be regulated in some framework regulations) and the project teams specialized in rail, road, water, healthcare etc. Indeed, in the process of identifying issues, and leading to a formulation of improved level of universal best practices both the specialized Centre and the global one in France could have identified issues and developed contacts and solutions which should facilitate the work of the other.

The empirical evidence/experience also indicate that in several areas, a project team specialized by sector may only provide useful set of standards having chances to be effectively endorsed and implemented in practice only after the formulation of an improved set of best practices valid to all sectors. This factual situation should be taken into account in the prioritization of the activities of both Projects teams and Centers of Excellence.

For the International Centre of Excellence,

(Drafted with the support of ETIC-PPP international expert team)



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