

DRAFT CATALOGUE OF PROPOSALS

Working Group on Investment Security in the Mediterranean region (ISMED)

This document presents 14 project proposals developed by the Investment Security in the Mediterranean (ISMED) Working Group and its 4 "Task Forces" during 2014. It offers a catalogue of proposals, accompanied by more detailed explanatory sheets, which address the four thematic areas selected at the end of 2013 by the Working Group: guarantees and bond refinancing, Islamic finance, public-private partnerships and international arbitration.

These proposals reflect discussions between the members of the Working Group and its "Task forces". The views and interpretations expressed do not necessarily reflect the views of the OECD or of the governments of its member countries.

FOREWORD

Infrastructure is a key element of the business environment and job creation. However, the significant increase in infrastructure needs in the Middle East and North Africa (MENA) is hampered by weak private investment in big projects due to the global economic situation and uncertain regional policy.

These factors add to the complexity related to long-term financing of infrastructure projects, including the high costs of development and financing and the objective of reaching for an efficient risk allocation amongst the project stakeholders. The lack of technical capacity of public institutions is often cited as an additional barrier to the development of viable infrastructure projects.

The levers that MENA governments have to attempt to secure private investment and alleviate the doubts of investors in these difficult conditions are based on the definition of a solid and predictable legal framework and a better business climate.

The MENA-OECD Working Group on Investment Security in the Mediterranean region (ISMED) was launched on 9 December 2013 on the occasion of an inaugural conference. It provides a regional dialogue platform gathering government officials, international institutions and the private sector, to facilitate private investment in infrastructure in the MENA region, with a focus on public-private partnerships (PPP).

It is currently chaired by:

- H.E. Mr. Fareed YASSEEN, Ambassador of Iraq to France
- Mr. Olivier DE SAINT-LAGER, Senior Advisor, ISMED.

Four "task forces" of the ISMED Working Group met throughout 2014 to develop, in an autonomous but articulated manner with the co-presidency, original proposals on the following topics: arbitration, PPP, Islamic finance, costs and risk sharing in guarantee instruments. The proposals are presented in this document as a "draft catalogue." They will be subject to a review and validation process starting from 4 December 2014. The composition of the sub-working groups is as follows:

- **Task Force 1: Guarantees and bond refinancing**

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- **Task Force 2: Arbitration**

- Leader: Renaud Sorieul, Secretary of the United Nations Commission on International Trade Law (UNCITRAL).
- Contributors: Corinne Montineri, William Geriatric and Miriana Belhadj, UNCITRAL.

- **Task Force 3: Public-Private Partnerships**

- Leader: Roger Fiszelson, Director General, Confederation of International Contractors' Associations (CICA).
- Members: Yves Lafargue, Cofinter; William Mako, World Bank; Hamzah Jaradat, Director, PPP Unit, Ministry of Finance, Jordan; Bertrand Marchais, Professor, Audencia Business School; Michel Gonnet, IPEMED.
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INTRODUCTION

1. This catalogue of proposals seeks to mitigate a number of structural shortcomings in existing investment security mechanisms¹. It offers suitable responses to the difficulties of developing infrastructure projects, under structured finance or project financing structures that are absolutely indispensable and urgent given the circumstances of the MENA region.
2. The OECD ISMED Working Group developed the proposals during discussions held from spring 2010. During 18 months, the Commission brought together a first group of experts, representing major international institutions - including, most notably, the OECD and the MIGA (World Bank Group) - but also the EIB, IFC, EBRD, the AFD (French Development Agency), KfW (German Development Bank), as well as certain key players from the world of insurance (Hermes, SACE, Lloyds) and the Secretariat of the Union for the Mediterranean. The discussions led to the adoption by consensus of a report presented on 14 December, 2011, subsequently validated by the European Commission, which provided an assessment of the situation and several courses of action to improve the existing system².
3. On this basis, on 25 October, 2012, Stefan Füle, the European Commissioner responsible for the Barroso Commission's Neighbourhood Policy³ announced that the Neighbourhood Investment Facility (NIF) was prepared to contribute to better investment security in the Neighbourhood-South region and to finance. In this context, the establishment of an ISMED support pilot programme at the OECD was decided in order to advance some of the proposals submitted to him by the end of 2011.
4. This first phase of consultation is now completed. In order to relaunch the 2011 proposals that have not been developed yet, to secure the opportunity for dialogue on the implications beyond the purely technical sphere and capitalize on cooperation between international institutions, in late 2012, France took the initiative of suggesting that the OECD sets an autonomous working group within the MENA-OECD Investment Programme. This Working Group differs from the ISMED Support Programme, established by the European Commission in 2012. It leads analytical work, capacity building and dialogue with the authorities and the international financial institutions (IFIs) on horizontal and specific topics. The working group has expanded the themes addressed⁴ and positions itself as a platform for discussion and proposals open to representatives of the States and

¹ The key finding is that there is a mismatch between legal provisions and guarantee mechanisms and, within the latter area, a suboptimal combination of the wide range of national and international, public and private, guarantee and insurance mechanisms.

² Support and legal advice initiatives for infrastructure projects carried out by the OECD, risk sharing and cost-sharing mechanisms, the creation of a "guarantees consultant" (or "facilitator") in the guarantees and assurances market.

³ European Commission Press Release reference IP/12/1157 dated 25 October, 2012.

⁴ Inclusion of the themes of Islamic finance and international arbitration.

to infrastructure investment professionals, both public and private experts. The new working group was inaugurated at a conference organised by the OECD on 9 December, 2013 and will deepen the ongoing discussion on investment security in the MENA region.

5. The goals pursued by this new OECD Working Group, defined from 2011, are the search for resources to facilitate and simplify the implementation of large infrastructure projects. The aim is to put forward concrete measures that are improvements, innovations or extensions of existing devices. Priority was given to proposals with potential for immediate implementation and to the notion that the devices or uses could be directly deployed by all categories of professionals working on investment projects. Accordingly, the long and frequently difficult prior phases of international agreement or modification of internal laws could, where possible, be avoided.
6. The approach deployed remains that selected from the beginning of these discussions: a global, holistic approach, with interconnection of all the factors - financial, legal, organizational and insurance - that make up the current system. This complex approach is the only realistic option because independent improvements or innovations, due to their isolated design and lack of a coordinated vision or integration in an overall system, although useful, would not be capable of producing the same effect as in a fully joined-up system with measures in full correspondence with one another.
7. During 2014, the four thematic areas selected by the ISMED Working Group (guarantees and bond refinancing, Islamic finance, public-private partnerships and international arbitration) were discussed in four specialized task forces, with the release, in Autumn 2014, of 14 proposals. Six of these proposals can be considered innovations while the rest are enhancements or extensions of the use of devices already existing in areas other than the MENA region. Half of the proposals involve market organization mechanisms (7), while the others address legal mechanisms (2), public contributory devices (2) or measures of an institutional nature (3).
8. Naturally, this set of proposals is a long way from exhausting a very rich and vast area that deserves further exploration, especially by comparing devices or tools developed in other regions. Some proposals, like certain aspects of the investment security system of the MENA region itself, share features with those in other areas and therefore lend themselves to duplication.

LIST OF PROPOSALS

9. In this context, the ISMED Working Group recommends the implementation of the following proposals in the four areas mentioned above:

A. Guarantees and bond refinancing

1/ Upstream use of a "guarantees consultant" in projects, to address issues relating to investment guarantees against political other project risks.

10. Many private and public investment guarantee and insurance instruments are available in the MENA region.
11. These instruments, however, offer different characteristics in terms of access, risks covered and procedures. Some of them are of a highly technical nature. The AfDB (Irma report of 2009) and WB (2009 report of the independent group on guarantee operations of the WB) reports show that the coordination between the available instruments is not optimal, which raises significant barriers to their use by potential beneficiaries, particularly medium-sized businesses.
12. Guarantees are an indispensable part of the financial documentation of a project and should be negotiated at the same time as the financing terms. However, it is notable that guarantee arrangements are often negotiated after the financing agreement is signed, with further discussion of its terms to meet the demands of guarantors. This means, at best, delays and additional costs, at worst abandonment of the project. Furthermore, guarantee arrangements under these conditions does not make best use of the different market offers.
13. Just as technical, financial and legal engineering are mobilized to study project feasibility, guarantee engineering should also be set up at a sufficiently early stage to ensure better risk management. As this does not yet exist in a structured way, it would be part of a comprehensive approach to guarantee needs. So that this issue - which is vital for the financial feasibility of projects - can be addressed in a timely and orderly manner, it seems appropriate to suggest the market involvement of independent actors with the capacity to fulfil this role. The role of this "guarantees consultant", whose scope could be extended depending on the specific needs of each project, would be to design and structure the most suitable guarantee arrangements, then assist project sponsors and possibly represent them in negotiating these arrangements with guarantees and insurance agencies or cover some of these guarantees directly. When the public contractor does not directly select and fund the "guarantees consultant" as one of the tender terms, investor freedom of choice should be the rule, as should freedom to negotiate contract terms setting the terms of involvement and remuneration.
14. Access, from the initial project development phase, to a recognized investment guarantees professional who can manage the available supply and structure a proposal tailored to the project risks would be a guarantee of efficiency and a substantial source of savings in time and money for investors and lenders.

15. In order to identify the future positioning of this professional role, whose definitive involvement in the effective implementation of the investment guarantee mechanism is not yet fully circumscribed, it is recommended that it be designated initially as a "guarantees consultant".
16. For example, the role of the "guarantees consultant", from the upstream phase of the project, would be to advise, identify, coordinate and test the implementation of the most suitable guarantee arrangements for the project profile. The guarantees consultant would be needed to structure the coverage of projects and offer or obtain guarantee capacities on the market under the best conditions.
17. The use of the "guarantees consultant" could be routinely offered by contracting authorities during tendering procedures. It could also be financed from technical assistance budgets. It would be desirable to have at least two different institutions to carry out the role.
18. This proposal has the potential to improve the capacity and time taken to structure project guarantee and insurance cover, to strengthen cooperation between market actors and to reduce transaction costs to the benefit of investors and ultimately public contractors.

2/ Promotion of cost sharing to reduce the project guarantee costs

19. Investors and lenders frequently feel that guarantee premium costs, including for guarantees against political risks, are too high. This can result in the volume of investments actually guaranteed being limited or even the financial sustainability of certain infrastructure projects being weakened.
20. It would be desirable to encourage, at least for some projects that meet the socio-economic criteria accepted by donors, the establishment of public contributory mechanisms. Contributions by Member States, acting within the framework of joint financed trust funds, might increase the leverage effect sought by these contributions. The average volume of these contributions, for example, could change from 20 to 50 base points (0.20 to 0.50%) per year. This would provide high-risk countries (guarantee cost > 1.50% / year) with significant reductions in guarantee premium costs or give investors in high risk countries an opportunity to broaden the base of the guaranteed funds (loans, equity, foreign investment, but also local investment).
21. This public contribution to lower premium costs for investors, for some exceptional projects, would facilitate their implementation, either through lower financing costs or through a wider range of guarantees, covering foreign (FDI) and local loans and equity or, finally, through a combination of these two effects. International financial institutions and State beneficiaries of projects or States whose companies are involved in the project could combine their contributions to increase leverage. In addition to its direct effect, this device would also contribute significantly, by providing long-term growth in multilateral funding to the guarantees sector, to improve its structure and enhance and diversify its supply.
22. Accordingly, the device would enable a reduction in overall financing costs, by lowering the implied risk premiums that impact profitability rates and bank margins. It could also improve the feasibility of strategic projects where implementation is constrained during the set-up phase, through a decrease in guarantee costs or an extension of the capital volumes guaranteed, in both cases leading to a reduction in final project costs.

3/ Deployment of public instruments in the MENA region to increase credit prior to the issue of project bonds

23. Since the financial crisis of 2008, commercial banks are increasingly reluctant to provide long-term financing, although they do agree to finance project construction phases and to issue short-term guarantees against project risks (on-demand guarantees and letters of credit), subject to strict completion and performance guarantees. Bond financing represents an alternative, but investors wish to subscribe to high quality securities eligible for public issues ("investment grade").
24. However, infrastructure project financing often faces significant risks, particularly in the implementation and build-up phases of such projects. In the commissioning phase, for example, traffic risks (transport sector) or more generally risks related to future user demand (water, energy, telecommunications sector) are often difficult to control, especially in economies such as those in the MENA region, which do not always have the very long-term statistical references to make the necessary projections. There are instruments in other regions that can be used efficiently to mitigate these hazards. Their deployment in the MENA region and adaptation to the countries of the region would improve the financial viability of projects. This would also meet the financing needs of new undertakings ("greenfield" projects), which remain the majority in the MENA region compared to the demand for restructuring of old projects (known as "brownfield").
25. On the other hand, the historically low yields on sovereign bonds has led institutional investors (including insurance companies and pension funds) to look for alternative long-term investments with high ratings ("investment grade") authorizing public issues of securities. With a history of low default, infrastructure projects are attractive to these institutional investors. They do, however, entail a residual risk, especially when exposed to the risk of infrastructure user demand volume.
26. Bond issues must also be subject to credit enhancement through the provision of a tranche of high-risk bonds. Credit enhancement involves guaranteeing the bond issue through the subscription of a tranche of "subordinate financing," exposed to these residual risks. This guarantees the yield of the "senior securities" (the share of securities issued on the market) so that the issue premium and, therefore, the project finance costs can be lowered. This mechanism was previously provided by private insurance instruments known as "monolines", which disappeared from the market following the financial crisis. It could be a substitute for public enhancement mechanism, a practice already implemented successfully in other regions.
27. This proposal has the potential for deployment of a credible alternative in the MENA region to mitigate the lack of availability of long-term bank financing for infrastructure, by creating the collateral enhancement conditions required for the development of bond financing.

4 / Facilitation of bond issues in MENA infrastructure projects

28. With the use of credit enhancement mechanisms, bond issues should enable substantial increases in the long-term refinancing capabilities of the infrastructure market. These issues may be subscribed by private and public institutional investors as in the financial market. They could be implemented project by project when the refinancing covers a big project. They could also take the form of a vehicle dedicated to the financing of a portfolio of selected smaller projects. This vehicle would be in charge of project selection and the bond refinancing. To benefit from the opportunities associated with the development of Islamic finance, particularly active in this area, this portfolio would benefit from the inclusion of projects eligible under standard environmental, social and governance funding criteria, as well as Islamic finance criteria, through the progressive harmonization of their ethical principles.

29. Given the costs of its structuring, a bond issue must achieve a minimum critical mass to offer a competitive alternative to bank financing. Moreover, this approach mainly tends to finance major infrastructure projects.
30. Accordingly, medium-sized projects, whose implementation times are shorter and which represent a significant proportion of the infrastructure need, have no access to the bond market. To achieve the critical mass for a bond issue, a project portfolio must be established, with aggregation of individual project financing needs.
31. For this second category of smaller projects, careful project selection will be required to ensure portfolio quality and attract potential investors. This will be achieved by setting up a project portfolio refinancing vehicle, supported by public and private investors, to be managed by an independent team, according to professional use, implementing an investments diversification policy based on market standards.
32. The vehicle, which could take the form of a debt fund, would have two categories of subscribers: public financial institutions that would subscribe the subordinated finance tranche and institutional investors who would buy the remaining shares of the senior tranche thus secured. Given the diversification of the portfolio, it is likely that the credit enhancement needed would be lower than in a single project, allowing further reductions in the cost of financing.

B. Islamic Finance

5 / Create a focus group to identify best practices to strengthen the activity of Islamic finance in the financing of infrastructure projects and encourage Islamic/conventional co-financing

33. Islamic financial law is based on principles which apply to the intentions of the contracting parties, based on prohibitions and obligations, of which the following are the main ones: prohibition on lending at interest (*riba*); loss and profit sharing; prohibition on speculation (*gharar*) and gaming (*maysir*), payment of a religious tax (*zakat*) and legality (*halal*) of assets whose corollary is the prohibition on investments in unlawful sectors (*haram*). Compliance with these principles requires special arrangements in financial transactions to incorporate Islamic ethical rules into conventional contractual techniques. In the context of project financing, encouraging Islamic / Conventional joint financing presupposes harmonization of conventional and Islamic financial criteria.
34. There are examples of financing of major projects in the MENA region involving a significant Islamic tranche, such as the Marafiq Power Station Project and seawater desalination plants in Saudi Arabia (2007), which included an Islamic tranche of US \$ 600, 000,000 out of a total of US \$ 2,725,000, 000. Given the infrastructure needs in the MENA region countries (FEMIP ⁵ estimates that investment of \$ 300 billion will be needed over the next 20 years in the MENA region alone) and the growing liquidity of Islamic financiers, the conclusion is obvious: Islamic tranches need to be promoted in infrastructure funding.
35. One of the difficulties relates to the need for Islamic financing to be backed directly by real assets or by cash flows from real assets ("asset-backed" or "asset-based"), which may put Islamic finance in a more favourable position than conventional finance, as the latter only has an accessory real right (collateral).
36. Equal treatment ("pari passu") of conventional and Islamic creditors is a key success factor in co-financing, as it enables a balance to be achieved in the respective legal positions of the Islamic and conventional creditors. This requirement, however, involves the drafting of complex and costly inter-creditor agreements that do not encourage the development of co-financing, with the result that it is limited to large-scale projects, as the costs of organizing joint financing and the set-up complexity may be prohibitive for small and medium-sized projects.
37. Islamic finance is in a paradoxical situation: it is highly dynamic, expanding rapidly and represents an increasingly significant volume of international financing. However, it remains highly focused on medium-term maturity periods (5-10 years) in the Gulf region or, beyond the Gulf, on low-risk real estate or industrial investments with little activity in infrastructure in other MENA region areas. There is a lack of visibility and confidence on the part of Islamic banks in the financing of long-term infrastructure projects.
38. These trends have intensified since the 2008 crisis and the reluctance persists.
39. However, the position of Islamic banks is beginning to change. They are now willing to consider long-term financing (15-30 years) and are increasingly seeking out high-grade investments. They are gradually becoming more open to longer maturity periods.

⁵ FEMIP (Facility for Euro-Mediterranean Investment and Partnership), which has been operational since October 2002, brings together all of the EIB's instruments for intervention in Mediterranean partner countries. Since its inception, funding of 12 billion Euros has been allocated to investment projects.

40. The development by multilateral financial institutions of technical assistance and guarantees specific to Islamic finance should facilitate its involvement in long-term investments, including major network infrastructure projects in the MENA region.
41. Financing consistent with Islamic ethics is partly based on the principle of sharing of profits and losses. The passage of time cannot be the source of remuneration of a financier. It follows from this principle that a real asset is needed to back up any financing project consistent with Islamic law, with the Islamic financier being paid out of project revenues.
42. Under joint financing, the Islamic financier may therefore end up *de facto* being in a more secure position than the conventional financier who receives only collateral. To encourage joint financing, a legal mechanism could be established to align the conditions of conventional and Islamic financiers, through an inter-creditors agreement developed by a dedicated working group.
43. A working group could be set up to produce a model agreement for financiers from the two systems. Such a tool would promote the development of Islamic financing tranches in infrastructure projects, including small and medium-sized projects for which the finance set-up costs are limited.

6 / Encouraging Islamic mutuals to invest in infrastructure projects in the MENA region.

44. As in Western countries, the allocation of cash available to insurance companies and Islamic mutuals at the service of the real economy in the MENA region is becoming a major political issue. Prudential constraints on insurance companies do not yet encourage these players to invest in infrastructure projects. In recognition of this, regulatory changes have already been initiated in Europe (particularly in France with the Decree of 2 August 2013 establishing the "Loan Fund to the economy") to redirect the cash towards the provision of finance for the real economy.
45. Islamic mutuals (*takaful*) aim, like their conventional counterparts, to cover the long-term liabilities of their members. Directing these savings towards the financing of the real economy could be a crucial issue in the economies of the MENA region, where infrastructure financing is a sector that could meet Islamic mutual investment needs.
46. In the MENA region, the insurance sector is still relatively underdeveloped. It is, however, expected to develop to capture existing large development opportunities, thus becoming a genuine lever of mobilization of savings to the benefit of the real economy.
47. The World Bank report on the insurance sector in the MENA region⁶ notes a number of factors hindering its development: "the absence of statutory insurance in key areas, the State's influence in certain countries, the lack of regulation and supervision, unfavourable tax regimes, fragmented market structures, a chronic shortage of qualified staff and lack of products tailored to cultural or religious particularities, especially in life insurance".
48. The insurance sector is undergoing major development in the MENA region and therefore faces several challenges. Insurance demand in the MENA region is particularly affected, as noted by the World Bank, by cultural and religious factors. The incompatibility of insurance products with Islamic law is cited as one of the main reasons for these difficulties. The emergence of the concept

⁶ World Bank (2011), *The insurance sector in the Middle East and North Africa – challenges and development agenda*.

of the *takaful* Islamic mutual that is fully compliant with Islamic business law can, however, help boost insurance demand in the MENA region.

49. However, in this rapidly modernizing sector, the first priority of these Islamic mutuals is not to develop specialized skills in the selection of infrastructure projects. Prudential regulations and constraints in terms of ratios in Europe and the MENA region can also be obstacles to infrastructure financing by insurance companies and Islamic mutuals. One or more collective infrastructure investment vehicles, specifically dedicated to these *takaful* Islamic mutuals, needs to be created to collect their growing liquidity to be used to finance the real economy in the MENA region. A "label" could be assigned to them marking their compliance with the regulatory and prudential constraints of insurers and Islamic mutuals.

7 / Development of infrastructure-dedicated financial instruments consistent with Islamic finance criteria in the MENA region

50. Islamic finance must build bridges and develop suitable tools to enable capital flows between conventional finance and Islamic finance.
51. It would be desirable to consider creating common financial instruments that meet common criteria, which would ideally be suitable for the financing of major infrastructure projects to achieve the joint financing volumes that are currently out of reach.
52. One tool for creating investment-grade bonds in the region could be the support of multilateral backers for joint financing consisting of equity capital in conventional finance and tranches structured to meet Islamic ethical standards.
53. This tool could serve the development of Islamic law bonds (*sukuk*), with the marketing of bonds for major projects or portfolios of small and medium-size projects, by public and private institutions, to ensure the refinancing of short and medium-term bank loans, once the infrastructure is commissioned and has reached a sufficient stage of operation.
54. This proposal has the potential to mitigate financial market insufficiencies in infrastructure projects in the MENA region, particularly to finance small and medium-size infrastructure projects, which constitute the vast majority of projects in the region and mostly have a greater socio-economic impact than in mature economies.
55. The proposal is specifically for the mobilization of Islamic finance and is a complement to proposals 3 and 4 above as it is based on similar credit enhancement mechanisms, while complying with Islamic finance criteria.

8 / Establishment, based on an in-depth comparative study, of a dialogue on the similarities of the principles of social responsibility of conventional finance and ethical principles of Islamic finance to multiply convergence actions

56. The decision to invest is based on a range of criteria, including a non-financial rating, i.e. the project's compliance with ethical criteria. It is noteworthy that *managers of investments fund that comply with Islamic law*, like the managers of *ethical investment funds*, resort to extra-financial criteria as actual filters for project selection.
57. Islamic finance is based on ethical principles and participatory methods and uses securities representing real assets. In this respect, it appears to converge with trends in conventional finance

towards securities upholding ethical values and embodying a closer correlation with the financing of the real economy.

58. However, Islamic finance and Islamic business law again remain poorly known among players in conventional finance. Conversely, project funding is a specialist area in conventional finance and is still under development among Islamic financial actors.
59. However, comparative study of real compatibility between the criteria of the two sectors remains embryonic and the situation is still unclear, even though certain elements of convergence are evident. Identifying the degree of normative convergence between ethical criteria is nevertheless fundamental in the development of understanding and cooperation between Islamic finance and conventional finance.
60. This study should be undertaken to compare the content of the ethical criteria developed in conventional finance by socially responsible investment ("SRI") funds with Islamic ethical criteria. It seems that environment protection, justice, human rights and other so-called socially responsible criteria could serve common objectives for a gradual convergence of Islamic ethics and the ethics of socially responsible conventional finance.
61. Due to a change in the mentality of the players, it is now possible to envisage the implementation of joint projects with funds from conventional finance supported by an Islamic component.
62. Identifying the actual degree of convergence between the different criteria will encourage the formation of partnerships between Islamic finance and conventional finance.
63. The establishment of a neutral exchange platform (in the form of an international forum) could be considered to facilitate this analysis and dialogue work, identify good practice, develop non-binding standards and produce reference guides, to enable bridges to be built between practices and actors working in the same sector. Ultimately, this work could pave the way for the development of a common charter.
64. A desirable increase in contacts and joint discussions should trigger the launch of joint operations on projects eligible for technical assistance support from multilateral institutions.
65. This call for dialogue was made recently by politicians, including the Prime Minister of Luxembourg, Mr Xavier Bettel, at the opening of the 10th *World Islamic Economic Forum* in Dubai 28 October, 2014.
66. This exchange framework could take the form of an annual forum, supported by a universal, neutral, non-profit organization, serving as a discussion platform between public and private sector actors and experts.

C. Public-Private Partnerships (PPP)

The proposals of the Task Force 3 on PPPs are based on a pre-existing framework, notably on standards and OECD instruments that are the cornerstone of this framework. Among them, it seems essential to include:

- The Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships (OECD, 2012): The Principles for Public Governance of Public-Private Partnerships help governments in negotiating PPP contracts with the best value for money for the public sector. Principles used to ensure the added value of future projects and to block the projects that do not meet this criterion. They also allow defining the criteria for suitability of use of PPPs (excluding, for example, projects involving rapidly changing technologies such as ICT, but generic techniques such as roads are allowed). The Principles also concern the adaptation process to the different areas of public action: institutional design, regulation, competition, and fiscal and financial transparency at all levels of government.
- The Policy Framework for Investment (OECD, 2006): The Framework for Investment is a tool that provides a list of important issues to be considered by any government committed to creating a favourable environment for investors and to ensure that society - and especially its disadvantaged population - reaps the benefits of development. In this regard, the Framework aims to advance the implementation of the UN Monterrey Consensus, which highlights the crucial role of private investment - from small businesses to multinational corporations - in effective development strategies. The PFI is under review.
- Principles for Private Sector Participation in Infrastructure (OECD, 2007): The OECD Principles for Private Sector Participation in Infrastructure are intended to help governments work together with private partners to finance and implement projects in areas that are vital to the economy, such as transport, water supply, power generation and telecommunications. They are for governments a self-assessment tool, and help establish action plans and to report on progress made to ensure citizens access to essential services at a reasonable price and a fair return on investment to private sector partners.

9 / Provision of a recognized methodology to facilitate the choice by public contractors of an optimal PPP contractual formula

67. Among the many formulas enabling public contractors to commission the design, construction, maintenance and operation of infrastructure by private investors and entrepreneurs in public-private partnerships (PPP), some are more or less adapted to the administrative organization, legal system and public finances of a state. However, there are many PPP implementation formulas that do not share these characteristics nor the same effects and risks to partners, public contractors, investors and entrepreneurs. These formulas include, for example, concessions, leases, third party management and their many variants.
68. Provision of clear, comprehensive and internationally recognized methodological elements to facilitate choice of the most suitable contractual form for a particular infrastructure project would be useful and would save time and resources and limit downstream risks created by inappropriate choices. These methodological elements, regularly updated in light of acquired experience, should be included in a handbook on concessions and other PPPs that lists the fundamentals of these complex issues for public contractors and international decision-makers sponsoring investment projects in public infrastructure. To be intelligible and ensure effective dissemination of information to public decision-makers, this short document (about fifteen pages) will present the

bulk of the material in a simple and educational way. It will be supplemented by a short selected bibliography.

69. It could be drafted during 2015 within the OECD, in partnership with the UNECE, international financial institutions and other professional parties. It will primarily address the following:

- The concept of the PPP and its various possible legal instantiations;
- Investment in infrastructure: the role and resources of the public authority:
 - The institutional framework;
 - The legal and regulatory framework;
 - Dissemination of good practices;
- Usefulness of PPPs:
 - Sphere of relevance of public action;
 - Sphere of relevance of private action;
 - Socio-economic profitability and consideration of time;
- Cost reduction;
 - The establishment of an overall contract;
 - Management of interfaces;
 - Discarding useless projects;
- Execution conditions;
 - Remits of the parties;
 - Reduction of and compliance with time periods;
 - Minimization of transaction costs;
- Conclusions and proposals;
- Essential bibliography.

70. An informed choice of the PPP formula best suited to a project by the public contractor should improve the conditions for the completion and implementation of projects in terms of compliance with budgets, deadlines and quality, thus leading to greater economic, legal and financial security and favourable to the attraction of investors.

71. This pre-tender discussion also promotes the development of a coherent governmental process of selection and prioritization of different national projects.

10 / Strengthening the technical competence and capacity for governance of PPP projects by representatives of public contractors and other interested authorities

72. Beyond the public contractor's initial decision-making process for selection of the optimal PPP formula, there is the capacity of its representatives to operate long-term in partnership with the private partner under satisfactory conditions. However, experience shows that in many cases, the representatives of the public contractor and the various administrations that will be involved throughout the project cycle do not always have the multiple skills required, over the long term of a project cycle, for successful completion.
73. The recruitment, training and long-term retention of the teams required by the public contractor and the different administrations, are essential for the satisfactory completion of projects in the common interest of public and private partners.
74. Accordingly, the delivery and dissemination of continuing vocational training modules should be offered to the representatives of public contractors and to the agents of the various administrations, depending on their needs, to enhance their skills and their project governance capacity. The establishment of PPP-dedicated training centres, such as those offered by the European Investment Bank and the United Nations Economic Commission for Europe, is to be encouraged.
75. The creation of centralized and regional continuing training centres is envisaged as part of the programme of the United Nations Economic Commission for Europe International Centre of Excellence dedicated to "Best Practices, institution and law", which received a mandate to that effect for all the other economic commissions of the UN.
76. It is anticipated that these training centres will deliver theoretical and practical education for the senior officials of different ministries who participate in the study, agreement and execution of concession and other PPP contracts, as well as for the staff of the PPP units and the enforcement officers of public contractors.
77. These courses will be entrusted to recognised experts of concessions and other PPPs with proven experience in implementing projects of this nature. The training will cover institutional and governance, legal and contractual aspects, including contract and project management, addressing both economic and financial matters. These experts will be selected by the centres of excellence and will have to prove their independence with respect to any risk of conflict of interest.
78. The courses will be funded by different bilateral and multilateral institutions responsible for international technical assistance. The finance will be supplemented by contributions collected at the donor conference to be organized by the UNECE.
79. This increase in the project management and governance skills of public contractors and different administrations will encourage dialogue and genuinely collaborative behaviour, which are essential for successful project implementation and operation.

11 / Seeking a better contractual balance in PPPs

80. Improvements in public procurement practices, tender conditions, bidder pre-qualification, enhancing the skills of public officials and more robust governance are all prerequisites for the adoption and implementation of the balanced and future-proof contracts and model clauses that need to accompany this specific category of projects.

81. The specific nature of infrastructure projects is that they are long-term, complex undertakings involving many stakeholders. The risks are therefore particularly numerous and prone to change. Projects undergo economic, social and cultural changes, resulting in shifts in the needs and conditions required for their satisfaction. Good contractual balance to address such changes, while maintaining the smooth running of the project, its sustainability and the essential interests of the stakeholders, is therefore a key success factor. They are ineffective where certain clauses are absent, inadequate or unbalanced and are therefore less able, or unable, to respond to the changes inevitably experienced by all projects over time.
82. The profusion of documents in circulation, some of which are contradictory, at times incorrect or incomplete, can become a source of confusion. A set of consistent, simple and operational educational materials, recognized as an international reference, needs to be made available to all public officials managing PPPs and their private partners.
83. These materials would meet the triple objective of promoting dialogue between the various project stakeholders (public contractors, investors, businesses, lenders, insurers, etc.), reducing costs and transaction times and increasing the legal and financial security of all partners.
84. Particular attention will be paid to key points of the projects:
- risk sharing between parties;
 - conditions governing the revision/modification of the rights and obligations of the parties in response to changes experienced by projects over time;
 - price setting and changing;
 - protection of the public domain and public service;
 - assignment of contract;
 - prevention and resolution of disputes;
 - arrangements for sanctions, penalties and contract termination conditions.
85. This document will be drafted in consultation with all public and private stakeholders involved.
86. To facilitate the identification of the factors and conditions that promote optimal contractual balance, an essential element of a PPP, a reminder of the identification elements and benchmarks, regularly updated based on experience acquired, could also be included in the handbook made available to international project sponsors of infrastructure investment projects.
87. Improved contract terms, such as the adoption of general principles for adaptation to the changes that will certainly occur, but whose nature is unpredictable, should help avoid the failures or serious difficulties currently experienced by too many projects.

D. International Arbitration

12 / Improvement in the actual implementation of the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and its transposition into law in each country

88. The promotion of alternative dispute resolution methods (arbitration, mediation) is a classic proposal for improving the investment climate.
89. Currently, almost all states in the MENA region (with the notable exceptions of Iraq and Libya) have ratified the New York Convention, the cornerstone of the essential domestic mechanisms of States seeking to enable credible use of arbitration, which is always highly valued in international investment projects. However, in fact, there is still a gap between rule and practice.
90. Given the importance of international arbitration in the settlement of international commercial disputes and in the field of investments, the New York Convention seeks to establish common legislative standards for the recognition of arbitration agreements and the recognition and execution by state courts of foreign and non-national awards.
91. The Convention provides a robust legal framework for States seeking to enable credible use of arbitration in their domestic legal system, which is always highly valued in international investment projects. However, in fact, there is still a gap between rule and practice.
92. However, where application of the New York Convention fails to uphold its spirit, there may be discrimination in the treatment of foreign awards and non-national awards with resulting obstacles to the settlement of disputes in international trade and investment. Moreover, the courts of the signatory States are in no condition to give full effect to arbitration agreements when the New York Convention is not interpreted correctly.
93. According to a 2008 UNCITRAL study, there are clear discrepancies in the application of the Convention, in part as a result of the diversity of legal systems worldwide. Thus, the application of specific rules of national procedure to certain questions can lead to different outcomes - whether relating to the conditions applicable to a request for enforcement of rights, contributions, fees or royalties payable in connection with such a request, rectification of defects in requests, deadlines for filing requests for recognition and enforcement or procedures for the filing of appeals against decisions rejecting enforcement arbitration awards and the courts of jurisdiction in such matters.
94. The adoption of modern standards that comply with internationally recognized standards in the areas of arbitration and mediation must be continually promoted. The modernization of the legal framework must cover both legislative aspects (ratification of the New York Convention and adoption of national legislation derived therefrom) and contractual and legal practice, to encourage genuine development of arbitration in the spirit of the New York Convention and a harmonized interpretation of this text by the MENA courts.
95. The UNCITRAL secretariat will shortly publish a guide on the New York Convention to encourage its uniform and effective implementation. This guide will provide a framework for national application of the Convention, to address the discrepancies currently weakening the overall effectiveness of the instrument. The guide will help to resolve legal uncertainty resulting from imperfect or partial implementation of the Convention and will reduce the risk of States failing to adhere to the spirit of the Convention.

13 / Promotion of the effective implementation of new transparency standards in arbitration between States and investors

96. The adoption of rules on transparency in treaty-based arbitration between investors and States contributes to the establishment of a harmonized legal framework to support fair and efficient settlement of international investment disputes.
97. However, to date, the lack of genuine transparency can undermine principles of accountability and good governance, thereby impeding efficient and speedy settlement of investment disputes. Conversely, transparency in such arbitrations strengthens the legitimacy of the dispute resolution process, while enabling interested parties to participate in the proceedings.
98. The UNCITRAL Rules on transparency in treaty-based arbitration between States and investors ("Transparency Regulations"), which came into force on 1 April 2014, provide a set of procedural rules for transparency and public access to treaty-based Investor-State arbitration.
99. They are also applicable to arbitration between States and investors under regulation other than the UNCITRAL Arbitration Rules or for ad hoc procedures.
100. Provisions on transparency in the resolution of disputes between states and investors are more necessary than ever given the public interest inherent in this type of arbitration. It is clear that the rules on transparency contribute to the establishment of a harmonized legal framework for the fair and efficient settlement of international investment disputes. They also strengthen the principle of accountability and provide better consistency and predictability in arbitration awards in the area of investment law.
101. States are encouraged to adopt the United Nations Convention on Transparency in arbitration between State and investors whose purpose is to ensure the general implementation of this transparency regulation.
102. The purpose of this Convention is to provide an effective mechanism for States wishing to apply the transparency Regulations to their existing investment treaties.

14 / Promotion of the creation of a Euro-Mediterranean community of international arbitration professionals

103. Beyond the standards and their practical application, there is a need to foster mutual understanding between people, cooperation and harmonization of practices between the different national and arbitration institutions of the region and between professionals from different backgrounds, who are often isolated in their countries of origin in the South and East of the Mediterranean.
104. This initiative does not seek to create new training in arbitration to compete with existing arbitration centres but to activate and energize the network of international arbitration professionals by convening biannual meetings offering both high-level professional training and a forum on international commercial arbitration practice in the Euro-Mediterranean area. The objective is to strengthen personal relationships between people, thereby promoting cooperation and harmonization of practices between the different national and arbitration institutions in the MENA region.
105. A board of trustees, under the auspices of UNCITRAL, will be set up to ensure the scientific monitoring of this initiative, supervise the regular organization of such meetings and disseminate

and apply their results. The members of the Board of Trustees shall be representatives of international institutions involved in or supporting this initiative, arbitration centres, practitioners and academics, with respect for the principles of geographical diversity and membership rotation.

106. To promote the development of a shared culture of arbitration and other dispute resolution methods, among all the economies of the area, it would be desirable to organize rapprochement and more robust links between the arbitration professionals of both shores through regular meetings. The ultimate goal is the gradual establishment of a genuine Euro-Mediterranean community of arbitration professionals, as rich in its differences as in its points of convergence. This rapprochement between people would take the form of two annual meetings, one on each shore of the Mediterranean, bringing together judges, arbitrators, legal practitioners, business people, government representatives and academics, for networking, information, discussion and, where necessary, continuing quality training for participants.

