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How is Convergence Best Achieved in International Project Finance?

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Abstract

This Essay will first review and then analyze the characteristics of each of three possible routes of convergence in light of three features. The first is stability and predictability of the legal environment. It is the main benefit that private investors look for before investing in a country. The second is the scope of influence and lobbying of interest groups. This feature is extracted from an analysis of the adoption of uniform laws proposed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") by Professors Ribstein and Kobayashi. These authors find evidence of enactment by states of NCCUSL's proposals despite a cost-benefit analysis suggesting that these proposals are not efficient. This inefficiency results from the influence of interest groups and NCCUSL's reliance on ill-informed generalists. The third feature is the respect for, or promotion of, public interest considerations. This analysis may reveal a tension between the economic efficiency and the social desirability of these routes, between market-driven policy and public interest concerns. This tension plays out in different ways. The more commonly addressed conflicts of interests are between public players and private investors; between (1) the interests of the host country in obtaining adequate financial and technical safeguards and assurances from the private participants that the project will be carried out safely, on time, and in the public interest and (2) the interests of private participants in limiting the type and number of guarantees that they give. The less explored tension addresses the respect for standards, such as human rights standards, that the host country itself may be reluctant to promote, but that affect private investment in terms of reputation or expense. This Essay disregards the tension between economic efficiency and social desirability, and rather focuses on the goal of reconciling private and public interest concerns. It will seek to determine whether one of these routes is better than the others, or whether a combination of the three is the best way to achieve convergence in international project finance. In conclusion, this Essay will show that all three routes to convergence are necessary to both foster and control international project finance. The twin goals of balancing private and public interests are best fulfilled at the international level, since this level can generate clear, balanced, and uniform rules by promulgating a suitable model law yet to be prepared. State initiative is then required to enact these rules and adapt them to domestic specificities. The establishment of a legal framework at the state level should be general and flexible enough not to suffocate private initiative since the latter brings innovation and evolution of norms in project finance. No one route can therefore be preferred over any other. If one is used alone, it is more likely to be inefficient.

HOW IS CONVERGENCE BEST ACHIEVED IN INTERNATIONAL PROJECT FINANCE?

*Catherine Pédamon**

INTRODUCTION

Today many countries are either unable or unwilling to fund traditionally “public sector” projects.¹ These countries are increasingly withdrawing from the financing, construction, and operation of those essential projects. Instead they appeal to both domestic and international private investment.² Project finance has developed in response to this critical need.³ For many, if not all, states, harnessing private sector skills and exper-

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This Essay assumes that the reader is knowledgeable in project finance. For general reading on project finance, see GRAHAM D. VINTER, *PROJECT FINANCE, A LEGAL GUIDE* (2d ed. 1998); SCOTT L. HOFFMAN, *THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE, A RESOURCE FOR GOVERNMENTS, SPONSORS, LENDERS, LAWYERS AND PROJECT PARTICIPANTS* (1998).

1. These projects cover sectors such as power, transport, telecommunications, and water and more recently education and prison that were traditionally funded and run by governments are nowadays financed, developed, and operated by private investors. This Essay will only focus on these projects that are usually large infrastructure projects.

2. Private capital has become a major source of financing for traditionally publicly funded infrastructure projects. Private companies invested \$96 billion in project finance transactions in 1998, down from \$119 billion in 1997 largely due to the Asian crisis, but up from \$29 billion in 1994. See Benjamin C. Esty, *Petrozuata: A Case Study of the Effective Use of Project Finance*, 12 J. OF APPLIED CORP. FIN. 26, 26 (1999).

3. Project financing is not a new funding technique, but its use re-emerged in the early 1980s to finance the construction and operation of traditionally public funded or regulated projects. The project financing technique was used in commerce in the Middle Ages until the 17th century. For example, in 1299, the English Crown negotiated a loan from a leading Italian merchant bank of that period, the Frescobaldi, to develop the Devon silver mines. The loan contract provided that the lender would be entitled to control the operation of the mines for one year to service its debt. During that year, the lender could take as much refined ore as it could extract, but it had to pay all costs of operating the mines. There was no provision for interest. The English Crown did not provide any guarantee (nor did anyone else) concerning the quantity or quality of silver that could be extracted during that period. See *Global Development Project Finance & Project Management Information Site* (Feb. 28, 1999), available at <http://members.aol.com/AllenWeb/infosite.htm>.

tise together with capital is key to economic and social development.

In this context, project finance is a debt finance technique used for the development of a public infrastructure project (e.g., construction and operation of a power plant, a port, or a road) where lenders look primarily to the cash flow produced by the project to service their debt rather than to other sources of security such as government guarantees or project sponsors' assets or credit. A special-purpose vehicle, the project company, is commonly created to carry out the construction, operation, and maintenance of the project under a concession (or license) given by the public authority of the host country. This company also raises the financing necessary for the development of the project.⁴ Project finance can then take on different forms depending on the rights and obligations of the project company under the concession agreement.⁵

Projects financed using this technique tend to be large in scale, requiring large funding packages. Private investors (private sector sponsors as well as lenders) are thus solicited to bring into the host country the large amount of money that these projects require. Their motivation for investing in a project is not only to make profits, but often also to satisfy a strategic commercial objective.⁶

4. Because the lenders cannot rely on established credit or balance sheet of the project company, the financing modality for the development of a project is called "project finance." In a project finance transaction, the shareholders of the project company, the sponsors, usually want to limit their equity investment to 20-30% of the total project costs, the remaining 70 to 80% being paid by loan proceeds. Project financing is either non-recourse (where lenders can only have recourse to the cash flow of the project) or limited recourse (where lenders are entitled in addition to look to certain assets of the borrower and project sponsors).

5. Under the commonly used form "build-operate-transfer" ("BOT"), the project company is awarded a concession to finance, build, and operate a facility that would normally be financed, built, and operated by the public authority. At the expiry or termination of the concession agreement, the project company transfers the facility, together with the project assets, technology and services, to the public authority. However, the project company may not have any obligation to transfer under the variant—"build-own-operate" ("BOO"); or it may, in addition, own the project facility during the life of the concession—"build-own-operate-transfer" ("BOOT"). Other forms reflect specific services to be performed (e.g., management and modernization) and may use a different terminology. For instance, the United Kingdom uses mainly two forms for its projects—"design, build, finance, and operate" ("DBFO") and "design, construct, manage, and finance" ("DCMF").

6. See GRAHAM VINTER, *PROJECT FINANCE, A LEGAL GUIDE* 2-5 (2d ed. 1998).

Project finance should be a vehicle of economic and social development for the host country that is respectful of the host's interests and preferences and a source of gain for the other interested parties. The difficult goal of project finance is to reconcile private interests and public policy considerations, to strike a balance between facilitating and encouraging private participation and meeting the host country's public interest. Rather than working in unfamiliar and differing legal regimes, market participants prefer to deal with one set of legal rules and principles. They look for a safe, stable, and predictable legal environment, ensuring, for instance, impartial application of regulations, transparency of laws and respect for private property, and for a flexible legal regime allowing innovation and creativity. Host states, in turn, want to obtain adequate safeguards and assurances that the project will be run in the public interest, ensuring, for instance, continuity in the provision of public services; skill transfer and local employment; compliance with health, safety, and quality standards; and environmental protection.⁷

Convergence of law⁸ can help achieve these twin private-public goals. It is a response to the aversion of private investors to any legal, commercial, or local divergences or uncertainties in a host country. Investors view any of these divergences or uncertainties as increasing risk. Convergence is a way to mitigate risk and create a safer investment environment. It gives investors certainty as to the legal rules that will apply and accordingly reduces the costs created by inefficient, silent, and parochial state laws. The benefits of convergence are even greater in fields involving players from more than one country and where international disparities can otherwise create further uncertainty and cost.⁹ From the public sector's perspective, convergence of law

7. See *id.* at 1; see also UNCITRAL, *Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, Report of the Secretary-General, Introduction and Background Information on Privately Financed Infrastructure Project, 33d Sess., at 4, A/CN.9/471/Add.1 (2000) [hereinafter UNCITRAL Introduction and Background Information].

8. Law is here used in the wider sense to embrace both positive law and private practice.

9. For the benefits of convergence in international subject-matters, see Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2277 (2000); John Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299 (1959); Hessel E. Yntema, *Unification of the Laws Respecting Negotiable Instruments*, 4 INT'L L.Q. 178, 178 (1951).

helps establish a legal framework by which the host country ensures provision of, and regulates, public services for its citizens and by which public service providers and their customers can protect their rights while attracting private investment.

Convergence of positive law and private practice is already happening in reality. It is the outcome of public lawmaking by state legislators and private ordering through standardization of practice. To deny this trend would be inappropriate and would ignore the acute infrastructure capital needs and capital investment realities that exist globally. Given this ineluctable trend, energies should rather be turned to providing the best legal framework for project finance. The search for the best framework requires an understanding of the various routes leading to it.

There are three different levels of promulgation of norms. The first results from spontaneous government initiatives to enact project finance legislation or define standard form contracts; this is the state route. The second is created by the work and practice of industry groups, financiers, and private practitioners leading to the development of standard form contracts and practices; this is the private route. The third derives from the efforts of multilateral organizations such as the United Nations Commission on International Trade Law ("UNCITRAL") to define common legal rules and principles or to provide legal recommendations in project finance that member states may choose to enact; this is the international route.

This Essay will first review and then analyze the characteristics of each of these routes in the light of three features. The first is stability and predictability of the legal environment. It is the main benefit that private investors look for before investing in a country. The second is the scope of influence and lobbying of interest groups. This feature is extracted from an analysis of the adoption of uniform laws proposed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL")¹⁰ by Professors Ribstein and Kobayashi.¹¹ These authors find evi-

10. The NCCUSL operates by drafting uniform law proposals, which are then considered for enactment by state legislatures. Its proposals are drafted by commissioners (appointed by state governors) and then approved at annual meetings by states (at least 20, each state exercising one vote).

11. Professors Ribstein and Kobayashi analyze and provide evidence (1) that NCCUSL's proposals can lead to efficient uniformity and (2) that the proposals can also

dence of enactment by states of NCCUSL's proposals despite a cost-benefit analysis suggesting that these proposals are not efficient.¹² This inefficiency results from the influence of interest groups and NCCUSL's reliance on ill-informed generalists.¹³ The third feature is the respect for, or promotion of, public interest considerations.

This analysis may reveal a tension between the economic efficiency and the social desirability of these routes, between market-driven policy and public interest concerns. This tension plays out in different ways. The more commonly addressed conflicts of interests are between public players and private investors; between (1) the interests of the host country in obtaining adequate financial and technical safeguards and assurances from the private participants that the project will be carried out safely, on time, and in the public interest and (2) the interests of private participants in limiting the type and number of guarantees that they give. The less explored tension addresses the respect for standards, such as human rights standards, that the host country itself may be reluctant to promote, but that affect private investment in terms of reputation or expense.

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result in enactment of inefficient laws. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 132 (1996).

12. *Id.* at 142.

13. "Under the economic theory of interest groups, legislators may pass inefficient laws that benefit small but concentrated interest groups that can organize relatively cheaply at the expense of larger but more dispersed groups that have higher organizations costs." *Id.*

the state level should be general and flexible enough not to suffocate private initiative since the latter brings innovation and evolution of norms in project finance. No one route can therefore be preferred over any other. If one is used alone, it is more likely to be inefficient.

I. *CONVERGENCE OF LAW AT THE STATE LEVEL: A SPONTANEOUS PROCESS OF STATE INITIATIVE*

Some countries, such as Finland, do not provide any special legal framework for project finance. The applicable rules are thus to be found in general contract, property, and business organization law. However, under market pressure, or for legal and/or political reasons, many countries have been led to, or encouraged to, adopt general or specific legislation on project finance or to amend their current legislation to attract private investment. This process of state initiative has resulted in spontaneous convergence. To varying extents, the process reveals the promulgating state's knowledge, and awareness, of international practices in project finance. It also shows the state's creativity in adapting those provisions required by market participants to their national and local context.

However, countries may be subject to interest group pressure that may persuade them to enact inappropriate legal provisions or market-driven laws that do not fit their legal traditions and social concerns. The Essay will first review and then analyze the characteristics of convergence of law at the state level by looking at three examples.

A. *Characteristics of Convergence of Law at the State Level: Three Examples*

There are different state legal approaches to project finance. Some countries, such as Italy, Turkey, and China, have enacted general project finance laws, whereas others, such as Russia, have adopted special-sector laws to respond to the needs and expectations of private investors. Still other states, for instance the United Kingdom, have standardized their contract forms used in project finance transactions. Despite the varying approaches, states have nonetheless adopted similar provisions.

1. Standardization of Contracts by a State: The United Kingdom Example

In the early 1990s, the British government launched at the national level an initiative called the Private Finance Initiative ("PFI").¹⁴ As stated by the current Chancellor of the Exchequer, Gordon Brown,

[T]he key to future economic success is investment and partnership. Investment is needed in infrastructure, technology and people. In the drive to equip Britain for the 21st century, some projects may best be managed by the Government itself. However, in many cases, the involvement of private sector skills offers the prospect of better value for money. Increasingly, a combination of both public and private skills will be necessary and desirable.¹⁵

This is the philosophy of the PFI.¹⁶ The Treasury Taskforce has drawn up a list of some significant cost-saving projects resulting from the partnership with the private sector when compared with traditional procurement routes.¹⁷ In addition to PFI, certain sector-specific issues have been addressed by legislation.¹⁸

One of the major priorities of the Labour government was

14. The policy of the PFI was launched in the autumn of 1992 by Norman Lamont when he was a Chancellor of the Exchequer and pursued by Kenneth Clarke as Chancellor of the Exchequer in November 1993. At this time, the UK Treasury published a booklet called *Breaking New Ground* with the following subtitle *Towards a New Partnership Between the Public and Private Sectors*.

15. *Id.*

16. For more information on the PFI, see <http://www.treasury-projects-taskforce.gov.uk>.

17. The average cost saving for the first eight DBFO road contracts was 15%, the Bridgend and Fazakerley prison projects represent a saving of more than 10% over the contract lives, the replacement for the national insurance recording system is estimated to cost up to 60% less than an equivalent public sector development, and the Home Office's Immigration Casework IT project is expected to generate productivity improvements of at least 40%.

In addition to this reduction of costs, the National Audit Office disclosed in June that Carillion and Group 4, who financed, built, and now run Fazakerley prison, raised their expected rate of return on the deal by 75% once the project was up and running. Refinancing gave them a 14 million pounds gain. For a discussion on the extent to which the Government departments and agencies have not negotiated the right to share in any windfall profits made on most PFI deals they have signed, in spite of treasury guidance last year to do so, see Nicholas Trimmins, *Treasury Missing Out on Share in Windfall Profits From PFI Deals*, *FIN. TIMES*, Dec. 28, 2000, at 1.

18. For instance, in the healthcare sector, arguments over two sector-specific issues that proved unbankable caused a major delay. These issues were ultimately addressed by new legislation, the National Health System Trust Covenant.

to produce model form terms and conditions and then, with a little more experience, to promote a standard approach to the PFI process. In consultation with other departments, the Treasury Taskforce published guidance documents to assist both procurers and providers. Those documents included *Basic Contractual Terms* issued in October 1996 and *Further Contractual Issues* in February 1997. According to the taskforce, the key to progress on the different PFI programs, for instance the Prison Service, is the establishment of "a commercially acceptable form of contract." In September 1999, the Treasury Taskforce issued a *General Guidance on the Standardization of the PFI contracts* after two years of work involving consultation with hundreds of stakeholders. As stated in a press release dated July 14, 1999, "the new contract guidelines will act as a blueprint for the future development of PFI and ensure that future PFI contracts across different public services will be able to follow a consistent approach by incorporating standard conditions into the contracts." These standard forms deal with cost-related issues and aim to address them in a cost-efficient way for taxpayers, the public authority, and the investors. The British government has adapted its public rules and practice to the market in an effort to reach a compromise approach balancing the needs of all project players. The purpose of this initiative was indeed to command the support of a broad majority of participants in PFI projects in both the public and private sector alike.¹⁹

The government's concern has been to reduce the costs associated with tender documents, legal fees, and negotiation costs. This initiative has been successful. Bidding periods have become shorter, transaction costs have decreased, deals have become more predictable, and projects are therefore easier to complete. The result for bidders is less uncertainty and for the public sector better value for money. Bidders and lenders know what to expect. Any standard form of contract that the public sector uses in the United Kingdom now spares the players "from re-inventing the wheel at considerable expense every time a hospital or a college enters into a PFI arrangement. . . . Consultation with hundreds of interested parties has produced guidance

19. Underlying the choice of standard contractual terms, the United Kingdom government has also made, as it would have done so in the case of enactment of a project finance law, policy choices.

which provides the public sector with a practical toolkit delivering the very best value to the tax payers.”²⁰ With this contractual framework available, it is expected that public sector-procuring authorities approach PFI deals in the same way, reducing costs associated with inconsistency and re-invention.

In its publication *Further Contractual Issues*, the Treasury Taskforce has dealt with the most commonly encountered issues in project finance transactions, such as payment mechanisms, performance incentives, monitoring performance, change of control, termination, step-in rights for the public sector, step-in rights for lenders, change mechanisms, and legislative risks.²¹ In the case of termination, for instance, it is acknowledged that the public sector should not be able to terminate the concession agreement at will, but should be entitled to do so in the event of a default by the project company. In this case of default, the PFI publication hesitates compensating the project company, as service is no longer being provided. However, in the case of termination for default by the public authority, it is recognized that full compensation of debt and equity is appropriate.²²

2. General Project Finance Legislation: The Italian Example

The Italian approach has been slightly different. Project finance saw its dawn in Italy in 1992 when new legislation was enacted to encourage independent power production,²³ but it was not before 1994 that this legislation could be really used to support project financing in the energy sector.²⁴ Then with the spread of project financing to a wider range of sectors, Italy decided it needed another law.

After more than three years of drafting, re-drafting, and lobbying, in 1998, a general law, The Merloni Ter,²⁵ was enacted in

20. See Press Release, Chief Secretary to the Treasury Alan Milburn (July 14, 1999).

21. See VINTER, *supra* note 6, at 248-53.

22. *Id.* at 250.

23. Law 9/91 and Resolution CIP 6/92. See Franco Vigliano, *An Overview of the Market at the Beginning of Year 2000*, INT'L FIN. L. REV. 25 (Mar. 2000).

24. The Ministry of Industry, Commerce and Handicraft (“MICA”) issued such a decree on August 4, 1994. Since then, a number of high profile projects have been closed in the energy sector, including Sarlux, Isab Energy, Api Energia, Rosen, Serene, and Centro Energia.

25. It was first introduced in November 1998 by way of an addition to the Public Works Act of 1994 (Law 109/94) and then amended in December 1998 (Law 415/98 published in the Official Gazette of December 4, 1998). On December 10, 1998, the

Italy to govern concessions of public projects and major aspects of project finance transactions.²⁶ This state initiative was in response to domestic and international market pressure. At the time of enactment, Italy had to avert a domestic public infrastructure crisis while complying with the criteria imposed by the Maastricht Treaty to join the European Monetary Union, such as a reduction of the public deficit to no more than 3% of the GDP. The Italian legislation introduces new common law features, such as the floating charge and the step-in right of the lenders, foreign to the civil law tradition, to reflect international practice. It was lengthily debated and negotiated by the Parliament because of its innovative content.

The Merloni Ter acknowledges the right of the lender to step-in and replace the project company in case of a default under the concession agreement or the financing contract to cure the default and avoid the termination of the concession.²⁷ It also gives lenders a first priority security right over the project company's movable assets. It fills in the gap in Italian law of a single lien on assets of variable size.²⁸ The introduction of this common law concept of floating charge was controversial. A compromise was found by inserting a reference to the Civil Code to ensure that bona fide possessors would be adequately protected. This reference, however, disrupted the coherence of the Article so that "it is not clear under which circumstances the right of a bona fide possessor does or does not prevail."²⁹ It also potentially changes the way in which security interests might be interpreted more generally under Italian law, despite an appar-

Italian Government approved the required implementation regulations for the Merloni Ter to be applied on December 22, 1998, and April 19, 1999. The Ministry of Public Works issued two circular letters of interpretation concerning the application of the new rules to concessions already awarded and projects already in the development phase.

26. See Graham & James LLP, *The New Law on Project Finance in Italy*, INT'L FIN. L. REV. 12 (July 1999).

27. See Article 37octies of the Merloni Ter.

28. See Article 37nonies of the Merloni Ter.

29. See Vigliano, *supra* note 23. Vigliano participated to the drafting of the articles on project financing in the Merloni Ter. He explains "how the original draft was straightforward and was based on the registration and publication of the lien, but the concern to protect the interest of third parties coming in good faith into possession of the company's assets led to the inclusion of a reference to Article 1153 of the Civil code, so that it is not clear under which circumstances the right of a bona fide possessor does or does not prevail."

ent attempt to reserve this new concept to project finance transactions. In any event, it gives lenders in project finance circumstances a valuable and easy-to-use security instrument in addition to the usual protections they seek in structured deals.³⁰

The Merloni Ter also acknowledges that the *concessione di lavori pubblici* (concession of public work) is a contract and that the rules of contract law apply to both the concessionaire and the public authority.³¹ In addition, it introduces a financial balance clause that addresses risks to be borne by the public authority, such as a variation in the scope of the service to be provided under the concession agreement or a change of law. It is aimed at putting the concessionaire back into the same position it would have been in, but for the occurrence of these risks.³² The concessionaire is entitled to receive compensation for the costs incurred and the loss of profits suffered. Compensation may include a revision of the fares or tariffs levied against the public authority or the customers and an extension of the duration of the concession. This clause mirrors remedies that are practiced around the world.

Furthermore, the Merloni Ter states that the winners of the bid may incorporate a limited liability company that will automatically become the concessionaire to build and operate the public project without any further approval of the public authority.³³ This company is the special-purpose vehicle that is characteristic of project finance transactions. Aware of the crucial need for funds to finance expensive projects, the Italian government allowed this vehicle to issue bonds beyond the limits otherwise provided by Italian company law, that is, to issue debt exceeding the company's equity.³⁴ A new Article deals with the termination of the concession and the manner in which hand-over to the state is to take place, including payment of compensation.³⁵ Finally the Merloni Ter allows the parties to subject any

30. The lenders will be able to receive any money payable to the project company pursuant to a sale of assets.

31. Unless otherwise provided in the Merloni Ter, see Article 19.2 of the Merloni Ter.

32. This clause is commonly found in concession agreements. The financial balance is guaranteed throughout the term of the concession. See Articles 19.2 and 19.2bis of the Merloni Ter.

33. Section 37quinquies of the Merloni Ter.

34. Article 37sexies of the Merloni Ter.

35. Article 37septies of the Merloni Ter.

dispute relating to the concession agreement to arbitration.

Following the Merloni Ter, the Italian Parliament adopted a law setting up a unit ("Unit") to advise public authorities on project finance and identify relevant issues in order to shape development of public private partnerships as a whole in Italy. The role of the Unit is to (a) promote project financing within the public administration, (b) assist public entities in structuring the terms of their concessions to attract and support private financing, and (c) advise in the evaluation and selection of proposals.³⁶ In 1999, two purposes were added to the Unit: (d) the standardization of documentation and the streamlining of procedures to facilitate private lending and (e) assistance to public administrators in identifying, preventing, and solving problems in connection with project financing.³⁷ Its role was inspired by the United Kingdom PFI Taskforce described above.³⁸

The Merloni Ter deals with provisions that are usually subject to tension and negotiation between the private and public parties (e.g., financial balance clause and compensation in case of termination of the concession). It also includes provisions that lenders usually seek (e.g., right to step-in and a first priority security interest). There is no doubt that this law was drafted with a high degree of knowledge of, and attentiveness to, current international practice and a desire to create a safe, predictable, and stable legal environment for the private players. As a result, Italy has become a favorable jurisdiction for private investment. There is no express reference to the public interest, but the latter imbues the whole Italian legal tradition and is to be found in other areas of Italian law. The current legislation is a significant development in a legal culture that has been traditionally reluctant to divest itself of any responsibility to the private sector for fear of compromising the best public interest. It contributes to the general tendency of convergence of law.

3. Sector-specific Concern in General Project Finance Legislation: The Turkish Example

Turkey's approach to project finance has been a little less

36. Article 7 of Law 144/99 (May 17, 1999).

37. On July 9, 1999 (Res. 63/99), the Interministerial Committee for Economic Planning ("CIPE") issued the Regulation of the Unit and added these two purposes.

38. See *supra* Section I(A)(1).

comprehensive. It has enacted a series of new laws relating to project finance in general and dealing more specifically with energy projects.³⁹ The approach in this case is grounded in Turkey's familiarity with the concept of "concession."

Before the adoption of the current legislation, concession agreements were governed by administrative law following a well-established distinction in civil law countries between private commercial law and administrative law. The application of administrative law gave the public authority unilateral powers of alteration of the project scope and services and submitted the agreement to the exclusive jurisdiction of the Supreme Administrative Court, the Council of State ("Danistay"). Such application of administrative law represented a serious country risk that rendered the project unbankable or bankable only at high project finance margins and arrangement fees. Before providing funding, lenders in project finance transactions assess the stability of the project, especially the steady revenue stream. Any change of scope, entities, or type of service impacts the revenue stream and the ability of the project company to service the lenders' debt.

In addition, for many years, the Turkish Constitution prevented the development of many privately financed projects. The Turkish Constitutional Court held in 1996 that all power projects were concession contracts subject to the Danistay. The risk that this court recast contracts in a strong pro-government mold, expanding the definition of company default while eliminating any possibility of government default or lender step-in or assignment rights, was paramount.⁴⁰ Under these circumstances, most lenders refused to finance power projects, thus causing a shortage of electricity generating capacity in Turkey. Both the relevant legislation and the Constitution had to be amended to attract private investment and to serve Turkey's citizens' crucial need for energy.

In 1999, the Constitution was amended to (1) enable the Turkish Parliament to pass legislation acknowledging that concession agreements in energy projects could be private law con-

39. The first law on project finance was passed in 1984 (Law 3096) and is often referred to as the BOT Law. It was supplemented by the enactment of a more general BOT Law (Law 3996) that applies to all BOT projects. See Leigh Hall & Emre Derman, *Turkey Puts the Final Piece in the IPP Legislative Jigsaw*, 188 *PROJECT FIN. INT'L* 56 (2000).

40. See Hall & Derman, *supra* note 39, at 56.

tracts, (2) enable disputes under concession agreements dealing with provision of a public service and involving a foreign element to be submitted to national or international arbitration, and (3) remove the Danistay's binding authority to review concession agreements.⁴¹ These changes clearly reflected the Turkish Parliament's political will to create a legal environment favorable to private participation in the energy sector by applying private commercial law principles and arbitration to power projects.⁴² Legislation was adopted in December 1999 to implement these changes.⁴³

The first law confirmed the reduction in scope of review of the Danistay.⁴⁴ The second law amended the hitherto ineffective general legislation on project finance to insert generation, transmission, and distribution of energy into its scope (Article 2) and to submit concession agreements, now called implementation agreements, to private law, as opposed to administrative law (Article 5).⁴⁵ These amendments accordingly denied the public authority granting the concession unilateral powers of alteration, forcing it to play by private rules. The mitigation of this political risk brought the predictability and stability required by private investors to carry out projects in Turkey.

Along with the United Kingdom and Italian examples, the Turkish example is another good illustration of a high level of attentiveness to project finance practice by a state. Turkey's law is, however, less exhaustive and clear than the Italian legislation. Numerous issues have not been dealt with, such as the lender's right to step-in in case of an event of default under the concession agreement or the financing contract, or the concessionaire's right to receive compensation in case of termination of the concession agreement or security interests. The latter are still addressed under general Turkish law that defines them restrictively. For instance, the lender must take physical possession of the movable assets concerned to obtain a pledge on them, the only exception being "enterprise pledges" (pledges of all of a

41. *Id.* at 57.

42. *Id.*

43. Laws 4492 and 4493 (Dec. 21, 1999). See Hall & Derman, *supra* note 39, at 57.

44. Law 4492 (Dec. 21, 1999).

45. Law 4493 (Dec. 21, 1999). See Hall & Derman, *supra* note 39, at 57, 58. An additional legislation was passed in January 2000 (Law 4501) to apply these reforms to existing concession agreements.

business's assets and operations). In addition, these legislative reforms have not been given full effect because of the practice by Turkish public authorities of issuing one-sided implementation agreements. As part of the Turkish government's political will to address this, the Ministry of Energy and Natural Resources has undertaken to draft a standard form of implementation agreement that would be more flexible and more favorable to private investors.

These three examples show states' awareness of current international practice and creativity in adopting relevant legal provisions to their local specificities. Each of these countries wanted to achieve the same goal of creating a legal framework favorable to private investment. All seem to converge on the same values and principles, although they differ slightly in the way, and to the extent, in which they implement them. Certain practitioners, however, still complain about the uncertainty and ambiguity of these laws. In their opinion, state legislators need to review, clarify, and refine their current legislation on project finance.

B. *Analysis of Convergence of Law at the State Level*

Although the introduction of new legislation may generate costs, it is more likely that focused state initiatives will reduce costs where a political will exists to attract private investment and where there is a clear understanding of what constitutes "project finance."⁴⁶ Convergence of law at the state level, however, raises the question of whether this spontaneous initiative has moved states towards appropriate convergence that meets the twin goals of project finance. This question may be addressed by looking at three aspects of this state process: (a) its decentralized approach to convergence favorable to private investment and public interest considerations, (b) its submission to influence and lobbying of interest groups, and (c) its implementation at the expense of other considerations, such as the coherence of the existing legal system and culture.

46. These two elements (political will and understanding of project finance) have been missing in China. See Melissa Thomas, *The Pressures of Project Finance: Beijing Tightens Its Regulatory Grip On Foreign Project Finance Deals*, CHINA BUS. REV. (Mar. 7, 1998), available at <http://www.chinabusinessreview.com/9803/thomas.html>. For example, she refers to the introduction of new approval requirements for projects to be financed privately and of regulations creating new uncertainties on most currency issues.

1. A Spontaneous Decentralized Process to Convergence

This approach to legal convergence contrasts with the centralized transnational and technocratic approach of multilateral organizations at the international level.⁴⁷ It relies on a general tendency among states to apply and enact the same concepts in project finance (e.g., submission of the concession agreement to private commercial law and arbitration). Actual practice suggests that states may be able to achieve spontaneous uniformity freely.⁴⁸ As Ribstein and Kobayashi advise, "in the long run, the best solution to the problem of inefficient and inconsistent state laws may be more competition among the states rather than more uniform laws."⁴⁹ Does the same rule apply to project finance? The question is whether the simple fact that more and more countries compete among themselves to attract private investment, leads them to freely adopt appropriate legislation on project finance without a need for international guidelines.

The Turkish and Italian examples are a good illustration of competition among states to attract private investment and of the efficiency of this process. Both countries inserted new concepts into their current legislation. Italy especially was extremely innovative since it introduced foreign common law concepts into its project finance legislation. They spontaneously sorted out the provisions relevant to their needs. Interestingly, these provisions are quite similar and, accordingly, will reduce the costs of diverging legislation.

Competition to attract private investment may thus motivate countries to be more responsive to the needs of investors and in turn lead to convergence in legislation in the interests of efficiency. It may result in a "race to the top."⁵⁰ However, state legislators may be prone to acting in the interests of specific groups,

47. See *infra* Section III.

48. See Ribstein & Kobayashi, *supra* note 11, at 181; see also Bruce H. Kobayashi & Larry Ribstein, *Evolution and Spontaneous Uniformity: Evidence From the Evolution of the Limited Liability Company*, 34 *ECON. INQUIRY* 464 (1996); Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 26 *J. LEGAL STUD.* 43 (1987).

49. See Ribstein & Kobayashi, *supra* note 11, at 187.

50. A case-by-case analysis would have to be made in the field of project finance to decide whether competition among states results in a race to the top or a race to the bottom. For general discussions in the corporate field, see William Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663 (1974); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *HARV. L. REV.* 1435 (1992).

such as their state constituencies, the representatives in power (e.g., the ethnic minority in power), or industry groups, and overlooking their own public interest considerations.⁵¹ This may then lead to a "race to the bottom."

In this decentralized lawmaking process, private participants look for a flexible legal framework that gives them options. This flexibility can be achieved by adopting default, as opposed to mandatory, rules that project players may reverse in light of their particular circumstances.⁵² In the three state examples, the legal provisions seem to fall into the two categories of rules, although it is difficult to distinguish between them. For instance, submission to arbitration or the application of private commercial rules are likely to be default rules, whereas the obligation of the public authority to compensate the project company in the event of termination for its own default is likely to be a mandatory rule. States may experiment as they choose between mandatory and default rules. However, they need to be clear which rules are default rules and which are mandatory in their enactment to create the stable and predictable legal framework that participants seek.⁵³

In addition to satisfying the needs of private players, this state initiative is likely to be well suited to local variations and to take into account certain immediate public policy considerations, such as continuity in the provision of the public service, local employment and skill transfer, and completion of the project as soon as possible. For instance, in South Africa, employment of local labor and skill transfer are key components entwined in the development of project finance.⁵⁴ They are perceived as tools for economic and political empowerment of

51. See *infra* Section I(B)(2)-(3).

52. For a general analysis of the concept of default rules in ordinary contracts, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L. J.* 87 (1989). For a critical approach to uniform default rules in international commercial transactions, Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 *VA. J. INT'L L.* 671 (1999). Also, for an example of default rules in the international context, see Karin L. Kizer, *Minding the Gap: Determining Interest Rates under the U.N. Convention for the International Sale of Goods*, 65 *U. CHI. L. REV.* 1279 (1998).

53. For a need of clarity in distinguishing between default, mandatory and enforcement rules of contract, and for the development of a minimum body of unitary mandatory European contract law see Ugo Mattei, *Efficiency and Equal protection in the New European Contract Law: Mandatory, Default and Enforcement Rules*, 39 *VA. J. INT'L L.* 537 (1999).

54. See Natasha Calvert, *Roads Merry-go-Rand*, 215 *PROJECT FIN.* 28, 31 (2001).

disadvantaged groups. Thus, in all South African government-awarded tenders, a minimum percent of the concessionaire must be made up of so-called black empowerment groups.⁵⁵ To ensure that skill transfer really takes place at all levels (e.g., at the project company level or at the operations level), a complicated point system has been put in place.⁵⁶ Failure to meet the minimum required level of points carries heavy financial penalties.⁵⁷ This obligation to employ local labor can be an additional burden on private players, but this is the way the South African government wants to promote economic and social development, and balance public and private interests.

Wider public interests may, however, be neglected in state normative initiatives, such as compliance with international labor and human rights standards. Although these interests may be covered in other areas of legislation, countries may fail to address them.

2. Influence and Lobbying of Interest Groups

As seen, domestic legislation has been amended to meet the needs and expectations of private market players. The issue is, however, whether these laws have been enacted under the influence of a group that is also the owner of companies operating in the relevant sector or a group acting on political rather than technical grounds. It is more likely that a country that lacks expertise in the field of project finance will be subject to the lobbying of special interest groups (e.g., western energy companies, engineering and construction firms, and financiers) in the law-making process. The role of these interest groups ranges from lobbying for legislation to funding its drafting and even to participating in the drafting.

For example, when Russian legislators were drafting the republic's petroleum laws (the Russian Petroleum Legislation Project), western oil and gas companies funded and took part in the drafting of the legislation.⁵⁸ "For their contributions, which av-

55. *Id.* In the prison, for instance, the stipulation was 40%.

56. Points are awarded for the inclusion of certain groups, individuals, and enterprises, at certain levels, with stipulations rising over the life of the project. *Id.*

57. *Id.*

58. The University of Houston Law Center (partially) funded the Russian Petroleum Legislation Project through a US\$1.5 million program that it administered. See Linda Himmelstein, *Big Oil Plays a Big Role Shaping Russia's Energy Laws; The Fox, Say Crit-*

erage[d] about \$100,000 per donor, oil and gas companies [were] allowed to review the draft laws and even put their own representatives on the legislative-writing teams, where they work[ed] alongside academics and private lawyers."⁵⁹ This raises the question of whether industry groups should be drafting the very laws that will govern their industry and whether national interests (e.g., environmental concerns and a country's financial and public interests) can be adequately preserved in these circumstances. Capture of the legislative process by lawyers representing industry groups or financiers is part of the same phenomenon. For instance, Tanzania recently amended its legislation to attract international financing and private investors to its mining sector.⁶⁰ In this respect, Gerard Holden, managing director and global head of mining and metals at Barclays Capital, stated in a recent interview that "there is now no question over security of title or the normal protections lenders seek in structured deals such as offshore accounts and robust security. . . . The lawyers involved in the Golden price deal spent a lot of time with the Tanzanian government."⁶¹

Representatives of the government itself can also exercise influence at the state level. For instance, in its effort to promote the PFI, the previous government in the United Kingdom set up a committee called the Private Finance Panel made up of twelve leading individuals in the field of project finance from the public and private sectors. This panel was abolished; one criticism, among others, was that it had developed a tendency to take the government's side on issues.⁶²

One might, however, argue that the interests of the government and those of the industry groups naturally converge. As to the government, its goal is to attract foreign investment as quickly as possible and to adopt legislation well suited to its circumstances (e.g., predictability and stability required by inves-

ics, Is Building the Henhouse, *LEGAL TIMES*, Jan. 13, 1992, at 1. In her Article, Himelstein questions the impartiality of the Houston project and the donor influence. The Houston project included participation and financial support from such companies as the Exxon Corp., Conoco Inc., the Amoco Corp., and the Marathon Oil Co., all of which invest in Russia.

59. *Id.* Himelstein claims that 18 industry representatives were serving on six legislative-writing committees.

60. See Mining Act (1998).

61. See Louise Bowman, *Pits-Tops*, 214 *PROJECT FIN.* 52, 53 (2001).

62. See VINTER, *supra* note 6, at 241.

tors and conservation of domestic resources). As to industry groups, they help or guide the public entity in the drafting of new legislation in their industry field because of their technical and financial experience and understanding of international practice.⁶³ Yet it is more likely that an industry group will tend to further its own interest.

To what extent interest groups influence the drafting of new legislation and to what extent such influence results in damaging and unfair consequences for the relevant country requires analysis on a case-by-case basis. In any event, a country that lacks expertise and funding in the field of project finance is more likely to be subject to the lobbying and pressure of interest groups, thus potentially generating biased project finance laws and cost resulting from breaches of public interest considerations, such as labor, safety, and health standards.

3. Other Considerations

There is strong pressure to adopt market-oriented laws that satisfy private investor expectations. This pressure may lead to the enactment of legislative provisions to the detriment of the coherence of the existing legal system and culture. As already mentioned, the Italian and Turkish Parliament agreed to govern the concession agreement between the project company and the public authority with private commercial law instead of administrative law.⁶⁴ The benefit of such change is obvious for the private investor, but raises implications for the coherence of the existing legal system and culture. For instance, one can now wonder whether private commercial law, as opposed to administrative law, will also govern traditional concession agreements in Turkey and Italy.

63. In response to Himelstein's criticism of the role of oil and gas industries in the drafting of Russian oil laws and of the role of the University of Houston Law Center, see Robert L. Klaus, *Russian Oil Laws Are Being Drafted By Russian Experts*, LEGAL TIMES, Feb. 3, 1992, at 24. Dean Klaus points out that Russian experts themselves write Russia's petroleum legislation and that the Russian Parliament enacts legislation only after intense scrutiny and debate. Indeed, the Russian Parliament only adopted a few provisions proposed. In addition, "the Russian leadership considered it highly desirable that the University of Houston Law Center project receive advice from the international oil and gas industry to help assure that the laws would be workable. Ten academics from various law schools in the United States and abroad on the project as well as experts drawn from law firms, accounting firms and international oil companies."

64. See *supra* Section I (A)(2)-(3).

Each legal system should be considered as a whole, "rather than consisting of a loose collection of separable components, it is tied together by a complex incentive structure."⁶⁵ Modifying one rule without changing the structure undermines the coherence of the entire legal system. The establishment of a whole set of legal rules for privately financed projects would therefore be more appropriate since it would have its own legal coherence.

Even with the reform of its legal system, the host country still has obstacles to overcome to attract private foreign investment. There are largely centered on the lack of understanding of the new legal concepts by the relevant local public authorities. This lack of understanding makes giving proper effect to the enabling legislation difficult. This is particularly so in countries where there is a traditional resistance to tapping private resources for public needs, such as Italy and Turkey, and where there are powerful regional governments with relative autonomy, such as Italy, although this criticism has also been made against the public sector in the United Kingdom. The need for practical implementation and good understanding of, and familiarity with, the new legislation by relevant public authorities is therefore crucial. To tackle this lack of understanding, the Italian government set up a Unit whose role is to advise on, and spread the concept of, project finance throughout central and regional public administrations.⁶⁶ The Unit's focus is indeed on teaching the public sector about the private.

Finally a general criticism of this lawmaking process is that despite spontaneous convergence of law, states may still have diverging and inadequate legislation that may discourage or slow private investment, for instance on security interest issues. State legislators may adopt provisions that do not fit their local specificities because they engage in "herd" behavior or are subject to pressure of interest groups. An international framework may help avoid or contain the adoption of inappropriate measures by states. It may also help reconcile public and private considerations. International organizations are less partial than state legislators, thus having a more detached view from market needs of

65. See William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 219 (1999).

66. See *supra* Section I(A)(2).

the issues raised by project finance transactions. However, within such an international framework, the responsibility for defining the most suitable provisions for legislation, having regard to the national or local context, should always belong to the states.

II. CONVERGENCE OF LAW AT THE PRIVATE LEVEL: A SPONTANEOUS PROCESS OF PRIVATE INITIATIVE

Convergence of law at the private level manifests itself in the process of standardization of contractual forms. It raises the question of whether private initiative can help move private players towards a convergence that meets the twin goals of project finance. As the Essay will show, this route to convergence is not enough to achieve the twin goals, but it is a necessary complement to the convergence of positive law at the state and international levels.⁶⁷ The Essay will first review and then analyze the characteristics of convergence of law at the private level. It will show the tension between, on the one hand, the benefits of standardization and, on the other, the need for flexibility and adaptation to national culture and circumstances.

A. Characteristics of Convergence of Law at the Private Level

Standard contract terms are developed in sectors that require a high degree of expertise and technicality. Participants usually do not want to have their industry process (e.g., construction process) harmonized by legislation. This is the other facet, or the complement, of convergence of positive law. The main players are private participants whose motivation is liberalizing the host country's market and furthering their own interests.

Law firms involved in project finance repeatedly use very similar boilerplate provisions that they adapt to the specifics of the project. Banking institutions, whether commercial or multi-

67. For a similar approach in the field of construction at the European level in favor of harmonization through contract rather than through legislative intervention, see John Uff QC & Nerys Jefford, *European Harmonisation in the Field of Construction*, INT'L CONSTRUCTION L. REV. 122 (1993). See also Dominic D. W. Helps, *Harmonisation of Construction Law and Practice-Part I: The Current Position*, 14 INT'L CONSTRUCTION L. REV. 525, 535 (1997) (stating "We suggest that, while some areas of construction law and practice are amenable to direct harmonization, in other areas a more appropriate course would be to achieve commercial harmonization through the vehicle of contracts").

lateral, have developed their own standard form of documentation for financing projects. They are usually reluctant to depart from them and thus present them, or at least their central provisions, on a "take it or leave it" basis. This is particularly true for financing smaller projects. For larger projects, the financing agreement is mostly negotiated, and subject to the introduction of new and more sophisticated terms to mitigate the project risks and ensure reliable repayment conditions. However, when lenders use standard documentation, competition among them will be more on the numbers and the economic conditions offered than on the legal terms. Although a standard form may be a starting point, it will, needless to say, be subject to modification in order to reflect the characteristics of the project.

Industry groups tend nowadays to share information and to standardize their practice. For instance, in November 1998, a non-profit organization, the International Project Finance Association ("IPFA"), was created to promote and represent the interests of the project finance industry and of those who work within it.⁶⁸ The aim of this association is to advance and spread knowledge of a technical, economic, and professional nature related to project finance and to provide information on best practice that can be implemented in projects.⁶⁹ Such an association is a contributing factor to the standardization of practice. Project finance is no longer surrounded by secrecy and reserved only for a select few.

In specific domains, industry associations have also produced standard form contracts; for instance, in the field of engineering and construction, the Fédération Internationale des Ingénieurs-Conseils ("FIDIC")⁷⁰, the Institute of Civil Engineers ("ICE"), and the Engineering Advancement Association of Japan ("ENAA") have all developed such contracts. FIDIC is well known for publishing standard form contracts relating to the

68. IPFA is based in London. For more information, see <http://www.ipfa.org>.

69. The IPFA mission and vision in IPFA members Directory 2000.

70. FIDIC is the International Federation of Consulting Engineers. It was founded in Belgium in 1913 by the national associations of Belgium, France, and Switzerland. The United Kingdom signed up as a member in 1949 followed by the United States in 1958. The newly industrialized countries started to become members in the 1970s. It was only then that FIDIC became a real international organization. It now comprises 68 national member associations such as UK's Association of Consulting Engineers.

procurement of building and engineering works.⁷¹ In 1999, FIDIC issued a contract for engineering, procurement, and construction ("EPC") turnkey projects, the Silver Book, aimed expressly at Build-Operate-Transfer ("BOT") projects with a risk allocation suitable for projects financed by private lenders on a limited or non-recourse basis. FIDIC's prime objective, as stated by the Chairman of the FIDIC Contracts Committee, John Bowcock, is to prepare contract documents, the use of which will ensure completion of projects on time and within budget while providing fair payment provisions for both employer and contractor.⁷²

In the energy field in 1999, in the United States, a group of over eighty Edison Electric Institute ("EEI")⁷³ member utilities, affiliated and independent power marketers, and merchant power and end-use representatives formed a working group and drafting committee to prepare a model bilateral master agreement containing the essential terms governing forward purchases and sales of wholesale electricity. They drafted what is now called the Standardized Master Power Purchase & Sales Agreement, the "Master Contract." These standard forms con-

71. In September 1999, FIDIC published four new standard forms of contract that are known by the colors of their respective covers:

- (1) Conditions of Contract for Construction, also known as the "Red Book," which are recommended for building or engineering works designed by the Employer or by his representative, the Engineer;
- (2) Conditions of Contract for Plant and Design-Build, also known as the "Yellow Book," which are recommended for the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works;
- (3) Conditions of Contract for EPC (Engineering, Procurement and Construction) Turnkey Projects, also known as the "Silver Book," which are recommended where one entity takes total responsibility for the design and execution of an engineering project; and
- (4) Short Form of Contract, which is recommended for building or engineering works of relatively small capital value.

See information available at <http://www.fidic.org/resources/contracts>.

72. Speech from John Bowcock, Chairman, FIDIC Contracts Committee, *The Four New FIDIC Forms of Contract—Introduction*, in FIDIC NEW CONTRACTS LAUNCH SEMINAR SERIES (1998) [hereinafter Bowcock Speech], available at <http://www.fidic.org/resources/contracts/launch/bowcockl.html>.

73. Edison Electric Institute ("EEI") is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. "EEI's mission focuses on advocating public policy; expanding market opportunities and providing strategic business information. EEI helps members compete effectively by advancing equitable policies and ensuring maximum options in a restructured industry." See EEI Information, available at <http://www.eei.org/resources>.

tribute to the general tendency of convergence of law in a highly diversified field such as project finance.

B. *Analysis of Convergence of Law at the Private Level*

Does convergence of law at the private level help move private players towards a convergence that meets the twin goals of project finance? Certain features of this convergence will be examined to answer this question. A cost-benefit analysis of this route will show that uniform standard forms reduce transaction costs. A form should, however, be as standard as is consistent with flexibility so that it can be adapted to particular transactions and to the legal framework of the host state where industry groups work. This route is also more likely to be subject to the influence and lobbying of interest groups, as well as be remote from public interest considerations.

This private ordering highlights the need for diversity at the private level. It brings innovation and experimentation to a legal framework that might otherwise be too rigid.

1. Stability and Predictability of Practice: Reduction of Transaction Costs

The use of standard forms is a source of contractual predictability and stability, thus reducing transaction cost for the participants. For example, a systematic approach to the tendering procedure that sets out a transparent and efficient approach for obtaining, evaluating, and selecting bidders will decrease the costs of tailor-made procedures. FIDIC has defined such a "Tendering Procedure" for both civil engineering and electrical and mechanical works that "is intended to assist both the employer and the engineer in obtaining responsive and competitive tenders with a minimum of qualification, formulated in such a way that the tenders can be quickly and fairly assessed."⁷⁴

The standardization of contractual terms reduces the cost associated with risk, one of the most significant costs. This cost reduction is especially true for risks that cannot be economically insured or can be insured only at a very expensive price. One aim of standard clauses is indeed to address project risks and to specify how these risks are to be managed. The general princi-

74. See Bowcock Speech, *supra* note 72.

ple that applies is that risks should be borne by the party best able to control and mitigate them. From the Chairman of the FIDIC Contracts Committee perspective, "underlying all FIDIC documents has been a fair allocation of risks between the parties to a contract." Although this view may, of course, be partisan, it does reveal a concern to pre-allocate (fairly) the risks among the parties. Such pre-allocation of risks will decrease the cost of the transaction and increase its value, at least for certain players. It is particularly crucial in the field of construction where the risks of delay of completion and/or over-runs are extremely high and expensive (e.g., payment of liquidated damages). It gives bidders the opportunity to assess the risks that they will have to bear in advance. The more the parties are familiar with the project financing technique and its terms, the less time they will spend arranging and negotiating them.

Standard form contracts focus the parties' attention on the terms that are normally open for negotiation, the transaction's "basic negotiable elements," and allow the parties, indeed encourage them, to take the remainder for granted.⁷⁵ The Master Contract prepared by EEI, for instance, provides that traders should focus on these elements only: the price, quantity, location, and duration of the power purchase and sale. FIDIC distinguishes in some of its contracts between the "General Conditions" and the "Particular Conditions," the latter being left to the discretion of the parties to modify the terms of the former.⁷⁶

75. The reduction of negotiation and drafting costs would still be likely even if the parties decide that some of the clauses in a standard form of contract are inappropriate for the particular project.

76. The FIDIC Contracts encompasses two parts. Part one, deals with the General Conditions of the particular contract, and part two with Special Conditions or Guidance for the preparation of conditions of particular application. The way these parts work together is as follows:

where a sub-clause in the General Conditions deals with a matter on which different contract terms are likely to be applicable for different contracts, the principles in writing the sub-clause are:

- (a) users would find it more convenient if any provisions which they did not wish to apply could simply be disregarded or deleted, than if additional text had to be written (in the Particular Conditions) because the General Conditions did not cover their requirements; or
- (b) in other cases, where the application of (a) was thought to be inappropriate, the sub-clause contains the provisions which were considered applicable to most contracts.

In other words, provisions in the General Conditions that may be inappropriate for an apparently typical contract can readily be disregarded or deleted in the Particular Con-

Standard forms also give standardized (product) definitions that in theory should engender a better and common understanding of technical terms despite any cultural or background differences. Any costs related to drafting and negotiating will consequently be reduced since the use of standard terms and conditions will avoid the need for protracted debate on detailed wording.

There is, however, always a risk of misunderstanding among the players and a risk that some provisions may have different consequences in different legal jurisdictions. There is therefore a level of standardization that once exceeded may become counterproductive. This also raises the question about how much risk players in project finance transactions are ready to bear and how much time they are ready to spend.

In addition, standard forms can be ill-adapted to a specific transaction. In this situation, the standardization of forms, by establishing norms that are taken as givens and not questioned, may act inefficiently. It is a tradeoff to evaluate between, on the one hand, the economic benefits of using standard forms for every new deal resulting in certain economies of scale, and, on the other, the cost of ignoring particular needs in a specific transaction for the purpose of greater efficiency. A way to address this concern is to ensure that the terms of the standard form are default terms that the parties may cancel, modify, or amend. As practice constantly outstrips the law, a form should be as standard as is consistent with flexibility and innovation.

2. Influence and Lobbying of Interest Groups

Standard forms prepared by one interest group usually help further the interest of this group. The problem associated with these forms is then that they are too biased in favor of the group (despite any claim of impartiality). As of today, there is no association or general independent body supervising the practice of project finance that could develop “impartial” standard forms.

Standard form contracts can be abused when there are severe disparities of bargaining power. This is true when excessively strong parties draft contracts and present them to the other party on a “take or leave it” basis that leaves no room for

negotiation.⁷⁷ For instance, lenders may refuse to negotiate certain representations and warranties or events of default under their standard credit agreement. They may also request the creation and perfection of standard security interests over the project assets and revenues for funding the project. In addition, a change in the bargaining position of the players and a different structuring of the transactions can cause inefficiency and cost.

Different approaches by, for example, PFI and FIDIC give rise to significant differences between standard clauses.⁷⁸ FIDIC⁷⁹ is mainly the voice of engineers and other construction professionals involved in engineering construction and the provision of mechanical and electrical plants. It focuses on construction contracts in either private or public project finance transactions.⁸⁰ The Silver Book is, however, a good reflection of the practice and the relationships between the project company as employer and the construction company as the contractor in project finance.⁸¹ As it is in reality, the contractor bears all responsibility for all aspects of the work in the Silver Book. It is also required to assume certain obligations, such as ensuring that its work complies with all the employer's obligations toward the public authority.⁸² Contractor and employer are very likely to rely on the Silver Book as a good compromise approach.

77. This is not specific to project finance, but to all types of adhesion contracts.

78. See Geoff Haley, *Standard International Contract Clauses and U.K. Private Finance Initiative Contracts*, 10 EUR. BUS. L. REV. 346 (1999). He examines the approach taken by FIDIC on certain key contractual issues and contrasts it to that taken by the United Kingdom under PFI.

79. FIDIC is an association of national member associations and thus individual firms of consulting engineers are not themselves members. However, many of the national associations of engineers represent other construction professionals such as architects in addition to consulting engineers. FIDIC also has affiliate members who are not engineers or construction professionals but organizations who have an interest in the work it undertakes such as law firms and insurance companies.

Although the Chairman of the FIDIC Contracts Committee acknowledges that the contents of the FIDIC documents are essentially determined by engineers drawing on their extensive experience in contract management, he points out how much FIDIC had tried to consult widely with those sectors likely to be involved in the use of those documents, for instance the World Bank, the European International Contractors, or the International Bar Association.

80. In the FIDIC terminology, the employer may be either the public sector or a private entity.

81. See *supra* note 71.

82. For the first time, the contractor is deemed to have reviewed the obligations of the employer vis-à-vis the public authority under the concession or license agreement. It is therefore liable for the accuracy of these obligations.

Even private commercial lenders whose involvement in preparing the Silver Book was apparently limited can consider this master contract as an improvement from the time the construction agreement was tailor-made.

These standard forms are thus usually for the benefit of private players. Although they may indirectly take into account public interest considerations (e.g., provision of an uninterrupted public service), they are more likely to further their members' interests. For instance, project sponsors may want to insert a standard provision in their agreement with the public authority stating that they should be granted exclusive rights to provide a certain service so as to reduce the commercial risk of their investment. The public authority may, however, have to balance this private interest against the interests of consumers and the economy as a whole.

Convergence through private ordering is thus too remote from public interest consideration to be enough, by itself, to achieve the twin goals of project finance. It is also not enough to create a general stable and predictable legal environment. Without some degree of convergence of positive law, this form of "soft" convergence is unlikely to achieve a great deal in practice. It is a necessary complement to convergence of law in project finance. It brings creativity and innovation within existing legal frameworks.⁸³

III. *CONVERGENCE OF LAW AT THE INTERNATIONAL LEVEL: THE UNCITRAL LEGISLATIVE GUIDE*

The impulse to reduce diversity among legal systems in the area of commerce has manifested itself for as long as people have traded across political boundaries.⁸⁴ In establishing UNCITRAL⁸⁵ in 1966, the United Nations General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade and chartered the

83. See Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 *YALE L.J.* 1339, 1358 (1948). "The only lesson that can be drawn from the fact that society is in flux is . . . [to] keep the Code, in its final form, as general, as unspecific as possible. Let the strategy strong points be as widely spaced as they can be and still defend the essential territory." *Id.*

84. See Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 *VA. J. INT'L. L.* 743, 744 (1999).

85. See UNCITRAL General Information, available at <http://www.uncitral.org>.

Commission to be the vehicle by which the United Nations could play a more active role in reducing or removing these legal obstacles. UNCITRAL's mandate is to further the progressive harmonization and unification of the law of international trade. It has tried to encourage legal convergence in various fields.⁸⁶

Aware of the importance of project finance as a tool for economic and social development in many countries, UNCITRAL has prepared and adopted a Legislative Guide on Privately Financed Infrastructure Projects.⁸⁷ These projects include projects with respect to "physical facilities that provide services essential to the general public." This Essay will first review and then analyze the characteristics of the Legislative Guide.

A. *Characteristics of the UNCITRAL Legislative Guide*

The purpose of the Legislative Guide is to create a common sense approach on how project finance transactions should be dealt with and how to harmonize the legal principles used. To embrace the variety and complexity of these transactions, the guide is a mixture of the values and policies of different countries combined with international practice.⁸⁸ It advocates compromise on the countries' respective interests.⁸⁹

One of the main challenges faced by UNCITRAL in its work in project finance was to identify the common regulatory and legal issues in different privately financed infrastructure projects across various legal, political, and sociological contexts. The

86. For example, Sale of Goods, Arbitration, Electronic Commerce, Procurement, Negotiable Instruments, Project Finance, Insolvency, Countertrade, Construction Contracts, Guarantees, Receivables Financing, Letters of Credit, and Maritime Transport.

87. See UNCITRAL, Legislative Guide on Privately Financed Infrastructure Projects, 33rd Sess. (2000), General Assembly, Official Records, 55th Sess., Supplement No 17 (A/55/17) [hereinafter Legislative Guide].

88. The scope of these projects cover various sectors and include various types of facility, equipment, or system: power generation plants and power distribution networks; systems for local and long-distance telephone communications and data transmission networks; desalination plants, waste water treatment plants, water distribution facilities; facilities and equipment for waste collection and disposal; and physical installations and systems used for public transportation, such as urban and inter-urban railways, underground trains, bus lines, roads, bridges, tunnels, ports, airlines, and airports. See UNCITRAL Introduction and Background Information, *supra* note 7, at 10.

89. Professor Vagts states that for transnational economic activity, in the absence of international institutions with legislative functions, the treaty is effectively the only way in which rules can be generated to keep up with the variety and complexity of this activity. DETLEV F. VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 20 (2d ed. 1998).

challenge was compounded because relatively few of these projects have passed the contractually agreed period of private operation before being transferred to the public authority, thus making it hard to assess the success of the entire project.⁹⁰ UNCITRAL was inspired in this difficult task by the work of various expert groups, such as the United Nations Industrial Development Organization (“UNIDO”) BOT Guidelines⁹¹ and the World Development Reports.⁹²

The Legislative Guide raises three issues of significance to convergence. The first deals with the process by which the Guide was drafted; the second addresses its form; and the third, its structure. To prepare conventions (for instance, the New York Convention),⁹³ model laws (for instance, the Model Procurement Law),⁹⁴ or legislative guides, UNCITRAL usually sets up a working group consisting of experts, academics, and practitioners specialized in the relevant subject matter to perform the substantive preparatory work on the relevant topic.⁹⁵ The working group develops a draft that the Commission adopts after successive revisions in the light of conference review. Rather than following this usual practice for drafting the Legislative Guide, UNCITRAL assigned the task of preparing the drafts to the U.N. Secretariat itself. It was assisted by a group of experts and submitted its drafts directly to the annual plenary Commission ses-

90. Except for those projects occurring in civil law countries with a tradition of concession.

91. See United Nations Industrial Development Organization (“UNIDO”), *Guidelines for Infrastructure Development Through Build-Operate-Transfer (BOT) Projects* (1996) [hereinafter the UNIDO BOT Guidelines]. One might wonder what is the relationship between UNIDO and UNCITRAL, why UNCITRAL had also to prepare a legislative guide and how successful UNIDO BOT guidelines have been.

92. WORLD BANK, *THE WORLD DEVELOPMENT REPORT 1994: INFRASTRUCTURE FOR DEVELOPMENT* (1994); WORLD BANK, *WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET* (1996).

93. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) was adopted in New York in 1958. Since then, 121 countries have adopted the Convention.

94. UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (the “Model Procurement Law”) was adopted by the Commission in 1994.

95. The Commission is composed of 36 Member States representing national governments chosen on a rotating basis by the U.N. General Assembly. Membership is structured so as to be representative of the world’s various geographic regions and its principal economic and legal systems. It possesses a permanent secretariat (“Secretariat”) that administers its work and provides publicity.

sions. As Professor Wallace has observed, "many countries did not have expert delegates for the plenaries. As a consequence, in my view, there has not been as rich an exchange among representatives of different legal systems and traditions as there could have been."⁹⁶ One wonders why the preparation of the Legislative Guide was so removed from the usual process and whether this chosen process may affect the legitimacy or effectiveness of the Legislative Guide. One might only speculate that the Commission was skeptical about the usefulness of preparing a guide given the complexity of the subject. It may also be that this process was a way to settle disagreement among experts as to which issues to address and how to deal with them in the Legislative Guide.

The second issue addresses the degree of convergence that the Commission was trying to achieve in project finance. Rather than drafting a model law, it merely prepared inspirational policy-oriented legislative recommendations for member countries to consider when preparing new laws or reviewing the adequacy of existing laws and regulations. These recommendations are statements of general legal principles intended to guide the establishment of a legal framework favorable to private investment in public infrastructure projects, but they do not include any precise and concrete wording or model provisions that would be more easily enacted by member countries. As stated in its introductory note, "the (Legislative) Guide is intended to be used as a reference by national authorities and legislative bodies."⁹⁷ Wallace disagrees with this approach stating that "rather than focusing on creating precise legislative language, which would inevitably have joined the difficult issues and sharpened our recommendations, we spent several years on rather general and descriptive, in the words of one expert, 'essay-like' text."⁹⁸ Although this comment relates to the notes attached to the legislative recommendations, it can be extended to the legislative recommendations themselves, which appear to be more like an academic exercise⁹⁹ than a pragmatic ready-to-use guide.

96. See Don Wallace, Jr., *UNCITRAL Draft Legislation Guide on Privately Financed Infrastructure Projects: Achievements and Prospects*, 8 TUL. J. INT'L & COMP. L. 283, 286 (2000).

97. See UNCITRAL Introduction and Background Information, *supra* note 7, at 7.

98. See Wallace, *supra* note 96, at 286.

99. In numerous books and articles, practitioners have addressed the issues raised

At its thirty-third session, the Commission acknowledged that the preference for a Legislative Guide had been mainly attributable "to a lack of consensus as to which of the various issues dealt with in the Guide might be suitable subjects for model legislative provisions."¹⁰⁰ It also recognized that the legislative recommendations, as written, would need to be analyzed and reworked by legislators and policy makers with significant expertise in the area before they could be enacted. This process will be costly and time consuming and doubtless beyond the reach of poorer nations. Indeed, it negatively affects the usefulness of these recommendations.

The proponents of the Legislative Guide focus on "the potential difficulty and undesirability of formulating model legislative provisions on privately financed infrastructure projects in view of the diversity of national legal traditions and administrative practices."¹⁰¹ What is the legitimacy of this argument? It is difficult to believe that project finance is more complex and diversified than, for instance, the international sale of goods. Both raise complex legal issues and public policy questions. In any event, the Commission is aware of those criticisms and the need of some countries for more concrete guidance. It has therefore decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues should be reconsidered at its thirty-fourth session in June 2001.¹⁰²

The third issue deals with the structure of the Legislative Guide. Explanatory notes are attached to the legislative recommendations. Although the introductory note defines a few basic terms, it does not provide a glossary of standard terms.¹⁰³ For these terms, such as financial and business terms, it advises the reader "to consult other sources of information on the subject."¹⁰⁴ Different state legislators are therefore likely to con-

by project financing. See VINTER, *supra* note 6; see also Marc Frilet, *Some Universal Issues in BOT Projects for Public Infrastructures*, 14 INT'L CONSTRUCTION L. REV. 499 (1997); Tore Wiwen-Nilsson, *Underlying Conditions for Successful Infrastructure BOT Projects*, 14 INT'L CONSTRUCTION L. REV. 513 (1997).

100. See Legislative Guide, *supra* note 87, at 375.

101. *Id.* at 377.

102. *Id.* at 379.

103. See UNCITRAL Introduction and Background Information, *supra* note 7, at 9-20.

104. *Id.* at 9.

strue the recommendations in different ways. Such divergent implementation will conflict with the very aim of the Commission in preparing the Legislative Guide, that is, convergence of law in international project finance.

B. *Analysis of the UNCITRAL Legislative Guide*

Convergence of law in project finance at the international level should aim to create a stable and predictable legal environment favorable to private investment and respectful of the public interest of the host country.¹⁰⁵ Has the UNCITRAL Legislative Guide achieved this aim? This Essay will first examine whether the UNCITRAL Legislative Guide has fulfilled the stated twin goals of project finance and then whether legal convergence under the auspices of the Guide is subject to the influence and lobbying of interest groups.

1. Predictability and Stability of the Legal Environment Favorable to Private Investment

As has already been said about model laws prepared by UNCITRAL in other fields, convergence of law gives investors certainty as to the legal rules that will apply. It accordingly reduces the transaction costs created by inappropriate or silent state laws. These costs include inconsistency costs, information costs, litigation costs, and instability costs. The same principle now applies to the UNCITRAL Legislative Guide.

As the Commission acknowledges in its introductory note, although the UNCITRAL Legislative Guide "does not provide a single set of model solutions to address these concerns, it helps the reader to evaluate different approaches available and choose the one suitable in the national or local context."¹⁰⁶ This ab-

105. This Essay will not discuss the conflict of judicial interpretation of legal provisions. It is a given that, in the event of a dispute, domestic courts determine the ultimate construction of law and that they are likely to have diverging interpretations of identical legal provisions. See Michael Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 729 (1987). Professor Sturley examines the problem of conflicting interpretations and its significance in the context of a particular international uniform law, the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules). Diverging judicial interpretation undermines the efficiency of uniform laws. He looks especially at the major influence of domestic law in causing these conflicts of interpretation among national courts.

106. See UNCITRAL Introduction and Background Information, *supra* note 7, at 4.

sence of concrete advice may, however, lead to uncertainty and ambiguity for the member countries (interested in the Guide).

a. Identification of Issues

The Guide aims to create a stable and predictable legal environment by identifying the major issues that private investors encounter in project finance transactions. For instance, it states “the legislative and institutional framework for the implementation of privately financed infrastructure project should ensure transparency, fairness and the long-term sustainability of projects. Undesirable restrictions on private sector participation in infrastructure development and operation should be eliminated.”¹⁰⁷ The language used in this recommendation is powerful and sets a clear policy preference, despite being a compromise text. The terms of transparency, fairness, and long-term sustainability are then explained in the relevant note.¹⁰⁸ In another recommendation, the Guide promotes the impartiality and independence of the infrastructure operators and public service providers.¹⁰⁹ These principles may encourage the host country to liberalize and render its processes and institutions more impartial and transparent for the benefit of project participants. These recommendations are therefore helpful guidelines for host countries.

The Legislative Guide also recommends that “the law should identify the public authorities of the host country (including, as appropriate, national, provincial, and local authorities) that are empowered to award the concession to enter into agreements for the implementation of privately financed infrastructure projects.”¹¹⁰ Although drafted in very general and broad terms, this recommendation meets one of the main concerns of sponsors and lenders: that they know the identity and precise power of the authority that will grant the concession rights.

A similar concern for the private investors is obtaining all

107. See Legislative Guide, *supra* note 87, at 198 (Recommendation 1).

108. See UNCITRAL, Notes on the Legislative Recommendations on the General Legislative and Institutional Framework, A/CN.9/471/Add.2, at 3-6 (33rd Sess., 2000) [hereinafter UNCITRAL, Notes on the General Legislative and Institutional Framework].

109. See Legislative Guide, *supra* note 87, at 213 (Recommendation 8).

110. See *id.* at 200 (Recommendation 2).

approvals necessary for the implementation of the project, since those approvals are usually a condition precedent to the commencement of the project. Any delay or refusal to grant approvals would jeopardize the entire project. Recommendation 6 deals with this risk as follows: "Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licenses, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions in the construction and operation of infrastructure facilities of the type concerned."¹¹¹ Once again, the language appears to be very general, but it mirrors the practice and the expectation of private players that the public authorities coordinate their activities. UNCITRAL then recommends that "regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers."¹¹²

The Legislative Guide thus highlights the issues that may discourage private investment, and encourages the establishment of a stable, transparent, fair, and predictable legal environment that, for example, identifies and encourages coordination among the various relevant public authorities in charge of granting the concession and the relevant project approvals. It therefore educates any country interested in attracting private financing by focusing attention on these issues, but does it give any practical and concrete advice on how to address them?

b. Absence of Concrete Guidance

In an ideal world, one would expect that the Legislative Guide would provide clear and uniform principles so that countries could enact them easily, thus establishing a legal framework favorable to private investment. For the purposes of the real world of project finance, however, the legislative recommendations appear to be too general and imprecise to meet this goal. The flexible wording of the legislative recommendations aims to embrace and reflect the diversity of the legal systems of the dif-

111. *Id.* at 209 (Recommendation 6).

112. *Id.* at 213 (Recommendation 8).

ferent member countries, but does not help these countries with the implementation of the advice given. This lack of practical guidance harms both private and public interests.

For example, the Legislative Guide shows great sensitivity to the choice of law and the legal system of a country. Under Recommendation 40, the Guide states that “unless otherwise provided, the project agreement is governed by the law of the host country.”¹¹³ Although very respectful of the local legal system, such recommendation does not enhance countries’ understanding of private sector expectations. Some experts have explained this respect by the fear of UNCITRAL of promoting legal reforms in conflict with the existing legal system of member states. Concerning the establishment of an authority to regulate infrastructure services, UNCITRAL indeed acknowledges, in its note, that “the Guide does not thereby advocate the establishment of any particular model or administrative structure.”¹¹⁴

Recommendation 12 states that “no unnecessary statutory or regulatory limitations should be placed upon the contracting authority’s ability to agree on an allocation of risks that is suited to the needs of the project.”¹¹⁵ Although this recommendation recognizes the crucial issue of allocation of risks in project finance transactions, it does not attempt to give any indication of the sorts of risk that the public authority may well bear, such as change of law risk. Each state legislator will thus decide in which manner the allocation of risks can be best achieved. The decisions will doubtless vary from one country to another. Such divergence may cause additional cost for the players in project finance transactions. This cost is not, however, specific to the allocation of risks; it is a cost associated with the legislative recommendations in general since they are too broadly couched to overcome the ambiguities that could otherwise have been more prescriptively and more precisely addressed, or that would otherwise mitigate the disparities among states. This vagueness

113. *Id.* at 292 (Recommendation 40).

114. For practical information and technical advice, the Guide refers to international financial institutions that carry out programs to assist their member countries in setting up an adequate regulatory framework (such as the World Bank and the regional development banks). See UNCITRAL, Notes on the General Legislative and Institutional Framework, *supra* 108, at 32.

115. See Legislative Guide, *supra* note 87, at 221 (Recommendation 12).

may discourage state legislators from enacting the Guide's recommendations.

In addition, the general uncertainty of the Legislative Guide may engender additional expense for implementing countries. For instance, a common issue that private investors, especially lenders, encounter when investing in a civil law country is a different set of security interest laws. In civil law countries, these laws usually do not include the concept of floating charge and prohibit the creation of security interests over public property in the possession of the concessionaire. Recommendation 48 of the Legislative Guide is another example of inefficient language. This recommendation states that, for the purpose of raising the funds required by the project, the concessionaire should have the right to secure any financing,

[W]ith a security interest in any of its property, with a pledge of shares of the project company, with a pledge of the proceeds and receivables arising out of the concession or with other suitable security, without prejudice to any rule of law that might prohibit the creation of security interests in public property.¹¹⁶

It describes the different security interests that the concessionaire may give in a host country but does not provide clear guidance as to what the state legislators should be doing to meet the private investors' expectations. What, then, is the aim of this recommendation? Does it compound uncertainty and all associated cost?

The relevant note, after describing the different legal regimes with respect to security interests, then refers to initiatives undertaken in different organizations to establish a model law for the development of modern legislation on security interests, such as the Model Law on Secured Transactions prepared by the European Bank for Reconstruction and Development to assist legislative reform efforts in central and eastern European countries. This reference can be helpful to countries that want to review or improve their current security legislation.

However, clear and uniform rules for the development of domestic security laws in the field of project finance would have been preferable. This is a general comment that applies to the whole Legislative Guide.

116. *Id.* at 311 (Recommendation 48).

Although the Guide is useful for domestic legislators and policy makers in understanding the issues raised by privately financed public infrastructure and the private player's perspective, it remains too descriptive and general in its current state to be enacted easily, especially by countries that lack expertise, and knowledge, in the field of international project finance.

2. Respect for, or Promotion of, Public Interest Considerations

As seen above, the Legislative Guide addresses the concerns raised by private investors, but does it also take into account public interest considerations?

In its recommendations and relevant notes, the Legislative Guide acknowledges the importance of the more commonly addressed public interest concerns such as the application of domestic law; continuity in the provision of public services; environmental protection; health, safety, and quality standards; and fairness of prices. For example, the first Recommendation provides for the establishment of a legislative and institutional framework that is transparent, fair, and ensures the long-term sustainability of projects as a prerequisite for private investment in infrastructure projects.¹¹⁷ In the relevant note, the Guide explains how a "fair" legal framework,

[T]akes into account the various and (sometimes possibly conflicting) interests of the government, the public service providers and their customers and seeks to achieve an equitable balance between them. The private sector's business considerations, the users' right to adequate services, both in terms of quality and price, the government's responsibility for ensuring the continuous provision of essential services and its role in promoting national infrastructure development are but a few of the interests that deserve appropriate recognition in the law.¹¹⁸

It then recognizes that "an important objective of domestic legislation on infrastructure development is to ensure the long-term provision of public services, with increasing attention being paid to environmental sustainability."¹¹⁹

117. *See id.* at 198 (Recommendation 1).

118. *See* UNCITRAL, Notes on the General Legislative and Institutional Framework, *supra* note 108, at 5.

119. *Id.* at 6.

Recommendation 52 also states that,

[T]he project agreement should set forth, as appropriate, the extent of the concessionaire's obligations to ensure: (a) the adaptation of the service so as to meet the actual demand for the service; (b) the continuity of the service; (c) the availability of the service under essentially the same conditions to all users; (d) the non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.¹²⁰

The concessionaire is therefore under an obligation to provide a continuous public service and to ensure equal access of users to the service. To fulfill this obligation, UNCITRAL recommends that the project agreement should set forth "the procedures for monitoring the concessionaire's performance and for taking such reasonable actions as the contracting authority or a regulatory body may find appropriate, to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements."¹²¹

In addition to these public interest considerations stated in the legislative recommendations, the notes discuss a few other relevant areas of law that, without necessarily dealing directly with privately financed infrastructure projects, may have an impact on their implementation, for instance environmental protection.¹²² The relevant note recognizes the importance of environmental protection as "a critical prerequisite to sustainable development" and of any legislation to ensure this protection.¹²³ Once again, UNCITRAL sets policy preferences, but falls short of giving any concrete advice to implement them. It then deals very briefly and in very general terms with one crucial objective of the public sector that is the "hand over" of the project (e.g., transfer of assets, technology, and services) at the expiry or termination of the concession period.¹²⁴ In the same broad recom-

120. See Legislative Guide, *supra* note 87, at 321 (Recommendation 52).

121. *Id.* at 324 (Recommendation 53).

122. See UNCITRAL, Notes on the Legislative Recommendations on Other Relevant Areas of Law, A/CN.9/471/Add.8, at 42-44 (33rd Sess., 2000) [hereinafter UNCITRAL Notes on Other Relevant Areas of Law].

123. *Id.* at 42.

124. Recommendation 67 states that:

[T]he project agreement should set out, as appropriate, the rights and obligations of the parties with respect to : (a) the transfer of technology required

mendation, it only indirectly acknowledges the obligation of the project company to (hire and) train local labor in the operation and maintenance of the facilities. It does not, for instance, provide for the placement of a minimum amount of work with local contractors.¹²⁵

One might have hoped that the legislative recommendations would have gone further to promote less explored public interest considerations. This is particularly true for the promotion of international standards in labor and even human rights.¹²⁶ Although states are free to enact whatever provisions they find relevant in the Legislative Guide, international pressure combined with suggestive international norms drafted by high-profile institutions, such as UNCITRAL, may be enough to encourage host countries to modify their behavior to attract foreign investment or to resist private player pressure to neglect adoption and enforcement of rules for labor and human rights protections.¹²⁷ In addition to imposing new international obligations on corporations for human rights violation,¹²⁸ for instance, the focus should also be on state responsibility for enact-

for the operation of the facility; (b) the training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility; (c) the provision, by the concessionaire, of operation and maintenance services and the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.

See Legislative Guide, *supra* note 87, at 355 (Recommendation 67).

125. See *supra* Section I (2)(c); see also VINTER, *supra* note 6, at 37.

126. In its addendum 8, UNCITRAL indicates the relevance of international agreements for the implementation of privately financed infrastructure projects. It notes that state membership in multilateral financial institutions may require that the relevant state comply with a number of policy objectives, such as adherence to internationally acceptable environmental standards, long-term sustainability of the project beyond the initial concession period and transparency and integrity in the selection of the concessionaire and the disbursement of loans. It does not, however, provide for compliance with international standards in labor and human rights. See UNCITRAL, Notes on Other Relevant Areas of Law, *supra* note 122, at 54.

However, the previous general counsel to the World Bank, Ibrahim F.I. Shihata, favored a broader interpretation of the International Bank for Reconstruction and Development ("IBRD") to allow for human rights considerations "when such rights are of a preponderantly economic (as opposed to political) nature or when such rights have a 'direct and obvious' effect on the economic condition of a member nation." John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 *CORNELL INT'L L.J.* 331, 353 (2000).

127. In areas such as use of forced labor, torture or other forms of coercion, or also corruption.

128. For a different theory of corporate responsibility for human rights protection,

ment and enforcement of domestic law in accordance with international standards of human and labor rights.¹²⁹ Legal convergence at the international level should promote the spread of such standards.

Convergence of law for the protection of public interest in project finance raises an interesting question: whether legal convergence may help economic and social development and broader development, such as democracy, from a public sector's perspective. Although this is still a hope shared among a large number of people today, it was especially the belief of the law and development movement born in the mid-1960s.¹³⁰ This movement emphasizes the importance of law in the development of a free market economy (which in turn would bring economic growth) and liberal democratic values through the promotion of western-style legal institutions. By the mid-1970s, however, the movement had lost its momentum. Its "liberal legalism" was criticized as being "ethnocentric and naïve . . . ignoring social stratification and class cleavage" in developing countries.¹³¹ As of today, the movement has revived but this time under the auspices of experts and practitioners specialized in the relevant fields. They once again share the belief that uniformity or legal convergence may help reduce the influence of arbitrary or oppressive governments and foster free market, democracy, and the rule of law in these countries. The Legislative Guide is an instrument of this revival.

Legal convergence may, however, be at the expense of other aspects of development. As Professor Chua notes, the problem

see Steven R. Ratner, *Corporations and Human Rights: Toward A Theory of International Legal Responsibility*, 111 YALE L. J. (forthcoming 2001).

129. For an application of the Alien Tort Claims Act to state responsibility for the acts of some private actors, including corporations, *Doe v. Unocal Corp.*, 2000 U.S. Dist. Lexis 13327 (C.D. Cal. 2000); *Beanal v. Freeport McMoran*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

130. This movement was born at leading American law schools such as Harvard, Stanford, Wisconsin, and Yale. For a good analysis of the movement, see Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L. J. 1, 5 (1998); see also John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Richard Bilder & Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995).

131. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections On the Crisis In Law And Development Studies In the United States*, 4 WIS. L. REV. 1062, 1070, 1080 (1974).

in the current paradigm is that "it ignores ethnicity and ethnic conflict in the developing world."¹³² Chua highlights the interrelationship between marketization, democratization, and ethnic conflict.¹³³ She shows how marketization, by either causing, maintaining, or exacerbating the economic dominance of a particular ethnic minority at the expense of an impoverished majority, develops an "ethnoeconomic resentment" against this minority.¹³⁴

Ignoring the interplay between these forces when enacting legal provisions stated at the international level may fuel existing tensions between ethnic groups in a country and aggravate ethnic inequalities in the distribution of wealth. It may then create a situation of political instability further discouraging any private financing. To avoid such instability the host country should show significant sensitivity to particular ethnic and nationalist structures and implement legal provisions in accordance with international standards. UNCITRAL should clearly advocate that convergence of law cannot be achieved unless the relevant countries share, or are willing to share, similar economic-market principles and common legal values.¹³⁵ It should then collaborate with, and co-ordinate the work of, state legislators to ensure an appropriate implementation of its rules to the local context. In turn, the Commission should be aware that any legislative reform in project finance could cause a redistribution of power between private investors and public authority, as well as a redistribution of wealth between various groups of the host state.

As shown, however, countries may not have the leeway, or the will, to allow them to be attentive to public interest considerations (e.g., environmental and safety interests) as well as mindful for international standards of labor and human rights. They

132. See Chua, *supra* note 130, at 20.

133. *Id.* at 9, 33. She defines marketization as referring "to the whole spectrum of efforts toward privatization and contractualization of economic activity in developing and transitional economies, ranging from the replacement of a command economy with market mechanisms to typical 'economic liberalization' measures (such as privatization, liberalization of investment and trade restrictions and elimination of price controls)." *Id.*

134. *Id.* at 37, 47.

135. For instance, the European Bank for Reconstruction and Development explicitly requires in its Articles of Agreement that it will only provide financing in or to nations that have adopted multi-party democracy, respect for human rights, and free-market principles. See John Linarelli, *The European Bank for Reconstruction and Development and the Post-Cold War Era*, 16 U. PA. J. INT'L BUS. L. 373, 376 (1995).

tend to be more eager to satisfy market needs and expectations in a rush to attract private investment. Legal convergence at the state level is thus more partial than international convergence. In pursuing the twin goals of project finance, international model laws are therefore superior to state laws in defining a balanced legal framework. They are better at striving to balance predictability and stability of legal rules favorable to private investment and public interest considerations. They should, of course, ideally, be flexible enough to adapt to national and local specificities (e.g., legal, ethnic, and cultural).¹³⁶

3. Influence and Lobbying of Interest Groups

It is important to note that UNCITRAL relies in its process on working groups made up of experts and representatives active in the field (e.g., non-governmental organizations). Even in the case of the Legislative Guide, the U.N. Secretariat relied on member-states experts. These experts are either practitioners or academics specialized in international law rather than representatives of industry groups, politicians, or civil servants. The objective pursued by these experts is in theory to find common ground or principles that transcend cultural, economic, and social differences and to draft the "best rules" that can be devised.

In addition, the sorting of efficient uniform provisions is the task of state legislators rather than UNCITRAL. As Ribstein and Kobayashi point out, "the NCCUSL has had success with proposals in areas in which uniformity is desirable and it is the efficient sorting by state legislators, not the appropriate discretion of the NCCUSL, that produces efficient uniformity."¹³⁷ State legislators have thus to select the provisions that they consider efficient, those "in which a cost-benefit analysis suggests that uniformity is efficient"¹³⁸ and which appropriately balance private and public interest considerations. The risk is, however, that an efficient uniform proposal may lead to inefficient diversity when different states' legislators choose to enact different provisions, especially if the original proposal is too vaguely drafted.

As of today, the legislative recommendations of the Legisla-

136. International laws should not simply reflect western views of project financing.

137. See Ribstein & Kobayashi, *supra* note 11, at 133.

138. *Id.* at 131, 133.

tive Guide are inadequate. To be enacted, they require a high degree of expertise and sophistication that state legislators may lack. There is therefore a need for a more practical approach using clear and uniform rules on privately financed infrastructure projects.¹³⁹ A practical model law at the international level has yet to be developed. In this difficult task, UNCITRAL may be helped by the existing Legislative Guide that sets policy preferences, identifies the issues that private players encounter in project finance transactions and, importantly, notes the need to balance the interests of the public and private sectors. UNCITRAL can also inspire itself from existing state legislation, for instance the British and Italian initiatives, as it sets about drafting more precise legal rules at the international level.¹⁴⁰

CONCLUSION

The trend toward convergence in international project finance is well established. Three sets of actors, each with their own approach, are engaged in this process: states, private players, and international organizations. Their approach has been assessed against the stated goals of project finance of reconciling private and public interests.

The examination of these three routes to convergence reveals strengths and weaknesses in each. State sponsored convergence certainly meets, on the one hand, private interest concerns, such as creating a legal environment favorable to private participation and reducing transaction costs, and, on the other hand, public interest requirements, such as satisfying the national interest and getting the project completed as soon as possible. However, in some of the examples seen, countries have, to varying extents, neglected wider public interest considerations from their normative initiative and/or allowed these initiatives to be overly influenced by interest groups.

Private ordering is clearly best situated to protect private interests. For example, lenders have successfully imposed certain standard terms and practices that have become virtually non-ne-

139. This Essay will not discuss the nature and type of rules that a model law in international project finance should insert.

140. See Steven Walt, *supra* note 52, at 702. "Continuity with national law reduces legal uncertainty associated with the use of uniform sales law and therefore reduces its cost to early users."

gotiable. This route to convergence is also the farthest removed from public interest considerations, such as health, safety, and quality standards and the protection of the environment.

International organizations are well placed to arbitrate the tension between public and private interests and to help foster a legal framework both favorable to private investment and respectful of the public interest. They are more impartial, their work being further removed from immediate needs and interest group pressure. The UNCITRAL Legislative Guide, although extremely helpful in identifying issues, is disappointing since it lacks pragmatism and even neglects some public interest considerations. The current legislative recommendations require a high degree of expertise and sophistication that state legislators may not have. There is therefore a need for a more practical, balanced guidance for privately financed infrastructure projects in the form of clear and uniform provisions yet to be defined in an international model law.

This Essay proposes a blended approach as the best way to achieve convergence in international project finance. At the international level, UNCITRAL should state legal rules that attract private investment and help enacting countries to meet their public interest concerns. Techniques for the protection of public interests should be well articulated so that individual countries are assisted in the task of adopting these rules as well as encouraged in their resolve to protect such core interests.

In order to facilitate enactment by state legislators, these rules should be clear, precise, and readily implementable. They should also be flexible enough so that different legal systems with differing legal traditions can adopt them. For instance, UNCITRAL could draft a minimum body of mandatory rules combined with default provisions.

In turn, countries should enact market, as well as policy, oriented laws. Market pressure and competition among states to attract private investment should help this process and contribute to convergence. The framework to be defined by domestic legislation should be general and flexible enough to keep pace with developments in various sectors. An excessively detailed or rigid legislation would stifle innovation or cause rules to be applied to contractual transactions for which they are not suitable. One way would be to give participants the choice between a se-

lection of adaptable default terms. This approach would preserve and enhance the market participants' contractual freedom and assist in the task of tailoring rules to specific project transactions.

At the private level, the drawing up of standard conditions is essential to most practitioners to reduce cost, and increase efficiency, but such standard forms need to be sufficiently flexible to allow for adaptation to the legal framework of the relevant host country and to be compatible with public interest considerations, as set out in international or state level norms.

Under this blended approach to convergence, project finance would become a vehicle of economic and social development for the host country, respectful of its national interests and preferences, and favorable to private investment. The combination of the three routes is therefore the best way to achieve convergence in international project finance and reconcile private and public interests.