

Svetlana Maslova: Trends in the Development of International Legal Regulation of International and Cross-Border Relations in the Field of Public-Private Partnership

Doctor of Legal Sciences Thesis, Saint Petersburg State University, 2022.

This doctoral thesis is a study of the 'interaction between international and domestic law in the field of PPP' (p 254) and makes a significant contribution to the identification and understanding of the trends in legal regulation of cross-border relations in the field of PPP. It analyses the regulation of cross-border relations through the many dimensions of law (including international and national law, and analyzing the state as a public partner), PPP formed as a legal institution, cross-border relations and special legal regimes created to regulate cross-border relations, customary international law rules and international PPP standards. Importantly, it also analyses the existence and significant influence of what it terms non-legal rules and observes the lack of a multilateral international treaty which might unify governing rules in the PPP field. It proposes an approach to international PPP standards as model rules to pursue uniform international practise and introduces the idea of Lex PPPs as a new platform of best practises. The non-legal sources of Lex PPPs include guiding principles, practical guidelines, and contemporary recommendations. Whilst not legally binding, they are nonetheless significantly influential. Overall, the thesis argues for a strengthening of the rule of law at the international and domestic level through a multilateral framework approach to regulation. It argues that a framework approach will provide a faster achievement of consensus of general principles of PPP and effectively consolidate the best parts of international law, domestic law and wide range of non-legal PPP regulators including the roles of international players such as OECD, EBRD, UNECE, IFC, EDB, ICSID, PCA, WB, UNCITRAL and ESCAP (p258).

Overall, this thesis provides an argument for unifying legal regulation of PPP agreements, and does this with solid research of existing concepts and arguments, (particularly those of Russian origin), deep analysis and strong logic. As part of this approach, it argues for a dispute resolution scheme based on international law arrangements through the Permanent Court of Arbitration. The thesis makes a fine contribution to the PPP field, particularly in terms of the legal frameworks governing international financial and economic flows. The dissertation consists of an Introduction, followed by four chapters.

Introduction

The introduction provides a context for the research in terms of its relevance, the many theoretical contributions of previous authors to the domain and the specific objectives of this dissertation research. It outlines the novelty of the topic, noting the contribution to the science of international law of creating a holistic concept of regulation of international and cross-border relations in the field of PPP. It notes explicitly the several ideas that are to be defended and explains the significance both practically and theoretically of the research undertaken. It is a strong introduction, preparing the reader to acknowledge the key influence of non-state actors as new rule makers (p5) who now contribute to a 'world order based on rules', and not simply based on law alone (p6). It also alerts readers to the multi-disciplinary approach being sought in the thesis, in assessing PPP 'as a phenomenon that is located at the junction of law, economics and sociology' (p12).

Chapter 1 presented the genesis and evolution of the PPP concept. It outlined the large array of different PPP definitions amongst Russian legal literature alone and was impressive. It also presented the rationale for studying PPP - its importance in terms of risk management, in terms of seeking to combine the best of both worlds (private-sector skills, knowledge and management, and public sector capacity and public interest protection), in terms of attracting private financing capacity and because of the wide array of available PPP models. The coverage here was again impressive. It noted the fact that both PPP and concession agreements are different legal contractual forms of foreign investments and whilst considerable research work has been completed on concessions this was not so for PPPs more generally. The popularity of PPP models including governments of developing countries and those seeking sustainable development goals (SDGs) was discussed and the One Belt One Road initiative was

seen as a 'promising' accelerator for achieving SDGs (p 51). The manner in which the thesis carefully analysed the dual role of States as both public partner and as a commercial signatory alongside private investors was excellent. I appreciated the French-UK International Treaty and the China-Russia Agreement for the Amur River bridge being presented. These clearly showed the importance of international and cross border relations to PPPs.

Chapter 2 built on this foundation and discussed the extensive international cooperation which has been occurring in the PPP field in terms of Institutions, Treaties and Standards. It notes the extensive number of international organisations now involved in PPP regulation ('more than 50 international institutions' – p69) covering technical assistance, training, policy development, rule-making, informational, codification, (p71). The thesis discusses dispute resolution options and various attempts at establishing international forums. It distinguishes between those activities having a legal basis and those of 'non-legal' status and discusses the various opinions on the degree to which different arrangements are or are not legally binding, including briefly the extent to which current arrangements may be ineffectual (p 79). The example of unsolicited proposals is given (p 81), with different organisations putting forward different recommendations. It also notes that there is no universal international treaty regulating international cross-border relations in the field of the PPP and suggests that this may be necessary to protect States as well as protecting private investors. The thesis laments the lack of systematic and comprehensive coverage (p 94) and comments that many of the international organisations involved in rulemaking have long been establishing standards as part of 'soft law' and 'soft international law'. This soft law (p 97) significantly influences the law and as such, is seen as an important factor in regulating PPPs. International standards are likewise crucial and it is good to see them being investigated, analysed and discussed in this work. I was impressed by the solid analysis and debate on the role of international organisations in the remainder of the chapter.

Chapter 3 dived deeper, and into the correlation between international law and other regulatory activities in PPPs. Specifically, it dealt with the interaction of international and national law and the significance of transnational law. I endorse your comments on the influence of the many international organisations (such as those noted on p 125) and enjoyed the interesting description of several relevant State legislative practices described and discussed – including aspects of those of Russia (p142-145). Likewise, the discussion of law diffusion, penetration, export and transplantation (p150) was excellent along with the roundup of international law concepts (p155-159). Further, I also endorse the discussion on pluralism (p159-160). This work directly parallels the findings over decades of regulatory scholars (of which I am one.) I was less sure, however, whether the continued labelling of 'non-legal vs 'legal' activities was useful in cross-disciplinary discussions. Anyway, as you say on page 166, cross-border relations 'cannot be reduced to only national and international law'. They also include a host of rules and activities coming out of intergovernmental organisations, including international standards. The significant role of International Financial Reporting Standards is a good example. The notion of Lex PPPs (a 'set of standardized terms of PPP agreements' – p 168) was impressive. Having previously come across Lex Sportiva in my own research (see Windholz and Hodge 2019), I found your argument persuasive. Applying the Lex Sportiva concluding logic of Reidenberg (1997) we might therefore consider Lex PPPs to be an

an existing complex source of PPP policy rules and standards which provide useful tools to formulate rules customized for different particular situations. Although it is acknowledged that Lex PPP incorporates a variety of organizations whose membership largely reflects industry representatives, it does allow the coexistence of varying PPP policies in a heterogeneous environment. The pursuit of PPP rules that embody flexibility can maximize public policy options and at the same time enable public values to be preserved. These tools lessen a number of problems that traditional legal solutions face in regulating PPPs. But a shift in public policy planning must still occur in order for Lex PPP to develop as an effective source of PPP policy rules. Lex PPP cannot simply look like more government regulation and must meet the challenge of including the best of both public and private values if it is to become an effective and legitimate source of authority.

I loved your courageous conclusions on pages 175-177 that 'Transnational law in the field of PPP includes norms contained in international treaties and domestic legislation as regards regulation of cross-border PPP relations, rules contained in legally non-binding decisions of international intergovernmental organizations forming, among others, PPP international standards, as well as lex PPPs...' 'The fact that a set of non-legal rules exists and affects cross-border relations in the field of PPP is a modern reality, a fait accompli which can hardly be reversed' ... 'It is unavoidable' ... 'At the same time it should be taken into account that the rule-making activity of non-power actors

in cross-border PPP relations is basically aimed at securing private interests in PPPs. Such conditions are unlikely to contribute to an effective, balanced and fair legal regime for PPPs. Among other things, this could potentially threaten national and global public goods, the economic development of States, the protection of human rights and the environment and generally the rule of international law. International law is needlessly insensitive to these challenges.'

Chapter 4 ventured into prospects for developing international law and covered models of regulating PPPs, improving our conceptual apparatus, problems with immunity and legal personality, unifying agreements and dispute settlement issues. It was the most far-reaching of the chapters and ventured further again into newer territory. I enjoyed the discussion on the declining role of states, although I was also left with questions. I agreed that PPP covered a set of legal forms of foreign investment, albeit a unique set (p 181) and I agreed with the idea of adopting a framework convention for PPPs (p187-190). I was, though, less sure (p 194) whether developing cross-border PPP regulation would indeed really improve information transparency given our past experience with 'commercial confidentiality' at all levels of both commerce and government. Likewise (p 195) I applauded the desire to clarify investment goals 'so that recoupment and profitability of foreign investment depend[ed] on clearly measurable SDG outcomes' and the potential use of social and environmental indicators to provide social value for people. I did have to ask, though, whether optimism had overtaken empirical realities here? We have been chasing such dreams of performance-based payments for several decades now and the best we can say is that such practices are not only far from perfect, they are in reality still more of a dream than a reliable practice. Likewise (p 196) it was noted that the experience of international investment projects showed an underestimation of the significance of the functions of the state and that excessive concessions to foreign investors can seriously damage a country's economy. I agree. Yet I also wonder whether this is not simply a problem of law but more a problem of government capacity, expertise and integrity. After all, academics such as myself have been preaching for decades that governments need to behave as a 'smart purchaser' not a 'dumb purchaser' in contract negotiations. So PPP research such as this cannot avoid the empirical question of government capacity in its search for perfect legal arrangements. And on the issue of equality or inequality in partnership relationship, I agree that the State should have greater power than a commercial investor. After all, the State is the enabler for commerce and for civilised activity as well as being a commercial signatory. However, there seemed little acknowledgement in the thesis currently that the State can use its power to act in pursuit of its own selfish short term party or political interests and not in the public interest when it chooses. I have long said in my international addresses that PPPs will work in countries where a small private contractor can win a contractual case against a powerful government. Nonetheless, your desire to unify legal regulation of PPP arrangements is impressive. I broadly agreed with your (p 217) comment that it should be unified despite the increasing importance of the Lex PPPs and the challenges for regulatory convergence in cross-boundary contracts. Your thesis identified different relations in the field of PPP and also the fact that Lex PPPs were focused on the protection mostly of non-state actors and argued that 'by unifying the legal regulation of such terms of PPP agreements ... the protection of public interests can be ensured and balance of public and private interests can be achieved' (p 217). This is a great thought. I also enjoyed your comment (p 218) that PPP is 'an element of the public administration system' and has a fundamentally public law nature about it. This makes the nature of domestic PPP agreements dual and heterogeneous, as you say on page 219. It was great to see the development of the argument that whilst PPP was certainly a legal form of investment activity, the concept of Material Adverse Government Action could be enhanced to apply to PPPs in several ways. Finally, I appreciated discussion on settling PPP disputes and your conclusions that 'PPP agreements are not exclusively commercially driven' (p237) because they have both public and private elements and that as a consequence, a model of International legal regulation of PPP is desirable. International disputes such as cross-border disputes could be settled at various fora but agree that the framework of the Permanent Court of Arbitration is suitable for stable and predictable PPP dispute resolution practises.

The Conclusion. The conclusion restated arguments of the thesis. These were strongly presented, and as a reader, I endorsed them. Having said this, I wondered whether some work overplayed the degree to which the insensitivity of international law to the challenges of PPP 'will undermine its supremacy in the international legal system [and] threaten the international legal order as a whole' (p250). This is a doctrinal belief and is surely contestable. I agree that progressive development of international law through an international convention on PPP is important, but the reality of soft law and non-traditional subjects of international law do not to my mind necessarily undermine the foundations of international law – as much as they reflect its inevitable inadequacy.

Specific SPBU Criteria for Thesis Examinations

Relevance of the topic

The topic chosen was engaging, contemporary and highly relevant. It was also a hugely challenging task to take on and the author is to be congratulated on her endeavour. The thesis was impressive from a number of different perspectives. The relevance of this topic was clear from the extensive coverage of research threads already begun by Russian academics (several of whom became part of the examination panel). But the need to join together these various earlier contributions to thinking under one coherent analytical frame was a strong argument to mount and this research was impressive in its scope. Also, regulatory scholars have long argued that we currently live in an era of Regulatory Capitalism (Braithwaite, 2008) or Regulatory Governance (Levi-Faur, 2010) so the aim of taking a cross-disciplinary lens to this topic was highly relevant to current times. This cross-disciplinary aim, though, was also quite courageous given the usual academic tensions between scholars coming from different disciplines.

Scientific contribution and scientific novelty of the research

The articulation of the many conceptual domains underpinning the current legal regulation of PPP and their development were both significant scientific contributions to our thinking. These were also novel in the domain of PPP to my knowledge, as well as being of interesting contemporary relevance to cross-disciplinary regulatory scholars. These contributions were significant through their global relevance as well as their relevance to the home country of the author.

Practical importance

As the author noted, PPPs now exist throughout the world and are a major part of public policy and public administration in numerous countries across both developed and transition countries. PPPs, though, do remain heavily contested in terms of their effectiveness for citizens and taxpayers (Hodge and Greve 2021). As a consequence of this, how PPPs are regulated currently and how they could be better regulated are both of considerable importance to most governments around the globe. The large financial sums involved in these big construction projects are sufficient, as the thesis suggests, to affect a State's economy and are worthy of serious analysis in the public interest. Added to these points is the practical importance of how, as a global community, we might best achieve SDGs in ways that are fair to all global citizens, and not simply rewarding for the current owners of capital.

Strengths and weaknesses

This thesis had many major strengths to my mind. The comments made thus far attest to the strengths of the thesis in terms of its relevance, the scientific contribution and novelty of the research undertaken, and the practical importance of both the analysis completed and the recommendations for change. To this fullsome list of strengths, I would also suggest another three points. First, the thesis strongly drew together a raft of major intellectual commentaries on the various regimes of relevance to PPP regulation. Debates were sensibly articulated, accompanied by excellent referencing, and then developed in order to show gaps in existing arrangements as well as areas still needing resolution and further development. These discussions and arguments for future improvements were all undertaken in an analytical style which acknowledged the crucial role of the law in its various forms but avoided getting bogged down in the legal minutiae which sometimes unfortunately besets legal analyses. Referencing was also exemplary. Second, whilst the primary interest at the centre of our analysis in this thesis was law (in its multiple forms), its aim of taking a cross-disciplinary view of PPP regulation was a terrific strength and its explicitly pluralist approach bridged both legal and 'non-legal' arenas throughout. Third, the question of examining a Russian based thesis could have been, for this examiner anyway, a major potential hurdle. This was overcome thoughtfully through the English translation. This was most useful (and necessary)! I nonetheless apologise for any misunderstandings in my analysis of your thesis work which may have arisen through mis-translation issues, however.

Having said this, one major strength of this thesis - its desire to take on a pluralist and cross-disciplinary analysis - could have been done with greater acknowledgement of the international regulatory scholarship which has flourished over the last four decades. Areas of cross-disciplinary scholarship which could have been strengthened here included the very definition of regulation (including your own definition of 'legal regulation') and the large question as to the extent to which regulation works well in terms of system design, effectiveness and legitimacy. Many points of access to regulatory scholarship were possible. Please allow me to make a few comments here.

Legal scholar Julia Black (2002, 26) offered a seminal article in articulating our contemporary understanding of regulation. She saw regulation as being 'a sustained and focused attempt to alter the behaviour of others according to defined standards ...' Her work had big implications, as set out in Hodge (2020), attached. Contemporary conceptions of regulation include a vast array of regulatory mechanisms and tools, including government Acts and Regulations of course, but also encompassing codes, guidelines, standards, contracts, grants, economic incentives, information usage, markets, licences and accreditation schemes. A multitude of regulatory tools and techniques are now at our disposal, with Law as just one option. Most regulatory scholars therefore now look beyond the state and use a broader view looking to multiple overlapping 'webs of influence', as Grabosky (1995) put it. To them, regulatory regimes are, by their nature, complex and overlapping, and governments are only one of the influential players.

As you found in your thesis, the contemporary regulatory perspective brings with it a different lens. Regulatory scholars are most interested in how behaviour is influenced and ordered, and we now realize that whether we look at the safety of food, the activities of businesses or the behaviour of churches, the actual role of law in altering behaviour is usually modest. Legal scholar Colin Scott put it nicely when he said 'the behaviour of those regulated in those regimes is shaped only partly by legal rules, but also by other forms of control'; Scott (2008). Regulatory scholars look 'outside the court room', and in contrast to doctrinal law scholars, tend not to focus on the text of legislative instruments, but ask questions of how regulatory systems can be best designed, what tools and mechanisms work most effectively, and how legitimacy and credibility can be strengthened. These comments directly parallel many of your own thesis observations and comments.

A useful tool when analysing a public policy area is to use the concept of regulatory space (Hancher and Moran, 1989). Legal scholar Christine Parker explains that

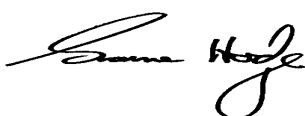
'regulatory space is a metaphor that emphasizes that the state must always compete with other regulatory ordering for social control in any particular circumstance. ... Public agencies that seek to regulate members of society never issue their regulation onto a blank slate. Rather it enters a social space in which all sorts of other orderings already 'regulate' how people behave' (Parker 2000, 532).

Looking at your thesis findings in Chapter 2, global regulatory scholars would no doubt loudly applaud you for articulating what regulatory scholars see as the 'Regulatory Space' inhabited by PPPs at present. Lastly, Ken Abbott's work on hard and soft law (Abbott and Snidal 2000) and Framework Conventions (Abbott et al 2008) might have also been further potentially useful reference points.

This thesis aimed to adopt a cross-disciplinary approach – a socio-legal perspective rather than simply a traditional doctrinal perspective (Dent 2017). It also, though, often focused on the law as a doctrine and automatically took on the doctrinal assumption that better law (as the researcher recommends) necessarily leads to improved outcomes. Linking your research to existing regulatory scholarship may be a fruitful way of developing your future research and publishing agenda. This would ensure that one can avoid the concern that better law, too often, simply leads to better law (which continues to be discretionary for powerful actors!)

Examination Summary

This thesis had a suitable structure for the argument put forward. Its arguments were clear and its conclusions were robust. The thesis constituted an ambitious and very solid piece of scholarly work. The author took on a huge challenge in looking at the issue of regulating PPPs, and did a sterling job of scholarship through the lens that she adopted. Overall, then, this thesis constituted an ambitious and solid academic work that satisfies the standards set for a Doctor of Legal Sciences thesis. I am also convinced that the author will easily address the minor issues raised in this examination report in her future research.



Professor Graeme Hodge,
Faculty of Law, Monash University, Australia

References

- Abbott, K.W. and Snidal, D. (2000) Hard and Soft Law in International Governance, *International Organization*, 54 (3), Legalization and World Politics (Summer, 2000), 421-456.
- Abbott, K.W., Marchant, G.E. and Sylvester, D.J. (2008) A Framework Convention for Nanotechnology?, *Environmental Law Reporter*, 36 (12), 10931-42.
- Black, J. (2001) "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World", *Current Legal Problems*, 54, p.103
- Black, J. (2008) Constructing and contesting legitimacy and accountability in polycentric regulatory regimes, *Regulation & Governance*, 2, pp137.
- Black, J. (2002) Critical Reflections on Regulation, *Australian Journal of Legal Philosophy*, 27 (1).
- Braithwaite, J. (2008) *Regulatory Capitalism – How it works, ideas for making it work better*, Edward Elgar, Cheltenham.
- Dent, C. (2017) A Law Student-Oriented Taxonomy for Research in Law, *Victoria University of Wellington Law Review*, 48, 371-388.
- Grabosky, P.N. (1995) Using Non-Governmental Resources to Foster Regulatory Compliance, *Governance*, 8, pp527.
- Hancher, L. and M. Moran (1989) *Organising regulatory space*, in L. Hancher and M. Moran (eds), *Capitalism, culture and economic regulation*. Oxford, Clarendon Press.
- Hodge, G.A. (2020) What Should Every Public Servant Know About Regulation?, *The Palgrave Handbook of the Public Servant*, edited by Helen Sullivan and Helen Dickinson.
- Hodge, G and Greve, C. (2021) What Can Public Administration Scholars Learn from the Economics Controversies in Public-Private Partnerships?, *Asia Pacific Journal of Public Administration*, 43 (4), 219-235.
- Levi-Faur, D. (2010) Regulation and Regulatory Governance, *Jerusalem Papers in Regulation & Governance*, Working Paper No 1, February 2010.
- Parker, C. (2000) Reinventing Regulation Within the Corporation: Compliance-Oriented Regulatory Innovation, *Administration & Society*, Vol. 32 No. 5, Nov, pp529-565.
- Reidenberg, J.R. (1997) Lex Informatica: The Formulation of Information Policy Rules through Technology, *Texas Law Review*, 76 (3), 553-593.
- Scott, C. (2008) *Regulating Everything*, UCD Geary Institute Discussion Paper Series, Geary Institute.
- Windholz, E. L. and Hodge, G. A. (2019) *International Sports Regulation: An Evolving Private-Public Partnership*, *Monash University Law Review*, 45 (2), 298–332.