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Chapter 17.
Core principles of modern PPP law

A modern PPP law should:

1. be based on a clear policy for private sector participation in infrastructure, consistent with the government's wider development goals

2. create a sound and coherent legislative foundation for PPPs and establish a stable and predictable legal framework for PPPs

3. provide clarity and certainty of rules and procedures

4. promote fairness, transparency, efficiency and accessibility of rules and procedures

5. ensure the proper oversight and accountability of decision-makers and the engagement of different stakeholders

6. be consistent with the country's wider legal and regulatory system, and its investment and fiscal management regimes

7. be consistent (where feasible) with best international practice

8. reflect appropriate ESG values and the SDGs, including affordability, value for money/people and the importance of resilient and sustainable infrastructure

9. provide for robust procurement processes, which benefit where appropriate from competitive pressures and meet investor expectations

10. allow for a flexible and appropriate allocation of risks within projects

11. permit suitable flexibility and negotiability of PPP contracts

12. enable bankable projects and accommodate lender and investor security interests

13. allow for the use of available forms of state support, including payments, investments, asset contributions, undertaking and guarantees

14. allow for an appropriate range of dispute resolution procedures, including enforceable and impartial court or arbitral awards.

Explanatory memo

The Core Principles for a Modern PPP Law (the "Core Principles") are designed to capture the essential elements of a robust legislative and regulatory framework for a PPP system, primarily for the benefit of countries seeking to introduce new PPP laws for the first time or overhaul their existing ones.

Not all countries need a PPP law. Many common law countries do not, for example, or at least not a broad or comprehensive one. The principles of their legal systems already allow PPPs to be structured and implemented effectively.[1] Many other jurisdictions have concluded the opposite, however, especially civil law countries, which tend to rely on a somewhat greater degree of codification and statutory provision than the former. Even where there is uncertainty about the strict technical need for a PPP law, it can still be helpful to adopt one, to remove any doubts that may otherwise exist about aspects of the PPP system.

In the end, most countries prefer to adopt the latter approach and to put in place a coherent, comprehensive law which sets out all the key legal elements of the PPP system, giving its framework the clarity, certainty and structure that it might otherwise lack. The Core Principles seek to encapsulate the main elements of such a law in a way that is consistent with international best practice. In any case, many of them will also apply the frameworks of countries which do not actually need a comprehensive law of this kind. To that extent, the Core Principles have universal relevance.

Principle 1.

A modern PPP law should be based on a clear concept of and policy for public-private partnerships, consistent with the government's wider infrastructure development goals.

The host country's government needs a clear concept of PPPs. This is not quite as simple as it sounds. It highlights the importance of ensuring that the government has a firm grasp of the subject and an in-depth, balanced understanding of what PPPs are really about, their pros and cons, their uses and challenges. PPPs need to involve public infrastructure and services, a real partnership between public and private sectors, and genuine risk-sharing between them on a long-term, contractual basis. They are not a panacea or "magic bullet", let alone a

[1] Although very specific pieces of sector or supplementary legislation are sometimes required as well.

convenient "balance-sheet fiddle". They are complex, sophisticated transactions, offering benefits which can be challenging to capture and which must be approached with caution and a range of relevant expertise.

Every proposed PPP project must be rigorously evaluated as it is designed and prepared, to satisfy its promoters that it is suitable as a PPP (rather than a traditional form procurement) and meets all the applicable evaluation criteria. These criteria are likely to include feasibility, affordability, social and economic benefits, value for money, "value for people" and other tests related to environmental, social and governance (ESG) and/or Sustainable Development Goal (SDG) considerations, such as sustainability and resilience. The government's concept of PPPs must capture these considerations, which in turn will be reflected in many of the provisions of the PPP law.

One aspect of the host country's concept of PPPs which must be addressed at the outset is whether a formal legal distinction needs to be made between user-pay "concessions" and government-pay PPPs. Some countries, such as France, are constrained by their legal traditions and jurisprudence to distinguish between the two and in some ways to approach them differently. This is partly because concessions are sometimes thought to involve a much greater degree of risk transfer and delegation of responsibility to the private sector than government-pay structures,[2] and partly because the former may be classified as falling under a branch of administrative law, while the latter are governed by the civil code. Numerous civil law countries take a similar approach to France, including in Europe, Latin America and francophone Africa. The European Union has adopted the distinction in its procurement legislation, and so therefore have many of the accession countries.

Where this approach is taken, the country concerned will often use two PPP laws instead of one, covering these two different forms, even though the laws may actually be very similar in many respects. Countries which do not feel obliged to make such a formal distinction usually prefer instead to treat all PPPs as simply points on a spectrum, so to speak, and to make them subject to a single PPP law (if there is one, or the same legal principles, if there is not).[3] This has the advantage of simplicity and clarity. The Core Principles are compatible with either approach.

Whichever approach is adopted, it will usually be helpful for the government then to spell out the principal aspects of its PPP concept in a short policy paper that describes the new system being created, outlines its main features and sets out the government's plans and expectations for it. This will help explain it to civil servants, stakeholders and users, generate public-sector momentum behind it and elucidate the workings of its component parts. At the same time, any policy paper needs to be set squarely in the context of the government's wider plans and strategy for infrastructure development. It will be vital to ensure that all parts of that strategy constitute a coherent, long-term whole, with the various ministries involved collaborating harmoniously around a clear set of objectives and priorities.

Principle 2.

A modern PPP law should create a stable and predictable legal framework for PPPs, with a sound and coherent legislative foundation.

This principle highlights the value of having a coherent, comprehensive PPP law. In contrast to the often fragmented or patchy legislation of the past, many countries now try to put in place a single (or dual)[4] law, which offers a complete legislative picture – or at least a complete framework of primary legislation. Separate sets of supporting regulations and guidelines are often drawn up to accompany the PPP law, showing how some of its more detailed aspects are meant to work in practice. This builds in a degree of flexibility to make appropriate refinements to the details over time, in response to changing circumstances or thinking. The overall objective, though, should be to have a settled legal framework which does not need to change significantly as the system takes shape. A well-drafted, sound and coherent PPP law which "slots" well into the host country's wider legal regime offers the stability and predictability the PPP system will require as it evolves. And evolve it certainly will, as the complexity, sophistication and high value of PPP projects mean the approaches and methodologies they reflect are constantly being refined as capacity is built and the market learns from experience.

[2] Although logically and commercially this is not necessarily true. A concessionaire can be protected by contract against as many risks as the parties wish, while a government-pay PPP could impose a high degree of risk transfer on the private partner if the public partner so decided.

[3] This is the case with most common law countries, including in anglophone Africa, Australia, Canada, New Zealand, the United Kingdom, the United States of America, [much of the Middle East] and much of the former Soviet Union (other than the EU accession countries).

[4] See Principle 1 above.

Principle 3.

A modern PPP law should provide clarity and certainty of rules and procedures.

Principle 3 should follow as a matter of course from Principle 2. Many rules and procedures can apply to the preparation and implementation of PPPs. It should be possible to identify, understand and apply all of them, confidently and efficiently, under the PPP law. They include basic PPP requirements and criteria; authority to award PPPs; applicable sectors and activities; determining a PPP's term (duration) and its extensions; the roles and relationships of different government bodies; initiating and preparing PPPs; review, appraisal and approval criteria and procedures; selection of the private partner-tendering structures and procedures; unsolicited proposals/direct negotiations; reviewing and challenging actions and decisions under the law; the content and negotiation of PPP contracts; dispute-resolution mechanisms; and monitoring and data collection/provision requirements. The legislation will set out the "skeleton" of the system, as we have said, often leaving a good part of the detail to be addressed (and, when necessary, modified or refined) in supporting regulations and guidelines.

Principle 4.

A modern PPP law should promote fairness, transparency, efficiency and accessibility in its application.

This principle is increasingly accepted as a fundamental requirement of any modern legislation which conforms to international best practice. Key points include:

- Potential private partners, other stakeholders and the general public should be treated fairly under the law. "Fairness" in this context connotes (among other things) non-discrimination, a level playing field for competitors, the just application of the law's requirements and due regard for the views of those affected by PPP projects.

- "Transparency" refers to the clarity of the workings of the PPP system. All of its component parts and processes should be capable of being readily understood and applied. They should also be subject to a high degree of publicity and information flow, with extensive data capture and storage covering all PPPs.

- All the rules and procedures mentioned above should be designed to work efficiently in practice, allowing the host country to turn over an ambitious number of projects as part of its PPP programme. Projects can otherwise get easily bogged down.

- "Accessibility" means the law should not create excessively high barriers to entry. The idea should be to enable a wide range of private entities, stakeholders and even the public to grasp its principles and provisions on an inclusive basis and use them as appropriate. The law should seek to benefit all.

Principle 5.

A modern PPP law should ensure the proper oversight and accountability of decision-makers and the engagement of the various stakeholders.

PPPs typically involve large, high-value projects that develop the infrastructure on which vital public services depend. Implementing them successfully involves the exercise of a range of government powers and the application of a plethora of rules and procedures (as we have seen). It is therefore extremely important that those powers and their application are subject to proper oversight and that decision-makers are fully accountable for the decisions they take.

Accordingly, PPP laws usually contain carefully defined criteria governing the definition, selection and preparation of PPPs, together with mechanisms for the review and approval of each project as it is put together. Many countries will then have general rights and processes available under their legal systems for challenging illegitimate decisions or the wrongful exercise of powers by government bodies (such as the "judicial review" procedures in the United Kingdom). A PPP law may also contain specific challenge or grievance mechanisms allowing decisions to be reviewed and potentially overturned.

PPP laws should provide for the proper engagement of the various stakeholders at different stages of the process – ranging from other government bodies and authorities to potentially interested parties in the private or commercial sector (sponsors, investors, contractors, suppliers, lenders, guarantors, and so on) and, of course, the general public. Proper allowance should be made in the law for their participation in the PPP system and the impact of the law on them.

Principle 6.

A modern PPP law should be consistent with the country's wider legal and regulatory system, including its investment protection and fiscal management laws.

A careful checking exercise must always be done to ensure that a new PPP law is fully consistent with the country's wider legal and regulatory system. This can take the form of a systematic "diagnostic review" to identify any inconsistencies and needed

amendments. PPPs can touch on many areas of a country's laws, including contract, companies, property, construction, finance and security, tax, the environment, tort, constitutional and administrative law. Procurement law is always central. Laws relating to investment protection – national and international (such as bilateral investment treaties and multilateral investment treaties) – need careful consideration, as PPP laws effectively contain a range of such protections and often involve international investors. Sector-specific laws and regulations should be considered in the context of individual projects. The host country's wider administrative processes also need careful review, in particular in the area of public sector fiscal management, as they may constrain the kinds of government support and contingent liabilities that PPP contracts take on.

Principle 7.

A modern PPP law should be consistent (where feasible) with international best practice.

So much progress has been made with PPP laws over the past decade that it is feasible to speak of accepted standards and international best practice in this area. Some first-rate precedents are now available. Leading international institutions such as the EBRD and the World Bank have published a considerable amount on the subject. The much-respected UNCITRAL Guide to PPPs and model legislative clauses was updated in 2019. The Confederation of Independent States and the EBRD/UNECE have published model PPP laws.

It is therefore reasonably straightforward these days for a host country to align its PPP law with international best practice. It should obviously do so where it can, not least to attract international investment. International sponsors and lenders will expect this and know how to evaluate its success in doing so. Any serious deficiencies may deter them from investing. There may conceivably be certain respects in which the country is not yet able to do so, legally and economically. Nevertheless, any "derogations" from best international practice are likely to be fairly minor. The Core Principles should still be largely applicable.

Principle 8.

A modern PPP law should reflect appropriate ESG values and the SDGs, including affordability, value for money/people and the importance of resilient and sustainable infrastructure.

There is talk these days of the "ESG revolution" that has swept the corporate and financial worlds in recent years. While companies often gave due weight to ESG considerations – especially where they were enshrined in local laws with which they had to comply[5] – the general view in the past was that a company's primary corporate duty was to enhance its shareholders' returns. That has now changed dramatically. There is a new and widespread expectation – on the part of directors, shareholders, investors, lenders and the general public – that corporates will adopt a purposive approach to the achievement of ESG values and take proper account of them in their decision-making and policy formulation. This trend has been powerfully augmented by both the COVID-19 pandemic and the challenge of climate change, which have spurred a new global demand to "build back better". It now informs portfolio strategies everywhere and is increasingly seen as complementary to profitability, rather than a drag on it.

The acronym ESG covers a wide range of priorities and objectives. These range from protection of the environment and mitigating climate change to respecting human rights, observing labour standards, promoting social goods and applying good governance principles both internally and externally to customers and consumers. Each company must work out how best to define and give effect to them.[6] One increasingly popular approach is to use the SDGs – and the UN's related 2030 Sustainable Development Agenda – as a touchstone. UNECE's Working Party on PPPs has now converted the SDGs into a set of "People-first Principles" for PPPs.[7]

[5] For example, the first British Corporate Governance Code was published in 1992.

[6] Although, increasingly, they are also finding their way into binding regulations, such as the Sustainable Finance Disclosure Requirements, introduced across the European Union in March 2021.

[7] These have been incorporated in the EBRD/UNECE Model PPP Law.

A modern PPP law therefore must reflect these ESG values adequately in its terms and so promote their application to PPP projects. It can do this in its processes, criteria, tender documents and contracts. It should, for example, emphasise affordability, social benefit, "value for people and the planet" as well as value for money, and the vital importance of infrastructure being environmentally beneficial, resilient and sustainable. In the words of the G20 Principles for Quality Infrastructure Investment: "The facilities and services of infrastructure should have sustainable development at their core and need to be broadly available, accessible, inclusive and beneficial to all".

Principle 9.

A modern PPP law should provide for robust procurement processes that benefit where appropriate from competitive pressures and meet investor expectations.

Procurement processes are often the central component of PPP laws. Where a country's existing procurement laws already cater adequately for PPPs in all their forms, it may not be necessary to say much or anything about them in a PPP law (if there is one).[8] Many countries, however, find that they are not in such a position, and so need to introduce special procedures designed to suit the particular demands, size and complexity of PPPs. The resulting provisions may adapt or build on existing procurement regulations, in which case great care must be taken to ensure they are all mutually consistent. Not infrequently, however, it is simpler just to disapply most of the wider procurement regime from the PPP system altogether, and incorporate a comprehensive, self-standing one for PPPs within the PPP law.

In that case, the law's procurement provisions will be extensive,[9] dealing with all key aspects of the bespoke PPP regime – the available tender structures and processes,[10] tender documents and criteria, evaluation, selection and negotiation mechanisms, contract award and so on. The over-arching principle of these procedures – apart from transparency and fairness – should be to foster competition effectively among bidders, as this is generally recognised as the most efficient way to maximise bid benefits and drive down prices while reducing any scope for corruption. There are often limited exceptions to this general rule, however, such as when unsolicited proposals are involved or direct negotiations are otherwise permitted. Even then, the law should seek to generate competitive pressures to the extent feasible. The resulting "suite" of procurement provisions must also be consistent with the expectations and requirements of sponsors and lenders, especially international ones.

Principle 10.

A modern PPP law should allow for a flexible and appropriate allocation of risks within projects.

PPPs, like project finance generally, are all about risk allocation. The invariable rule is that risks should be borne by the party best placed and able to manage them. In practice, this is achieved in the way that each project is structured, described in the various contract documents and then negotiated. That, in turn, calls for flexibility in terms of how risks can be allocated, so the most appropriate decisions about them can be made on each project. The principle is emphatically not susceptible to being translated into a rule of law or a prescriptive formula. It is down to the judgement and expertise of the people putting together and negotiating each project. The PPP law's provisions should reflect an understanding of the need for such flexibility and accommodate it, but not contain any specific prescriptions or formulae on the subject.

Principle 11.

A modern PPP law should permit suitable flexibility and negotiability of PPP contracts.

Similarly, a good PPP law will permit a high degree of flexibility as to the contents of PPP contracts. While this will depend to some extent on the jurisdiction and its legal traditions, it is generally true that it is difficult and counter-productive to attempt to prescribe the contents of individual clauses, as their meaning and effect turn so much on subtleties of

[8] EU countries are typically in this position, as EU procurement directives provide for them specifically.

[9] Many of the details may be set out in the supporting regulations and guidelines.

[10] For example, prequalification, single-stage, two-stage, competitive dialogue and negotiated procedure.

language and provision. If host governments need to be flexible about the whole risk allocation process, they need to be flexible about the contractual clauses which give effect to it. A model clause worded in a firm and mandatory manner can easily turn out to be unsuitable for an individual project and pattern of negotiation, and so become an obstacle to its successful conclusion.

The most helpful approach is usually for the PPP law to set out an indicative list of the types of provision that PPP contracts might contain, while leaving the inclusion (or not) and precise terms of each to the judgement and agreement of the parties. The basic principle should be that the PPP contract may contain such clauses as the parties to it may agree (provided, of course, that they are legally enforceable). This approach leaves maximum scope for negotiation, which makes sense as one never knows in advance exactly which clauses may need to be negotiated or with what outcomes. This article of the law then becomes an enabling tool, removing possible doubts about the types of clause that may be available to the parties, and so facilitating the conclusion of a contract which is both consistent with best market practice and bankable.

Principle 12.

A modern PPP law should enable bankable projects and accommodate lender and investor security interests.

The PPP law should be generally consistent with what sponsors and lenders are likely to consider "bankable" projects – for instance, projects which can be debt-financed and (where appropriate) project-financed. Debt finance typically constitutes most of the funding. This is usually achieved primarily through the terms of the project contracts, and so again there is not a great deal that the PPP law can and should prescribe to advance it. "Bankability" is not achieved by legislative fiat! But the law can help to make possible or "enable" bankable projects by avoiding pitfalls or restrictions which would otherwise stand in their way. For example, most development banks require the projects they finance to be put out to competitive tender. Similarly, if the law prohibits clauses which are essential to a project's bankability, such as termination payments allowing lenders to be paid out on an early termination for any reason, this may be fatal to the funding of PPP projects. The law will often say the PPP contract may contain such provisions designed to protect the rights and interests of lenders and investors as the parties to it may agree.

The law will often also contain a few other positive provisions designed to promote bankability. It is usually helpful to recognise lender step-in rights and direct agreements, for example, and to allow the private partner to create such security interests over its project assets and contracts as may be necessary to finance projects (subject always to any relevant local law restrictions).

Principle 13.

A modern PPP law should allow for the use of available forms of state support, including payments, investments, asset contributions, undertakings and guarantees.

There may be some uncertainty about the various forms of state support that can be available to PPP projects. These may range from different forms of payment (especially on a government revenue-stream PPP) to grants, investments, asset contributions, assumptions of risk, contractual undertakings, guarantees and so on. To remove any such doubts, which may otherwise impede the structuring or negotiation process, it can be helpful for the law to spell out the full range of public support that a contracting authority (or other government body) is able to provide. In any event, these will always be subject to applicable legal restrictions and policy decisions before they are actually applied to individual projects.

Principle 14.

A modern PPP law should allow for an appropriate range of dispute resolution procedures, including enforceable and impartial court or arbitral awards.

The law should ideally create the flexibility to allow the parties tos choose whatever dispute resolution procedures seem to them appropriate, whether this is the local courts, arbitration (domestic or international), mediation mechanisms, expert determination or whatever – or, typically, a selection of them. Even the governing law that applies may be treated as a matter of choice, although there is nearly always a presumption that local law will apply. But the appropriate forms of dispute resolution procedure can prove a challenging issue in negotiation, and the solutions often multi-tiered. The law should therefore allow the principle of freedom of contract to apply. The parties will need to select and agree on procedures that are appropriate for the project, acceptable to lenders and reliable, impartial and enforceable.