European Bank
for Reconstruction and Development

EBRD PPP regulatory guidelines collection
Volume I

Chapter 2. Commentary on the EBRD/UNECE model law for public-private partnerships/concessions

1. Preface

This document is a supporting commentary on the EBRD/UNECE Model PPP Law for "SDG-compliant PPP Projects (the "Model Law"). It contains short summaries of the law's Articles and provisions, together with brief explanations of the thinking behind them and some discussion of the issues to which they typically give rise in practice. The Model Law is designed to be read and understood on its own terms, however. Its provisions should be clear and largely self-explanatory. This commentary offers some additional elucidation of its text, where this might be helpful, written in non-legal language, but does not attempt to restate or explain every one of its provisions.

The Model Law was drawn up as part of the wide-ranging corpus of guidance documents, modules and studies on public-private partnerships (PPPs) being produced on behalf of both the United Nations Economic Commission for Europe (UNECE) Working Party on PPPs and the Legal Transition Programme in the European Bank for Reconstruction and Development (EBRD) to help governments around the world seeking to create or develop PPP systems of their own – especially those doing so for the first time. These documents cover a wide range of subjects in the PPP area, with a view to promoting a deeper understanding of the structures and issues involved. Further information can be found on the websites of UNECE and the EBRD. The main focus of the working party these days is identifying ways to help PPPs comply with the UN's Sustainable Development Goals (SDGs). It recently finalised and published an evaluation methodology showing how this can be done.

This seems to be an eminently suitable time to prepare a model PPP law as part of these exercises. Governments seeking to launch or expand PPP systems often decide to put a PPP law in place, especially in countries based on civil law systems and/or relatively highly regulated commercial activities, where a comprehensive and explicit set of rules applicable to PPPs may be considered helpful or necessary. Many common law countries, on the other hand, have done without one altogether, or with only very focused and limited new legislation in this area, as existing legal and contractual principles are often thought to constitute an adequate framework for them.

Different countries around the world have adopted many new PPP laws in the past few years[1]. Others are doing so now or planning to do so. However, there is still considerable disparity in the quality of the laws already in place around the world. Some are extremely well thought-out and structured, others rather less so. Moreover, most of these laws do not yet take into account the challenges that have arisen in attracting private business to infrastructure in connection with the adoption of the SDGs. In the authors' view, this reinforces the case for publishing a new PPP Model Law.

In drawing up this Model Law, we have made extensive use of those existing laws that we believe represent leading precedents and international best practice in this field[2]. On the one hand, the availability of these documents has made the production of a model text based on them readily feasible; on the other, the number of countries still seeking to enact new or revised legislation of this kind provides a clear justification for publishing such a text, in terms of offering further helpful available guidance.

It should be stressed, though, that a great deal of original drafting went into the Model Law's clauses. The methodology adopted by our drafting team was to think through and debate what each provision should ideally say, based on our experience of working on actual PPP legislation being adopted by countries embracing PPP systems, while taking account of the precedents of which we were aware and which we considered most helpful.

Moreover, the UNCITRAL[3] team at the United Nations recently revised and finalised its own work on this subject, known as the UNCITRAL Legislative Guide on PPPs and Model Legislative Provisions (2019). These texts have been a leading authoritative guide in this field for the past 20 years. The authors of the Model PPP Law drew widely and fruitfully on it[4] in structuring and wording the Model Law's provisions, which cover a good deal of the same ground and are designed to be generally compatible with them. Both

[1] See, for example, the periodic studies and assessments (PPP Law Review) carried out in this field by the EBRD in its economies, available on its website.

[2] Please see the list set out in Appendix 2.

[3] United Nations Commission on International Trade Law.

[4] We would like to express our gratitude to UNCITRAL for making the latest drafts of its revised clauses available to our team to draw on as our document was being finalised, and for the willingness of its team leader, José Angelo Estrella-Faria, to cooperate with and assist our efforts.

UNECE and UNCITRAL asked us to do that as we made progress with our project, and we were only too happy to comply. Many of the same concepts and much of the same phraseology have therefore been used where possible, especially in the area of tendering procedures. The documents are accordingly similar and, we believe, wholly consistent. Any differences between them come down largely to the individual judgement and style of the different authors behind them and the slightly different approaches taken to their production – in particular, the fact that the Model PPP Law is a joint UNECE/EBRD exercise[5]. It is also worth remembering (see further below) that there is no single perfect provision for any model law, especially one designed for use by governments all over the world. There can only ever be helpful suggestions, not final and definitive terms, with various ways of crafting them. There is room in the PPP universe for more than one precedent!

A great deal has also been published in recent years on the subject of PPPs and their explosive growth around the globe over the past few decades (a list of some of the best-known and most highly regarded sources of guidance and information is attached as Appendix 3). Readers should note that it would be well beyond the scope of this commentary to introduce, explain or discuss PPPs in general terms or on an abstract level. The authors have assumed that readers will have considerable knowledge of them, the issues associated with them and the practical arrangements involved. Where this is not the case, readers should turn to these other published sources for a fuller explanation.

Readers should also be aware that the United Nations formerly adopted a new vision or paradigm for PPPs in May 2019. Referred to under the rubric SDG Guiding Principles, this has been conceived specifically with a view to encouraging governments to design and structure their PPPs in ways which are likely to foster and achieve the SDGs, and to stimulate and attract private-sector involvement on this basis. Above all, it aims to prompt governments to focus on the tangible and vital human and environmental aspects of PPPs, rather than simply approaching them as economic or financial constructs. It invites them to think hard about the impact of PPPs and their implementation on a social, environmental, ethical and human rights level, in ways which are fully compatible with the SDGs, and to ensure that PPPs genuinely advance those objectives. Hence the title "SDG Guiding Principles". The principles behind the concept were discussed and explained in a paper published by the UN in 2019.[6] They aim to ensure that PPPs are accessible, affordable, sustainable and resilient, and that they are implemented in ways which discharge environmental responsibilities, ensure proper stakeholder consultation and involvement, avoid corruption and help to promote social justice. They aim to promote "value for people and the planet" as well as "value for money".

These aims will already be part of the PPP agendas of some governments, especially those that are strongly committed to the SDGs. After all, PPPs are a tool of infrastructure development. To that extent, they will contribute to economic growth and therefore benefit society in any case. Nevertheless, the record shows that PPPs can sometimes be poorly conceived, structured and/or implemented, while many governments are still exploring and refining their commitments to the SDGs. And at these levels, the SDG PPP concept can provide invaluable guidance and focus, even if this is just a matter of emphasis. By highlighting the human, social, environmental and ethical aspects of PPPs, it should contribute to better designed PPPs in ways that are fully aligned with the United Nations' wider mission.

The SDG PPP concept has now been formally supported, and its use recommended, by four United Nations regional commissions – namely UNECE, the Economic Commission for Africa, the Economic and Social Commission for Western Africa and the Economic Commission for Latin America and the Caribbean – which in May 2022 announced their decision to collaborate to make PPPs "fit for purpose" for the 2030 Agenda for Sustainable Development. The Model Law has been drawn up specifically with these objectives in mind and makes them intrinsic to its provisions, many of which have been crafted to give effect to them. The five core principles behind them are cited in the preamble. Article 4.2 requires all PPPs implemented under its terms to be compatible with these principles and designed to reflect them. Other Articles contain cross-references to them. This compatibility with the SDGs is accordingly referenced in the document's title.

The Model Law is not, of course, a template piece of legislation which can simply be pulled down and enacted by any country introducing a law of this kind.[7]

[5] The members of the drafting subgroup (see below) have all worked closely with the EBRD in advising governments in economies where it operates on modifications and revisions to their PPP laws. The Model Law took full account of that experience.

[6] Guiding Principles on SDG Public Private Partnerships in support of the United Nations Sustainable Development Goals (ECE/CECI/2019/5). In particular, see the 10 key principles into which they are broken down.

[7] In this commentary, and in the Model Law, these countries are referred to as "host countries", and the PPP law they introduce as "the law" or "the PPP law".

It is designed to offer guidance, not "cut-and-paste' clauses. Careful thought will always be needed to make use of it. In the end, there are many different ways to approach laws of this kind and the provisions they contain. They give rise to questions and issues to which different countries will offer different answers and reach different conclusions. Furthermore, any PPP law adopted by a country must be fully compatible with its wider legal system, jurisprudence and legislative traditions, as well as the idiosyncrasies of its PPP system. Taken together, these factors may call for extensive modification to the Model Law where it is being used as a precedent.

The Model Law represents the type of PPP law which aims to be relatively comprehensive in scope, setting out a robust framework governing all the fundamentals of a PPP system, the basic elements of PPP projects and the procedures and regulatory mechanisms that apply to their preparation, award and implementation. It may not always be technically necessary at a legal level to do this. Some of its legal concepts and arrangements may already be in place. The country's existing procurement regime may be adequate for PPP purposes, for example, and it may already have a long history of successfully using PPPs. In that case, a much shorter, more focused law may be appropriate, if one is needed at all. This is something each country must decide for itself. The advantage of the approach reflected in the Model Law – and the reason this approach is often taken – is that the new PPP law then becomes a comprehensive enabling statute, offering clarity and certainty across the board, so to speak, about what is feasible in the PPP context and how individual projects should be approached and implemented. This can work to the advantage of all.[8]

It should also be noted that the Model Law is not directed primarily or even at all at member countries of the European Union (EU) or accession countries in the process of joining it. The EU already has a wide-ranging body of laws and requirements applicable (directly or indirectly) to PPPs and their procurement. Because these reflect the complexities and idiosyncrasies of EU-based law as it stands, which are not necessarily compatible with the legal systems of other countries around the world, we thought it better not to try to make the Model Law fully consistent with the former.[9] It seemed to us unnecessary to do so. Any EU accession countries (or even member states) that do seek to draw on its provisions, then, should also think carefully about the need to harmonise their PPP laws with the EU acquis and adapt the clauses from the Model Law accordingly.

The Model Law assumes a relatively low level of general regulatory control by government over the PPPs implemented under its terms (at least, outside the scope of the contractual powers vested in each contracting authority)[10] and a correspondingly high degree of freedom of contract for the parties to the relevant PPP contracts. Some countries may prefer to include additional tiers of approval and control over a PPP's elements, terms and implementation. The degree of regulatory control that any country seeks to establish is something it must decide itself, in light of its political and jurisprudential traditions and socio-economic system.

Striking an appropriate balance between rigour and transparency, on the one hand, and flexibility and innovation, on the other, is never easy. And one important factor which needs to be weighed in the balance (there are many others) is fighting corruption. Countries concerned about rising levels of corruption may wish to emphasise the former at the expense of the latter.

The Model Law and this commentary are the work of a team of distinguished legal (and some non-legal) experts in this field, who collaborated on this exercise for more than four years, under the aegis of the United Nations and the EBRD. The names of the participants are listed in Appendix 1. They comprise a wider group of some 60 professionals from around the world, who contributed thoughts and suggestions from the outset, and a drafting subgroup of about 15, who were closely involved in the document's contents and wording. Members of the Bureau of the UNECE Working Party on PPPs and a team of experts in France led by its International Centre of Excellence on Laws, Policies and Institutions made further valuable suggestions during intensive discussions of the document in 2020-21 (Phase II). Their names are also included in Appendix 1.

[8] See the fuller discussion of this subject in the following Volumes of the EBRD PPP Regulatory Guidelines Collection, titled the legislative and regulatory frameworks for PPP (Chapter 2, Volume III).

[9] We are not aware of any clear areas of incompatibility between the Model Law and EU law, although there are certain obvious differences. For example, EU law makes a formal distinction between "concessions" and other types of "public contract", applying different principles to their respective procurement. The Model Law does not do this. Rather, it puts all PPPs in the same basic conceptual and linguistic category.

[10] The PPP contract itself obviously represents a form of regulatory instrument, allowing the relevant line ministries and other authorities reflected in its terms to exercise a degree of control over the private partner's activities. A PPP is also different from a regulated utility, where government will exercise extensive regulatory control, usually in the context of a sophisticated sector-regulatory regime.

2. Textual commentary preamble

The preamble is designed as a simple introduction to the law. It allows the host country to summarise the purpose of the law and to capture some of its main policy objectives and priorities in making use of PPPs. It may be more appropriate to do this in a preamble, which can be written in non-legal language, than in the more precise and binding legislative language of the statute's provisions.[11] The text uses a short-form preamble, keeping the key messages brief and simple. Some countries may prefer to discuss the background justification for PPPs at greater length.

It is also common these days for governments to put a detailed policy statement in place before the PPP law is enacted. If so, the policy statement can set out all the relevant policy priorities and objectives that are thought to be important or relevant, leaving the law to set forth the PPP system's legally binding provisions. Either way, guidance notes or explanatory documents of some kind are likely to be invaluable to all those working under the new system.

The preamble mentions that the law is limited to the PPPs defined in its terms and not to other types of commercial or contractual arrangements between public and private sectors. There may be many of these other arrangements in the relevant jurisdiction which should not be governed by the PPP law (such as simple outsourcing contracts, design and construction contracts under traditional procurements mechanisms, certain types of franchise, consulting contracts, other standard commercial agreements and perhaps even natural resource concessions where these are carved out of the PPP regime (see further below)). Care needs to be taken to ensure that they are not inadvertently caught by the language of the PPP law in ways that may give rise to confusion.

As explained in the foreword, the preamble also highlights the importance of the "SDG" values and objectives for PPPs set out in the United Nations Sustainable Development Goals and subsequent documents (the SDG Guiding Principles). These are now accorded the highest priority by the UN. The EBRD is also promoting them through some of the obligatory environmental and social requirements for the projects it is funding, and in the Green Economy Transition policy and dialogue it has adopted in economies where it operates. The preamble proclaims that the Model Law enshrines those principles and sets out a brief summary of them. Various references to them are also embedded in the text of the Model Law. Many of its provisions have been crafted with them specifically in mind. They are therefore intrinsic to the document and cited in its title. Each host country should carefully consider how and to what extent it wishes to refer to these principles. The hope and expectation of the United Nations, under whose aegis this Model Law is being published, is that every member state will adopt and underwrite them fully and wholeheartedly in their PPP laws.

Chapter I. General provisions

This chapter deals with the more general aspects of PPPs and the new PPP system that may need to be addressed for the law to be understood and applied clearly, such as definitions, the use of regulations and guidelines, preliminary criteria and requirements, the authority to award PPPs, applicable sectors and some of the fundamentals of a PPP contract (such as its parties and term).

Article 1. Scope

This Article summarises the scope of the law. Some countries may prefer to leave this largely or even entirely to the preamble[12]. The authors felt on balance that, notwithstanding the repetition, it was appropriate to make some of the same statements legally binding in an Article, to assist the interpretation and application of the Law.

In particular, the Article makes it clear that the law applies to all forms of PPP, as defined by its terms, regardless of the labels that may be attached to them. Note that some countries distinguish formally and as a matter of jurisprudence between different types of PPP, in particular between "concession" and "non-concession" PPPs, not infrequently limiting the latter to structures involving government revenue streams and the former to those based on direct user charges and some degree of exposure to demand risk[13]. This can sometimes lead to the adoption of two different laws dealing respectively with each (as in China and Serbia, for example, and, in some ways, France). EU law also makes a formal distinction along these lines. Most countries, however (including common law ones), tend to prefer to lump them all together conceptually, so to speak, and subject them to essentially the same statutory provisions and

[11] A country's jurisprudential traditions will also be important here. It may nevertheless be necessary to set out every "object" and rule in the law itself.

[12] Although the scope of the law will, of course, need to be clear for interpretative purposes.

[13] At least these days. Common "business speak" today often reflects this distinction. Historically, however, other factors were at least as important, such as scope and sector. In many countries in the past, the term "concession" was synonymous with "PPP" (or predated it).

principles. That is the approach we have taken in this Model Law. It offers the advantages of simplicity, consistency and comprehensiveness. It will usually be more straightforward, both conceptually and practically, to treat all types of PPPs as essentially the same, as points on a spectrum, as it were, subject to the same legal statute, unless there is a clear and compelling reason to make formal legal distinctions between different varieties.

The Article, following UNCITRAL, mentions the fundamental general principles underlying its terms, but also includes a reference to the SDG Guiding Principles. It also makes it clear that the law applies to PPPs implemented at any level of government – national, federal, regional or municipal.

Article 2. Key terms and definitions

It is generally desirable to try not to use too many defined terms in a model legislative document, so that each provision can be readily understood on its own terms. Most of the terms defined in the Model Law should be self-explanatory. A few call for specific comment below:

• **Applicable law** is simply a generic term for all of the host country's domestic laws which may be relevant to PPPs one way or another. Where those laws give effect to its international obligations (for example, under public international law), those too may need to be taken into account in interpreting the Articles. Laws which are particularly relevant to the SDGs and the SDG Guiding Principles, such those relating to the environment, human rights, health and safety, indigenous peoples and citizens' rights, should be carefully considered.

• The expression "**government**" is intended to be understood widely, as referring to any part of the administrative or executive branches of government legally entitled to exercise powers or perform functions under the law. Some of these will arise by virtue of the law's provisions. Others will already be vested in the government under the country's wider legal system (including its constitution). Careful thought must be given to the interrelationship between these two categories, and any possible conflict between them. Each host country may wish to be more specific about which government bodies are being referred to in certain Articles than we have been in the Model Law. If so, the necessary amendments can easily be made. We have also allowed for this possibility with the generic term "competent body", which is used in various places in the text. There can also be uncertainties about the extent to which local or regional bodies are being empowered under the law, especially where combinations of different government bodies are involved simultaneously in the exercise of certain functions (as contracting authorities under the same project, for example); this, too, may need to be addressed expressly in the host country's PPP law.

• **Inter-ministerial committee.** This allows for the use of a high-level body with broad approval powers in relation to PPPs at any government level. It is not always used in PPP systems. It tends to have appeal principally to those countries that are developing PPP systems and all the related government expertise and capacity needed to implement them for the first time, and/or which believe that a relatively high degree of control by central government is necessary and helpful. The committee is sometimes attached to the cabinet or the prime minister's office.

• **Partnering.** This is also an unusual term for a PPP law. It is designed to capture – and so encourage – the notion of collaborative and consensual monitoring of the implementation of projects throughout their life by both public and private partners, which is implicit in the term "public-private partnership".

• **SDG PPP** is defined in the terms set out in the UN's Guiding Principles on the SDG Guiding Principles.

• **PPP guidelines/PPP regulations.** The host country should decide if it wishes to allow for both of these concepts in its PPP law (there may also be formal legal requirements under local law determining if it should do so). The text assumes that both will be used, with the regulations containing legally binding secondary legislation filling out the details of many of the Articles, and the guidelines consisting of non-binding guidance documents designed to facilitate an understanding of the workings of the PPP law and regime. Some countries may prefer to allow for only one or the other, or even to combine them in a looser, joint term (for example, PPP-enabling framework).

• **Public authority.** Note that this term is not intended to refer simply to contracting authorities. It has a wider scope, designed to take in any public authority whose powers may affect or impact PPPs (including their initiation, selection, appraisal, procurement or implementation).

• **Public infrastructure.** Host countries should give thought to the breadth and scope of this definition, to tailor it to its expectations for the range of PPPs it plans to use. The Model Law defines the term very broadly, to avoid any potentially awkward or unintentional restrictions on their scope and make the Model Law compatible with future developments. It includes intangible assets (such as intellectual property) and other types of assets and their operation which may be only indirectly related to infrastructure service provision (such as information technology systems).

• The term **PPP** is not always as straightforward to define as one might think! It is perhaps best not to attempt to make a definition more accurate or perfect than it needs to be, however. The critical thing is to use a short, simple definition which captures the essentials and is reasonably robust and workable at a practical level, and above all is fully consistent with the critical requirements set out in Article 4, rather than one that is conceptually flawless. It also needs to be designed to help clarify the distinction between the PPP law and other forms of public procurement for other purposes. This definition is very similar to the UNCITRAL one and includes the distinction between "concession" and "non-concession" PPPs mentioned above.

• **Sustainable Development Goals.** A definition is included for ease of reference.

• **Value for money/value for people.** The use of these terms needs very careful consideration. The PPP world has been subject to years of difficult debate about how it should be defined and interpreted. The definition in the Model Law stresses the need for a wide perspective, looking at the value of a PPP in terms of its broad impact on the economy, society, the environment and the government's finances over its life, and the net benefits it stands to generate. As such, it is very much a "value for people" test as well as a "value for money" test. The two terms are therefore treated as virtually interchangeable in the definitions. But host countries should reflect carefully on the meaning they wish to give it, in terms of the key tests to be taken into account when it is applied. The draft allows for a detailed methodology for those tests to be set out in the PPP regulations. A narrow definition (for example, lowest price) is not likely to be appropriate.

Article 3. PPP regulations and guidelines

As explained above, the host country should decide whether it wants (or is legally obliged) to refer formally to both PPP regulations and guidelines in the law. The former will usually be necessary to complete the PPP legal regime, and so are made an obligatory feature of the draft. The latter may or may not be, at least at a formal level, and so are mentioned in more permissive language. The text allows the government to designate one or more "competent bodies" to issue them on its behalf. Allowance is made in para 3 for revisions to each over time, to create the necessary flexibility for the long term. Paragraph 4 makes it clear that, where regulations are in place, the relevant provisions of the law to which they relate should be read and interpreted in conjunction with (and sometimes subject to) them.

Article 4. PPP criteria and fundamental requirements

This Article seeks to define the essential features and characteristics ("criteria") of any PPP. It makes it clear (in para 1) that a PPP which complies with them is to be undertaken in accordance with all the law's requirements – substantive and procedural. This is necessary to create clarity about which type of project properly falls into this category, and so is subject to its provisions and procedures. There is then a link back to the public interest objectives summarised in the preamble. If these have been carried over into the law itself, the cross-reference should be to the relevant Article. Note, however, that if those objectives are to be enshrined in law, controversy can arise about how exactly they are expressed and interpreted. That is why the authors preferred to set them out in the (non-binding) preamble to the Model Law. Fundamentally, given their importance to the United Nations, these objectives must also include the SDG Guiding Principles, to which there is therefore a cross-reference in the Article. Each PPP project must be designed and structured to accomplish and give effect to them. The Article then highlights the five key outcomes' envisaged by the SDG Guiding Principles, namely access and equity; economic effectiveness and fiscal sustainability; environmental sustainability and resilience; replicability; and stakeholder engagement.

Paragraph 2 sets out some of the main characteristics of PPPs, making it clear again that both "concession" and "non-concession" PPPs are covered. Certain other features are mentioned, such as sources of revenue, the basis for determining a project's term and the use of both tangible and intangible assets.

Paragraph 3 sets out these base criteria for judging whether a particular project is indeed a PPP. The tests are cumulative, not alternative – that is, all of them should be met. The following should be noted:

• Sub-para a. reminds legislators that PPPs need to be long-term in nature (with a minimum term established in accordance with Article 8 (if included)) and implemented on the basis of a PPP contract that accords with Chapter V.

• Allowance is made in sub-para. b. for a possible minimum or threshold (estimated) value for PPPs, but in square brackets. In essence, this is because of the complex nature of PPPs and the time and resources necessary to make them work. Host countries may not want to do this, however. If not, the sub-para should be deleted. Because it can be difficult to establish what exactly any minimum value should be, and how it should be calculated, as a matter of law, the draft assumes this will be dealt with in the PPP regulations, rather than being firmly set out in the main body of the law. That also introduces some flexibility to modify the

threshold test over time without amending the primary legislation.

• Sub-para c. is designed to allow a suitable degree of flexibility in terms of the combination of physical activities which a PPP may comprise. The long-term, risk-exposed nature of these activities should always be kept in mind. A PPP is not the same as a construction contract or a simple contract for services. It needs to contain an appropriate element of long-term responsibility for the public infrastructure and/or public services.

• Sub-para d. highlights the all-important element of risk allocation between the parties throughout the life of the PPP project. There should be a clear element of risk-sharing between them from beginning to end of any PPP.

• A PPP usually includes the use of private finance, but – at least in theory – may not do. This is allowed for in sub-para e., but in square brackets. Private finance may have to be used, or there may be a clear wish on the part of the contracting authority to see it used. But as the wording acknowledges that it may or may not be, the rationale for including the provision is that, if it is, it becomes another one of the cumulative tests confirming that the project is indeed a PPP. Any host country that considers that it will always be necessary should delete the square brackets. Some countries may prefer not to include this test at all and so should delete it.

• Paragraph f stresses the need to implement the project in accordance with the output specification and key performance indicators (KPIs) that will inevitably be a feature of the contract for it.

Article 5. Authority to award and enter into PPPs

We have included this Article because there is often considerable uncertainty in some countries about which government bodies actually have the legal power and authority to award PPPs. In others, there may be no doubt about this at all, in which case the Article may be completely unnecessary. Many PPP laws do not contain it. If the Article is thought to be necessary and helpful, however, it should ideally be expressed in simple, clear terms, as we have done in the text.

The Article states (in para 1) that any public authority which already has the right to develop projects involving assets and/or services of the kind comprised in PPPs (as most ministries and many municipalities will usually do), together with the right to enter into commercial contracts with the private sector, shall be deemed to have the right to award and enter into PPPs – except where any specific law or regulation provides otherwise.

The Article also gives the government the specific power (in para 2) to vest the necessary authority in individual bodies where necessary (and subsequently revoke it). This is intended to function as a helpful fallback provision.

Article 6. Applicable sectors and activities for PPPs

This Article defines the range of sectors and economic/commercial activity to which PPPs can apply in the host country. It is usually desirable to make any such provision broad and flexible, and any list it contains inexhaustive, as formal legal restrictions or exclusions are often, in the end, simply unnecessary. (Governments can always then make ad hoc decisions about whether to use a PPP in a particular area.) The draft therefore allows PPPs to be used in any sector involving the provision of public services. An illustrative list is sometimes excluded, or even an exhaustive one. If the host country prefers to be specific rather than general about the sectors to which PPPs can apply, the Article should be modified accordingly.

Paragraph 2 then allows for certain specific sectors or areas to be excluded from the application of PPPs, if that is what is considered appropriate and necessary. Some countries prefer to exclude certain areas of defence activity and contracting, for example. Many PPP laws contain no such exclusion, however, which is why the paragraph has been left in square brackets. Countries which do not need it can delete it.

One sector which sometimes proves problematic in this context is the natural resource/extractive industries sector, which is often distinguished and excluded from the scope of PPPs and PPP laws, although "concessions" may already have been in use in the sector for many years. That is because (a) the sector is often already the subject of well-developed laws and procedures which have been in place for a long period, representing a self-standing and comprehensive body of applicable rules and regulations, and (b) PPPs are essentially about or related to public services and public infrastructure, which many extractive industries are obviously not (at least not directly)[14]. In that case, it may be better to carve out the relevant sector and industry from the scope of the new PPP Law, even though the "concessions" in use there may be conceptually very similar to PPPs and subject to many of the same principles. This is an analysis each host country should carry out. Appropriate exclusions can be set out in this Article and/or in the definitions of PPPs

[14] In addition, some projects in this sector may not be able to satisfy the SDG Guiding Principles.

and scope provisions in Articles 1 and 2. It should be kept in mind, however, that the power sector, which is obviously closely related to public services and public infrastructure, may need to be addressed specifically and treated differently to other energy or natural resource concessions of which the same cannot be said. The former is more susceptible to categorisation with other types of PPP.[15] This is why the government's specific lists of applicable PPP sectors (if they use them) often include a reference to "energy".

Article 7. Parties to a PPP contract

There will often be only two parties to a typical PPP contract – the contracting authority and the private partner (as we call them). The Article acknowledges, however, that, on the one hand, there may occasionally be more than one public authority participating as contracting authority,[16] such as where several municipalities are involved, for example, or a state-owned enterprise teams up with a line ministry. On the other, the private partner will often consist of a consortium of companies which become shareholders in the special-purpose vehicle company incorporated to fulfil this role under the contract. The two principal parties may also agree to bring in additional third parties to the PPP contract, when the project's particular circumstances or needs call for it.

Article 8. PPP term

This Article envisages a statutory minimum term for all PPPs. Host countries should think carefully about what this should be and how it should be calculated. The period can be inserted (in years) if they wish to specify one (some countries may not). A term of at least five years is likely to make sense, given that PPPs are inherently long-term structures, with all their complexity and the importance of long-term risk-sharing between the parties. Because there is no commonly recognised basis for establishing a minimum term, however, the draft leaves the details to be set out in the regulations (if at all). These details should be consistent with any minimum value (if any) specified under Article 4.

A maximum term is also envisaged for PPP contracts in para 2, although this is left to the parties to the contract. This is because it is important not to allow such contracts to "lock up" assets and activities for too long, potentially creating long-term, anticompetitive monopolies, but also to mitigate the risk of corrupt practices. Again, no figure is specified in the text, as there is much debate about what an appropriate term should be. Some take the view that very few PPPs need be longer than 25 or 30 years, as this should always be sufficient to make a project financeable and investible. Others believe that significantly longer periods can make sense; there are indeed not a few examples of them in practice.

For that reason, a specific figure is not suggested in the Model Law. Instead, the Article assumes that an appropriate basis for calculating one will be available to the contracting authorities (and perhaps again developed or set out in the regulations)[17], and that the maximum term will simply be specified in each PPP contract. This is also the approach taken by UNCITRAL. Some of the basic principles to be taken into account in framing any maximum term are set out in para 2. Host countries should add any further criteria that they regard as fundamental.

Notwithstanding the principles reflected in para 2, PPP contracts usually contain mechanisms which allow their term to be extended in exceptional circumstances described in their provisions.[18] This may occur, for example, when events of force majeure seriously delay progress or interrupt operations, or a change in law necessitates major changes to aspects of the design and construction works. For the contracting authority, an extension of the term to compensate the private partner for its resulting losses (by allowing it to earn revenues for longer) may be preferable to paying it cash compensation. Paragraph 3 allows for this, together with the possibility of further conditions being specified in the regulations (among others to prevent abuse of the extension mechanism).

The expiry of the PPP contract should not, of course, affect the private partner's title to any assets covered by the PPP of which it is entitled to retain ownership.[19] Paragraph 4 makes this clear.

[15] This seems to be particularly the case with renewable power projects, especially in jurisdictions where long-term power purchase agreements are being relinquished in favour of periodic auctions and/or feed-in tariff arrangements.

[16] Where this happens, it may still be helpful to give one of these authorities a clear leading role in interfacing with the private partner under the PPP contract, to promote a "one-stop shop" effect.

[17] This is likely to be more a matter of judgement and experience, however, based on the criteria referred to in the article, than trying to define a single applicable scientific test or methodology.

[18] These are not discretionary remedies available at the private partner's option. They typically represent objective grounds for modifying the contract in the specified circumstances, in a way which is arbitrable and legally enforceable.

[19] As in a BOO (build-own-operate) structure, for example, and even perhaps a BOT (build-operate-transfer) structure.

Chapter II. Institutional arrangements and roles

It may be necessary to include provisions in a PPP law dealing with the interrelationship between different government bodies and ministries in the PPP context, and the ways in which their respective powers and functions may affect or impinge on each other. (Indeed, there seems to be a growing expectation on the part of international financial institution[20] experts in this field that such provisions should be included). The decision-making processes behind the different stages of a PPP's preparation, approval, award and implementation certainly need to be properly accountable. The wider aim here is to achieve the necessary administrative clarity in relation to the implementation of PPPs.

With the exception of the inter-ministerial committee and the PPP unit, we have not provided for this with any specificity in the Model Law, however. This is because (a) there is no general rule about what exactly such provisions should cover or address, as this will depend on the particular administrative structures and procedures in operation in each country, and (b) the authors are aware of few if any examples of such provisions in PPP laws actually in force.

There are many possibilities, and the "placeholder" in the draft touches on these. Cross-referring to the wider public investment process is one, integration with long-term infrastructure development planning another (including its SDG strategy), the application of budgetary and fiscal rules and procedures a third, the powers of sector regulators a fourth. Other examples might include the role of the finance or economy ministry and its risk management unit,[21] and additional tiers of approval or control where the exceptions to normal procedures come into play under the law (as in the case of unsolicited proposals or direct negotiations).

The long-term fiscal impact of PPPs may need to be specifically addressed. Flowcharts drawing together the relevant strands of decision-making may be helpful. The authors' view, however, is that the processes and constraints relevant to these areas will often already be in place within the existing administrative and constitutional structures and rules. To that extent, it may be unnecessary or inappropriate to reproduce them in a PPP law. When they are not, it may make sense to address them in the law. In any case, host countries should always give careful thought to this question, and any provisions believed be necessary included in this chapter by way of an additional Article or Articles.

Article 9. Inter-ministerial committee and PPP unit

Article 9 deals with the establishment of two government bodies that can have central and critical roles to play in relation to a PPP system: an inter-ministerial committee and a PPP unit.

Inter-ministerial committee. This is provided for in Articles 9.1-3. An inter-ministerial committee is by no means always found in host countries. As the text suggests, it is envisaged as a body that has high-level and broad oversight powers in relation to the whole PPP system, giving it overall responsibility for many of its aspects. The draft sets out some examples, including approvals of PPP projects, policymaking and implementation, coordination of administrative functions, strategic changes and trouble-shooting. The draft allows mechanisms to be put in place designed to coordinate the issue of relevant licences and permits for PPPs between the different ministries and public authorities likely to be responsible for them. This "one-stop shop" arrangement is often referred to in discussions of institutional arrangements, as it self-evidently seems a helpful step to take, especially in light of the large number of permits that can sometimes be required.[22]

Experience suggests that countries developing PPP systems for the first time, where civil-service capacity and understanding of the system (which may still be rapidly evolving) are still limited, can welcome such a body. Others may find it unnecessary or unduly restrictive, including line ministries implementing PPPs, especially once the PPP system is well-understood and functioning efficiently. An alternative to this overall supervisory body is to vest certain reserve powers of approval and decision-making in one existing ministry, such as the finance ministry, or the prime minister's office. Each host country must decide for itself what is appropriate, and amend the Model Law accordingly.

PPP unit. Many governments, on the other hand, create PPP units as part of their new PPP systems.

[20] See note 29 below.

[21] The ministry of finance often plays a leading role in the decision-making behind a country's PPP system – unsurprisingly, as the ways PPP projects may impinge (or not) on a government's finances are usually a prime consideration in their application. This may be an alternative to setting up an inter-ministerial committee.

[22] Actual examples of such mechanisms are hard to find, however. They may be something of an elusive ideal! Note that the EU, however, is devising some helpful provisions long these lines, at least for cross-border projects.

These are essentially administrative support functions, designed to help with the implementation and refinement of the new system and to disseminate a proper understanding of it, within both the public and private sectors. However, their structure, responsibilities and powers vary widely from country to country, depending on governmental preferences and the evolutionary stage reached by the country's PPP system. In some cases, they have a limited advisory role. In others, they can have a much more central and executive role, with extensive powers to help shape the new PPP system, including wide rights of approval over aspects of the implementation of individual projects.

Again, each host country should think carefully about how it wants to structure, organise, staff and empower its PPP unit, and amend the Article as necessary accordingly. The draft (Article 5) requires it to be adequately staffed, on the basis of a spread of skills and backgrounds (including a grasp of the SDG Guiding Principles). It allows for a controlling ministry and director to be specified in the law, without prescribing solutions (even though the ministry/minister of finance or economy is frequently specified). This may, of course, be the inter-ministerial committee.

The list of functions and responsibilities in para 6 is a broad "wish list", containing the full range of matters which are often allocated to such units. Host countries should amend it as necessary. Few, if any, real PPP units around the world would have such a wide array of responsibilities! Functions should be chosen and allocated in ways which avoid potential conflicts of interest with respective ministerial duties or conflicts between different responsibilities within the PPP unit (para 7).

Article 10. Information about PPPs

The transparency of a PPP system will be critical to its success (as the SDGs recognise). The more fully the public and private sectors understand all its technical, procedural, commercial and operational aspects, the better. PPPs are complex, sophisticated vehicles which often take years to be fully understood. A steady flow of helpful, accurate information about them in any country seeking to implement them systematically will therefore be vital. Article 10 thus imposes wide-ranging duties on government to prepare, collate, develop, maintain and publish the relevant information. The relevant information covers all the key areas of the PPP system (para 2). It extends to information to be supplied by contracting authorities about individual projects they have implemented or are about to implement, information about tenders and information to be supplied by the private partners, as well as information that local communities may need to exercise the rights of protection they may enjoy under applicable law.

Host countries should consider any other specific requirements of this kind which they would like to see included in their PPP law, such as mechanisms for independent audits of aspects of the published information and procedures for public reviews or hearings where appropriate.[23]

Chapter III. Initiation and preparation of PPPs

This and the next chapter are perhaps the most "central" chapters of the Model Law, dealing with the all-important subject of the selection, preparation and award of individual PPP projects. These are often a principal focus of laws of this kind. A host country's existing procurement law may not be well-suited to PPPs, necessitating a tailor-made (and perhaps comprehensive) set of procurement procedures for them in the PPP law.[24] The Model Law aims to set out a clear, robust framework for the procedures and principles involved, leaving much of the relevant detail (such as timescales, deadlines, precise formalities, definitive rules and methodologies) to be addressed in the regulations and tender documents. Chapter III deals with the early stages of a project's initiation, preparation and approval, and Chapter IV with its award and implementation.

Article 11. Initiating and preparing PPPs

This Article describes the steps and procedures that must be followed as a PPP is defined, initiated, appraised and approved. Under para 2, either the relevant contracting authority or a private initiator in the case of unsolicited proposals can initiate PPPs. However, the Article assumes (para 4) that the contracting authority will usually carry out, or at least manage, the detailed work of preparing any PPP, as this will allow it to retain a suitable degree of control over its contents. (In some jurisdictions, including ones with limited relevant experience of PPPs or

[23] It is not just the transparency of the available information which is important, but the right to take appropriate action where it reveals deficiencies or abuses.

[24] See generally the discussion of this subject in the next Volumes of the PPP Regulatory Guidelines Collection, dealing with the legislative and regulatory framework for PPPs.

relatively constrained government resources, it may nevertheless be necessary to delegate at least some of this work to the private sector. The Article therefore allows for exceptions to the general rule to be identified.[25]) Under para 3, the contracting authority has to establish a suitably qualified project team (with knowledge of the SDG Guiding Principles).

Paragraph 5 gives an idea of what the identification and preparation work should aim to cover and achieve. The preparation work needs to include a comprehensive feasibility study, showing how the applicable appraisal criteria will be met, together with (or covering) a strategic impact assessment (reviewing its social and environmental impact) and reports on various other fundamental matters that should be examined and confirmed before the project can go ahead as a PPP. These are identified in para 8 and include an initial risk allocation pattern, an assessment of the contracting authority's capacity to launch and carry through a PPP, and proposals for the most appropriate basis for awarding it. Before these are carried out, however, a preliminary identification report must be prepared, covering the fundamental matters that need to be addressed and confirmed before the project can be allowed to go ahead as a PPP. These will then be developed and examined in further detail, and more definitively, in the feasibility study and project preparation work required under Article 8. All the reports prepared as part of this process are subject to review and approval (perhaps certified) as compliant with the requisite standards and procedures, by whichever competent body is empowered to do this (paras 7 and 10).

It should be noted, however, that the Article contains rather more detail on the content of these studies and reports than host countries may want to include in their PPP statutes. If so, many of the details can be moved instead to the implementing regulations and guidelines. The Model Law's requirements in this context should (like a number of its other Articles) be treated as an indicative wish list, and amended or modified as host countries think best. The statute needs to be robust, setting out the key long-term principles for a legal framework, but at the same time allowing for an appropriate degree of flexibility in terms of its application. Regulations in support of statutes are designed to provide that flexibility. The draft therefore assumes that host countries will in time want to reduce the processes involved to a more detailed set of procedures in the PPP regulations, allowing for differing requirements to be met at different stages of a project's preparation.

The preparation work must allow for any public consultations and hearings, structured to allow issues to be properly aired and ideas for improvements to be put forward (para 12). It must be possible to make changes and adjustments to any set of PPP proposals during their preparation to ensure they comply fully with all the law's requirements; this is mentioned in para 13.

Article 12. Appraisal and approval procedures

Once a PPP project has been prepared, it will need to undergo a process of formal approval before it can be implemented, and the private partner for it chosen, in accordance with the applicable procedures. Article 12 lays down this basic requirement, cross-referring to the PPP regulations, where the relevant details can be more precisely specified.

Paragraph 2 summarises the powers and responsibilities of the competent body tasked with reviewing the PPP preparation work submitted to it by the relevant contracting authority, to make sure it has been carried out in accordance with the procedures and criteria. The requirements are comprehensive and strict (as they are in UNCITRAL). Enacting states should decide if they want such a rigorous supervisory role over the actions of contracting authorities in preparing and awarding PPPs, and whether it should include formal powers of approval (as opposed to simple review). Some states may wish to split the review and approval functions, perhaps giving the first to an administrative body (such as the PPP unit) and the latter to a higher-level one (such as the inter-ministerial committee). The draft allows for both possibilities. Some may want it to extend to approval of PPP tender documents, but others may regard this as unnecessary. Allowance may also need to be made for the fact that these functions may have to be loosened somewhat over time as the PPP system evolves and becomes larger. Eventually, many contracting authorities may be capable of at least an element of "self-regulation" in this context.

Paragraph 3 then sets out a broad, suggested "wish list" for the relevant appraisal criteria themselves. These are not the same as the approval tests identified in the previous paragraph, although they would need to be taken into account during that process. They are the key criteria that should be applied during the preparation work for a PPP project, as part of its feasibility (appraisal) studies. Compliance with the requirements of Article 4 and the SDG Guiding Principles is placed at the head of this

[25] Note that when this happens, it will be vital for the contracting authority to be in a position to carry out a thorough review and assessment of the private partner's preparatory work in all its aspects – technical, financial, legal, environmental, social and so forth. It may need to hire in independent expert advisers for this purpose.

list (although the principles are also built into several of the other specific criteria listed). Again, this is a wish list. Host countries should consider which ones to include in any definitive list(s) of their own, either in the main PPP law or the regulations. While most of the criteria suggested are likely to be relevant to any PPP assessment, they will not necessarily all be, at least not in all circumstances. Their relative importance or weighting will also vary from context to context. The PPP law should therefore retain an element of flexibility about them, as they are likely to differ depending on the type of project being considered.[26] Allowance is made for other criteria to be used and included in the regulations in the future.

This is why we have used the words "as appropriate for [the] purpose" of appraising the relevant PPP. Careful thought should be given to the question of which criteria will always be applicable – mandatory – and which will only sometimes come into play. The answers are likely to be reflected in detailed mechanisms and procedures linked to a specific context, for which the regulations rather than the law would provide. This is acknowledged by para 5. The criteria and procedures are also likely to evolve and need refinement over time. Paragraph 6 gives the government responsibility for determining and revising them, and for publishing their contents.

Article 13. PPP Implementation resolutions

Once a PPP project has been selected, prepared, appraised and approved, it will be important to confirm this in a public document with an appropriate degree of formality and transparency. Article 13 provides for this in the form of a published "implementation resolution". This should summarise all those critical aspects of the project which need to be described in its contents, to ensure they are publicly available and readily understood, and demonstrate the project's compliance with the law's essential requirements (such as the SDG Guiding Principles) and the applicable approval criteria. A summary of the results of the public consultation process should also be included, together with an indication of how objections or grievances can be addressed. Host countries may wish to make the publication of an implementation resolution the start of a formal tendering process. If so, the PPP law should make it clear that this is the case.

Article 14. Unsolicited proposals

This Article deals with the initial stages of an unsolicited proposal. Unsolicited proposals (USPs) can be controversial, with many commentators regarding them as unnecessary and wide open to abuse. Others see them as essential in emerging-market countries with little experience of PPPs. The host country needs to decide whether and to what extent to permit them.[27] The introductory words of the next Article acknowledge that some do not. The Model Law's provisions assume they will be used, but seek to make the procedures applicable to their use – and the award of the resulting PPPs – as transparent, fair and competitive as possible, as well as consistent with those applied to PPPs initiated by contracting authorities.

Under the Article, the private initiator must submit its preliminary proposal for the proposed project, in the required form, to the relevant contracting authority (and any other competent body authorised to receive it. Host countries may wish to provide for this to reduce the risk of any system abuse). The latter has a discretion, but not an obligation to review it and make a preliminary decision about moving to the next stage. The rationale for this discretion is that the potential contracting authority may not have the time, resources or inclination to review every unsolicited proposal presented to it, especially if many of them are coming forward or they are clearly incompatible with its wider strategic or policy priorities (the host country may still prefer to turn this into an obligation to review them, together with a duty to give reasons for the conclusion reached).

Only proposals that do not relate to projects which have already been officially "lined up" by the host country's government should be considered. The contracting authority can require the private initiator to provide as much of the relevant information as is needed to make its preliminary assessment, including impact studies (for instance, technical and commercial feasibility) and information as to its own qualifications for the task. Any exclusive rights of the private initiator in relation to the project (such as intellectual property and commercial confidentiality) are protected under para 5. If the contracting authority decides formally to review the PPP and move forward, the provisions of Articles 11 and 12 then come into play, covering the project's

[26] For example, a PPP procurement will not always be the most cost-effective and efficient basis for tendering a project – indeed, it will often not be. The "value for money" test referred to, however, may still justify approaching a project as a PPP rather than a conventional procurement, as other long-term benefits can accrue which mean it nevertheless represents optimum value for money for the country, considered in the round over time. This will involve judgements about the applicable criteria and their relative importance as decisions are made.

[27] See the more detailed discussion of this subject in Chapter 4, Volume II , dealing with unsolicited proposals.

detailed preparation, appraisal and formal approval. If an implementation resolution is then passed to proceed with it, the provisions of Article 21 will govern the next stage. In short, this means that competitive tendering procedures must be applied, except in the circumstances where Article 21 allows them not to be.

Chapter IV. Selection of private partner

Article 15. Procedures for selection of private partner

Paragraph 1 of this Article requires competitive tendering to be used to select the private partner (on an electronic basis if possible), save only where exceptions are expressly permitted, including in the case of certain USPs and direct negotiations under Article 22. It is widely recognised today that competitive tendering is generally the most efficient, effective, transparent and fair basis for awarding major contracts, and the best way of mitigating any risk of local corruption. It is also often an explicit requirement of international financial institutions,[28] such as the EBRD, and a condition of their financing for particular projects (albeit not an invariable one). The Model Law therefore assumes that, as a general rule, it will be used. The introduction to the chapter summarises the key qualities and principles of a well-structured tendering regime.

Those introductory words also touch on an issue which always arises with PPP laws, namely, to what extent a country's existing procurement regime should apply to the award of PPP projects. This is something each country needs to weigh carefully. Most countries will already have such a regime in place. It may be a sophisticated one which already caters specifically for PPPs (as in the EU, for example). Where it has been drawn up before the country has started to make use of PPPs, extensively or at all, however, it will often not be readily applicable to the very large, complex, high-value structures that PPPs typically represent.

It may be possible to amend or modify the existing procurement regime to accommodate PPPs. On the other hand, this may be difficult to do and could give rise to considerable confusion about how exactly the revised provisions will apply in the context of the new PPP law. For that reason, host countries often prefer to create a comprehensive, self-standing procurement regime under the PPP law which will apply specifically to all PPP projects, and to disapply the existing regime substantially or completely from their award.[29] This is the approach reflected in many PPP laws and the one suggested by the Model Law. Paragraph 2 is drafted accordingly. If the host country decides to amend its procurement regime, or concludes that it can be used without amendment, the provisions of Chapter IV (or equivalent) of its PPP Law may differ significantly from the Model Law, as they will either need to cross-refer explicitly to the relevant requirements of the former, or invoke them as a whole, disapplying specific provisions that do not work in this context. The draft also allows for this possibility (as does UNCITRAL).

Paragraph 3 again makes it clear that the more detailed aspects of the applicable tendering procedures will be set out in the regulations, but shall be governed by the principles set out in that paragraph, which are almost universally recognised today as suitable governing tests for such processes.

The exact criteria and evaluation methodology for the prequalification and selection of successful bidders, appropriate for the relevant PPP and the tender structure being used, will then have to be chosen (by the contracting authority) and set out in the relevant tender documents. Paragraphs 4-6 contain a further wide-ranging wish list of possible tests which can be used. These would have to be refined and made more precise in the tender documents. They must always be consistent with the criteria used to approve the PPP at preparation stage and the implementation resolution for it. Paragraph 7 places a standard non-discrimination duty on the contracting authority (consistent with UNCITRAL) in relation to the award and implementation of PPPs.

Article 16. Tender structures and procedures: general

Article 16 deals with an assortment of general matters that will apply to any tender structure adopted. The contracting authority will determine the tender structure for the award of any PPP, in accordance with the requirements of the PPP law and regulations. Its detailed aspects will be set out in the tender documents. Paragraph 1 provides for this.

[28] That is, development banks and similar international funding organisations, as opposed to private-sector banks and investors. They include the World Bank (International Bank of Reconstruction and Development), International Finance Corporation, the EBRD, the African Development Bank, the Asian Development Bank, the Asian Infrastructure Investment Bank and the Development Bank of Latin America.

[29] If the host country is an EU accession country or even a member state, it would need to ensure that any bespoke procurement procedures for PPPs were fully consistent with EU law on procurement and state aid. However, as we have explained, the Model Law is not primarily directed at such countries.

Paragraph 2 then states that an open public tender shall normally be used (where potentially any interested bidders can respond to the published invitation), with flexibility as to the use of prequalification and a one- or two-stage process. Closed tenders – where the contracting authority specifically selects bidders without a public advertisement – are only permitted in the very limited circumstances described. Each host country should decide on the scope of these exceptions. Specifying them with precision in the law is recommended and considered common best practice.[30] When closed tenders are used, the contracting authority should still try to maximise the element of competition involved, as required by para 3. There are various recognised methods of doing this.

Paragraph 4 provides that any person, or groups of people, with legal capacity can participate in a tender, subject to any applicable legal restrictions. These restrictions are intended to refer in particular to rules excluding people who may have been convicted of relevant offences, such as corruption, illicit employment practices (for example, using child or slave labour) or similar prohibited acts. National security considerations may also come into play in this context. Where consortia are involved (as they usually will be), their joint qualifications to perform their responsibilities, as well as those of individual members, must be assessed (para 5).

Under para 6, all decisions during the tender process concerning prequalification, selection (shortlisting), rejection and final contract award must be made only on the basis of the criteria, requirements and procedures set out in the tender documents. This guarantees the integrity and transparency of the process, and its efficiency for bidders (so they know what they are dealing with).

Paragraph 7 spells out the need for transparent communication processes and methods with bidders, allowing for suitable bidder input into the tender documents and discussion of critical aspects of the project. Paragraph 8 allows for the use of tender security (such as bid bonds); where it is used, the security must only be forfeited where the tender documents so provide. The Article also addresses other specific aspects of a tender process which can sometimes prove problematic or uncertain, such as restrictions on multiple or joint bids (paras 9 and 11) and the consequences of receiving only one tender (para 11). Bids can be changed or revoked before the final deadlines (para 9). The scope for a final clarification or negotiation stage is specifically addressed (para 10) as this represents a potentially awkward area that should be carefully handled in the regulations and tender documents.

The confidentiality restrictions set out in para 12 generally govern tenders (as between competing bidders), although these are, in turn, subject to the transparency requirements of Article 10. The contracting authority has to keep appropriate records of tender proceedings under para 13, in accordance with the requirements set out in the PPP regulations.

Article 17. Tender documents and criteria

This Article lays down the general requirements for the contents of any set of tender documents to be drawn up by the contracting authority. They are designed to ensure the documents are sufficiently complete and transparent to enable bidders to participate effectively on the basis of a "level playing field".[31] The underlying principle is to maintain an adequate, "healthy" (but not excessive[32]) level of competition throughout the process. Paragraph 1 summarises the typical essential components of the documents, which should be drawn on as appropriate.

Paragraph 2 obliges the contracting authority to provide all such information in its possession about the proposed PPP as may be necessary to promote the efficacy of the tender, either in the tender documents themselves or in a data room. This is designed to impart an additional element of rigour and transparency to the process.

The Article makes it clear in para. 3 that tender documents can be amended during a tender, before the applicable deadline(s), either on the contracting authority's initiative or in response to bidders' comments (but subject of course to the usual transparency principles). Deadlines must be extended as necessary to allow for this, and appropriate records kept of the justification for the changes.

Para 4 allows (in square brackets) for the possibility of tender documents, as well as the preparatory work

[30] Host countries which are EU member states or accession countries must also take the possible exceptions under EU law into account, in particular under Art 10 – 17 of the EU Directive 2014/23 on the award of concession contracts; under Art 7 – 17 and Art 32 of the EU Procurement Directive 2014/24 as well as under Art 18 - 35 and Art 50 of the Sector Procurement Directive 2014/25.

[31] The Article obviously needs to be read and interpreted in conjunction with all the other provisions of the Model Law governing the tender process.

[32] Which may lead to "dumping".

for a PPP, being reviewed and approved by another competent body, if that is what the enacting state has decided to do.[33]

Article 18. Tender committee

The Article provides for the use of a tender committee to manage each PPP tender. Each host country should decide on the detailed requirements for the structure, composition and operation of the tender committee, which should then be set out in the regulations. Some flexibility is advisable, allowing committees to be formed which are always best suited to the needs of individual projects. To promote the legitimacy and transparency of the processes involved, the Article requires minutes to be kept and reasons to be given for key decisions.

Note that the tendering provisions of Chapter IV have been largely written in terms of what the "contracting authority" is entitled or obliged to do. This is at least in part in the interests of simplicity. However, because the exact role and powers of the tender committee will depend on the tender structure in use and the requirements of the PPP regulations, para 5 states that reference to the contracting authority should be interpreted as including references to the tender committee, where the context so requires.

Article 19. Tender stages

This Article provides a framework for the various stages of a PPP tender, depending on which structure (open or closed, one- or two-stage, with or without prequalification) is used. Paragraph 1 summarises them. Certain provisions are then set out in the ensuing paragraphs in relation to each stage. Note, though, that these do not amount to a complete picture, a comprehensive set of procedures. It will be for the PPP regulations to contain the complete story, including all the details (such as formalities, timescales and deadlines, applicable criteria and methodologies) necessary for each tender structure. (Even then, many precise details will only be set out in the tender documents themselves.) The aim of the PPP law – in the case of this Article as well as others – is to define the main "pillars" of the system, its over-arching framework. These paragraphs therefore set out only a few statements about each tender stage, in terms very similar to those used by UNCITRAL.[34]

Paragraph 2 references the tender announcement, para 3 the possibility of a single-stage tender and para 4 the use of closed tenders (in the limited circumstances permitted by the law). Paragraph 5 covers the basic requirements of a prequalification process, para 6 of the subsequent request for proposals, and para 7 of the contracting authority's objective approach in comparing and evaluating proposals.

The next two paragraphs deal with areas that are sometimes not allowed for, adequately or at all, in more general procurement regimes. They are particularly important for PPPs, which typically need longer and more tiered procedures than smaller, simpler projects. The first, set out in para 8, is a so-called two-stage procedure (not to be confused – confusingly! – with a prequalification step followed by a bid, which is very common). Here, the proposal submission phase, following prequalification, is itself divided into two. It is used where the contracting authority needs to refine certain aspects of the project so proposals for it can be finalised. It is often deployed in the PPP context. In the first stage, bidders are asked for their preliminary proposals and comments on the main project elements – specs, KPIs, financing needs, available contractual terms and so on. The contracting authority can then refine and modify all these elements in discussion with bidders. In the second stage, bidders submit firm proposals, which can be negotiated, in order of their evaluated rankings, until a conclusion is reached.

The second, summarised in para 9, is more unusual. Known as the "competitive dialogue" procedure, it can be used when it is not feasible for the contracting authority to specify a PPP project at all in sufficient detail for a routine tender process to be followed. In essence, it allows the definitive aspects of the project to emerge from a constructive dialogue with a group of bidders, so a straightforward competitive tender can then be deployed in the concluding phase. As the provision makes clear, only certain aspects of the tender should be opened to dialogue in this way—that is, those that require greater clarity and specificity which can only properly be achieved with input from bidders. The process should not be used to throw open the whole tender to speculative discussion. Once all the details have been settled, the shortlisted bidders are invited to submit their "best and final offers", from which a winner is selected. The idea here is usually to avoid any final negotiation.

Conceptually, the competitive dialogue is similar to a two-stage tender. The main difference lies in the level of uncertainty about fundamental project features, which can only be defined in dialogue with

[33] See comments under para 2 of Article 12.

[34] In many of its provisions, UNCITRAL does not cross-refer to PPP regulations, but to a country's existing procurement rules and laws. The equivalent UNCITRAL clauses are also somewhat more detailed.

bidders. The two-stage procedure in para 8 is more about simply refining, or fine-tuning, certain aspects of a project. In practice, the use of the competitive dialogue procedure is relatively limited, as it calls for a certain level of capacity, competence and sophistication on the part of contracting authorities and bidders for it to work, which may only be found in the more established PPP markets.[35] It can also carry a risk of collusion or corruption if not properly handled; its use may therefore also need to be sanctioned by appropriate approvals from a separate competent body (such as the PPP unit following presentation of a report), for which the PPP regulations can provide.

Article 20. Conclusion of the PPP contract

This provides for the conclusion of a PPP contract with the winning bidder identified by the tender committee on the basis of the relevant evaluation criteria and methodology, or (more usually) with a special purpose vehicle incorporated by it. Any requirements for the special purpose vehicle set out in the tender documents are allowed for. A two-week "standstill" period is included between award and signature, to allow for the tender challenge procedures in the Model Law (see below). A formal notice of contract award must then be posted on the contracting authority's website and published through the official channels. The draft also allows for the public disclosure of PPP contracts (subject to applicable confidentiality restrictions) where the law requires this. It is assumed that governments may be slightly hesitant about publishing all their contracts as their new PPP systems take shape, but this may in time come to be perceived as advantageous to all, and so provided for in the PPP regulations or elsewhere. (The same provisions apply to PPP contracts entered into under Articles 21 and 22.)

Article 21. Conclusion of PPP contract for unsolicited proposals

This Article provides for the final stages of the award of a PPP project based on an unsolicited proposal. One of its main objectives is to seek to bring competitive pressures to bear, notwithstanding the project's initiation by a single private-sector source, who may hope to be awarded it without the need for a tender. The caveat to this requirement, however, is that the PPP is not based on intellectual property or other exclusive rights of the private initiator, and its concept and technology are not truly unique or new. Subject to this caveat, once a final decision to proceed with the unsolicited proposal has been made under Article 14, an implementation resolution has to be passed and published on the contracting authority's web site and the relevant official channels, inviting third parties to compete for the project. If no third parties come forward, or if the caveat referred to above applies, the contracting authority can go ahead and award the project to the private initiator (subject to any direct negotiations permitted under Article 22 and the PPP regulations), provided it is satisfied that reasonable steps have been taken to attract competing proposals. Further amendments to the documents can be made and the process repeated if it is not so satisfied.

If third-party expressions of interest are put forward, tender proceedings must then be organised in accordance with this chapter. Paragraph 6 provides for incentives or compensation to be offered to the private initiator in these circumstances, in view of the effort and resources it already invested in the project. Host countries should think carefully about whether they wish to include such a mechanism and how exactly it would work. The Article suggests a couple of options. Compensation for pre-tender costs incurred (up to a maximum amount) should be relatively straightforward. Finding a suitable basis for adjusting tender evaluation scores can be much more difficult. Some countries prefer not to provide for this at all; others may already address them in other regulations. Another possibility is waiver of certain bid requirements that would otherwise apply, such as bid security.

Article 22. Direct negotiations

This Article addresses the somewhat contentious subject of awarding a PPP project on the basis of direct negotiations without holding a competitive tender. Host countries should think carefully about the exact circumstances in which they wish to permit this and define them closely in the PPP law. The reason for caution is that these situations are widely recognised as being vulnerable to corruption, as well as creating "log jams" in a country's pipeline of potential PPP projects.

The Model Law treats only a few, specific classes of project as being viable in this regard (several of which are also listed in UNCITRAL): (a) where only a single compliant bidder has surfaced in the context of a tender process (subject to the relevant qualifications); (b) where the unsolicited proposal provisions in Article 21 allow it; (c) perhaps, where there is an urgent need to maintain public services and holding a tender would be impractical (this exception is in square brackets, as some experts counsel against it); (d) where the state's vital security interests do

[35] In some of them – such as France – it has indeed become the norm.

not permit tendering; and lastly (e) where it has been clearly established, based on an independent expert report, that only one source is actually capable of implementing the project (for example, in the case of unique patented technology or intellectual property).

The regulations will set out the detailed procedures governing any such direct negotiation. Close monitoring of the PPP implemented as a result, including its standards of performance, is encouraged by para 2. Paragraph 3 obliges the contracting authority even then to try to introduce an element of competition into at least aspects of the procedure if it believes it can.

Article 23. Review and challenge procedures

This confirms that bidders who feel they have suffered (or may suffer) loss or injury as a result of a contravention of the law by a government body in connection with a PPP's award or implementation can bring proceedings through any available legal channels in the host country. The Article does not provide specifically for any such channels or proceedings, as these can vary widely from jurisdiction to jurisdiction. Many countries have established grounds for bringing "judicial review" and similar challenges to government decisions improperly taken. The host country should consider whether the established channels are adequate for this purpose.

The Article acknowledges that these established channels and mechanisms may need to be reinforced or supplemented in the regulations.[36] Careful thought should also be given to the question of the speed and efficiency, as well as efficacy, of any such channels, and the availability of suitable interim measures. It is much better to solve a problem caused by an abuse of process at an early stage, than to have to wait until it has done damage to the project at a later or more advanced one; prevention is better than cure.

Where the PPP regulations provide for such procedures, the Article requires them to operate quickly and efficiently, using interim or interlocutory measures and powers, so that defective or unlawful decisions and actions can be challenged and overturned at speed, ideally before they are actually implemented in the context of a PPP project. Broad powers to open up, review and revise decisions and documents, and to suspend or overturn actions being taken, are allowed for, together with a power to award compensation for losses incurred and even to cancel an entire project in certain circumstances. Because any such powers would be invasive and sweeping, however, and may well overlap with similar powers and mechanisms under other branches of law (such as procurement laws, judicial review, or the laws of tort or contract), host countries should take great care in framing them.

Chapter V. PPP contracts

Article 24. Main terms and conditions of PPP contracts

This makes it clear that, under the Model Law, an overriding principle of freedom of contract shall govern the drafting and negotiation of the contents of a PPP contract. The parties can agree on essentially whatever provisions they choose, subject to any requirements or constraints in the wider legal system (and, of course, the PPP law itself). Host countries should give careful consideration to what these constraints might be. There will always be some, ranging from unfair contract terms, for example, to unenforceable provisions (such as the exclusion of certain forms of liability), to terms required or implied in certain circumstances, sectors or industries (especially extensively regulated ones).

Within those constraints, the Model Law envisages that it will usually be most productive for the parties to a PPP contract to have wide latitude in settling its terms and contents, to reduce the risk of clauses which seem to them to be appropriate being treated as unavailable or challenged as illegal. PPP contracts are long, complex documents, often heavily negotiated by the parties to them. The parties usually need the help of sophisticated professional advisers to get them right. Where those advisers are available, it tends to make most sense for the law to trust the parties, so to speak, to reach suitable conclusions about their terms, with the freedom to agree the clauses they consider suitable. Even where they are not, it can be unduly restrictive or unhelpful for a PPP law to attempt to prescribe individual clauses, and very challenging even to word them.

The Model Law sets out a lengthy wish list of provisions typically found in agreements of this kind, to help focus minds on the relevant ones and remove possible doubts about their legitimacy, but leaves it to the parties to make the final decisions about which to use and how to word them. Many other types of clause are also possible in a PPP contract. The list touches on the SDG Guiding Principles in numerous

[36] In many cases they will need to be, as the complexity of PPPs means they often have to be subject to "bespoke" procedures and mechanisms at almost every level.

places where they are likely to be highly relevant to the contract terms, including KPIs, most obviously, but also in areas where novel clauses may have to be thought through and structured in ways that are perhaps less obvious or familiar. These include providing for adequate dialogue with stakeholders and exercising step-in rights or rights of early termination in a manner which maintains public services and minimises potential harm to end users.

The underlying assumption behind this approach is of course that the host country will welcome and accommodate it. Countries which take a more prescriptive approach to commercial agreements with government, or which see a need for a higher degree of regulation of the whole PPP sector, may wish to include tighter controls over the contents of PPP contracts. That is their prerogative. Great care does need to be taken, though, in the way such clauses are worded in the law, as deficient wording may make the provision unworkable or "unbankable".

The Model Law's approach is also consistent with the drawing up and publication of model clauses for PPP contracts. Most countries find it helpful to do this, as it sets standards, promotes an understanding of the system and reduces the scope for unnecessary negotiation and wasted resources. Model clauses should usually not be made legally binding or compulsory, however. Their role is to furnish constructive guidance, not to remove or constrict the valuable freedom of contract discussed above. They may otherwise prove counterproductive and obstruct the rapid evolution of the system.

Paragraph 2 contains a reference to the wide range of possible PPP structures that the industry has evolved over the past few decades, with the many familiar acronyms used to describe them (for example, BOT, BOOT, BOO, DBFO and BLT[37]). It is again designed to reinforce the sense that the parties will have maximum freedom to use the structure which seems to them most appropriate for the project in question. If host countries have any serious reservations about any of them, they should modify the provision accordingly.

Article 25. Amendment and termination of PPP contracts

The Article provides that the PPP contract will terminate on the expiry of its term, which may be extended in accordance with its provisions (see comments under Article 8). It can be amended or terminated by mutual agreement, but subject to any relevant restrictions in the contract, the regulations, a direct agreement or otherwise at law (para 2). Some countries may wish to specify applicable conditions and criteria for contract amendments with precision in the PPP regulations. Others – particularly those from a common law tradition – may prefer to leave a wide discretion on the subject to the parties. It generally goes without saying, though, that any elements of the PPP contract requiring the initial approval of any competent bodies or relevant authorities besides the contracting authority will need further such approval before they can be amended. Paragraph 2 provides for this.

The next paragraphs address the subject of constraints to the parties' freedom to agree on contract amendments, if that is the course the enacting state wishes to follow. One suggested possible approach is set out, in square brackets, in "alternative 1", providing for a separate tier of approval of any amendments to the "essential" or "fundamental" aspects of a PPP, especially ones which weighed heavily in the application of the original approval criteria or the competitive tendering process for selection of the private partner. Some countries may wish to translate these (somewhat imprecise) terms into percentage figures or monetary amounts. Others may wish to specify the applicable approval mechanisms in considerably more detail (as some laws do).

Alternative 2 is an example of how to do this (based closely on the UNCITRAL approach). It contains tighter and more detailed definitions of what amounts to a material amendment, requiring further approvals, or even (as in the UNCITRAL original) subject to outright prohibition. Some host countries may consider these clauses too long and elaborate (hence the square brackets). It should also be remembered that most PPPs will be subject to many amendments during their life – as will any major project – and putting ponderous obstacles in the way of the parties' freedom to agree on them may be pointless or counterproductive. The underlying commercial and political reality is that, if major changes need to be made to a PPP, let alone any fundamental restructuring, other government bodies will almost certainly be drawn into the process.

Early termination of the PPP contract can also happen unilaterally in the circumstances specified in the agreement, subject again to the relevant conditions and procedures, such as the lapse of time or (where

[37] Build-operate-transfer, build-own-operate-transfer, build-own-operate, design-build-finance-operate, build-lease-transfer. There are many others. The standard texts on PPPs should be consulted for fuller explanations.

the law requires it) the confirmatory decision of a court or tribunal. This is allowed for in para 3.

The Article (para 4) also provides in some detail for the payment of compensation on an early termination of a PPP contract. This is because the subject almost invariably proves highly challenging and contentious when these contracts are being negotiated, with the potential payment of very large amounts "on the table". The Article makes it clear that either party may be entitled to compensation on an early termination of the contract for any reason, in accordance with its terms (and those of any direct agreement). The notion that a defaulting party may be entitled to compensation when it is itself at fault can often meet with great scepticism on the part of government bodies attempting PPPs for the first time. The Article therefore spells out that this may, indeed, be the case, as the assets transferred to the contracting authority on an early termination will usually have a long-term value far in excess of the amount of any losses suffered by it as a result of any default. Moreover, they will usually have been funded largely or wholly by the private partner. All that funding will be lost and written off in the absence of any compensation.

Best international practice therefore usually entails the payment of at least some compensation for those assets and costs, an approach reinforced by the fact that project finance lenders will nearly always insist on being paid down in these circumstances. This is also consistent with the relevant legal principles of many jurisdictions (for example, rules against unjust enrichment). The Article does not specifically require such compensation to be payable as a matter of law, however. The final decision about that question is again left to the parties negotiating the PPP contract. It simply obliges them to give due consideration to the principles governing any such compensation when they are concluding it, listing several likely to be relevant in para 4. The applicable details will have to be worked out and specified in the contract.

Paragraph 5 then lists some of the other matters that may need to be specifically addressed or provided for in connection with a termination of the agreement, such as transfer or purchase of certain assets (such as technology), training of government personnel, residual support services (such as spare parts) and decommissioning. These should be covered as appropriate in the PPP contract.

Article 26. Property and related matters

This Article addresses some of the main property (real estate) issues likely to arise as a PPP is being structured and negotiated. The contracting authority is given general responsibility in para 1 for ensuring that the physical property (typically, the site) and associated rights (such as easements) and assets needed for the PPP are provided to the private partner, in accordance with the terms of the PPP contract (where all the relevant details will be set out). Paragraph 2 makes it clear that this must extend to the crucial but sensitive subject of rights of access to and from, and rights to fix installations on, third-party property. Under para 3, these rights can apply to any real property in the contracting authority's use, occupation or control which it is entitled to transfer to the private partner, including public infrastructure. If such property belongs to third parties, the contracting authority is obliged under para 4 to acquire it (using any available compulsory purchase powers as necessary), together with the necessary legal rights and interests.

The underlying rationale for these provisions is that the contracting authority will typically be in a position to take on these responsibilities, and so should bear the risk of discharging them effectively for the project's benefit. Investors and bidders for projects will expect them to do so. Any doubts or uncertainties about these matters can be fatal to the success of a PPP.

Paragraph 5 makes it clear that the parties to the PPP contract can grant each other whatever property-related rights or interests are needed for the purposes of the project, in accordance with its terms. These may include outright ownership, leases, licences, rights of use and so on. The private partner is, in turn, entitled under para 6 to grant "back-to-back" rights and interests to its third-party contractors. Paragraph 8 acknowledges that the parties may decide in the PPP contract to identify and list different classes of asset, depending on their treatment on termination; namely, assets which are to be transferred or sold to the contracting authority, and others which the private partner may freely dispose of or retain. It is worth noting, though, that a complete categorisation of this kind in the initial terms of the contract may be impracticable and so relatively unusual.

Article 27. Types of payment under PPP contracts

This Article confirms that the PPP contract may contain such forms, conditions and amounts of payment for the proper performance of the private partner's responsibilities as the parties may agree. Local law may impose certain constraints in this area – such as regulatory requirements – which are allowed for. The Article contains a broad, illustrative list of the types of payment that may be used, including direct user charges (typical of a "concession" structure) and payment streams from the contracting authority, making it clear that any

available form of permissible payment may be used. Payments to the contracting authority from the private partner may also be included, such as PPP fees, royalty payments or profit shares. The Article "casts a wide net" on this subject with a view to eliminating any unnecessary restrictions or doubts on the forms and types of payment that can be made.

Article 28. Liability of parties to the PPP contract

This Article contains some straightforward provisions relating to the liabilities and remedies of the parties for breach of the terms of a PPP contract. The terms of the contract and the rights provided by a country's wider legal system will normally apply, without the need for further legislative detail. Host countries should consider whether the law contains any unusual or problematic restrictions in this context and add to the Article as necessary accordingly.

Article 29. Step-in rights and substitution of parties to the PPP contract

Step-in rights are a common feature of PPPs, especially those funded by project finance. They can either work in favour of the contracting authority, allowing it to take over temporary control and operation of a project in defined circumstances, such as when an emergency endangering the public or public services is occurring. Alternatively, they can operate in favour of the lenders, allowing them to pre-empt a threatened termination of a PPP contract by the contracting authority, temporarily take over control of the project, put right a default and perhaps restructure or replace the private partner, to keep the project functioning and its revenues flowing. Such rights can be surprising and contentious from the perspective of either party to a PPP contract. They can also be vitally important, however.

Article 29 therefore expressly entitles the parties to include step-in rights in the PPP contract (and in a "direct agreement" with the lenders), although without imposing any obligation to do so. The relevant details, procedures and conditions will have to be agreed and set out in the contracts. In line with the SDG Guiding Principles, the Article requires those procedures and conditions to be drawn up with the aim of ensuring that step-in rights are exercised in a way which does not adversely affect the provision of public services to end-users.[38] Because the nature and effect of lenders' step-in rights can be particularly startling to contracting authorities negotiating PPPs, para 2 summarises the main powers they typically bestow on those lenders. Paragraph 3 again makes it clear that it shall not be necessary to hold any additional public tenders when step-in rights are properly exercised (as they will have formed part of the contractual matrix at the time of the original PPP award).

Chapter VI. Support, protections and guarantees

The purpose of this chapter is to confirm the viability of certain types of clauses in PPP contracts which can often prove problematic or uncertain when they are being structured or negotiated, as well as to clarify certain general responsibilities.

Article 30. Protection of parties' interests under the PPP contract; miscellaneous

Paragraph 1 confirms that exclusive rights can be granted in a PPP contract. This could well be in the best interests of the project and the public, as well as (more obviously) the private partner. Whether this is appropriate in individual cases, or will tie up competition unnecessarily, is something the relevant contracting authorities will need to decide.

Paragraph 2 gives the private partner primary responsibility for obtaining the permits and consents needed for the project, while giving the contracting authority an obligation to provide all appropriate assistance in this context, as well as granting any for which it is itself responsible. This "risk" is effectively a shared one, in other words, but with the private partner taking the lead role, as permits and consents will have conditions attached to them which it will be mainly responsible for satisfying.

Paragraph 3 prohibits the contracting authority from taking steps which may unduly interfere with or get in the way of the private partner's rights and obligations under the contract, including its management autonomy – subject, of course, to any specific rights of intervention the former may have under the contract (for instance, certain approval rights) or at law (for instance, step-in rights). This is designed to overcome the temptation many contracting authorities often feel, at least in the early days, to try to micro-manage PPP projects, and to help them make the cultural shift from traditional procurement methods to the much more "hands off" one needed in the case of PPPs.

[38] This is a novel requirement, reflecting the novel nature of some of the SDG Guiding Principles. It is worded as simply a qualified aspiration, as it were, for the relevant contractual provisions ("aim to ensure…"), as both contracting authorities and project-finance lenders often consider step-in rights to be fundamental components of PPP contracts. Both might consider a more restrictive, unqualified obligation along these lines unacceptable. The Model PPP Law seeks to work with the grain of both government expectations and concepts of "bankability" in the international finance markets, not against it.

Paragraph 4 again confirms that the parties are allowed to agree on such payments terms as may offer the private partner and its lenders and investors adequate cost coverage and returns in compensation for the proper performance of the private partner's obligations.

Paragraph 5 allows for a PPP contract to include "exceptional" or "special" event provisions offering protections against and compensation for the impact of certain major events beyond a party's control, such as force majeure or material change of law. It also includes an illustrative list of the sort of consequences that may be specified in the contract. These clauses again tend to feature among the more difficult and challenging ones in negotiation. The authors thought it important to highlight their availability in principle.

Paragraph 6 is designed to protect the position of the contracting authority by requiring its consent to be obtained to any disposal of a controlling or "essential" interest in the private partner, at least for a certain period of time and subject to certain conditions.

Article 31. Forms of public support for PPPs

This Article represents another "avoidance of doubt" provision, stating that the full range of the various forms of government support, assets or commitments which the host country government is entitled to provide under applicable law shall also be available to PPPs. These will, of course, also be subject to any relevant constraints under applicable law.[39] Under para 3, the government can also provide for these specifically in the PPP regulations and explain them in the guidelines. Examples of them are given in the Article. The terms and conditions applicable to them must be set out in the PPP contract (para 2). Host countries should add references to any other specific forms which they think need to be included (if any) or qualify or remove any they regard as inappropriate.

Article 32. Protection of public service provision and contract equilibrium

This Article contains provisions relating to the clauses which may be included in PPP contracts to uphold and maintain the continuity of public services and sometimes adapt them in response to changes in demand or circumstance. The financial equilibrium provisions which protect the private partner's commercial position in that event are again allowed for. Provision is also made for setting tariffs, maintenance programmes, regular meetings and reversion of assets to the public partner.

Article 33. Protection of lenders' and investors' rights and interests

This Article – again to avoid doubt – allows the parties to a PPP contract to include such protections in favour of lenders, either in the PPP contract or in the direct agreement, as they may agree to be necessary to secure the successful financing of the PPP. These can include step-in rights and their associated powers (see above). But it should also be remembered that the credit agreements with lenders will also contain numerous clauses requiring the lenders' approval to the exercise of specific rights and powers under the PPP contract, and preventing the taking of certain steps without their consent. The Article also confirms that the private partner can grant the full range of financial security interests available at law over the assets and rights comprised in a PPP with examples.

The rationale for the Article is that doubts and uncertainties are often voiced in countries first attempting PPPs about the extent to which the rights and powers of commercial lenders can or should be protected or prioritised, either contractually or through security interests, where public infrastructure, publicly owned assets and public services are involved. The Article acknowledges the possible need to do so, and the parties' rights to provide for them appropriately. This can help remove doubt. Step-in rights, in particular, can prove problematic. Where a host country does indeed wish (or is legally obliged) to qualify those protections, it should modify the Article accordingly. In that case, however, careful thought should be given to the danger of applying principles or imposing restrictions which may threaten the "bankability" of PPP projects. If new principles need to be crafted and restrictions disapplied, the PPP law may represent a vehicle for doing so. Existing law may have to be modified or repealed as a result.

Paragraph 3 starts from the assumption that the PPP can be subject to all forms of available security in the host country over its assets, other than those public property assets that are specifically designated as exempt from such security. Paragraph 4 confirms that the private partner's shareholders can grant similar security over their ownership interests in the project company. Paragraph 5, however, provides (following UNCITRAL) that any transfer of the private partner's rights and obligations will require the consent of the contracting authority, as provided for under the PPP contract. Care needs to be taken with this provision. It should not stand in the way of what is known in common law countries as assignments by way of security (that is, lenders can enforce the private

[39] For example, EU member states and accession countries will be subject to EU state aid rules. Many other countries will have equivalent restrictions. Trade treaties and conventions may also impose similar constraints.

partner's rights under its contracts, without having to perform its obligations). It is designed to prevent a full transfer of those obligations, as well as rights, which would mean, in effect, substituting another party for the private partner. This should always need the contracting authority's consent, even when that consent is automatically provided for as in a direct agreement. Subcontracts and subleases of part of those obligations are also allowed, of course.

Article 34. Protection of end-users and the general public

This is a simple, broad provision, designed to alert governments to the importance of ensuring adequate protection for the general public and end-users of public services as PPPs are implemented. This might seem obvious but, in reality, is too often and easily forgotten or downplayed. It is a fundamental aspect of the SDG Guiding Principles. The Article (para 1) obliges governments, in drawing up their detailed procedures for implementing PPPs, to be set out in the PPP regulations, to take due account of the needs and best interest of members of the general public and end-users who stand to be affected by such implementation. It requires (para 2) suitable mechanism to be put in place for lodging and addressing complaints, grievances and objections, including (where appropriate) a regulatory or parliamentary ombudsman. Any such procedures will always need careful thought, however. The legal systems of most countries will already contain a range of procedures, rights and remedies designed to achieve a similar objective. If so, there may still be no harm in creating additional mechanisms in the procedures specifically directed at PPPs. Such mechanisms should never "oust" or limit other existing rights and remedies, however. The Article makes this clear.

Paragraph 3 allows the contracting authority to require the private partner to put in place an "operational-level grievance mechanism" which will be designed to facilitate the efficient handling of complaints and claims by the public. This would need to be provided for in the PPP contract. Paragraph 4 allows the private partner to make rules governing the use of public infrastructure by third parties and the public.

Chapter VII. Governing law and dispute resolution

Article 35. Governing law

Paragraph 1 allows the parties to a PPP contract to choose and agree on the system of law which governs it. This may seem surprising to some people. However, the authors felt that, on balance, it would be better for the law to bestow this freedom of contract than to impose local law automatically. Many legal systems do the latter in the case of government agreements. This can be problematic or even fatal to a PPP regime, however, if the perception of international investors and financial markets is that the host country's legal regime is not compatible with a project's "bankability". Sometimes, very innovative contractual structures need to be deployed to overcome this problem.

In addition, when the PPP project is a cross-border one, with assets straddling different jurisdictions, under the terms of a single unitary PPP contract, a "neutral" system of law may have to be applied to the contract, by agreement between all the parties, which (by definition) is not that of one or more of the jurisdictions involved.[40] It was therefore thought to be helpful and constructive to allow the parties at least the possibility of choosing a different system of governing law than that of the host country.

The choice of a foreign system of governing law is a somewhat theoretical possibility, nevertheless. PPP contracts are almost invariably governed by local law, for a range of cogent reasons (especially at the sub-sovereign level). It will govern all the underlying assets anyway, for example, especially the real property involved. Local law will govern the public infrastructure and public services themselves, and it would be very difficult politically for a government to accept the use of foreign law on a large-scale, high-profile infrastructure project. Host countries should therefore keep in mind that local law will nearly always apply to the PPP contract in practice in any case. The Article therefore builds in a "presumption" that local law will be used, save in exceptional circumstances. Finally, if the contract does not expressly provide otherwise, local law has to be applied.

Other agreements and documents relating to the PPP (there will always be a plethora of them) are unlikely to be subject to quite the same sensitivities as the PPP contract. Paragraph 2 allows the parties to choose the law governing them, subject to any applicable legal restrictions. These are likely to be local laws for the

[40] The most famous example is the Channel Tunnel, the concession agreement for which was made subject to (in crude terms) "common principles" under both English and French law, with specific provision for resolving inconsistencies between them.

security documents and purely domestic commercial subcontracts, and an internationally recognised system of foreign law for the credit agreements and the other major commercial contracts.

Article 36. Dispute resolution

This Article again applies the principle of freedom of contract to the agreement by the parties of appropriate dispute resolution mechanisms in the PPP contract, explicitly mentioning a wide range of possibilities. Some legal systems will prescribe specific procedures in this context, as the Article acknowledges. If they do so in ways which are perceived as problematic, the relevant legislation may have to be amended in accordance with Article 41. International arbitration under a well-recognised system or set of rules (for instance, ICC/ UNCITRAL, the International Centre for Settlement of Investment Disputes or the London Court of International Arbitration) is usually a "sine qua non"[41] of any bankable PPP contract. This is accordingly allowed for in para 6. In addition, the Article provides expressly for some of the more familiar forms of early-stage dispute resolution often applied to PPP contracts, including a dispute board and formal mediation (paras 4 and 5). Unusually, the Article also encourages "partnering" between the parties (para 3), by stating that they may provide for it in detail in the PPP contract. Paragraph 7 confirms the efficacy of any waivers of sovereign immunity included in the contract; these will usually be essential for legal proceedings to be successfully brought against the contracting authority or other sovereign body.

Chapter VIII. Implementation and monitoring of PPPs

This area is often somewhat neglected in PPP laws. The accurate compilation of full, detailed information about the implementation and operation of PPPs, including the challenges they face during their life, is essential to the successful development of the wider PPP system. PPP systems need to be constantly reviewed and assessed by the governments advancing them. The Model Law seeks to provide for that.

Article 37. Monitoring and reporting on the implementation of PPPs

Paragraph 1 confirms that the contracting authority is entitled to exercise such powers of supervision and monitoring of its PPPs as may be necessary to satisfy itself that they are being implemented in accordance with their terms. Reports, documentation and physical access to the site are allowed for. The detailed requirements and procedures will all have to be set out in the PPP contracts, as these powers must be exercised in ways which do not interfere with the efficient implementation and management of the projects. But the Article encourages the parties to make proper provision for them.

Paragraph 2 then obliges the contracting authority to provide regular reports about its PPPs to central government, copies of which shall generally be publicly available, as well as any specific information requested from time to time. This is designed to help promote that central store of useful information mentioned above. Paragraph 3 contains a back-up provision dealing with any additional information that government or the PPP unit may require from time to time.

Paragraph 4 requires contracting authorities to keep accurate and complete records of the decisions they made and the procedures they followed in connection with all aspects of PPP implementation under the PPP law. This is considered important from the perspectives of both transparency and accountability (both of which constitute SDG Guiding Principles).

Article 38. PPP database

This Article mandates the creation and maintenance of a central database and register of PPPs in the host country, containing information that is reasonably comprehensive, up-to-date and clear, as well as generally publicly available. It aims to promote the transparency of the whole system, which is likely to be in the best interests of all involved. The detailed workings of the database can be set out in the regulations.

Chapter IX. Transitional and final provisions

The last three Articles deal with the formalities of entry into force of the PPP law. They provide for the cancellation of certain existing laws (which can be listed), the disapplication to subsequent PPPs of provisions of existing laws which are not cancelled, and the consequential amendment as necessary of others (allowing for either a list in the law itself or a deadline to make the amendments, or both). As a backstop, Article 40 also provides for the primacy of the PPP law over other laws relevant to PPPs in the event of a conflict between them. Host countries should conform these Articles to their legislative customs and style as appropriate.

[41] An unavoidable condition.

Appendices

Annex 1 list of participating members of the project team contributing to this commentary

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Annex I
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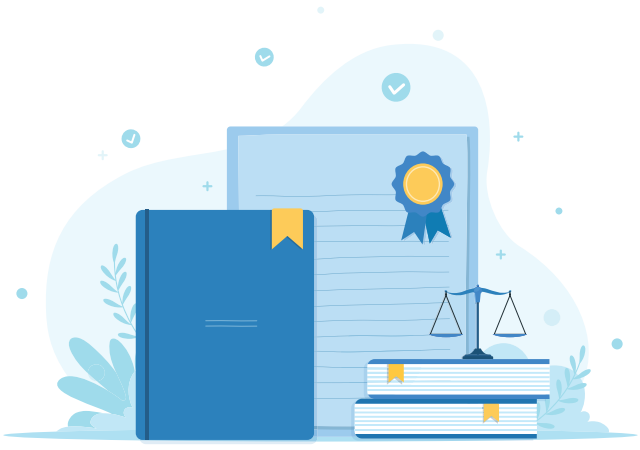
Annex II
Appendix 1 list of some leading precedents used in drafting the model law

CIS model PPP law

PPP (or equivalent) laws for the following countries

- France
- Lithuania
- Russia
- Serbia
- Mongolia
- Croatia
- Egypt
- Georgia
- Uzbekistan
- Kenya
- Armenia
- Ukraine
- Germany

Relevant EU legislation



Appendix 2

Some leading sources of reference and further reading about PPPs and PPP legislation:

- **UNCITRAL Legislative Guide on Public-Private Partnerships** and Model legislative Provisions (2019)

- **European Commission Guidelines for Successful Public-Private Partnerships (2003); Commission Interpretative Communication** Brussels, 05.02.2008. C (2007)6661 on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP); **Directive 2014/23/EU** of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Official Journal L 94, 28.3.2014, p. 1; **Directive 2014/24/EU** of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65; **Directive 2014/25/EU** of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; OJ L 94, 28.3.2014, p. 243

- **EBRD Core Principles for a Modern PPP Law – 2021**

- The **PPP Reference Guide published by the World Bank (IBRD)**

- **UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines)**

- **UNECE Guidebook on Promoting Good Governance in Public-Private Partnerships (2008)**

- **OECD Basic Elements of a Law on Concession Agreements, 1999-2000**

- **CIS PPP Model Law**

- **The EPEC PPP Guide 2011**

- **Graham Vinter-Project Finance (4th edition)**