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Chapter 6.
Forms of government support

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1. General

By definition, public-private partnerships need some form of government support behind them to succeed. If none is involved, the project or development in question will be a purely private sector one, of the kind comprised in much free market and capitalist activity. Many types of such activity can also involve an element of public sector support, of course; licensing arrangements, grants, subsidies, tax breaks, regulatory exemptions and so on. But these in themselves usually fall far short of the level of long-term sharing of risks and responsibilities which justifies the use of the term "public-private partnership".

The phrase "government support" in the PPP context, however, also goes beyond this fundamental notion of risk-sharing. It connotes the specific protections which the public sector may choose to provide to individual projects to strengthen their viability and appeal to private investors, and in particular to provide certain financial or economic safeguards relating to them. They can include the provision of finance and financial guarantees, assets and investments, commercial benefits and institutional protections, as well as various forms of contractual support. They often play a critical part in the financial structuring of a project. The types of support offered may be embedded in the host country's wider infrastructure development strategy, or may simply become an evident necessity as individual projects are structured and defined. This chapter summarises the main ones and discusses how the supporting documents might address them. It looks first at the legal framework, then the policy considerations that underlie the provision of such support, and finally at the types of support typically provided.

Model Law. The Model Law in principle allows governments to make available the full range of forms of public sector support that can be used for PPPs. Article 31 provides as follows:

1. "**General and Specific Forms of Support.** The contracting authority and/or the Government shall be entitled to provide, contribute, or make available to or for the benefit of any PPP such forms and means of public support, assets and/or commercial or financial commitments, as may either be generally permitted or available under applicable law and/or as the PPP regulations may specifically provide for from time to time, such as:

(a) Any of the forms of payment provided for in this law

(b) Construction and/or operational grants

(c) Subsidies

(d) Contributions of physical assets and property

(e) Guarantees and incentives, including guarantees of PPP revenues, whether from end users, off-takers or otherwise

(f) Guarantees of minimum quantities of off-take or consumption by the contracting authority

(g) State or municipal financial guarantees

(h) Loans and other forms of funding or investment

(i) Compensation or direct responsibility for certain types of costs and risks

(j) Tax and customs benefits and exemptions

(k) Other guarantees and/or indemnities and/or incentives

2. **Support to be compliant.** Any such support, assets and/or commitments must be consistent with the appraisal and approval criteria applied under Article 12, the implementation resolution, and the tender documents for the PPP project for which they are to be used. The terms and conditions applicable to any such support, assets and/or commitments shall be set out in the PPP contract (and/or in any related agreement)."

Governments of host countries should consider which of these (and perhaps other) forms of public-sector support they wish to make available to PPPs implemented under their systems and ensure they are adequately reflected in their policy statements and legislation. The supporting documents can then develop and explain them as necessary.

3. **The legal framework.** It is unlikely that any of these forms of support are going to be made possible solely by the PPP legal framework. Their provision will generally depend on wider government functions and powers than those found simply in the PPP law. They will have other legal bases, which can sometimes be subject to complex constraints – the power to provide loans or issue guarantees, for example, to provide grants or subsidies, to own and transfer property, to enter into commercial contracts and take on certain risks and contingent liabilities, and so on. These will all have other legal underpinnings and limitations, as the opening words of the Article make clear. But host countries should consider the potential need for specific provision in their legislation – especially their PPP laws and regulations – to make certain forms of support available for PPP projects.[1]

Article 31 of the Model Law shows how this might be done, while also seeking to remove any potential doubts about the availability of the types of support listed to PPP projects –to clarify the legal position in the PPP context, in other words, especially for the benefit of those countries that choose to make their PPP legislation as comprehensive as possible. It also allows the regulations to make more specific provision for such support, including any forms that may not necessarily be more widely provided for by domestic law. The supporting documents (primarily the regulations) can therefore explain, justify, develop and/or qualify any of them as appropriate. But the wider legal background will also have to be considered very carefully as this is done, to ensure that whatever provision is made for government support in the PPP law and regulations is fully consistent with it. Certain forms of support, for example, may be interpreted as state aid, while bestowing exclusive rights or protections from competition on the private partner in the PPP contract may be deemed to involve market distortions or restrictions. Both may be at odds with the host country's competition or trade liberalisation laws and commitments. International and regional treaties, arrangements and conventions covering these areas will need to be considered.[2] So, too, may any relevant intergovernmental agreements (IGAs) relating to certain sectors, such as the energy sector, which can contain both undertakings by two or more governments to provide certain types of support (for example, connecting infrastructure) or exemptions from domestic legal restrictions, and conditions restricting their application. IGAs are sometimes also entered into in connection with specific projects (for example, cross-border pipelines or rail networks).

The supporting documents can also provide for and clarify the available options. Clearly, the forms of support available for any individual project can vary widely. Decisions about what is needed for each will be made as each project is defined, prepared and finalised. ("Late entries" in negotiation, such as certain types of guarantee, can never be ruled out altogether). They must be consistent with the relevant appraisal and approval criteria used for the project in question, however, and the tender documents for it, as material inconsistencies (such as excessive subsidies or guarantees which fundamentally change the risk-allocation profile) could potentially vitiate the basic project structure. The PPP contract will be the device which finally and formally provides for them (or most of them).

2. Policy considerations

There are numerous reasons why governments may choose or need to provide support to PPP projects. These should be brought out as appropriate in the governing PPP policy paper and/or the supporting documents. In simple terms, the main reason is to make a project viable and attractive to investors where it otherwise might not be. But there may be a range of factors behind any project's need for support, calling for different types of response and backing. Hence the need for flexibility and a range of options available to the government. Whatever form is used, the combination of state support and privately sourced finance should be sufficient to enable the private partner to repay the debt, operate and maintain the PPP facility, and earn a return on its investment.

The main factors and objectives include the following:

- **Risk allocation.** As mentioned above, the first and most obvious reason relates to the risk allocation at the heart of every PPP, which give meaning to its partnership structure – the long-term sharing of risks and responsibilities. Getting the balance of risk right is fundamental to the success of any PPP, with the contracting authority bearing or sharing in any which it is best placed to shoulder and manage (as the PPP cliché goes). The project's principal risk allocation will, of course, have been determined and defined as part of its original structuring and preparation. In addition, as the PPP contract is drafted and negotiated (if it is negotiated at all), there may be many areas of detail

[1] According to Recommendation 13 of the UNCITRAL model Legislative Provisions on Privately Financed Infrastructure Projects, "The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide." The recommendation is not simply referring to PPP laws, however. The national PPP laws of many countries, however, leave this open. In Greece, for example, Law No. 3389: Partnerships between the public and private sectors drafts this provision broadly, permitting "public entities" (being the state, government bodies and legal entities under public law) to provide support for the implementation of projects or the provision of services "in money or in kind". Other countries, such as Croatia, are even less prescriptive. The Croatian Act on PPPs of 2012 (Regulation number 71-05-03/1-12-2) is largely silent on forms of public support, delegating the deciding of all "mutual rights and obligations, mutual payments, payments towards the private partner" to the terms of a mutual agreement. Kazakhstan's Concession Law provides a complete list of forms of state support, comprising state sureties for infrastructure bonds, state guarantees for loans, transfer of exclusive intellectual property rights to the concessionaire, the provision of "in-kind grants", co-financing opportunities and guaranteed offtake of a certain amount of goods. In contrast, Kazakhstan's PPP law contemplates identical measures to the Concession Law, but the list is not exhaustive as it is prefaced by "including", that is, not limited to. In Russia, both the Law on Concession Agreements and the PPP law allow public co-financing of the project, the PPP law limiting the forms of government support to budgetary subsidies. In practice, budgetary subsidies are the most frequently used form of public support in Russian infrastructure projects.

[2] This will be a particularly important consideration in the case of European Union member states or accession countries, where EU procurement, antitrust and international trade laws and regulations will apply.

which can only be filled in and completed as the contract is being finalised.

There will accordingly be various practical steps and responsibilities which the contracting authority will agree to take on for the benefit of the project and the private partner under the PPP contract. These become undertakings and duties – and accordingly potential risks and contingent liabilities – under the contract's terms.[3] They may or may not be provided for expressly in the country's PPP law; if they are, it is likely to be in general terms. They cover such matters as assistance with obtaining permits, providing connecting infrastructure and utilities, ancillary facilities, developing new phases of the project, indemnities against third-party claims, other types of third-party risk and, above all, unforeseen risks and circumstances, which may have a seriously deleterious impact on the project or the private partner's position as and when they occur. This last category is typically addressed in the force majeure and "change of law/exceptional event" clauses of the contract, but there is often intense negotiation over their exact terms and the kind of compensation or contractual adjustments to which they can give rise This subject is covered fully in other chapters of the EBRD PPP Regulatory Guidelines Collection (in particular on drafting and negotiating PPP contracts). As mentioned above, the expression "government support" for PPPs usually refers to additional, specific forms of support, beyond the straightforward pattern of risk allocation and mitigation, that the public sector must provide to strengthen a project's viability and its appeal to private investors.

- **Project feasibility.** The key test for the government in taking on these responsibilities, and providing any of the specific forms of support discussed in this chapter, will be this: To what extent does it enhance the project's feasibility? As explained in detail in the chapter Value for Money Matrix, a PPP will have to demonstrate its viability at different levels in a detailed and wide-ranging feasibility study before it can be approved and implemented. These include technical, commercial, financial, economic, legal, social and environmental, fiscal and affordability feasibility tests. The results of these tests will make up the business case for it and establish its overall "value for money"/"value for people". Government support can be used in relation to any of them to strengthen feasibility. The precise ways in which it is done will take shape and be refined as needed as the feasibility study is carried out and the project prepared in detail.

- **Asset contributions.** Governments will usually be able to contribute certain core physical assets to PPPs to support their implementation and so facilitate their success. This will enhance their technical, commercial and economic viability. There will also be certain fundamental matters which it makes sense for the government, rather than the private sector, to handle. The project site, for example, the property interests and land plots needed for it (including easements and rights of way to gain access and egress) which are usually granted with "vacant possession" and free of any encumbrances, the exercise of any compulsory purchase process involved, site clearance to make it fit for purpose, certain physical assets built into it which will form part of the project and so on all constitute assets and rights which a government will typically contribute to a project.[4] If the PPP relates to an existing physical structure on a "brownfield" site, such as a port or government building, the government will in effect contribute the whole structure to the project, for its further development or refurbishment, perhaps together with its existing staff and functioning operations. Supporting infrastructure (utility supplies and connections, connecting roads or rail systems, perhaps security arrangements around the site and so on) will often need to be put in place for the project to function. This, too, is usually the responsibility of the public partner.

- **Facilitate/provide competitive funding.** There may be doubts about the ability or willingness of the private sector to finance certain projects at an acceptable cost. The long-term funding available for PPPs may at times be limited, for example,

[3] Kazakhstan's PPP law, for example, permits state bodies to participate in PPPs by fulfilling certain obligations such as providing land, granting the right to use objects of state ownership, participating in the creation and activities of a PPP company, providing engineering and transport communications to a PPP company, and in other forms that do not contradict Kazakh legislation (Article 27). State support also manifests through its PPP advisory centre, set up in 2014 in partnership with JSC National Holding Baiterek to promote infrastructure development in Kazakhstan through the provision of services on structuring and support of infrastructure projects, including by assisting with drafting PPP documentation and negotiating its approval with the state authorities. Russian PPP law establishes an obligation of the public partner to help the private partner obtain permits and approvals.

[4] The Bulgarian PPP law simply provides that the grantor shall "designate" a concession area to the object of the concession and can also "designate" areas adjoining the concession area, adjoining physical infrastructure and any other self-contained object necessary for the functioning of the concession object. Governments that fail to provide such assurance of mutual obligations risk creating barriers to the implementation of PPPs. Ukrainian PPP law, for example, is hindered by an absence of guarantees of obtaining land-use rights for the project company necessary for PPP projects. Croatian law specifies that government support may take the form of "the concession of the use of real property (partially or in whole), the concession of real titles in property", but unlike Bulgarian law, it does not oblige the public entity to provide the requisite property.

especially where – again – the project structures and markets for them are novel or suffering from serious market disruption. Alternatively, the anticipated project revenues may simply not be sufficient to underpin private finance, in whole or part. In these circumstances, governments may choose to provide the necessary finance themselves, or a portion of it, directly or indirectly, on terms that would not otherwise be available to the private partner. They may have access to concessional finance, for instance, or be pursuing a wider policy of using public funding for infrastructure development purposes. As the Commentary to the Model Law explains, the use of private finance is not an inevitable feature of PPPs, even though it is deployed in the vast majority of cases. The project's financial viability may mean that at least some element of public funding must be involved.

- **Investment climate.** There may also be uncertainties about the host country's wider investment climate or track record. This can be a particular problem in some lower- and middle-income jurisdictions. The country may just have emerged from a period of war, conflict, revolution or economic transition which may make that climate challenging. There may be little or nothing the government can do if the international financial and investment markets are still closed to it.[5] But many emerging market countries will be in a more stable state than that, and "investible" in principle, yet still subject to concerns about the state of its economic development, the quality of its institutions, the reliability of its laws, the capacity of its civil servants to implement projects and its track record with privately financed infrastructure. An assessment of these "country risk" areas will usually be the starting point for a potential PPP. It will be reflected in their cost of finance and their required project returns. Governments should take account of them and may need to line up certain forms of support as a result.

- **Reduce project costs.** Subsidies or up-front payments – in the form of grants or loans, for example – would lower costs and potentially strengthen the project's bankability and financial viability. If the project is a government-pay PPP, this can also reduce the risk premium which the private sector factors into its overall costing in respect of the government revenue stream. At the same time, any subsidies and other forms of finance should obviously be rigorously tied to actual (anticipated) project costs and their timing to avoid any element of windfall profit or inappropriate benefit being derived from them by the private partner.

- **Reduce risk premiums.** The private sector will usually factor an element of risk premium of some kind into its project costings, to reflect the idiosyncrasies of the project and market at the time it bids. This can be high, pushing the aggregate cost to an unattractively high level, particularly where projects or markets are relatively new and untried (as in the case of countries developing PPP systems for the first time) or at times of market disruption. An element of government funding or support can lower these premiums and with them, total project costs.[6]

- **PPP market development.** In countries with nascent PPP markets, the government's readiness to invest in and support PPP projects will help build up the credibility of the PPP system and signal its serious intent to develop a PPP market. This may be instrumental in attracting private capital and developing a steady pipeline of PPP projects.

It will also be important, of course, for the government not to take any support it provides too far. After all, the starting point of any PPP will be an extensive transfer of risk to the private sector, in the absence of which there is not much point in using the structure at all! If the private partner is over-protected, it may underperform. Or it may make excessive profits, which can also become publicly controversial and damage the reputation of the wider PPP system.[7] Every element of support provided and every risk taken on by the public partner will count towards overall fiscal feasibility and may represent a potential loss of support to other projects. The government may become over-burdened with contingent liabilities.[8] It will be an essential part of the feasibility study for each project to ensure that none of this applies. The government's internal budgeting and fiscal procedures and processes for all its PPPs will also play an important role in this assessment. The efficiency of its support measures needs to be maintained, and techniques applied for costing and budgeting them, which take appropriate account of the present value of future costs and losses of revenue.

[5] For example, Libya while its recent civil war dragged on.

[6] There were many examples of this during the Great Recession after 2008.

[7] The perception that this was happening – fairly or unfairly – played a key part in the 2017 decision to cancel the Private Finance Initiative (PFI) in the United Kingdom.

[8] This was also a perception in the PFI context.

3. Different forms of government support

3.1 Support by host government

As Article 31 of the Model Law makes clear, government support for PPPs can take various forms. The supporting documents can (if necessary) set out the government's policy position on each and clarify their practical aspects and the associated procedural steps. These include:

- **Loans and grants.** The government may provide loans, grants or grant subsidies directly to the project company. The terms offered for these capital contributions can be flexible and are often subordinated to senior commercial debt, so as not to compete with it for repayment. They may be low-interest or even interest-free, to reduce the project's overall cost of funds. They may be for the entire finance needed, but more usually cover only a portion of it, their function being to leverage the private funding that may otherwise not be available.[9] This will often be because of a mismatch between the cost of the project using private finance and the revenues it stands to generate from affordable user charges. This will affect its economic and financial viability. For this reason, the expression "viability gap funding" is sometimes used. Loans and grants of this kind may be provided up front or brought in later in response to certain risks as part of a financial restructuring. (An on-demand term loan, for example, may be made available to the project company, which it can call on when needed to meet its debt-service obligations). Their provision can send powerful signals to the market to help build confidence among private investors, especially in times of market stress.

- **Guarantees.** As an alternative to offering funding themselves, governments will sometimes provide guarantees of the project company's third-party commercial debts. This may be done by way of a direct guarantee of the loan repayments for the benefit of lenders, or indirectly by way of guarantees of the project company's income on which the loan repayments depend. The contracting authority can offer the guarantee. This may seem superficially more attractive to government than actually providing the finance needed, as the guarantee may never be called. But it can still leave the public sector with a large contingent liability, which will need to be accounted for at a budgeting and fiscal level. The guarantee is rarely for the full amount of the debt, however, or there may be little point in using a PPP structure at all; a debt guarantee can effectively undermine at least part of the project's risk transfer to the private sector, while leaving the project debt on the government's balance sheet.[12] Full debt guarantees are sometimes provided nevertheless, especially when there are doubts about the project's ability to support a thoroughgoing project-finance structure, where the repayment of loans depends entirely on the future revenues generated by the project's cash flows. As mentioned above, the use of private finance is not a necessary element of a PPP. In reality, however, in most cases, its use reinforces the risk allocation to the private sector, as both lenders and investors then have a strong interest in the private partner's performance of all its responsibilities for the term of the PPP contract. They become de facto guarantors – so to speak – of that performance, which in turn generates the revenues on which their repayments and returns depend. This is why partial rather than full guarantees are more common. A partial revenue guarantee is sometimes used on user-pay PPPs/concessions, for example, where there are concerns about the extent to which demand and revenue risk can be transferred to the private partner and therefore about the adequacy of the anticipated revenues to cover debt service.

- **Limits on liability.** Governments may seek to place certain limits in their legal frameworks on their potential exposure under both the funding and guarantee mechanisms discussed above. The rules governing their use may, for example, set maximum individual or aggregate amounts which can be provided or maximum proportions of the cost of individual projects which can be covered.[13] These

[9] See, for example, the Viability Gap Fund in India or the mechanism established in the United States of America under the Transportation Infrastructure Finance and Innovation Act.

[10] As the UK Treasury found during the Great Recession with its Treasury Infrastructure Finance Unit set up in 2009.

[11] See below under Sovereign Guarantees.

[12] Many governments turn to PPPs, as one of the rationales for using them, in circumstances where their ability to fund infrastructure projects themselves, using public sector resources, is limited or under strain, and so using financial structures which leave the private sector debt raised on their balance sheets nevertheless can seem counterproductive.

[13] Some countries have retained legislative restrictions on spending. Kazakhstan's law on PPPs contains the following restriction: "The total amount of co-financing of public-private partnership projects and compensation of investment costs aimed at compensation of expenses related to the creation (reconstruction) of a public-private partnership object cannot exceed the cost of creating and / or reconstructing a public-private partnership object." According to the Russian PPP law, if the volume of the public co-financing exceeds the private partner's financial contribution, the PPP object must be transferred into public property after the termination of the PPP agreement.

limits can be defined in the regulations, if not set out elsewhere in applicable law. They are also likely to find their way into the PPP contracts themselves, where the circumstances triggering the provision of such support are likely to be described (at least in the case of contingent loans and guarantees); an exceptional event clause, dealing with political risk events or change in law, for instance, will often contain thresholds and ceilings that apply to the private partner's potential losses which can be included in any claim.

- **Equity funding.** Governments may sometimes provide a portion of the equity invested in the project company.[14] (Publicly owned companies may also act as equity investors.[15]) This would usually be a minority share of it, as a majority share may turn the project company into a subsidiary and take the project debt onto its balance sheet. Its activities and decisions would also be subject to government control in those circumstances, which could vitiate the "private" element of the PPP; there would not be that degree of transfer of risk and responsibility to the private partner which is fundamental to a PPP.

A (small) minority equity contribution, however, would be a different matter. In addition to the simple contribution of funds, this can allow the government to share in the project's investment returns (which can enhance its value for money); give it helpful additional access to project information (including about the project company's own financial performance); and allow the public sector to play a significant, albeit minority, part in strategic decisions. It can also strengthen the project's financial viability by supplementing sponsor or private investor equity, especially where the latter is insufficient to achieve the debt-to-equity ratio (leverage) sought (equity from infrastructure investment funds may not be available, for example). There may also be applicable law requirements in the host country for ownership interests in domestic companies by local entities, especially in the case of vital national infrastructure, which local investors cannot satisfy. At the same time, however, even minority equity contributions by government can trigger concerns about conflicts of interest (especially if the project is in a regulated sector) and interference with management's independent operations.[16] It may not be appealing to the private sector. Much will depend on the latter's wider perceptions about government reliability.

- **Subsidies.** Subsidies have already been mentioned in the previous section. The project's costs may be too high for affordable local tariffs to cover them fully, or its revenues may not be sufficient for other reasons (for instance, low demand) to cover debt service. In these circumstances, the government may have to provide subsidies to the project company to "plug the gap" and make the project feasible. These can take different forms, such as tariff subsidies or single or periodic lump-sum payments.[17] As explained above, the legal feasibility of such subsidies will always have to be carefully verified, as they may be inconsistent with the host country's competition and trade laws and/or international obligations.

- **Ancillary facilities.** An alternative to subsidies provided directly by the government may be to allow any ancillary commercial activities of the project company that it is permitted to carry on under the terms of the PPP contract (for example, petrol stations and restaurants on a toll road), to cross-subsidise the public services it is obliged to provide. These activities are unlikely to raise the same legal issues as subsidies provided by the government. They are sometimes thought of as a further form of government support. Permitting the private partner to undertake them usually makes eminent practical sense in the context of the wider PPP project. They can enhance the project's feasibility and appeal to private investors. A port or airport project is unlikely to succeed, for example, unless the project company is allowed to develop a wide range of ancillary commercial facilities at the project site. Their development can always be made subject to the contracting authority's reasonable approval in the PPP contract, to give it some degree of control and prevent abuses. Careful legal checks should also be made to ensure that applicable law does not restrict such facilities and activities (governing the grant of subconcessions or commercialising public infrastructure).

[14] PF2, the British government's second iteration of its preferred approach to PPPs, involved several structural changes to the PFI model, including the public sector taking a minority equity interest in PFI vehicles alongside the private sector (typically a 10 per cent interest).

[15] It should be noted that whenever publicly owned companies rather than the government itself take on public funding obligations, the government should guarantee its obligations as a matter of good practice.

[16] A concern which can sometimes be mitigated by formally separating ownership and management functions, as in the United Kingdom and France.

[17] Suitable audit or accounting mechanisms may have to be put in place to confirm their proper use and amount over time.

• **Sovereign guarantees.** There may be a need on some PPP projects for certain guarantees from the central government, above and beyond the contractual protections and support offered by the contracting authority itself. This may be due to concerns about the credit-standing of the latter or uncertainties about the extent to which the former is deemed to stand automatically behind the latter's responsibilities and risks, as a matter of law. Thus a municipality or regional government under a PPP contract for local services relating to a hospital or transport service, an electricity off-taker under a power purchase agreement or a regulator awarding a concession contract for a port or airport, to take three examples, may each need its undertakings and liabilities guaranteed in this way. Again, a publicly owned supplier of vital utilities to a project company, such as water or electricity, may similarly need such support for the project to be bankable and investible. The guarantee will be provided to the project company.

To the extent that the contracting authority's credit is the main concern, the primary purpose of the guarantee will be to underwrite its payment obligations under the PPP contract (and/or off-take agreement, such as a power purchase agreement). Yet sovereign guarantees of this kind are frequently expressed in terms of an unconditional guarantee of all the authority's obligations under the relevant contract, usually by making the central government a party to the contract and including the guarantee within it. This will also reinforce the importance of relying on all the contract's internal remedies and procedures to protect the project company before a call is made under the guarantee.[18] Alternatively, the guarantee may be issued by an international financial institution, such as the World Bank or one of the specialist institutions within its group,[19] and counter-guaranteed by the sovereign government. This can give sponsors and lenders an even higher level of comfort, free of the political risks that may affect the enforcement of the guarantee against the government directly.

• **"Country risk" protections.** Sponsors and lenders – especially international ones – may also seek specific guarantees of certain rights and protections they will need to continue to enjoy in the host country if the PPP is to be bankable and financially feasible. They include the "country risk" considerations that project developers, international financial institutions and commercial lenders will typically take into account before deciding on a cross-border investment in a PPP,[20] such as foreign exchange availability, convertibility and transferability. But the protections sought may also extend to the wider risk of interference or adverse action by government agencies other than the contracting authority, which could prejudice or undermine the project or the commercial position of the project company. This is why they are sometimes referred to as political risk guarantees.

The possibility of nationalisation and expropriation (wholesale or "creeping") is the most obvious, but perceptions of instability in government or a recent pattern of economic turmoil in the country concerned may prompt a call for much broader definitions of political risk and protections against them. Typically, the terms of the PPP contract will allocate these risks anyway to the public partner in the clauses dealing with "exceptional events", political force majeure and change of law. The country's investment protection laws and treaties may also contain appropriate and reliable protections. Nevertheless, the government may be keen to reinforce them in the terms of the PPP contract to attract foreign investors.[21] And it may also be thought necessary to go beyond the terms of the PPP contract with the contracting authority, where it is a public agency with limited authority, and set out all the protections and support of this kind in a separate implementation agreement with central government.[22]

Support of this kind that may be provided may include:

• opening of bank accounts, including in a foreign currency, inland or offshore

• hard currency availability

• free money transfers abroad

• unrestricted exchange of currencies

• easing of repatriation requirements

• employment preferences, including around hiring foreign skilled workers

• waiver of certain legislative restrictions (for instance, on amounts or proportion of government spending)

[18] As it will be guaranteeing the contracting authority's liabilities under and subject to the terms of the contract.

[19] See further below.

[20] See further above.

[21] For example, Libya in its recent concession agreement for the Port of Sousa.

[22] The Independent Power Projects in Pakistan in the 1980s and 1990s are a case in point.

- **Exclusivity.** Certain types of PPP projects may call for support in the form of an assurance that the completed project will not be undermined or prejudiced by the development of competing facilities. The Model Law permits the grant of exclusive rights. The PPP laws of some countries also expressly prohibit the government from acting inconsistently with any exclusive rights it has granted, although this is unusual. Where the private partner is fully insulated from demand risk, as in most government-pay PPPs, the possibility of competition may be irrelevant. Some types of concession-based PPP, however, are potentially highly exposed to it. These can include toll roads, rail projects and ports. In these cases, the project may not be financeable unless the sponsors and lenders are given certain long-term protections against it. These are likely to be set out in the PPP contract and can be heavily negotiated. What exactly does the exclusive right involve, and what sort of competing developments should be restricted, how and for how long? The contracting authority may be sceptical about such restrictions, arguing that they represent an illegal constraint on its statutory powers and restrict future policymaking unacceptably. The answer may be for the parties to rely on the compensation provisions in the "exceptional event" clause, rather than an outright ban on any competing facilities. But there are no automatic solutions. The supporting documents can provide guidance on the subject.

- **Tax and customs benefits.** Another common form of government support for PPPs is found in exemptions from or reductions in certain taxes or customs duties that would otherwise apply to the project. Again, this is often done with a view to attracting major foreign investment and international sponsors. Examples include exemptions from (or lower rates of) corporate tax, profit tax, income tax due on loan interest and withholding taxes. Stamp duties can sometimes also be disapplied to infrastructure projects. Similarly, import duties on imported equipment and materials may be waived or reduced. Any such relief may be "tapered", declining over time. Both the project company and its contractors may be permitted to benefit from it. The PPP law, the regulations and/or the relevant taxation and trade legislation may set out the rules relating to it. The host country's investment-protection regime may also provide for it.

- **Forfaiting.** Another form of government support sometimes used to reduce finance costs (and therefore overall project costs) on government-pay PPPs is forfaiting. In crude terms, forfaiting involves the sale of receivables to a third-party financial institution. On a PPP, it might (as in Germany, where it has been widely used on smaller projects[23]) entail the government issuing an irrevocable commitment, on construction completion, to pay at least a portion of the project company's construction costs, in a sufficient amount, say, to cover debt service. This can be relied on by or assigned to the lenders. It can lower the project company's cost of borrowing. Or (as in France, under the cession de creance [assignment of receivables] model) the project company may, on confirmation of the project's operational availability, assign the receivables payable by the government under its PPP contract to its lenders to cover debt service.

Practically and commercially, the two models are very similar. The government payment undertaking becomes unconditional in each case. This makes it equivalent to a partial guarantee, which can have the disadvantages in terms of risk transfer mentioned above. It also keeps that portion of the project company's debt on the government's balance sheet.[24] But in doing so, it should reduce the project company's cost of debt. Another variant (developed in Peru) is for the government to issue unconditional, amortising bonds during construction as certain milestones are reached, which the project company can then securitise.

3.2 Support from institutions and agencies

Institutional involvement. In recent years, governments have increasingly established publicly owned, special-purpose financial institutions to support the funding and implementation of PPPs and other forms of infrastructure development. They are typically capitalised by the public sector and can access concessional funding, but often have at least a degree of operational independence from central government. This can put them in a better position to evaluate projects in a specialised, focused manner than the latter. Examples include the Green Investment Bank and the new Infrastructure Bank in the United Kingdom, BNDES in Brazil and the India Infrastructure Finance Company Limited. The Indonesian Infrastructure Guarantee Fund

[23] Cf World Bank/IPAF PPP Reference Guide, section 1.3.3.

[24] This may not particularly matter, of course, in the case of a government-pay PPP. PPPs should not be driven primarily by off-balance sheet considerations anyway, even though (as we have seen) they are likely to play a part in the government's thinking. Many government-pay PPPs are effectively "on balance-sheet" anyway, under the more up-to-date fiscal methodologies used these days (for example, Eurostat). [22] The Independent Power Projects in Pakistan in the 1980s and 1990s are a case in point.

provides guarantees for PPP projects, as did the Treasury Infrastructure Finance Unit in the United Kingdom (mentioned above).[25] Public-sector financial institutions of this kind can strengthen policy development in the PPP area, as well as providing analysis, funding and guarantees. They can lay down clear criteria and procedures for the availability of funding, which can benefit the wider system. For example, the implementation of PPPs in Mexico is closely controlled in practice by Fondo Nacional de Infraestructura, an infrastructure investment fund operating under the aegis of Banco Nacional de Obras y Servicios Públicos, the country's national development bank. These are all domestically focused examples, however, created by national governments. One should be mindful, too, of the major part played at an international level in PPP development for many years by the multilateral development banks,[26] which are of course themselves largely government-owned, from technical assistance, law reform and capacity building to project identification, preparation and funding.

Local PPP knowledge or state support hubs may also be enabling to PPP projects by leveraging on their privileged access to decision-makers from the government and/or by means of the additional rights/funds sometimes entrusted to them under applicable law, in particular a right to designate projects eligible for public funding. In some cases, sponsors' success or failure to get a publicly owned institution of this kind into the project will decide a project's fate. This order of things is not always optimal, and governments should seek to place suitable limits on the powers and discretion of any such quasi-public company. The regulations can provide as appropriate for any rules and procedures specifically applicable to the involvement of any of these institutional mechanisms to PPPs.

- **Credit enhancement and third-party risk mitigation.** In addition to the guarantees and protections offered by government bodies in host countries, measures may need to be put in place to reinforce a project's financial viability and bankability. An external third party may accordingly have to "backstop" certain risks by means of a risk-transfer or credit enhancement instrument, under which it undertakes to pay or compensate the private partner for losses attributable to specific events. Insurance policies are the most familiar form. They can cover a wide range of project risks. Interest rate swaps and other hedging instruments are also customary features of infrastructure financings. These are not, of course, forms of government support. Other types of third-party support are, however. The Multilateral Investment Guarantee Agency has a range of products, in particularly the political risk insurance (PRI) product, which is well known amongst active emerging market investors. This product covers against the risk of default under contractual obligations or long-term loans involving government action, of a kind, which private sector lenders or insurers may struggle to evaluate or shoulder. In addition, due to their application of high standards with respect to procurement and environmental and social aspects. Multilateral development banks have an element of in-built political risk protection in their lending arrangements anyway. These standards, coupled with the fact that MDBs are government-owned across a broad number of shareholders, gives them a certain level of protection against political risk in host countries.These instruments tend to take one of three forms: full or complete credit guarantees, partial credit guarantees and partial risk instruments. These respectively cover government credit standing, loan maturities and breach of contract on the part of government. The Multilateral Investment Guarantee Agency's guarantees are somewhat broader, covering the transferability of foreign currency, expropriation, war and civil disturbance as well as breach of contract. Payments under these instruments may be linked to project debt or – more unusually – equity, or both. Their use is primarily a matter of commercial choice and cost for the sponsors and their lenders, although contracting authorities will occasionally line them up as well, to enhance a project's appeal as it is tendered.

- **Export credit agencies.** Additional third-party institutional support for large PPPs is also frequently sought from export credit agencies. These are typically government-backed entities offering insurance against specified risks (and sometimes funding) to contractors and suppliers providing goods or services from the country where they are established to projects being developed abroad. The terms on offer can vary from country to country, but usually cover export credit insurance (guaranteeing payment to the seller) and investment insurance (guaranteeing certain political and commercial risks). The regulations are unlikely to need to provide for them in any detail, as they are by definition foreign bodies, but the guidelines should take account of them in addressing this subject.

[25] Until the formal conclusion of the Private Finance Initiative process in 2017.

[26] For example, the EBRD, the World Bank/International Finance Corporation, the Asian Development Bank, the African Development Bank, the Inter-American Development Bank and the Asian Infrastructure Investment Bank.