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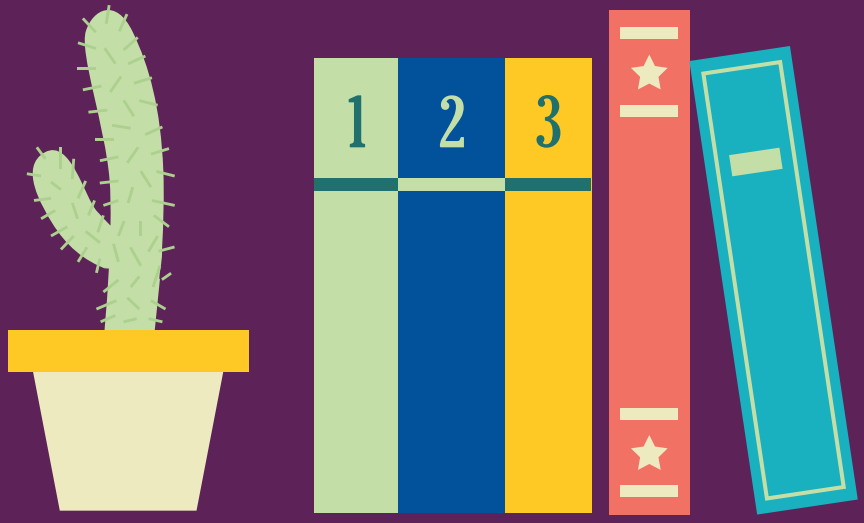

Chapter 8.
Appraisal and approval procedures

1. Introduction

The Model PPP Law contains a range of provisions which require aspects of PPP projects to be appraised and approved as they are prepared, awarded and implemented. The general purpose of these provisions is to ensure that the system created by the law is interpreted and applied correctly by participants and that the projects developed under its purview comply fully with its requirements and standards.

These provisions relate, in particular, to the work of identifying and preparing PPPs. Once a project has been awarded to a private partner and the contract for it entered into, the task of ensuring that it remains compliant with all the law's standards will pass essentially (although not entirely – see below) to the contracting authority. It will be governed by the terms of the PPP contract. It is before that stage has been reached, however, while a project is still being developed, that the greatest need for reviewing mechanisms arises, to ensure that a project has been selected and defined fully in accordance with the many procedural and structural requirements and criteria that the law lays down for it. Once it has been awarded, it may be much more difficult and costly to change any of its key features. And any significant flaws may prove very problematic, on a practical, commercial and public relations level.

These mechanisms in the Model PPP Law are therefore designed to promote each project's efficacy, avoid mistakes, safeguard the efficiency of the procurement system and prevent abuses or lapses in standards. They seek to promote the effective operation of the system and the success of the projects implemented within it. Their premise is that prevention is better than cure, especially where the projects concerned are complex, high-value ones, involving vital public services and infrastructure, of the kind that PPPs typically represent. They are therefore critical to build confidence in that system in a country's domestic and international markets.

The Model PPP Law does this in several ways. It provides for clarity and rigour in the procedures governing a project's selection and preparation; for support and assistance to be available to the contracting authority and its project team, if needed, during the preparation and award stages; for the transparency and publication of information about a project (and the wider system) as it is awarded and implemented; and for various steps and stages of the process to be subject to review and approvals by specified bodies identified in the law. Many of the former elements have already been explained and developed in other chapters of these supporting documents.[1] This chapter focuses on the last – the review and approval mechanisms – but also touches on other aspects where appropriate.

Article 12 (Appraisal and Approval Procedures) of the Model Law sets out a general "catch-all" provision which pulls these mechanisms together. It requires (para 1) all projects implemented under the law to comply with the appraisal criteria and approval procedures laid down in the law and the regulations. This makes it clear that the latter can develop and expand on the former as appropriate. Paragraph 5 (Detailed Procedures in Regulations) reinforces this. It states that all detailed procedures applicable to any proposed PPP during its identification, detailed preparation and approval shall be set out in the regulations. These can include timescales, documentation and reporting requirements, notification and publicity requirements, formalities, relative weightings and priorities, and appeal procedures.

2. Reviewing and approving bodies

The Model Law provides for a number of government bodies with review and approval functions. The regulations can provide for others if appropriate, and/or subdivide their functions and powers. In any event, they should introduce precision and certainty to the composition of each, as well as in the powers and responsibilities they exercise. The regulations (together with the guidelines) should state how exactly each one is staffed, what skills and expertise need to be reflected in its members, which higher-level government body it reports to, what its operational procedures are (where is it physically located, how often it can meet, what documentation needs to be available to it, how decisions are made, and so on) and precisely what functions and powers it must/can discharge in relation to the PPP process. These will inevitably vary from country to country, reflecting local legal and administrative traditions and constraints. These Guidance Notes to the supporting documents do not attempt to provide a single template.

The two main bodies of this kind identified in the Model Law are the inter-ministerial committee and the PPP unit. They are both formally created by Article 9 in Chapter II (dealing with administrative roles and functions).

2.1. **Inter-Ministerial Committee.** Article 9.1 says the government shall establish an inter-ministerial committee and determine its organisational and

[1] See, in particular, Chapter 7, Criteria and Requirements, and Chapter 9, Review and Challenge Procedures.

management structure and operational procedures. This should be done in sufficient detail in the regulations, so that its (relatively unusual) powers and responsibilities are clearly and transparently defined at law. The committee is envisaged as a high-level body, perhaps with equivalent standing to a line ministry in the PPP context, and so it can make and enforce major decisions affecting the structure of PPP projects and policy where necessary. Its composition would need careful thought and provision precisely because of its status and authority. Its members may be drawn from various ministries closely involved with PPPs, and/or they may be independent of them. It will probably include responsible officials from both the ministry of finance and the attorney general's office (or equivalent), as so many of the more difficult PPP issues involve both financial/fiscal and legal/constitutional dimensions.

The regulations should provide for the qualifications and experience of its members as well as the identity of the government bodies from which they should be drawn. A body which is to be specified in the PPP law appoints its chair. The committee may also need a standing and well-qualified support staff, provision for which should be made in the regulations. These should include people familiar with PPPs and public procurement generally, as well as being exceptionally well-acquainted with the PPP law and the system it has created, although the committee may be able to rely closely on the PPP unit for PPP expertise and day-to-day staffing requirements. It may not need any full-time capacity, however, and should be able to meet periodically or as and when need arises.

Some countries base a body of this kind in the prime minister's or president's office, to signal its importance and powers. Others locate it in the cabinet, or simply name the cabinet as having equivalent functions. Not all host countries will see a need for this committee at all, however (they have not been a common feature of Western European PPP systems, for example). Many allow the ministry of finance or economy to be the final arbiter of questions and issues needing determination at ministerial level,[2] as the use of PPPs by governments is so fundamentally driven by fiscal and economic considerations. Countries which give a single ministry a clear dominant role in their PPP system may conclude that having an additional inter-ministerial body in place is not necessary, and may give rise to conflicts which impede, rather than facilitate, decision-making. On the other hand, some may feel that a cross-ministerial body is a helpful additional mechanism to have in place anyway, to deal with particularly thorny, policy-related issues. This seems to be especially true of emerging-market countries implementing PPPs for the first time, to help ensure that there is a suitable degree of central government "grip" over the system. But they may also prefer to subordinate the body to various line ministries and the finance ministry, giving it another label than "inter-ministerial" (such as 'PPP review committee[3]). That is for each country to decide. The Model Law is entirely flexible on this point. The conclusions reached should be set out in the regulations. A record of them should also be kept up-to-date and publicly available at all times, as the Model Law requires,[4] in a manner also identified in the regulations or guidelines.

Equally, the regulations should closely define the functions and powers then ascribed to the committee. Article 9.3 of the Model Law sets out an indicative list, making it clear that these are subject to precise definition or qualification in the regulations. They include:

- **Establish the government's PPP policy, guided by its wider infrastructure development strategy, SDG compliance priorities and socio-economic growth plans.** Whether it actually establishes the policy or simply endorses and develops it over time is a moot point. Many countries will have drawn up and adopted that policy as part of the process of defining their PPP framework and enacting a PPP law. The policy may already have been established when the committee comes into existence, in other words. Almost inevitably, there will be changes to that policy over time, as the PPP system, grows and evolves and governments learn from experience. The committee may well have a key role to play as those changes are made (as a later sub-clause of the Article recognises). Care therefore must be taken in describing this function. In any event, the way developments or changes to PPP policy are made can helpfully be elaborated in the regulations and/or guidelines, especially in terms of consultations that need to take place and formalities required to give effect to them.

The rest of the sub-clause highlights the importance of giving the PPP policy a proper context, and so taking account of the government's wider infrastructure and socio-economic development plans and priorities. This is critical, and a requirement that the supporting documents could helpfully develop in detail, to ensure

[2] In the United Kingdom, for instance the Treasury was firmly in charge of the Private Finance Initiative, the British PPP system

[3] For exactly that reason, the Model Law uses the expression "or equivalent body" in the definition of the committee.

[4] Article 9.2.

that all relevant plans and priorities are identified and considered as appropriate. That "contextualisation" will differ from country to country. The reference to the SDGs is also key here, and fundamental to the Model Law's content as a "SDG PPP" document.[5] The supporting documents can provide a good deal of guidance as to how to make PPPs SDG-compliant, taking account of the growing body of published know-how on this subject.[6] Governments around the world are now moving in that direction, as part of today's environmental, social and governance ('ESG') "revolution", and so increasingly likely to make SDG compliance an important aspect of their PPP policy.

• **Coordinate and promote PPP activity across the relevant ministries.** This is another important function of a body of this kind, as it would call for clear high-level authority. The supporting documents can spell out what these activities may involve and any powers the committee can exercise in this context in relation to the different ministries. For example, "promotion" may involve explaining PPP policy to those ministries and persuading them to apply it properly – or it may involve other steps. The way PPPs are effectively "coordinated" across ministries will also need careful thought and definition.

• **Facilitate PPP activity in accordance with relevant government plans.** This is essentially a planning function, to ensure that PPP projects and strategy are properly integrated into wider government plans for infrastructure development at a national, regional and sectoral level. The supporting documents could provide helpful guidance as to how that integration and facilitation could take place, with procedures for consulting other government bodies (including local municipalities), lists of other policy documents and plans to consider, private sector entities and civil society groups to interface with, and so on. Explicit allowance should be made for the SDGs and SDG Guiding Principles in this context, which are likely to become an increasingly important part of the government's wider plans.

• **Oversee and give effect to the government's PPP policies.** Again, the supporting documents could elaborate on what this function amounts to in practice. How exactly will the PPP system be monitored? What reviews and reports will be written? What powers, exactly, will the committee have to "give effect" to policy?

• **Review and approve proposed policy and strategy changes and refinements.** See above. There will be many proposed changes of this kind over time. The supporting documents could clarify the consultation and decision-making processes for reviewing and approving them.

• **Facilitate the coordination of relevant aspects of PPPs, such as authorisations, permits and consents required from other public authorities.** Textbooks and commentaries about PPPs widely recommend a coordination role of this kind, as long delays in obtaining authorisations and consents often occur and can be problematic and frustrating for project promoters. The "one-stop shop" for obtaining them that is often suggested may actually be something of an academic myth, as the legal power and responsibility for issuing them cannot easily be transferred or delegated to another body. But a coordination function is a different matter and can be very helpful to smooth and accelerate the process. The supporting documents should describe how exactly this will work in practice, with lists of the main types of permit and consent typically needed, suggestions for speeding up their issue, standing arrangements with the main public authorities concerned to improve efficiency and so on. The supporting documents could also propose other areas of helpful coordination, such as between different competent bodies with approval powers for PPPs and between central and local government.

• **Assist with the constructive resolution of problems and issues during the implementation of PPPs.** This would essentially be a "fallback" role that the regulations may not need to develop in any detail. A trouble-shooting function of this kind is usually performed primarily by the PPP unit.[7] A high-level body, such as an inter-ministerial committee, would not be appropriate for it on a day-to-day basis. Some problems and issues relating to the implementation of PPP projects, however, can raise difficult questions of government executive decision-making – for instance, whether to restructure a distressed project fundamentally or agree to its refinancing – which can impinge on a number of different ministries and authorities at once. In that case, a high-level body with overall responsibility for the PPP system could step in and help resolve them, if it has the necessary decision-making authority. The supporting documents

[5] See the Model Law's preamble and related provisions, such as Article 4. As the introduction to this chapter and the Model Law Commentary explain, references to the SDG Guiding Principles are worked into many of the document's articles.

[6] See, for example, the UNECE Working Party on PPP's document entitled Evaluation Methodology for PPPs for the SDGs.

[7] It quickly became a critical function of the Treasury Taskforce in the United Kingdom, for example, in the Private Finance Initiative context.

could make this clear in the description of its powers, indicating the typical circumstances in which this function might come into play – while recognising that it would still be essentially an ad hoc mechanism. That could also help to define a demarcation line between the functions of the committee and the PPP unit, which may be usefully informative to all.

• **Exercise approval powers.** Finally, the inter-ministerial committee must exercise those powers of review, appraisal and approval of individual PPP project which are ascribed to it by the PPP law and regulations. As we have said, each host country must decide these powers itself. The supporting documents should list them comprehensively, setting out precisely what procedures apply to them, how decisions are made and what criteria are to be applied.

2.2 PPP Unit. The Model Law gives a relatively prominent role to the PPP unit, especially in terms of the appraisal and approval powers ascribed to it. Article 12.4 bestows on the PPP unit a general and wide-ranging power of approval of PPPs submitted to it pursuant to the law's provisions (see below). This will not necessarily be thought appropriate by all governments, however. Many PPP units have what is essentially a pure support function, not a final decision-making one, with all important and difficult decisions being made at a politically higher level (for example, by ministries or an inter-ministerial committee or equivalent body, as discussed above). Typically, PPP units are primarily centres of PPP expertise and experience, created to provide advice and guidance about the operation of the system. The question of what, if any, formal powers of approval or correction over the decisions and commitments of contracting authorities and line ministries the PPP unit should have, needs to be considered very carefully by each host government and provided for with precision and clarity in the supporting documents.

Article 9.4 obliges the government to establish the PPP unit and determine its organisational and management structure and operational procedures. Article 9.5 then describes some key elements of its structure, such as its main oversight body (to which it must report) and the position of its director. Again, these are all matters for which the regulations will need to provide in detail. The unit is likely to operate on a largely full-time basis, sooner rather than later, and will need to be organised and staffed accordingly. Only a small team of dedicated experts may be needed in the early months or years of a PPP system, but this may change as the system evolves and grows.

Article 9.5 spells out some of the qualifications and expertise that its staff will need. The regulations can confirm and elaborate on these details, making clear what exactly is looked for in each case and how appointments are made. They should include competence in PPPs, public infrastructure and service procurement, engineering, economic and financial modelling, public accounting and budgeting, social and/or environmental impact, and public administration. An understanding of the SDGs and the SDG Guiding Principles, the government's policy for promoting them and the ways they can be reflected in PPPs will also be important.

As little PPP expertise may available anywhere in the early days of a new system, thought will need to be given to the question of how best to plug the gap. Long-term capacity-building plans should be developed. Appointments can be made from both the public and private sectors. Where private sector members are reluctant to become permanent staff, temporary secondments (for instance, for six months to two years) from private organisations could be used instead. Secondments help to foster an understanding of the system in the private sector, as well as building capacity within government.

Article 9.6 then provides for the unit's functions and responsibilities. As the Model Law contains a fairly comprehensive "wish-list" of them, the regulations should convert these into a definitive one (subject, of course, to future modification). Many of them are self-explanatory and reasonably obvious in terms of the guidance, assistance and know-how that an essentially supportive body of this kind should be able to offer. Others, however (as we have said), go beyond this, and involve a degree of decision-making authority that some governments may not wish to give them.

This applies in particular to the approval and confirmation powers which the Model Law bestows on the PPP unit (referred to in sub-clauses (h) and (i) of Article 9.6). Sub-clause (o) also obliges the unit to "keep track of the monitoring and oversight by contracting authorities of the PPP projects for which they are responsible" – a function representing an additional tier of protection under the law to ensure that contracting authorities are discharging their own supervisory responsibilities properly under their PPP contracts.[8] Some countries may be concerned that these powers go too far and may give rise to political or even constitutional tensions with other competent bodies, especially contracting authorities, which may resent and resist them. It should be remembered, however, that these powers can play a critical part in

[8] See the introductory section of this chapter.

safeguarding the correct interpretation and application of the PPP system, as capacity is built within the civil service and understanding of it, together with confidence in it, grow in the private sector. Experience suggests that government teams and ministries can be hesitant and tentative about using PPPs in the early years of a new system.

Giving the PPP unit an active, responsible and authoritative role of this kind, however, can help to overcome that initial hesitation within government about implementing the PPP system, and to build momentum behind the pipeline of PPP projects, by enabling it to take a positive lead in ensuring that the law's procedures and standards are being followed. This is more likely to result in a constructive, enthusiastic relationship between the unit and contracting authorities than any awkward tension, particularly at the "embryonic" stage of the system in its first years. Authorities may welcome this oversight role with its potential confirmations that they are taking the correct steps. And if the PPP unit does not exercise these powers, which other body will? The host country can always establish an alternative approving body with suitable standing – such as an inter-ministerial committee – for this purpose. But the PPP unit, with its staff, resources, knowledge of the system and related responsibilities, seems the obvious choice.

Once the host country has decided on the PPP unit's exact scope, responsibilities and powers, the supporting documents can describe and expand on what each will involve in practice, to whatever extent is thought helpful and appropriate. The resulting guidance and documentation could be voluminous. We do not attempt to outline it in any further detail in these Guidance Notes, as the Model Law already contains a comprehensive list, and a great deal could be said about what each task may involve.

There are two other areas of a PPP unit's role that should be mentioned in this chapter, however. One is publication and data flow, as these are prominent parts of the unit's responsibilities under the law,[9] and transparency is an important aspect of well-defined appraisal and approval mechanisms (as well as the SDG Guiding Principles). The unit has several publication roles under Article 9.6. It must maintain an up-to-date registry of all PPP projects and the contracts for them (sub-clause (k)), containing relevant details. The supporting documents could describe this registry and its functioning in some detail, clarifying the rights of access to it that private companies and the public may have, with due regard for commercial confidentiality. It then has to "ensure that elements of the documentation referred to in this Article are publicly available and/or published as required or appropriate" (sub-clause (r)). That documentation is potentially very extensive. It can include "methodologies, procedures and guidelines" (sub-clause (a)) and the official documentation containing them (sub-clause (e)); its views on "proposed policy and strategy changes" (sub-clause (d)); standard bidding and contract documents (sub-clause (f)); recommendations for potential improvements to the structuring of PPPs (sub-clause (g)); training materials (sub-clause (n)); and the contents of the knowledge base it is required to maintain (sub-clause (q)) covering these and other areas.

Article 10.1 then sets out a broad "catch all" provision, making the PPP unit responsible for preparing, maintaining and publishing "comprehensive" information about all aspects of the PPP system in a form that may be "helpful and informative to stakeholders, participants and the general public", to promote the system's effective functioning and the clarity of its workings. All such information is "subject to a presumption of transparency and disclosure to the general public" (subject to confidentiality). Article 10.2 indicates what this information may include, covering essentially all aspects of the workings of the system under the PPP law. It is reinforced by the other clauses of Article 10, which impose similar obligations on each contracting authority and their private partners. Again, the scope is very broad. Specifically, information about individual PPP projects (actual or proposed) needs to be "collected, made available and where necessary published" by contracting authorities as required by the government, the regulations or applicable law. Article 10.4 contains requirements for information about tenders, their stages and results, linked to specifics set out in the regulations.

The supporting documents should thus provide guidance and precision as to how all the information and documentation listed above are to be identified, drawn up, collated and published, and how to approach any relevant confidentiality restrictions. Each category should be exactly elucidated where possible. The enforceability of several of these clauses will depend to some extent on what the supporting documents eventually specify, at least where they cross-refer to them.

The other requirement to highlight here is the importance of the SDGs and SDG Guiding Principles to the work of the PPP unit. An understanding of the principles is assumed by both the staffing

[9] These are often functions of PPP units.

requirements for the PPP unit (Article 9.5) and its facilitation and refinement roles in relation to PPPs and their implementation generally (Articles 9.6(b) and (g)). The supporting documents should set out guidance on these last two functions. They can offer detailed descriptions of how those principles can be applied to PPPs, taking full account of the guidance published by the United Nations on the subject including, in particular, the evaluation methodology. An understanding of how PPPs can most effectively be made SDG-compliant is likely to become familiar territory in the near future, as environmental, social and governance priorities deepen their rapidly strengthening hold over the thinking of governments, sponsors and financiers (and others). An abundance of material on the subject may become available quickly. These can be drawn on as the supporting documents are developed and refined over time.

2.3 Other Competent Bodies. The Model Law allows for additional competent bodies to discharge specific functions under a country's PPP law, if that is what a government decides to do. This is entirely up to host countries. The definitions article (Article 2) contains a catch-all definition of "competent body" as meaning "the government, a line ministry or any public authority either having the legal power and authority under applicable law or specifically authorised by the government under this law or the PPP regulations to perform certain functions in the field of PPPs".

Countries may choose, for example, to divide the functions referred to above among several different responsible authorities or bodies, or create additional ones that they consider necessary or helpful. One obvious possibility is the creation of additional PPP "sub-units" within line ministries or sector regulators. Where individual ministries or regulators find themselves handling a range of different PPP projects, having a standing in-house team of experts on the subject of PPPs can be a useful resource. This is not uncommon in the real world, although it tends to develop only when a country's PPP system has reached a certain level of growth and maturity. Some countries may also want to spell out the roles of certain sector regulators in relation to PPPs, either in the main legislation or the PPP regulations.

One area where the supporting documents (and quite possibly the PPP law itself) may need to provide for additional evaluation and approval functions is under Chapter II, dealing with institutional arrangements and roles. As the Model Law explains in what is partly a "placeholder" chapter, the idea is that host countries should address any specific administrative mechanisms here (and in the corresponding regulations) that they believe are called for in the PPP context. This could extend to ministries or government bodies with functions or powers that could apply to any aspect of the preparation, award or implementation of PPPs. As the introductory wording explains: "These provisions may need to provide for the interface between them and any relevant procedures and processes involved."

Their purpose is to "provide administrative clarity and to help ensure that PPPs (and any government programmes for them) are properly integrated with the wider public investment process and other relevant decision-making or regulatory mechanisms and plans". Two of the most obvious areas that might need to be addressed are budgetary and fiscal constraints, and sector regulation. Integration with the body responsible for a country's overall infrastructure development strategy is another one. But because the provisions in question could differ so widely from country to country, allowing for existing administrative structures and the priorities and preferences of host countries in terms of how their PPP systems are organised, the Model Law does not attempt to prescribe them. It is up to host countries to do so. The main principles could be set out in the PPP law and the details in the supporting documents.

2.4 Tender Committee. The Model Law gives a formal role to the tender committee in the context of competitive tenders. This is the body established by each contracting authority (and perhaps the PPP unit) to manage the closing stages of the tender process for a PPP project, evaluate the bids and propose the contract award to the successful bidder. See Chapter 5 on Tender Procedures and Requirements for a full description of its potential composition and responsibilities in the context of the supporting documents. These will vary from country to country and project to project, depending on legal traditions, administrative preferences and the needs and demands of individual projects. In particular, countries should decide whether they wish the PPP unit to have an automatic or partnering role in setting up a tender committee, as the Model Law suggests, or prefer to limit this function to an ad hoc support one, available when needed.

2.5 Official Channels. The Model Law also contains a number of references to the "official channels". These are defined as the "official journal(s) or vehicle(s) of communication used by the government (or any competent body) to publish certain information which it wishes to draw formally to the public's attention, including in connection with tender proceedings it is organising (such as an official gazette or the official government website)". Host countries may wish to identify them in their PPP laws or supporting documents. There may be more than one, especially in relation to tender announcements, where well-

recognised domestic and international platforms (such as the Official Journal of the European Union, the Global Infrastructure Hub or The Economist) are often used simultaneously to publicise major tenders.

3. Specific appraisal and approval procedures

The Model Law then applies specific appraisal and approval procedures to PPP projects in different places, especially in the context of defining, preparing and awarding them. The supporting documents should flesh put these procedures as fully as necessary. The main ones are:

3.1 Article 11. This Article deals with initiating, identifying and preparing PPPs. Chapter 8, Criteria and Requirements, discusses the regulatory provisions and guidance that should apply to these tasks in detail. This part of the supporting documents should cross-refer to it (and them) as necessary. Article 11.7 requires the identification report (that is, the pre-feasibility study) prepared by the contracting authority to be submitted to the PPP unit for its review and approval. The supporting documents should specify the documents and grounds that an identification report must contain when it is submitted, the period of time required for its review and – above all – the criteria that the PPP unit must apply to the giving or withholding of its approval. Because this mechanism entails a power to, in effect, stop a project in its tracks or (implicitly) to call for improvements and refinements to be made to it, those criteria need to be defined with clarity and precision. The Article mentions three:

• Whether the identification report has been prepared "in (general) accordance with the requirements of this law (and other applicable regulations and requirements)". The idea here is that the PPP unit should only carry out a relatively general checking exercise rather than an exact review which might involve second-guessing the judgements and decisions of the contracting authority, which would not be appropriate. The word "general" is meant to emphasise this. The review is meant to confirm that the report has been drawn up in accordance with the applicable procedures and standards. But responsibility for it – "ownership" of it – must remain firmly with the contracting authority. And, of course, the PPP unit will not be issuing a legal opinion on the subject! It simply needs to form a view about whether this has happened. The wording is also designed to allow additional requirements and rules for the report to be set out in the regulations, if necessary. Other important legal requirements, outside the scope of the PPP law, may also have to be taken into account, such as sector regulations, fiscal constraints, planning or property legislation. These, too, are allowed for. The supporting documents should offer precise guidance about how to interpret these matters.

• The PPP unit should form a preliminary view about whether the project seems "worthwhile and appropriate" to be carried out as a PPP. The criteria for this judgement should also be set out in the supporting documents. Those criteria are essentially about value for money and people, and the time, cost and effort needed to award and implement a PPP. The supporting documents in Chapter 8 explain this in some detail, and should be cross-referred to here.

• That judgement will put the unit in a position to apply the third criterion applicable here, which is whether PPP is the "anticipated best option by comparison with other procurement methods". Again, detailed guidance will be needed in the supporting documents as to the basis on which this view must be formed. See Chapter 8 for a fuller explanation.

It should be stressed, though, that these judgements are all "indicative" only at this stage, as the identification report is only a pre-feasibility study. Definitive judgements about these matters can only be made following the preparation of the full feasibility study.

Article 11.8 addresses the feasibility study, cost-benefit analysis and related studies to be carried out after approval of the project identification report. The content of these reports and the key considerations and criteria that apply to them are also explained in detail in Chapter 8, to which this part of the supporting documents should again cross-refer. The Model Law itself is also very specific and comprehensive about them (Article 11.9). Once completed, they are subject to the review and approval of the PPP unit under Article 11.10 (and 12.4). The supporting documents should specify the documentary requirements for submitting the reports to the PPP unit, the length of time needed for review and approval, the scope for dialogue with the contracting authority and for making any necessary changes, and the procedure for resubmission and final approval (or its refusal).

3.2 Article 12. Article 12 sets out the Model Law's main appraisal and approval provisions. As we have said, it gives (in Article 12.2) the PPP unit a general and wide-ranging power of approval over PPP projects submitted to it in accordance with the Model Law's requirements. The principal stage at which that power will have to be exercised is its review and approval (or otherwise) of the feasibility study and related documents, as, when finalised, these documents will be definitive, constituting the basis for a final decision about whether to go ahead and implement the project and award it to the private sector. The PPP

unit's review and judgement at this point (or points, as a phased series of approvals may be necessary) will therefore need to be correspondingly conclusive. Article 12.4 lays down the main basis for them. When the feasibility study is submitted to it, the unit should form a view about whether the project meets the applicable appraisal requirements for it (see below). It is then responsible under this clause for:

- ascertaining whether a proposed PPP is worthwhile being carried out as a PPP project and is expected to meet the purposes and objectives set out for it
- confirming that the PPP project has been prepared in accordance with the requirements of Article 11
- confirming that the PPP project meets the specific appraisal criteria applicable to it
- reviewing the contracting authority's capability to carry out the proposed PPP and make appropriate recommendations accordingly
- reviewing and approving the draft tender documents prepared by the contracting authority to ensure conformity with the approved proposal

The supporting documents should explain and clarify these tasks as necessary, with a view to providing as much precision and objectivity to them as possible. This will reduce the risk of the unit making biased, unfair or inappropriate judgements about these matters. The review process is again essentially a checking and safeguarding one (see Article 12.4), to ensure that the contracting authority and its project team have done what they are supposed to do in preparing the project. The feasibility study (and related reports) is the centrepiece of this process, as Article 12.4 makes clear. But special emphasis is given to the "results of all public consultations and/or public hearings which have taken place" during the course of preparing it, to which "due regard" must be given. This is intrinsic to the SDG Guiding Principles, in terms of transparency and stakeholder consultation. The supporting documents should bring out this emphasis.

The judgement under sub-clause (a) is one the contracting authority should have put at the heart of its feasibility study, as it is fundamental to any PPP. PPPs involve greater complexity and transaction costs than other types of infrastructure project. There needs to be a high degree of confidence that the benefits and advantages of the proposed project will more than compensate for this, and that its purposes and objectives are likely to be achieved. The feasibility study should demonstrate this and convince the PPP unit accordingly.

Sub-clause (b) is essentially a further checking exercise, to confirm that all the requirements set out in Article 11 and the procedures laid down under it have been met. These would include the requirements related to the SDGs and the SDG Guiding Principles.

The "specific appraisal criteria" for the project referred to in sub-clause (c) are those that should have been applied by the contracting authority's project team during the preparation process, as it appraised and decided on its principal features. Article 12.3 sets out a comprehensive wish-list of those criteria, but they will have needed more precision as they were applied to the project in question, with relative priorities and weightings, as appropriate for the project's type, size and features. They would include specific SDG-related tests and requirements. (See Chapter 8, Criteria and Requirements, for a full discussion of this subject.) The unit's job will be to review the way they have been applied to the project described in the feasibility study and confirm that the project appears to meet them.

Sub-clause (d) is also an essentially precautionary criterion, as it should realistically have been satisfied at the outset, before the contracting authority draws up the identification report (or as part of it), and certainly before the feasibility study is finalised. But it makes a good deal of sense for a third party to reconfirm that the contracting authority does indeed have the necessary capability at this decisive stage of the process, before all the effort and expense of running a tender and implementing the project are incurred. The particular demands of the project should also be taken into account as it does so, as PPPs can differ widely in size, sophistication and difficulty. The nature of the public infrastructure and services involved should be given special weight, together with the way they are expected to evolve over time. The procedures should be specific about the factors to consider in carrying out this review.

Sub-clause (e) is also a checking exercise, to ensure that the tender documents are fully "present and correct" and in conformity with the approved project, as defined in them and in the feasibility study. Most of these documents need only be prepared at the end of or following the feasibility study phase. There is not much point in preparing them all until the project has been given the "green light", although at least some work will have been done on the draft PPP contract. The supporting documents should clarify when exactly this review takes place and what it involves, in the context of their detailed definition of the whole project preparation and award processes and procedures.

The supporting documents should also make it clear to which higher authority (or authorities), if any, the PPP unit will need to report some or all of its decision(s) and conclusions as it carries out its appraisal and approval functions, and the form such

reporting should take – at least to the extent such reporting is necessary at all, that is. Some aspects of these functions may only require feedback to the contracting authority. However, some countries may decide to give the PPP unit itself the final say in at least certain areas of them. This is why Article 11.2 puts a reporting requirement of this kind in square brackets. If it is used, allowance may have to be made in the procedures for its formal acceptance or endorsement by the competent body, as this would need to be obtained before the "implementation resolution" is issued under Article 13. The implementation resolution confirms the end of the project preparation phase and the start of the tender or award phase. The supporting documents will need to fully set out its form and contents, together with its publication channels,[11] although Article 13 itemises them in some detail. The implementation resolution also needs to be included with the tender documents (and copied to the private initiator in the case of an unsolicited proposal).

The competent body for this purpose recommended by the Model Law is the inter-ministerial committee. Serious thought should be given, though, to the question of whether a high-level body such as an inter-ministerial committee will actually want or need to receive copies of every report from the PPP unit about every identification report and feasibility study. This may make sense in the early stages of a new PPP system, but may well not once the system is well-developed and represents many different projects. If the PPP unit is attached to an individual ministry (such as the ministry of finance or economy, as is often the case), it will be obliged to report generally to that ministry in any event. In that case, perhaps only the more difficult or significant decisions need go to an inter-ministerial body. Equally, as we have said, some host countries may choose to subdivide the higher-level approval functions, splitting them between a suitable competent body for more routine matters and a ministerial or cabinet-level one for the more important ones. The former may well be a ministry in which the PPP unit as located (such as the treasury or finance ministry).

For all these matters, the supporting documents will need – as Article 11.5 acknowledges – to set out all relevant details governing reporting lines, formalities, timelines, records, documentation requirements, publicity and notification requirements, and any relevant appeal channels. It should be noted that Article 12.6 gives the government (of the host country) a general obligation to publish all appraisal criteria and approval procedures, as well as determining and refining them. The procedures themselves should reflect this and provide for their publication. They should then be built into the wider procedures covering the whole project preparation and award process, which should be covered comprehensively by the supporting documents.

3.3 Article 14. Unsolicited Proposals. As Chapter 6 (Unsolicited Proposals and Direct Negotiation) makes clear, the submission of unsolicited proposals by the private sector needs careful structuring in terms of PPP system safeguards, to ensure that the standards and requirements built into it are not bypassed or downplayed, and contracting authorities not taken advantage of by unscrupulous bidders.[12] Article 14.1 therefore allows for a competent body to be identified, to which an initial proposal must be submitted, as well as the relevant contracting authority, if that is a mechanism a host country decides to put in place. In that case, the supporting documents should identify the relevant body and the submission procedure involved (the ensuing paragraphs of this section of the regulations assume that such a body has been appointed).

The criteria applicable to any such review by the competent body at this stage should be made clear in the supporting documents. The contracting authority itself has discretion as to whether it considers the unsolicited proposal at all at this stage (Art. 14.1), which is essentially open-ended – that is, it can decide if it has the time, resources and inclination to do so. The competent body can defer to that decision. The proposal is only eligible for consideration in any event if it "does not already appear in selection procedures that have been announced or a plan or pipeline of future PPPs developed on behalf of the contracting authority or the government and if it is considered of public interest". The competent body can form its own preliminary view about those questions.

If the contracting authority decides to proceed with its review of the proposal, it must reach a preliminary conclusion about whether the proposal is in the public interest and whether it intends to proceed with it (Art. 14.2). The proposal must describe the project in sufficient detail, accompanied by all necessary documents, for it to do that. The competent body should check and verify that this is the case. The supporting documents should set

[10] "…and for advising the [relevant competent body] as to … [its decisions]".

[11] Article 13.3 requires it to be published on the contracting authority's website and via the official channels.

[12] See Chapter 5 for a fuller account of the relevant issues and procedures involved. They are only referred to in summary form in this chapter.

out timescales involved and indications of what the project descriptions might cover and what "necessary" accompanying documents might include.

Following a preliminary decision to proceed, Article 14.3 allows the detailed work of preparation of the proposal to go ahead in accordance with the requirements of Article 11, by either the private initiator or the contracting authority, or the two in combination. To this end, the private initiator has to provide as much information as necessary to enable both the contracting authority and the competent body to evaluate the initiator's qualifications for the role and the technical and commercial feasibility of the project, and to determine whether it is likely to be successfully implemented as envisaged on terms acceptable to them. The supporting documents should again be as precise as possible about what documents, tests and criteria should be applied to this process, the timescales involved and the scope for interaction with the private initiator. As Article 14.4 states, these can include conceptual studies, information about technology and public services involved, social and environmental impact studies, and so on. The supporting documents can indicate a full list of documents potentially required. If the work of detailed preparation goes ahead, Articles 11 and 12 then take over, so to speak, and the appraisal procedures and approval mechanisms specified for them above come into play.

3.4 Article 17. Tender Documents. Article 17.4 makes the tender documents for any tender process carried out under the PPP law subject to the review and approval of the PPP unit. Whether this requirement is included in the host country's PPP law will, again, be a matter of how extensive the country decides to make the unit's powers. In the early stages of a PPP system, when contracting authorities are still building their PPP capacity, such a power is likely to make sense, given the Model Law's strict tendering requirements and the potential complexity of the processes involved. The purpose of this review would be to confirm that the contracting authority has correctly prepared the tender documents and that they meet all the specific stipulations of Article 17 (which are quite extensive). The supporting documents should clarify this and set out timing and dialogue requirements. Once the PPP system is more sophisticated, however, and different and experienced contracting authorities are launching PPPs in parallel, this need for an automatic review of tender documents by the PPP unit may fade away. It should be possible to have a high degree of confidence in the contracting authority's tendering competence. In that case, the unit's role should be to assist where needed.

3.5 Articles 20-22. Conclusion of the PPP Contract. These Articles do not specifically call for any further third-party review and approval requirements. The assumption is that the procedures which will have already been followed before that stage is reached, as described above, together with the involvement of a tender committee in evaluating any tenders and the contract publication requirements, represent adequate safeguards. These are reinforced by the review and challenge procedures under Article 23. Of course, host countries can add a further tier of formal approval to the final decisions involved. This will apply anyway to the involvement of any supervisory bodies put in place in the context of unsolicited proposals and direct negotiations and the conclusion of contracts for them under Articles 21 and 22. In that case, the supporting documents should address that and the publicity requirements. The contracting authority is obliged under Article 20.3 to give notice of a PPP contract award on its official website and to publish it through the official channels. Each signed PPP contract is also subject to public disclosure under Article 20.5, in ways the regulations should specify.

3.6 Article 25. Amendment and Termination of PPP Contracts. Article 25 allows for the possibility of third-party approvals of an amendment or early termination of a PPP contract. Article 25.2 allows contracts to be amended by agreement between the parties, but subject to its terms (that is, internal procedures), the terms of any direct agreement (lenders will usually impose tight restrictions requiring their consent to any amendment) and any applicable conditions or restrictions under applicable law or the regulations, which may include any further authorisations or consents required.

Some jurisdictions, particularly certain civil law countries, require such authorisations or consents as a matter of course. A material amendment to at least certain provisions of a concession contract under an administrative law system may do so, for example. An early termination may require a court order endorsing it. Common law countries tend to be less restrictive in this context, more ready to leave the parties to make their own decisions on the basis of freedom of contract and the terms of the agreement they have signed. Nevertheless, the public interest dimension of PPPs, together with the tight requirements and criteria which the PPP law typically applies to them and the processes for procuring them, mean the need to obtain the further approval of a suitable competent body to a proposed amendment can make a lot of sense, to prevent improper, rushed or ill-advised amendments being made. Paragraph 2 contains two alternative sets of conditions of this kind, one rather more specific than the other, which should be adapted by host countries as they think appropriate.

In summary terms, the idea is to call for third-party consent whenever the proposed amendment would result in the contract becoming substantially different to the one signed on award of the project to the private partner. The supporting documents should in any event be as precise as possible about the nature of the change or amendment needing consent, the identity of the body giving consent (or withholding it) and the procedure involved. Several different consents from different competent bodies may be needed in different circumstances (for example, the PPP unit, the inter-ministerial committee or a court).

3.7 Article 34. Protection of End Users and the General Public. Article 34.5 allows the private partner to establish and enforce rules for the use of an infrastructure facility by members of the public (or third parties). This is subject to any requisite approvals of any public authorities, such as a sector regulator, as well as the contracting authority. The supporting documents should provide guidance about which bodies may be involved, how they are approached and how their consent is formally recorded.

3.8 Articles 37 and 38. Implementation and Monitoring. The contracting authority has to prepare regular reports on its PPP projects and provide them to the government, under Article 37, copied where required to the PPP unit. The supporting documents should specify exactly what is required and when. Similarly, it must maintain accurate and complete records of (in summary) all its actions and decisions in connection with the award and implementation of its PPPs. Guidance and pro formas can be set out in their pages.

The government or the PPP unit then has to maintain a PPP database under Article 38, containing the information required by the regulations, which should be a "reasonably comprehensive, up-to-date and clear compendium" of material information about the country's PPPs. All such information should be publicly available, subject to any confidentiality restrictions. The supporting documents should describe exactly how the database will work.