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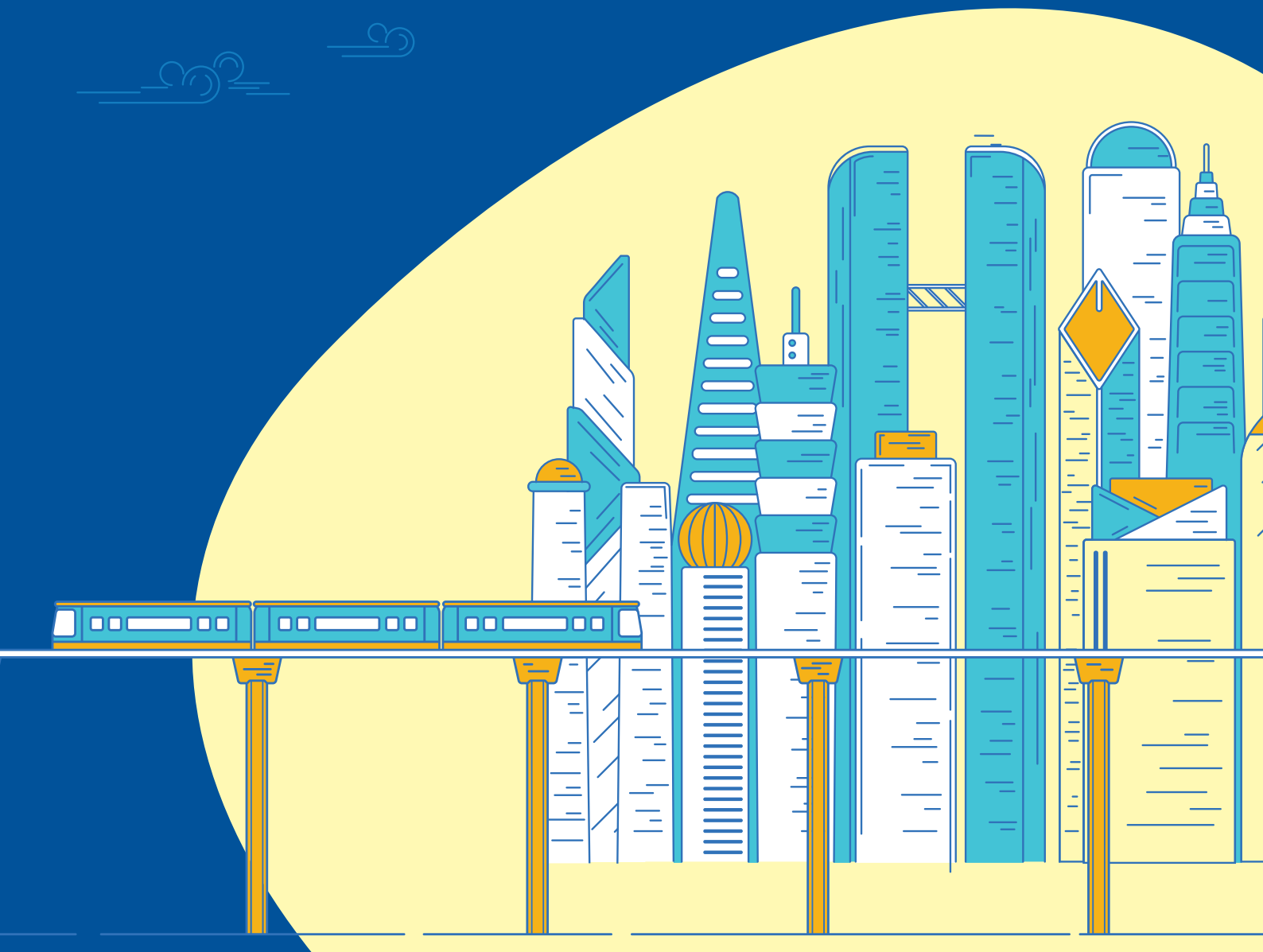
Volume I



EBRD PPP
Regulatory guidelines collection

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Foreword

This publication consists of three volumes, issued electronically with a limited number of hard copies. The collection is a culmination of over five years of hard work by a dedicated group of experts, most of whom took an active part, either on a pro bono basis or with a symbolic honorarium, in leading efforts for at least one of the chapters.

This publication was led by Chief Editor Alexei Zverev, Senior Counsel at the EBRD, with support and contributions from Reviewing Co-editors Christopher Clement-Davies, independent lawyer and consultant, and Chris Shugart, independent consultant. Additionally, this collection has benefited from a series of substantial commentaries and edits by a wide circle of stakeholders and contributors. The EBRD extends its thanks to all those who contributed to the publication, with special mention to Dražen Crčić and Sapun Ltd, the collections publishing agents, for their wonderful cooperation and dedication in bringing this publication to fruition.

The publication was created in response to feedback from governments and authorities in EBRD economies regarding the need for internationally accepted standards and best practices for the public-private partnership regulatory and institutional frameworks.

Idea, design and compilation: Alexei Zverev

The following people authored the publication: Christopher Clement-Davies, Chris Shugart, Alexander Dolgov, Bruno de Cazalet, John Crothers, Konstantin Makarevich, Roman Churakotv, Irina Zapatrina, Alexei Zverev.

Assistant reviewing editors for Volume I: Lucija Baumann, Zeynep Boba, Chris Tassis, Jeante Nero

Assistant reviewing editor for Volume II and III: Jeante Nero

Contributors (in alphabetical order): Motoko Aizawa, Lucija Baumann, Marcos Martinez Garcia, Richard Ginks, Thomas Hamerl, Vladimir Kilinkarov, Ian McGrath, Michel Nussbaumer, Olga Revzina, John Seed, Pascal Suffran, Wim Timmermans, Matthew Jordan-Tank, Don Wallace, Iryna Yelisyeyeva.

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Chapter 1.

EBRD/UNECE model law for public-private partnerships/concessions

Introduction by the EBRD. This is the text of a Model Law for Public-Private Partnerships/Concessions. It has been developed in collaboration by the United Nations Economic Commission for Europe (UNECE - Working Party on PPPs) and the European Bank for Reconstruction and Development (EBRD). It was drawn up and drafted by an international team of experts (listed in Annex 1), in cooperation with the EBRD and the UNECE Secretariat, and then modified and amended further in cooperation with experts from the International Specialist Centre of Excellence on PPP Policies, Laws and Institutions (listed in Annex II), members of the Working Party Bureau and the UNECE Secretariat. It is designed to represent a helpful precedent document for governments (especially in emerging economies and EBRD countries of operation outside the EU) to draw on as they structure or refine their legal frameworks for PPPs, in ways which will advance and give effect to the United Nations Sustainable Development Goals (SDGs).

This Model Law represents the same text published separately by UNECE. The UNECE document was endorsed by the UNECE Working Party PPP on 2 December 2022, as document number ECE/CECI/WP/PPP/2022/5 (https://unece.org/sites/default/files/2023-02/ECE_CECI_WP_PPP_2022_05-en.pdf) and the Working Party decided to rename it as “Standard on Public-Private Partnerships/Concession legal framework in support of the SDGs”. This document is one of the several that were designed for the implementation of the SDGs through PPPs/Concessions. Please visit this link https://unece.org/ppp/standards to access the full package of such UNECE documents.

Preamble

The purpose of this law is to establish the legal framework for Public-Private Partnerships for the Sustainable Development Goals (PPPs for the SDGs) and the contracts that give effect to them in [*host country*], including the rules and procedures governing their selection, preparation, appraisal, procurement and implementation, the contractual principles and institutional arrangements applicable to them, and assist in the orderly and coordinated delivery of PPPs. This law applies to PPPs, with particular emphasis on those with a "PPPs for the SDGs" basis, but not to other types of commercial or contractual interface between public and private sectors.

When properly structured and implemented, PPPs can fulfil a range of valuable purposes and objectives for the benefit of society and the common good. They can advance the efficient and cost-effective development, provision and operation of public infrastructure and public services, by harnessing the skills, resources, know-how and/or finance of the private sector most effectively and sustainably on a long-term basis, and structuring projects in ways that allocate the risks and responsibilities involved most appropriately over their life. This can strengthen the efficacy of project delivery (whether of design, construction, rehabilitation, operation and/or maintenance), stimulate new funding and investment opportunities, help bridge the public infrastructure and service gap, raise the quality of public services, improve the public's access to those services, and so help to achieve wider economic, environmental and social goals. It can enable projects to go ahead when they otherwise might not, advancing job creation and skills transfer. Ultimately, this can help to foster economic growth and social development in ways that promote the United Nations Sustainable Development Goals (SDGs), leading to a better and more sustainable future for all.

This law enshrines and gives effect to the Guiding Principles on PPPs in support of the SDGs, published by the UNECE in 2019[1] (the " Guiding Principles") and other documents endorsed by the Working Party on PPPs. The law is furthermore intended to be in accord with the UNCITRAL Legislative Guide on PPPs and related Model Legislative Provisions. The Guiding Principles represent a new model for PPPs, designed to achieve a range of sustainable development outcomes which are critical to the SDGs and which build on the PPP attributes described above, including the following five outcomes:

i. Increased access to essential services and decreased social inequality and injustice;

ii. Improved economic effectiveness and fiscal sustainability;

iii. Enhanced resilience and responsibility towards environmental sustainability;

iv. Replicability and the development of further projects; and

v. Full involvement of all stakeholders in the projects.

PPPs structured and implemented in accordance with the provisions of this law can therefore be expected to promote those outcomes. They should thus represent enhanced "value for money" in the true sense of "value for people", in terms of their long-term, net value for consumers, government and the wider public, considered over their life cycle in the light of all their significant impacts, for the greater good of all.

[1] "Guiding Principles on Public-Private Partnerships in support of the United Nations Sustainable Development Goals" (ECE/CECI/WP/PPP/2022/7).

Chapter I. General provisions

The Model PPP Law has drawn heavily on both the existing published UNCITRAL materials and their recent revisions as well as the UNECE Guiding Principles on PPP in support of the SDGs, the UNECE Standard on a Zero Tolerance Approach to Corruption in PPP Procurement and the UNECE PPP Evaluation Methodology for the SDGs.

Article 1. Scope of the law

1. **General.** This law establishes the legal framework for PPPs in [*host country*] and the contracts that give effect to them, the rules and procedures related to their selection, preparation, appraisal, procurement and implementation, and the institutional arrangements applicable to them, all in accordance with the principles of transparency, fairness, stability, proper management, integrity, completion, economy, and long-term sustainability, and the Guiding Principles.

2. **All PPPs.** This law applies to all forms of PPP, as defined in this law. It applies to all PPP projects implemented in [*host country*] after the date this law comes into force, whether carried out at national, federal, sub-national, regional or municipal level (except only in so far as the PPP regulations specifically provide otherwise).

Article 2. Key terms and definitions

In this law, the following terms and expressions shall have the meanings ascribed to them below:

(i) **"Applicable law"** means the laws of [*host country*] in force and effect at the relevant time, including all national, regional, and local laws and regulations, and including the country's international obligations and commitments, and any judgments, decrees, orders or injunctions of any court or tribunal having the force of law.

(ii) **"Bidder"** means any legal entity or person (or consortium thereof) participating in a tender in accordance with its terms and organised pursuant to this law.

(iii) **"Economic and financial viability"** means the maintenance of the contractual equilibrium of the commercial and financial terms as reflected in the contract.

(iv) **"Closed Tender"** means and refers to a tender or selection process where the contracting authority pre-qualifies and/or selects the tenderer(s) permitted to participate by notice and without advertising the tender openly;

(v) **"Competent body"** means 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.

(vi) **"Contracting authority"** means any competent body having the requisite legal capacity to enter into a PPP contract pursuant to this law.

(vii) **"Direct agreement"** means an agreement between the contracting authority and the lenders, typically together with the private partner, setting out the terms on which (amongst other things) the lenders may be entitled to exercise step-in rights, prevent a threatened termination of the PPP contract, receive payments upon its early termination and/or exercise certain other specified rights.

(viii) **"Feasibility study"** means the report drawn up for the purposes of [preparing and] authorizing a PPP project and which will be complemented with a final assessment before project award

(ix) **"Government"** means the government of [*enacting state*] and includes (where the context so requires) any public authority or competent body performing any function or exercising any power under this law.

(x) **"Identification report"** means the preliminary report that a government develops to assist in assessing whether a potential PPP should be further assessed through a feasibility study.

(xi) **"Implementing regulations"** means the government regulations applicable to the planning, preparation, selection, appraisal, procurement and all implementation of PPP (and other related matters) made pursuant to Article 3 from time to time and having binding legal effect.

(xii) **"Implementation resolution"** means a resolution referred to in Article 13 confirming a formal decision by a contracting authority to implement a PPP project.

(xiii) **"Interministerial Committee"** means the competent body made up of such authorities and/or departments at the national, state, and/or local level as appropriate for overseeing and approving key decisions and documents relating to the initiation, preparation, development, procurement and/or award of PPPs.

(xiv) **"Lender"** means any bank, financial institution or other form of lender that provides (or intends to provide) financing to the private partner in connection with a PPP contract, including any related commitments such as guarantees.

(xv) **"Official channels"** means 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).

(xvi) **"Open public tender"** means and refers to a tender or selection process where the contracting authority issues one or more public advertisement(s) to which in principle any legal entity or person meeting the specified criteria can respond.

(xvii) **"Partnering"** means a procedure for structured and regular exchanges between the Contracting Authority and the private partner aimed at monitoring in a consensual manner the implementation of the PPP project over its life;

(xviii) **"PPPs for the SDGs"** means the type of PPP stated in the UNECE Guiding Principles on PPPs in support of the SDGs:

"(…) Public-Private Partnerships (PPPs) designed to implement the Sustainable Development Goals and thereby to be "fit for purpose". It is defined as an enhanced approach for PPPs that overcomes some of the weaknesses in the way the traditional PPP model has been implemented. PPPs are contract delivery tools for public infrastructure provision involving initial private financing. They include two types: "government-pay PPPs" which are primarily funded by taxpayers and "concessions" which are primarily funded by the users of the infrastructure."

(xix) **"PPP contract"** means a mutually binding contract concluded between the contracting authority and private partner that set(s) forth the terms and conditions for implementing a PPP project, in accordance with the requirements and procedures provided by this law and its Implementing Regulations.

(xx) **"PPP guidelines"** means any PPP-related explanatory, guidance, or advisory materials (or similar documents) including templates, model bidding documents and contracts issued and published by the Government from time to time, which may or may not have binding legal effect.

(xxi) **"Private initiator"** means any legal entity or person (or consortium thereof) that submits an unsolicited proposal to implement a PPP project in accordance with Article 14.

(xxii) **"Private partner"** means any legal entity or person [(including where applicable a public entity acting as a commercial entity] retained by the contracting authority to implement a PPP project under a PPP contract.

(xxiii) **"Public authority"** means any local, national, or supra-national agency, authority, council, ministry, municipality, department, inspectorate, committee, court, official, or public or statutory person or any other executive, legislative or administrative entity of the government or under its control (or, where the context so permits, any combination of them), including a regulatory agency.

(xxiv) **"Public infrastructure"** means any (tangible and/or intangible) asset(s) of public interest or benefit designed and operated for the purpose of delivering (directly or indirectly) public services, including physical facilities and systems.

(xxv) **"Public-Private Partnership"** or **"PPP"** means a long term agreement between a contracting authority and a private entity for the implementation of a project, against payments by the contracting authority or the users of the [facility], including both those projects that entail a transfer of the demand risk to the private partner ("concession PPPs") and those other types of PPPs that do not entail such risk transfer ("government-pay PPPs") meeting the criteria and requirements set out in Article 4.3.

(xxvi) **"Public service"** means an activity performed to or for the benefit of the general public or the public good or otherwise in the public interest which is customarily provided by and/or on behalf of public authorities and/or for which a public authority is primarily responsible.

(xxvii) **"Public-Private Partnership unit"** or **"PPP Unit"** means the dedicated advisory and administrative body in the area of PPPs established pursuant to Article 9, having the functions and responsibilities related to the implementation of PPPs referred to therein.

(xxviii) **"Regulatory agency"** means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the public infrastructure or the provision of public services to which the PPP project relates.

(xxix) **"Stakeholder"** in relation to a PPP project, means and includes any persons who is or is likely to be involved with or materially affected or impacted by the implementation of the PPP project, whether directly or indirectly, positively or negatively, including the contracting authority, other relevant Public Authorities or Competent Bodies, the private partner, its owners, investors and lenders, contractors and/or suppliers, end-users of the relevant public infrastructure and/or beneficiaries of the relevant public services, the owners of property or assets affected by it, other providers of relevant services and/or households and the wider community

(including indigenous peoples) living in or near its place of implementation.

(xxx) **"Sustainable Development Goals"** or **"SDGs"** means those goals and objectives for sustainable economic, social and environmental development for the general good adopted and published by the United Nations in the General Assembly resolution 70/1 "transforming our world: the 2030 agenda for sustainable development" (A/RES/70/1), United Nations, 2015, and in the context of this law specifically refers to those goals and objectives related to PPPs (including the Guiding Principles) set out therein. In particular, PPPs should increase access to essential public services while lessening social inequality and injustice, be economically effective and bring transformational economic impact, deliver resilient and sustainable infrastructure, be replicable and scalable to allow the development of further projects, and bring all stakeholders together in partnership and consult those affected.

(xxxi) **"Tender committee"** means the committee to be set up by the contracting authority [and the PPP Unit] for the purpose of evaluating the bid and proposing the award of the contract to the successful bidder in accordance with Article 19.

(xxxii) **"Unsolicited proposal"** means a proposal for a PPP project submitted by the private initiator upon its own initiative to the contracting authority (and/or other relevant competent body) and not in response to a request or solicitation issued by the contracting authority in the context of a selection procedure under this law.

(xxxiii) **"Value for Money"** and **"Value for People"**, when used in this law, mean and refer to the overall, long-term, net value of a PPP project to consumers, government, the host country and the broader public, taking into account the long-term quantity and quality of services delivered and whole-life costs and benefits to the economy, including fiscal, environmental and social costs and benefits, in line with the Guiding Principles. It may be precisely measured in accordance with any detailed methodology (if any) set out in the PPP regulations. The underlying concept is that the more fully a PPP project gives effect to the Guiding Principles, the higher the value for people, the higher the value for money.

Article 3. PPP implementing regulations and guidelines

1. **Issue.** The Government shall issue the implementing regulations required by this law and may also issue and publish any PPP guidelines it considers appropriate for the development of sustainable PPP projects. The Government may designate one or more Competent Bodies to issue the same on its behalf.

2. **Purpose.** The purpose of the implementing regulations is to develop, adapt, and give effect to certain aspects of the operation and implementation of this law. Implementing regulations shall not contradict or supersede the provisions of this law, and in the case of any discrepancy or ambiguity between them, the provisions of this law shall prevail. The purpose of the PPP guidelines shall be to provide additional guidance and clarification to both public and private sectors as to the interpretation and workings of this law as well as to certain aspects of PPPs and their implementation but shall usually be without legally binding effect.

3. **Revisions and Publicity.** The PPP regulations and guidelines may be revised as necessary by the Government (or any such competent body) from time to time and shall be published through the official channels.

4. **Interpretation.** The provisions of this law should be construed in conjunction with any relevant PPP regulations relating to them (if any) where the context so requires.

Article 4. PPP criteria and fundamental requirements

1. **PPP Requirements and Objectives.** Any PPP project undertaken in [*host country*] shall comply with all applicable requirements of this law, including the relevant procedural requirements for the selection, preparation, appraisal, procurement, and implementation of PPPs. It shall also be designed and structured to accomplish the relevant public interest purposes and objectives referred to in the Preamble to this law, and in particular to be compatible with and give effect to the relevant Guiding Principles characterised by five specific outcomes: access and equity; economic effectiveness and fiscal sustainability; environmental sustainability and resilience; replicability; and stakeholder engagement.

2. **PPP Main Characteristics.** Reference to PPP in the Model Law apply to both concession and government-pay PPP and where concession is specifically mentioned it does not apply to government-pay PPP. The private partner's compensation is provided either by the contracting authority (in the case of government-pay PPPs) or by the end users (in the case of Concessions) or possibly through a combination of the two. The term of the project is established in such a way that the private partner may amortize applicable costs and make a reasonable profit. PPP projects may involve the creation of tangible or intangible assets that support the delivery of a Public Service.

3. **PPP Criteria.** Any PPP undertaken shall meet the following criteria and/or have the following features (as the same may be further elucidated or explained in the PPP regulations and/or PPP guidelines). It shall:

(a) Be long-term in nature (in accordance with Article 8) and implemented on the basis of a contract or contracts.

(b) [Have a minimum initial estimated value (if any) established and calculated in accordance with the relevant criteria and methodology set out in the PPP regulations (but subject always to paragraph 3 below)].

(c) Involve the design, development, construction, reconstruction/rehabilitation, operation and/or maintenance of public infrastructure and/or relate to the provision of public services or similar services of general interest.

(d) Involve the long-term participation of a private partner on a risk-bearing basis, and a sharing or allocation of project-related risks as between the public and private partners throughout its term.

(e) Involve an element of private finance, unless deemed unnecessary.

(f) Be implemented in accordance with the terms of the contract relating to it, which shall include appropriate functional specifications and performance indicators.

Article 5. Authority to award and enter into PPPs

1. **General.** Any public authority having the legal right to develop, procure and implement projects involving assets and/or services of the kind comprised in PPPs, in sectors in which PPPs are permitted under Article 6 below, and to enter into contracts with private sector persons in connection therewith, shall be deemed to have the power and authority under this law to award and enter into PPPs, except to the extent that this law, any other Applicable law or the PPP regulations specifically provide otherwise.

2. **Authorisation Mechanism.** The Government shall be entitled, within the scope of its existing competence and powers, to vest the specific power and authority under this law to award and enter into PPPs in certain designated public authorities or competent bodies, and to modify or cancel the same, as it deems necessary and appropriate from time to time.

Article 6. Applicable sectors and activities for PPPs

1. **Permitted Sectors and Activities.** PPPs may be undertaken in all sectors engaged in Public Service activity.

2. **Prohibited Sectors and Activities.** PPPs may not be undertaken in the following sectors or areas of activity (except where and to the extent that PPP regulations may provide otherwise):

- [*list any that might be excluded*]

Article 7. Parties to a PPP contract

1. **Main Parties.** The parties to a PPP contract are the contracting authority and the private partner.

2. **Acknowledgments.** It is acknowledged that, as parties to the PPP contract, the contracting authority may represent or include more than one public authority and that the private partner may have more than one owner or stakeholder.

3. **Additional Parties.** The parties to a PPP contract may agree to include other parties to the contract where they deem it necessary to do so subject to any relevant conditions of this law and Implementing Regulations.

Article 8. PPP term

1. [**Minimum Term.** Every PPP contract shall have a minimum term of [__] years (or such other minimum term (if any) as may be determined in accordance with the PPP regulations)].

2. **Duration.** The PPP contract shall set forth its duration, which shall take into account the purposes and objectives of the PPP project identified as part of its appraisal and approval process. It will also take into consideration the project business case, including the depreciation period for any permanent physical assets built or rehabilitated by the private partner in the PPP project, and any relevant policies concerning the competition and market structures for the infrastructure or service sector concerned, as reflected in any Applicable laws.

3. **Extension of Term.** In exceptional circumstances specified in the PPP contract (or permitted by Applicable law), the duration of the PPP contract may be extended in accordance with its terms for any necessary time period(s), if any, provided for therein, but subject always to any relevant conditions or restrictions in the PPP regulations. [The duration of the PPP contract may also be extended in exceptional circumstances, when such circumstances lead to a substantial impact on the economic/financial terms

of the Contract. The implementing regulations may specify an appropriate methodology and principles for determining any such extension.]

4. **Asset Ownership Unaffected.** Where the private partner is permitted by the terms of the PPP contract to own any assets comprised within the PPP project outright and indefinitely, that right of ownership may continue beyond the end of the term of the PPP contract.

Chapter II. Institutional arrangements and roles

PPPs for the SDGs are an innovative delivery form of global and inclusive contract for long-term participation of the private sector in the delivery of an infrastructure Public Service intended to meet public interest for a long-term period for the project duration. Many underlying conditions deriving from traditional procurement for construction of a public infrastructure or Public Service delivery by the private sector and related contract conditions are applicable to them.

In addition, several specific features and conditions aiming at organizing a long-term balance between the stakeholders' interests to be part of durable PPPs for the SDGs contracts (including social and economic objectives of the government as developed in This Law) must govern the planning and development of PPPs for the SDGs projects.

Due to the decisive role that PPPs for the SDGs may play in bridging the public infrastructure service gap and helping to achieve the SDGs, the institutions that will be established to perform PPP planning and development should be carefully authorized and administered. The goal is to create an institutional system that will allocate the most appropriate form for PPP delivery of public infrastructure projects in an orderly and coordinated manner such that the Government's and Contracting Authority's objectives are met. For example, this includes that a process should be established for projects to be in alignment with national or sectoral infrastructure plans as well as with fiscal sustainability goals through quantitative fiscal assessments of the off-balance sheet sovereign debt and contingent liabilities resulting from private financing.

To this end, governments should include provisions in the law dealing with the respective powers, roles and responsibilities of different ministries and government bodies (including where appropriate parliamentary bodies) relating to the selection, preparation, approval, procurement and implementation of PPPs. These provisions may need to provide for the interface between them and any relevant procedures and processes involved. The purpose of such provisions, where they are necessary, 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. In particular, they should be fully integrated with the country's wider strategic vision for infrastructure development, its long-term planning and prioritization processes and associated budgeting arrangements. These should include the country's long-term sustainable development and SDG plans (such as nationally determined contributions for carbon emissions under the Paris Climate-Change Agreement). Fiscal sustainability is always a critical aspect of these projects, and specific administrative or budgeting provisions may need to be included to provide for it.

Some countries choose to give a single public authority (such as a Commission or Cabinet of Ministers) overall responsibility for managing and running the entire PPP system. This may then become the "supreme authority" for all its purposes. This can offer certain advantages in terms of coherence, coordination and "single-point responsibility", which can facilitate decision-making processes and avoid conflicts or competition between different ministries or projects in the PPP area. Whether it is politically or constitutionally workable is another question. Line ministries may not be happy with the new tier of authority over their powers that it can represent.

The processes involved should be transparent and participatory. Accountability for decision-making at different stages and levels should always be clear, tied as appropriate to the challenge/redress of grievance mechanisms. Budgeting mechanisms and procedures, both long and short-term, need careful thought in this context; public sector undertakings and liabilities, including contingent liabilities, need to be properly accounted for and budgeted. A contingency fund may have to be put in place. This all tends to call for particular focus on the role of the Ministry of Finance (or other budget authority, such as a supreme audit institution) to safeguard public finances and the application of fiscal rules. The role of sector regulatory bodies may also need to be allowed for.

To this end, a PPPs for the SDGs institutional framework is created under Article 9 to organize in an orderly and coordinated manner the implementation of the four main PPP phases:

1) An identification phase leading to the selection and

establishment of PPPs for the SDGs projects to be prepared by the relevant Contracting Authority.

2) A preparation and preliminary evaluation phase enabling the Contracting Authority to identify the economic, fiscal, environmental, financial, legal, and social justifications for developing the project under a PPPs for the SDGs delivery form.

3) A procurement and contracting phase including the signature and approval of the PPPs for the SDGs contract.

4) An implementation and operation phase including partnership provisions aimed at monitoring and implementing smoothly the PPPs for the SDGs contract.

Article 9. Public-private partnership unit and administrative coordination

1. **Interministerial Committee.** The Government shall establish an Interministerial Committee (or equivalent body) and determine its organisational and management structure and its operational regulations[2].

2. **Interministerial Committee Structure.** The Interministerial Committee shall be comprised of [*the host country specifies the relevant ministries or authorities*]. The chair of the Interministerial Committee shall be [*state position*], who shall be responsible for organising and coordinating the activities and operations. The Interministerial Committee may utilize appropriate support staff with a view to enabling it to perform its functions and responsibilities effectively and efficiently. A record of its composition and staffing shall be kept up to date at all times and publicly available.

3. **Interministerial Committee Functions and Responsibilities.** The Interministerial Committee's functions and responsibilities [shall/may], subject to the PPP regulations, include the following:

(a) [Approval of the PPP project at its main stages];

(b) Establish the government's overall policy on PPP, guided by the Government's wider infrastructure development strategy, SDG compliance priorities and socio-economic growth plans.

(c) Coordinate and promote PPP activity across the relevant Ministries.

(d) Facilitate integrated PPP activity in accordance with applicable national, regional, sectoral, and other infrastructure and service plans.

(e) Oversee and give effect to the Government's PPP policies.

(f) Review and approve proposed policy and strategy changes and refinements relating to PPPs as required by the Government.

(g) Facilitate the coordination of aspects of PPPs as may be provided for in this law or the PPP regulations, such as to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits, or authorisations required for the implementation of PPPs in accordance with relevant statutory or regulatory provisions under applicable; and

(h) Assist with the constructive resolution of problems and issues during the implementation of PPPs.

4. **Creation of PPP Unit.** The Government shall establish the PPP Unit and determine its organisational and management structure and its operational regulations.

5. **PPP Unit Structure.** The PPP Unit shall report functionally to the [Interministerial Committee]. The director of the PPP Unit shall be [*state position*], who shall be responsible for organising and coordinating its activities and day-to-day operations. The PPP Unit shall be appropriately staffed based on a range of skills, expertise, and experience (including a grasp of the Guiding Principles), with a view to enabling it to perform its functions and responsibilities effectively and efficiently. Appropriate skills, expertise and experience may include but shall not be limited to competency in PPPs, public infrastructure and service procurement, engineering, economic and financial modelling, public accounting, and budgeting, social and/or environment impact, and public administration. Staff members may be drawn from both the public and private sectors. A record of its composition and staffing shall be kept up to date at all times and publicly available.

6. **PPP Unit Functions and Responsibilities.** The PPP Unit's functions and responsibilities shall include the following:

(a) [Propose methodologies, procedures and guidelines for structuring and implementing PPPs, including the dissemination of international best practice and methodologies and tools facilitating the initiation and the development of sustainable PPPs.]

[2] Governments should fully comply with all integrity and transparency requirements. To achieve a high level of integrity and transparency, the activities of project preparation, procurement, and regulation of PPPs should be carried out independently. For this purpose, the UNECE has adopted and made available the UNECE standard "A Zero Tolerance Approach to Corruption in PPP Procurement".

(b) [Generally, facilitate the preparation, appraisal, award, and implementation of PPPs in accordance with the requirements of this law and the Guiding Principles and methodologies.]

(c) [Assist in implementing and giving effect to the Government's PPP policies].

(d) [Review and comment on proposed policy and strategy changes and refinements relating to PPPs as required by Government.]

(e) [Prepare (or assist in preparing) official documentation describing the methodologies, procedures and guidelines referred to above, including for the purposes of their publication, and assist with regularly up-dating them.]

(f) [Prepare standard bidding and contract documents for use by contracting authorities.]

(g) [Identify potential improvements and refinements to the structuring and implementation of PPPs, including those related to the Guiding Principles and/or the most common issues preventing the development of PPP projects, and make recommendations accordingly.]

(h) [Exercise such powers of appraisal and approval (and/or coordination of approvals), if any, over aspects of PPPs as may be provided for in this law or the PPP regulations.]

(i) [Review and confirm the proper completion of the feasibility study (and other key reports and studies) for individual PPPs and the conformity of preparation work with the law's requirements and procedures, as provided for in this law or the PPP regulations.]

(j) [Assist contracting authorities with the coordination and development of individual PPP projects and PPP-related activities.]

(k) [Maintain an up-to-date registry of all PPP projects, containing relevant details of their registration and that of the related PPP contracts.]

(l) [Act as a point of contact and source of information for parties implementing or seeking to implement PPPs (whether public or private); provide guidance, advice, consultations and/or clarifications to them as necessary.]

(m) [Assist with the quantitative and qualitative assessment of projects, including the potential impact of PPP projects (including any contingent liabilities) on public obligations and/or public debt.]

(n) [Organize and provide training for public sector staff involved in PPPs (including educational sessions and workshops).]

(o) [Keep track of the monitoring and oversight by contracting authorities of the implementation of PPPs for which they are responsible.]

(p) [Advise the Government on administrative procedures related to PPPs.]

(q) [Organise, collate, and continually refine and develop a knowledgebase (including an electronic database) of PPP-related know-how, information, guidelines, assessments, research, studies, precedents, model clauses, opinions, methodologies, and other documentation to aid the regular progress of PPPs and the PPP sector in [host country].]

(r) [Ensure that elements of the documentation referred to in this Article are publicly available and/or published as required or appropriate.]

(s) [Assist with the constructive resolution of problems and issues during the implementation of PPPs ("trouble-shooting").]

(t) [Assist generally with the promotion of PPPs in [*host country*] and public education on the subject.]

(u) [Such other functions (if any) as may be provided for in the PPP regulations.]

7. **No Conflict.** Any such roles and responsibilities should, however, be defined and allocated to the PPP Unit in ways which at all times avoid any potential conflicts of interest between them.

Article 10. Information about PPPs

1. **Comprehensive PPP System Information.** The PPP Unit shall be responsible for preparing, collating, refining, maintaining and (subject to any confidentiality restrictions) publishing up-to-date information about PPPs in such form as it may deem helpful and informative to all stakeholders, other participants in the PPP industry and the general public, and as may be reasonably required to promote the effective operation of the PPP system in [*host country*] and the clarity and transparency of its workings, or as may otherwise be required by Applicable law. All such information shall be subject to a presumption of transparency and disclosure to the general public.

2. **Matters Included.** Such information may include the contents of PPP policy papers, the PPP regulations, the PPP guidelines and practice notes, appraisal and evaluation criteria and procedures (including fiscal transparency considerations), the progress of PPPs being implemented, results of tenders, material contractual terms (subject to any confidentiality restrictions), recommended contractual terms and conditions, the "pipeline" of future PPP projects

being planned or considered, the conclusions reached in reviews, studies and reports, the strategic, environmental and social impact assessments for PPPs, and any other matters it considers appropriate.

3. **Specific PPP Information.** Each contracting authority shall be responsible for collecting, making available and where necessary publishing, such information concerning any PPPs it is implementing or plans to implement as may be required from time to time by the Government or otherwise pursuant to the PPP regulations or Applicable law, including information necessary to ensure that the stakeholders relevant to any such PPP (including local communities) are able to respond to the plans and proposals for it in a timely manner in accordance with their rights under Applicable law.

4. **Tender Information.** Where tenders for PPPs take place in accordance with this law, such information containing such detail as the PPP regulations may specify concerning the relevant pre-qualification or tender requirements and results, the names and identities of any pre-qualified, short-listed, preferred or winning bidders, and (where applicable) the grounds on which they have been selected, shall be posted on the official web-site of the contracting authority and published as required through the official channels without delay, during or following the relevant stage(s) of the tender.

5. **Maintenance of Information.** The contracting authority shall maintain any PPP-related information published on its official website for such period(s) of time and with such public accessibility as may be required by the PPP regulations.

6. **Private Partner's Information.** The private partner under any PPP shall be responsible for preparing, collating, providing and where necessary publishing such information relating to such PPP as may be required by relevant regulations or Applicable law or otherwise under the terms of the PPP contract.

Chapter III. Initiation and preparation of PPPs

This phase addresses the initial work of documenting, describing and specifying the project and setting out the main functional characteristics of the infrastructure and/or public service to be delivered. The identification of a project and assessing its feasibility are important components to appraising a project and developing an adequate basis for procurement of the opportunity (including providing sufficient information to the proposers/bidders in order to bid). For these reasons, it is important during project preparation to include an appraisal of the possible project delivery options taking into consideration the full project life cycle and assess the main issues, material elements, and key functionalities of a proposed project. These preparatory steps may include the review and/or approval by a relevant Competent Body, such as the PPP Unit or the Interministerial Committee, based upon one or more reports prepared to support such decision making.

Article 11. Initiating, identifying and preparing PPPs

1. **General.** All work of defining, preparing, appraising, and approving PPPs (including those based on unsolicited proposals) shall be carried out in accordance with the procedures and methodology referred to in this law and/or specified in the PPP regulations.

2. **Initiation of PPPs.** Any proposed PPP shall be initiated by the Contracting authority, except in the case of unsolicited proposals as provided for under Article 14.

3. **Setting Up a PPP Project Team.** The contracting authority shall set up a project team comprising a range of skills, expertise, and experience (including a grasp of the Guiding Principles), with a view to enabling it to perform its functions and responsibilities effectively and efficiently. Appropriate skills, expertise and experience may include but shall not be limited to competency in PPPs, programming public infrastructure and services, procuring construction and/or service contracts, public administration, and comprehension of this law and its implementing regulations and/or guidelines, including the role of the Interministerial Committee and PPP Unit.

4. **Responsibility for Identification and Detailed Preparation of a PPP Project.** The identification and detailed work of preparing any PPP (including one proposed by a private initiator) shall be carried out or managed by the contracting authority, except where and to the extent (if any) that this law or the PPP regulations provide otherwise.

5. **Meaning and Scope of Identification and Detailed Preparation.** In this law, the expression "identification and preparation" refers to the action of starting the process of defining and assessing a potential PPP and seeking any preliminary approvals and consents needed under this law to progress it further, whilst the expression "detailed preparation of a PPP project" refers to and includes the detailed work of documenting, describing and specifying it, and setting out its principal scope, characteristics and features (including its Key Performance Indicators (KPIs)), in

sufficient detail for it to be appraised in accordance with this law, to form an adequate basis for detailed proposals by bidders or a private initiator, and for the procedures hereunder for approving and awarding it to be applied. The detailed aspects of such work (including documentation requirements and applicable appraisal criteria used in accordance with Article 12) and the steps and procedures applicable to them (including review and approval requirements) shall be set out in the PPP regulations and may differentiate between different types or scale of PPP and different project characteristics. For the avoidance of doubt, "preparation" shall not typically involve the work of final and definitive design of a PPP project which accompanies its actual implementation, which is generally carried out by the private partner).

6. **Identification Report.** The contracting authority shall develop an identification report. An identification report shall include but not be limited to:

(a) A summary of the scope of the proposed infrastructure and/or services to be improved or created, including their main functionalities and characteristics, including as applicable an assessment of issues that may arise over the life of the project such as proposed technological solutions becoming obsolete and/or socio-economic conditions evolving such that they would impact the project as contemplated

(b) The project's relative priority with respect to other public infrastructure and service obligations.

(c) Identification of the range of PPP delivery options with factors which would justify the choice between a PPP delivery or traditional public procurement, including but not limited to anticipated cost, complexity, capacity to deliver, sustainability, and social and economic benefits.

(d) The project's principal anticipated technical and economic features and needs, including an order of magnitude of costs, revenues (if any), funding and financing requirements, and the market for the project.

(e) The acceptability of the proposed infrastructure and/or services to users, local communities, and other stakeholders, [including the main conditions for public acceptance]; and

(f) Any other relevant preliminary information deemed prudent for identifying and/or summarising the proposed project.

7. **Identification Report Approval.** The Identification Report shall be submitted to the PPP Unit [or other applicable Competent Body such as the Interministerial Committee] for its review [and approval] including an indicative assessment of whether it has been prepared in [general] accordance with the requirements of this law [and other applicable regulations and requirements], whether the proposed project is deemed worthwhile and appropriate to be carried out as a PPP, and whether PPP is the anticipated best option by comparison with other procurement methods.

8. **Preparatory Studies.** Except to the extent the PPP regulations provide otherwise, the detailed preparation of a PPP project shall include a comprehensive set of studies to be used to appraise a project, covering its material elements and aspects, including in particular those referred to in the relevant appraisal criteria set out in Article 12 and showing how those criteria will be satisfied.

9. **Studies to be included.** The work of preparing a PPP project for appraisal shall:

(a) Further elaborate, develop, and detail applicable items contained in the Identification Report.

(b) Assess its anticipated social, economic, and environmental impact, including a cost benefit analysis, a quantitative assessment of the positive and negative externalities, its "value for people", and long-term sustainability (including the extent to which it gives effect to the Guiding Principles).

(c) Without limiting the sub-para (b) above, assess its capital and operating costs, affordability, and long-term sustainability (including fiscal sustainability, budgetary implications and any public-sector contingent liabilities).

(d) Assess the extent to which it will improve the quality and efficiency of the public services to which it relates.

(e) Identify how the PPP project aligns with the Government's wider sector objectives, plans and strategies for infrastructure and/or service delivery.

(f) Identify the technical requirements and expected inputs and deliverables, including any options relating to technological solutions and their long-term adaptability and affordability.

(g) If practicable at this stage, identify the anticipated KPIs and the indicative payment terms.

(h) Identify relevant stakeholders, any stakeholder consultations to be carried out, any known stakeholder issues and any stakeholder input or suggestions put forward, with particular emphasis on environmental and social impact and any vulnerable or marginalized persons or groups.

(i) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority.

(j) Assess the project's legal, regulatory, and institutional basis and its feasibility and viability.

(k) Identify the licences, permits or authorisations that may be required in connection with the approval or implementation of the PPP project.

(l) Identify conditions of land use and related issues concerning expropriation or resettlement as applicable.

(m) Identify and assess the main project risks and describe the proposed risk allocation under the PPP contract, together with any steps or options to address or mitigate them.

(n) Identify any proposed forms of Government support and guarantees needed for the implementation of the PPP project, and their budgetary implications.

(o) Determine whether PPP is the best option for carrying out the project through quantitative and qualitative comparison with other procurement methods.

(p) Determine the capacity of the contracting authority to enforce the PPP contract effectively, including the ability to monitor and regulate project implementation and the performance of the private partner.

(q) Describe the preferred choice of procurement process and tender structure.

(r) Include any other relevant background studies, taking account where appropriate of any other PPP project or public service with which the proposed PPP is closely associated or linked.

(s) In the case of Concessions, particular attention shall be paid to the following (but without limiting their applicability to other types of PPP as well):

(i) the potential impact of long-term economic and societal changes, including potential changes to individual behaviour, on the scope and pricing of the Public Service

(ii) the possible development of other public services that may compete with the Concession project.

(iii) the acceptability of the proposed PPP Public service to end users, including the necessity for project promotion and communications strategies that demonstrate the long-term benefits to end users.

(iv) the different categories of users, if any, and their specific needs for service delivery (e.g., vulnerable or economically disadvantaged groups, priority users, the necessity for different prices for the service without infringing on the equality of treatment of users and non-discrimination principles, etc.).

(v) [methods for adapting the public service to future needs and affordability considerations, taking account of the possibility of substantial changes to the economic or political landscape over the life of the project and the need to resolve resulting issues and maintain the continuity of the public service.

(vi) [mechanisms for optimising the long-term service provision and relationship between the main parties to the PPP, including their organisation and staff.]

(vii) [mechanisms for reverting the public service to the contracting authority in order to maintain the public service and if justified by the public interest].

(viii) means of maintaining the financial and economic equilibrium e in the event of exceptional circumstances.

(ix) Selection of a procurement process that is most likely to realize a project that delivers an essential public service adapted to the needs and affordability constraints of the end users for the life of the project.

10. **Review and Approval.** The compliance of such feasibility study and other studies and reports with the relevant appraisal criteria and approval procedures referred to herein shall be subject to review and approval by the PPP Unit [or other applicable Competent Body].

11. **Preliminary Studies.** The work of preparing a PPP project and assessing its feasibility may include other reports prepared and review procedures applied at earlier stages of preparation than the comprehensive feasibility study referred to in paragraph 9. The appraisal criteria to be applied at any such earlier stage shall be derived from the appraisal criteria set out in Article 12, adjusted as necessary and appropriate to suit the more preliminary nature of the information available at such stage.

12. **Consultations.** The work of preparing a PPP project shall be subject at the relevant stages to all requirements for formal consultation with stakeholders, other relevant authorities and the general public, including public hearings where appropriate, as may be required pursuant to Applicable law or the PPP regulations and/or as envisaged by the Guiding Principles. The consultation process shall be structured to enable a genuine dialogue to take place concerning all significant issues of concern to stakeholders, and available remedies to be pursued, and to allow suggestions from third parties for improving the PPP project to be put forward. Key points raised by stakeholders shall be accurately recorded and responded to as appropriate.

13. **Changes during Preparation.** A proposed PPP may be re-designed, changed or revised as often and in as many ways as necessary during its preparation under this Chapter III in order to ensure that it is fully compliant with the requirements of this law, including in particular Article 4, this Article and the appraisal criteria and review and approval procedures set out in Article 12.

Article 12. Appraisal and approval procedures

1. **PPP Compliance.** Any PPP implemented pursuant to this law (including pursuant to an unsolicited proposal) must comply with the requirements of Article 4 and the applicable appraisal criteria and approval procedures laid down for this purpose in this law and the PPP regulations.

2. **Approval.** The PPP Unit [or other applicable Competent Body] shall be responsible for reviewing and approving proposed PPPs (and the preparation work carried out for them) submitted to it by contracting authorities in accordance herewith, [and for advising [the relevant competent body] as to whether a proposed PPP meets the appraisal requirements set forth herein]. In particular, it shall be responsible for:

(a) 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.

(b) Confirming that the PPP project has been prepared in accordance with the requirements of Article 11.

(c) Confirming that the PPP project meets the specific appraisal criteria applicable to it.

(d) Reviewing the contracting authority's capability for carrying out the proposed PPP and making appropriate recommendations.

(e) Reviewing and approving the draft tender documents prepared by the contracting authority to ensure conformity with the approved proposal.

3. **Appraisal Criteria.** The appraisal criteria applicable to any proposed PPP (and referred to in Article 11) shall include such of the following as may be appropriate for this purpose:

(a) The PPP project's compliance with the criteria and requirements set out in Article 4.

(b) In particular, the PPP project's anticipated socio-economic and public-service net benefits and "value for people" (including inclusivity and accessibility) and the extent to which they satisfy and advance the Guiding Principles and the wider public good.

(c) The extent and urgency of the need and demand for the PPP project.

(d) The PPP project's alignment with the Government's wider sector objectives, plans and strategies for infrastructure and economic development and achievement of the SDGs.

(e) Its economic and financial feasibility and viability.

(f) Its technical feasibility and strengths (including implementation timescales);

(g) Its legal, regulatory, and institutional viability, including the procedures to be used for selection of a private partner and their timing.

(h) Its environmental and social sustainability and impact manageability, taking account of its long-term resilience and adaptability.

(i) The cost-effectiveness, acceptability, and affordability of the PPP project for both users (including vulnerable groups), on the one hand, and the host country from a budgeting/fiscal and sustainable debt perspective, on the other (including considerations relating to government debt and contingent liabilities).

(j) The need and scope for any anticipated public sector payments, finance, guarantees or other support for the PPP project.

(k) The appropriateness of the PPP project's proposed (preliminary) risk-allocation and incentive profile.

(l) The cost effectiveness and value-for-money/ value for people of implementing the project on a PPP basis relative to other procurement methods.

(m) Generally, the extent to which the PPP project is expected to meet the purposes and objectives set out for it in the documents drawn up as part of its definition and preparation under Article 11.

(n) Any other relevant requirements of Applicable law relating to public investments.

(o) Any other appropriate criteria arising from Article 11, and consistent with the foregoing as may be specified from time to time in the PPP regulations.

4. **Matters included in Appraisals.** In appraising the PPP project, due regard shall be had (inter alia) to the contents of the feasibility study and any related reports prepared under Article 11 and the extent to which it/ they demonstrate(s) compliance with the applicable appraisal criteria, as reviewed and certified by the PPP Unit [or other applicable Competent Body]. Due regard shall also be had to the results of all public consultations and/or public hearings which have taken place at that stage of the appraisal process in relation to the PPP project in accordance with Article 11.

5. **Detailed Procedures in PPP Regulations.** The detailed procedures applicable to the proposed PPP during its identification, detailed preparation and appraisal and approval under this Chapter shall be set out in the PPP regulations and shall include (amongst other things) relevant timescales, documentation and reporting requirements notification and publicity requirements, relevant formalities, the relative weightings and priority of applicable criteria and tests, formal review and approval requirements and appeal procedures.

6. **Responsibility for Accuracy and Publicity of Process.** The Government shall be responsible for determining, revising (as necessary) and publishing all appraisal criteria and approval procedures, and ensuring that the PPP regulations accurately reflect them at all times.

Article 13. PPP implementation resolutions

1. **Issue of Resolution.** Where a proposed PPP has complied with the applicable appraisal criteria and approval procedures referred to above, and a decision has accordingly been made by the contracting authority [or other applicable Competent Body] to implement it, a formal resolution to that effect shall be issued by the contracting authority ("implementation resolution") in the form and substance as may be required by this law and the Implementing Regulations.

2. **Contents.** An implementation resolution shall (subject to the PPP regulations) include the following information and components:

(a) The name and official address of the contracting authority responsible for the PPP project.

(b) A clear description of the public infrastructure and/or public services the subject matter of the PPP project.

(c) The PPP project's principal commercial, financial and economic characteristics and features.

(d) A summary of the material conclusions reached about the PPP project, identifying the key criteria applied in reaching them, including in particular the extent to which the PPP project is expected to satisfy and advance the Guiding Principles, the public benefits or goods expected to result therefrom, and the principal results of the feasibility study.

(e) The rationale for implementing the project as a PPP, as opposed to any other form of procurement, and justifying the proposed PPP structure as the most appropriate basis for implementing it.

(f) The anticipated (approximate) amount and nature of any private financing expected to be used.

(g) The anticipated (approximate) amount and nature of any public funding or other public support (such as guarantees) expected to be used, together with the anticipated amount of any sovereign debt or contingent liabilities which may be implied by the private financing of the project.

(h) The procedures to be used for selection of the private partner and their anticipated timing.

(i) A summary description of the consultation procedures held pursuant to Article 11, the material issues raised, and the conclusions reached in response to them, as well as of the mechanisms available to stakeholders for addressing objections and grievances to the PPP project.

(j) Any other matters which the contracting authority considers relevant.

3. **Publication and Copies.** After a project feasibility study has been appraised and approved, the project shall be registered on the official list of approved PPP projects and the implementation resolution shall (subject to any exceptions permitted by this law) be published on the official website of the contracting authority and in the official channels. In the case of an unsolicited proposal, it shall also be notified and copied to the private initiator. Where a competitive tender is being held pursuant to Chapter IV, a copy of the implementation resolution shall be included with the tender documents released to bidders.

Article 14. Unsolicited proposals

1. **Initiation.** A private initiator seeking to implement an unsolicited proposal for a PPP may at any time define and submit its proposal in preliminary form to the relevant contracting authority (and any other competent body authorised by the PPP regulations to receive such proposals), which shall have a discretionary power to consider and review it. An unsolicited proposal shall only be deemed eligible for consideration and review 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.

2. **Preliminary.** The proposed preliminary unsolicited proposal shall describe the proposed PPP project (including in terms of the infrastructure, technology, and scope of the public service it involves) in sufficient detail to enable it to be given a preliminary review by the contracting authority (and any such other competent body) and shall be accompanied by all documents necessary for this purpose. The contracting authority (and any such other competent body) shall carry out any preliminary review of the

proposal that it decides to make, reach a preliminary decision about whether it is considered to be potentially in the public interest and intends to proceed further with it, and notify the private initiator accordingly.

3. **"Open Door".** The private initiator may enter into discussions and an exchange of information at any time regarding the proposed PPP with the relevant contracting authority.

4. **Preparation.** Following a preliminary decision of the contracting authority to proceed further with the unsolicited proposal, the detailed work of preparation of the PPP project shall then be carried out in accordance with the requirements of Articles 11 and 12, [by the private initiator, by the contracting authority, or with the possible support of the contracting authority (to be given at its sole discretion)]. To this end, the contracting authority shall invite the private initiator to submit as much information on the proposed PPP as is necessary to allow the contracting authority (and any other relevant competent body) to make a proper evaluation of the private initiator's qualifications and the technical and commercial feasibility of the PPP project, and to determine whether the PPP project is likely to be successfully implemented in the manner proposed on terms acceptable to the contracting authority (and any other relevant competent body). For this purpose, the private initiator shall, if and to the extent reasonably required by the contracting authority, submit a technical and commercial conceptual study, and satisfactory information regarding the concept, technology and public service contemplated in the proposal, and any other assessments reasonably necessary including preliminary social or environmental impact studies.

5. **Protection of Private Initiator's Rights.** In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from, or referred to in the unsolicited proposal. When the decision to proceed has been made, the contracting authority shall not make use of information provided by or on behalf of the private initiator in connection therewith other than for the evaluation of that proposal, except with the consent of the private initiator, and shall, if the proposal is rejected, return to the private initiator all documents prepared and submitted by it during the evaluation process.

6. **Review, Appraisal, and Implementation.** When in the opinion of the contracting authority all the requirements of the preparation phase have been complied with in accordance with Article 12 and are duly contained in the feasibility study, it shall submit the report to the PPP Unit [or other applicable Competent Body] for approval under the same conditions as the ones applicable to any other PPP project.

7. **Implementation Resolution and Conditions of Conclusion of a PPP Contract.** After the PPP Unit's [or other applicable Competent Body's] approval has been received, the award of the PPP contract for the unsolicited proposal by the contracting authority shall be subject to testing the potential competition for the relevant PPP project by organising a competitive tendering procedure in accordance with Article 21, where required by the provisions thereof.

Chapter IV. Selection of private partner

The provisions in this Chapter are intended to promote transparent and effective competitive procurement procedures except where this law specifically provides otherwise. The fundamental principles behind a transparent and effective competitive procurement process under this law include:

(a) Open access to public procurement.

(b) Equal treatment of candidates and bidders and the pursuit of a fair and credible outcome.

(c) Transparency and confidentiality of procedures.

(d) Free competition.

(e) "Value for People and Society", comprising the fundamental principle of "Value for Money" (economy and efficiency), alignment with the SDGs, and taking into account, in addition, the satisfaction of the users of the service during the project life cycle and the contribution of the project to economic development in accordance with the government's objectives; and

(f) Realizing a fair allocation of risks and rewards over the life of the project.

Note that in some countries there will be no need to implement this chapter because they will have existing sufficient procurement provisions. If this chapter is implemented, special care should be taken to harmonize where necessary these provisions with other relevant provisions addressing the selection of a private partner, e.g. EU directives, the WTO General Procurement Agreement or similar authority. For example, the treatment of unsolicited proposals as described in this Chapter may not be compatible with some legal frameworks.

Article 15. Procedures for selection of private partner

1. **Competitive Tenders Standard.** The contracting authority shall utilize electronic procedures where feasible and select the private partner for a PPP project on the basis of a competitive tender as set out in Articles 15 – 20, save only where Applicable law permits otherwise, including in the case of unsolicited proposals under Article 21 (to the extent provided therein) and direct negotiations as set out in Article 22.

2. **Existing Procurement Laws.** The public procurement laws and regulations in force in [*host country*] [shall/shall not] apply to the award of PPPs, except where and to the extent that this law (or any subsequent law) specifically provides otherwise.

3. **Detailed PPP Tendering Procedures.** The detailed procedures and requirements (including any specific approval powers) applicable to competitive tenders for PPPs, the nature of the processes involved (e.g. whether paper, electronic or otherwise), the contents of the procurement notices, the pre-qualification and selection of the private partner and the contents of the tender documents shall be as set out in the PPP regulations, shall be designed to promote effective and fair competition leading to sustainable long-term outcomes, and shall be governed by the fundamental principles of transparency, equal treatment, non-discrimination, and efficient use of resources (including the cost and expense of bidding).

4. **Applicable Criteria.** The tender criteria and evaluation methodology applicable to the pre-qualification and selection of the private partner and award of the PPP contract shall be as set out in the tender documents and may include any of the following, as the contracting authority considers relevant for the particular PPP project:

5. **Pre-Qualification/Selection:** relevant experience and track-record, technical and professional proficiency and capabilities, financial and human resources, appropriate (dedicated) managerial and organizational capacity and skills covering the full range of relevant PPP tasks (including environmental responsibilities), ethical standards, legal capacity and standing, solvency, structure of consortium, relative consortium strengths.

6. **Tender Evaluation and Contract Award:** value propositions, technical quality (including soundness and innovativeness) of proposal, quality of services and measures to ensure their continuity, operational feasibility, relevant environmental and socio-economic criteria, risk allocation, pricing terms (including the value of the proposed tolls, and tariffs, fees or contracting authority payments, as the case may be, evaluated on an appropriate basis), other commercial terms, costs (whether capital or operational), the nature and extent of any public sector support sort, qualifications to terms and conditions of contract, structure and quality of management team, strengths of financial plan and availability of committed finance; together with such other matters as may be specified in the PPP regulations from time to time. The tender criteria and evaluation methodology shall be clear, transparent, non-discriminatory, reasonably appropriate for each PPP and consistent with the criteria applied and conclusions reached in appraising and approving the PPP project pursuant to Article 12 (as reflected in its implementation resolution).

7. **Non-Discrimination.** The contracting authority shall not discriminate as between local and foreign bidders for or participants in PPP projects or accord them unequal treatment, in connection with the award or subsequent implementation of any PPP, save only to the extent (if any) otherwise permitted under the PPP regulations or Applicable law.

Article 16. Tender process and procedures: general

1. **Choice of Tender Process.** The detailed aspects of the tender process to be used for the award of each PPP shall be set out in the tender documents prepared and made available to potential bidders in accordance with Article 17. They shall also be summarised in the public announcement of the tender.

2. **Open and Closed Tenders.** An open public tender shall ordinarily be used, with or without a pre-qualification stage, and involving either a one- or two-stage structure (following any pre-qualification). Alternatively, a closed tender may be used, but only in exceptional cases of national defence or national security, or such other exceptional circumstances as may be provided for herein, where the use of an open public tender could reasonably be expected to give rise to serious concerns about state secrets, government confidentiality and/or other demonstrable adverse consequences for the national interest and therefore the feasibility of the processes involved.

3. **Competition under Closed Tenders.** Where a closed tender is used, the contracting authority shall nevertheless take all reasonable steps to structure and organise it in a way which fosters genuine competition and shall invite offers from as many different sources as is practicable in the circumstances.

4. **Eligible Participants.** Participants in tenders can in principle be any persons with legal capacity (whether domestic or foreign) under Applicable law, including companies, partnerships and natural persons, or

combinations or consortia of such persons, but subject always to any relevant restrictions under this law or the PPP regulations as to such participation.

5. **Consortium Qualifications.** Where bidding consortia participate, the information required from them to demonstrate their requisite qualifications shall relate to each consortium as a whole, as well as to individual members. The contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of all of them are adequate to meet the needs of all phases and aspects of the PPP project.

6. **Decisions Compliant with Tender Documents.** Decisions by the contracting authority concerning pre-qualification, selection or rejection of bidders and award of the PPP contract shall be made on the basis of applying only those criteria, requirements and procedures set forth in the relevant tender documents.

7. **Communications with Bidders.** The tender documentation shall provide as necessary for the organisation of transparent communication processes and methods with bidders, allowing as required for (inter alia) conferences, meetings and procedures for written communication, provision of comments on and proposed amendments to the tender documents (including the draft PPP contract), discussions of and modifications to technical requirements and specifications, discussion of risk allocation and commercial terms, clarification of financing proposals and other matters.

8. **Tender Security.** The tender documents may require the provision of tender security, such as bid bonds, by the bidders, in an amount and on terms which are reasonable in the circumstances. In that event, the tender documents shall precisely specify the circumstances in which any such tender security may be forfeited by bidders. A bidder shall not forfeit its bid security in any circumstances other than those specified.

9. **Certain Procedural Aspects.** No bidder may participate in more than one pre-qualification or tender submission, except where and to the extent that the tender documents so permit (including, for example, in the case of sub-contractors). Pre-qualification or tender submissions may be changed or revoked at any time before the relevant deadline for their submission in accordance with the relevant tender procedures.

10. **Final Clarifications and Negotiations.** The tender documents may (or may not) allow for a final process of clarification or negotiation between the public and a bidder of certain aspects of the most favourable bid, judged by the relevant evaluation criteria and methodology, including amendments to the terms and conditions of the draft PPP contract, provided that any final amendments to the bid or the draft PPP contract are consistent with the overall tender and evaluation process, and would not have led to the selection of a different bidder if they had been made or agreed to at an earlier stage.

11. **Exceptional Procedures.** It is acknowledged that the tender documents may contain specific provisions modifying aspects of the tender procedure otherwise applicable in specific circumstances, such as (a) where only a single bidder prequalifies or submits a compliant expression of interest or bid (e.g. by allowing the contracting authority to re-tender the PPP project or alternatively proceed with it on the basis of direct negotiations where it is satisfied that the process has already been sufficiently competitive), or (b) qualifying or restricting the right and ability of different bidders to combine together during the tender process for the purposes of submitting a joint bid. The PPP regulations may also provide specifically for situations of this kind.

12. **Confidentiality.** Subject and without prejudice to Article 10, the contracting authority and the tender committee shall treat all proposals submitted in tender procedures conducted in accordance with this law in such a manner as to avoid the unnecessary disclosure of their content to competing bidders or to any other person not authorized to have access to this type of information. Any discussions, communications, and negotiations between the contracting authority and/or the tender committee and a bidder shall be confidential (subject as aforesaid). Unless required by law or by a court order, during any such tender procedures no party thereto shall disclose to any other person any technical, price or other confidential information in relation to such discussions, communications, and negotiations without the consent of the other party.

13. **Records.** The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings for the PPP project in accordance with the requirements of the PPP regulations.

Article 17. Tender documents, requirements, and information

1. **Contents of Tender Documents.** The contracting authority shall prepare the tender documents for any tender held in accordance herewith, which shall contain such information as may be required by the PPP regulations for the relevant tender structure being used, including as appropriate the following:

(a) A description of the envisaged PPP and the public infrastructure, facility, or services to which it relates.

(b) An indication of other essential elements of the PPP project that need to be identified at the relevant stage of the tender process, such as the services to be delivered by the private partner, the financial and commercial arrangements envisaged by the contracting authority (such as payment mechanisms and funding sources) and the nature and extent of any public sector support to be provided to the PPP project.

(c) A comprehensive and precise description of the applicable tender procedures.

(d) Project functional requirements and KPIs, as appropriate, including the contracting authority's requirements regarding safety and security standards, environmental protection, and the Guiding Principles.

(e) A draft of the PPP contract or, where preparing a full draft would not be practicable in the circumstances, a summary containing the main proposed terms and conditions and reflecting the allocation of key risks, including an indication of which terms, if any, are deemed to be non-negotiable.

(f) The detailed tender criteria and methodology, including relative importance or weighting, to be applied to the pe-qualification (if any) of bidders, the evaluation of bids and proposals and the final selection of the private partner and award of the PPP contract; and any relevant thresholds, if any, set by the contracting authority for identifying non-responsive proposals.

(g) Details on the communication process and methods for bidders, including any bidder conferences and process, if any, for making comments or requesting clarifications to the tender terms and conditions and/or documentation.

(h) Identification of any required tender security including the circumstances for forfeiture.

(i) Sufficient information to allow competent and/or qualified bidders to submit responsive bids in a timely manner, including identification of the deadline for submissions.

2. **Full Data.** The contracting authority shall provide in the tender documents (and/or in any supporting documents or data-room organised in connection therewith) all such information in its possession relating to the proposed PPP and the assets it will comprise, on a fully transparent basis, as can reasonably be considered to be necessary to enable bidders to participate effectively and on a properly-informed basis in the tender (or the relevant stage thereof), but subject always to any applicable confidentiality restrictions (if any).

3. **Amendments to Tender Documents.** The contracting authority may, save where this law or the PPP regulations provide otherwise, and whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise or amend any element of the tender documentation or the request for proposals during the tender process, including the draft PPP contract, provided it:

(a) refrains from making material changes to the project such that the prequalification, evaluation criteria, and/or minimum requirements of the project would change;

(b) notifies the PPP Unit [or other applicable Competent Body] of any amendments to the tender documents [and such body approves the amendments];

(c) notifies all bidders of any such amendments without delay; and

(d) where necessary, the deadline for the submission of proposals shall be prolonged to allow time for any such amendments and any responses to them.

The contracting authority shall indicate in its record of the selection proceedings to be kept pursuant to this law the justification for any such revision or amendment.

4. **Review of Tender Documents.** The tender documents and any amendments thereto shall be subject to the review and approval of the PPP Unit [or other applicable Competent Body]

Article 18. Tender committee

1. **Formation and Structure.** The contracting authority and the PPP Unit (and/or another competent body where the PPP regulations so require) shall form a tender committee for the purposes of conducting the PPP tender, evaluating tender bids and proposals, communicating with bidders, and determining the preferred or winning bidder. The composition, powers and procedures of the tender committee shall be determined in accordance with the PPP regulations (including a mechanism for addressing any conflicts of interest of its members).

2. **Members.** The tender committee shall have an odd number of members [with a portion or all its members being independent of the PPP project team]. The contracting authority (and/or other competent body, as aforesaid) shall appoint its chairman. Other members shall be appointed as required by the PPP regulations but may include such independent consultants and experts as may be deemed necessary.

3. **Minutes.** The tender committee shall keep minutes of all its meetings, which shall be subject to the approval of all members present and signed by the chairman and secretary of the committee.

4. **Records.** The tender committee shall document the tender process and evaluation in reasonable detail and give reasons for its selection and award decisions.

5. **Interpretation.** References in this Chapter IV to the contracting authority may be construed as including references to the tender committee where the context so requires.

Article 19. Tender stages

1. **Tender Stages.** A tender shall include the following stages, subject to and in accordance with the PPP regulations:

(a) Tender announcement and request for expressions of interest and/or pre-qualification submissions;

(b) Expressions of interest and/or pre-qualification submissions and short-listing of bidders;

(c) Formal invitation to tender (one or two-stage);

(d) Preparation and submission of tender proposals (one or two-stage);

(e) Evaluation of tender proposals and selection of the winning or preferred bidder;

(f) Finalisation of the terms and conditions of the PPP contract and all other required aspects of the PPP project with the winning or preferred bidder; and

(g) Award and conclusion of the PPP contract.

2. **Tender Announcement.** A tender announcement shall be followed by a request for expressions of interest and/or prequalification and subsequently (unless a single-stage tender is used) an invitation to tender, which shall each contain all information reasonably required to enable bidders to participate in that stage of the tender.

3. **Single-Stage Tenders.** A single-stage tender may be used where the PPP regulations so permit, combining the pre-qualification and tender submission stages into one.

4. **Closed Tender Exceptions.** A closed tender may be held where this law and the PPP regulations so permit, without the need for any tender announcement stage, tender participants being informed about the tender by written notice.

5. **Pre-Qualification Procedure.** For the purpose of limiting the number of suppliers or contractors from which to request proposals, the contracting authority may engage in pre-qualification proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged PPP. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) The invitation to participate in the pre-qualification proceedings shall be published in accordance with the requirements of the PPP regulations, containing all such information required thereby as may be necessary to enable bidders to submit responsive applications by the specified deadline.

(b) The contracting authority shall make a decision with respect to the qualifications of each bidder that has applied for pre-qualification, based on the criteria specified in the invitation to participate, and shall then invite all pre-qualified bidders to submit proposals for the PPP in accordance with the tender procedures and requirements.

(c) Where the contracting authority has reserved the right in the invitation to participate to request proposals from only a limited number of bidders that best meet the pre-qualification criteria, it shall rate the bidders accordingly and draw up a short-list of bidders that will be invited to submit proposals, up to the maximum number specified (but at least three, if possible). Those bidders shall then be invited to submit proposals for the PPP project in accordance with the tender procedures and requirements.

6. **Contents of the Request for Proposals.** The contracting authority shall provide a set of the request for proposals and related documents to each bidder (or pre-qualified bidder, as the case may be) invited in accordance with this law to submit proposals for the PPP project that pays the price, if any, charged for those documents. The request for proposals shall contain all such information as may be required by Article 17.1 and the PPP regulations to enable bidders to submit responsive proposals for the PPP project in accordance with the tender procedures and requirements by the deadline for submission of the same.

7. **Comparison and Evaluation of Offers or Proposals.** The contracting authority shall compare and evaluate each offer or proposal submitted for the relevant PPP in accordance with the evaluation criteria set forth in the tender documents, any relative weight accorded to each such criterion or the descending order of importance of the same. For this purpose, the contracting authority may establish thresholds with respect to the technical, financial, commercial, and quality aspects of the offers or proposals. Offers or proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

8. **Two-Stage Request for Proposals.** The contracting authority shall adopt a tender structure involving a two-stage request for proposals where the PPP Unit assesses that discussions with bidders are needed to refine aspects of the description of the subject-matter of the procurement and to formulate them with the requisite detail, in order to obtain the most satisfactory solution to its procurement needs. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) Prior to issuing its final request for proposals, the contracting authority shall issue an initial request calling upon the bidders to submit, in the first stage of the procedure, their initial proposals and comments relating to project specifications, performance indicators, financing requirements or other relevant characteristics of the PPP project and the main contractual terms proposed by the contracting authority.

(b) The contracting authority may convene meetings and hold discussions or dialogue with bidders whose initial proposals have not been formally and properly rejected as non-responsive or unacceptable. Discussions may concern any aspect of the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders.

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting, adding to or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the PPP project, including the main contractual terms, and any specified criteria for evaluating and comparing proposals and ascertaining the successful bidder. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals.

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with the tender procedure.

(e) The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria set out in the tender documents and invite the bidder that has attained the highest rating for final negotiation of the terms of the PPP contract (but excluding any terms, if any, that were stated to be non-negotiable in the final request for proposals).

(f) If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a contract, the contracting authority shall inform the bidder of termination of the negotiations and give the bidder reasonable time to formulate its best and final offer. If the contracting authority does not find that offer acceptable, it shall reject that offer and invite for negotiations the other bidders in the order of their ranking until it arrives at a PPP contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

9. **Competitive Dialogue.** The contracting authority may adopt a tender structure involving a request for proposals with dialogue ("competitive dialogue") where it is not feasible for it to formulate a detailed description of the proposed PPP needed for the purposes of an open public tender in accordance herewith, and it assesses that dialogue with bidders is needed to achieve the most satisfactory solution to its procurement needs. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) The contracting authority shall invite each bidder that presented a responsive proposal in accordance with the initial tender invitation (subject to any applicable maximum) to participate in the dialogue. The contracting authority shall ensure that a sufficient number of bidders, and if possible, not less than three, is invited to participate in order to ensure effective competition.

(b) The dialogue shall be conducted by the same representatives of the contracting authority concurrently.

(c) The contracting authority shall clearly identify those aspects of the PPP project and the tender documents and process that are to be the subject of the dialogue.

(d) During the course of the dialogue, the contracting authority shall not modify any material aspect of the proposed PPP, any pre-qualification or evaluation criteria, any minimum requirements, any element of the description of the PPP project contained in the request for proposals, or any term or condition of the procurement process that is not itself subject to the dialogue.

(e) Any requirements, guidelines, documents, clarifications, or other information generated during the dialogue that is communicated by the public authority to a bidder shall be communicated at the same time on an equal basis to all other bidders, save only to the extent it contains information which is exclusive to the relevant bidder and its disclosure would breach any applicable confidentiality restrictions.

(f) Following the dialogue, the contracting authority shall request all bidders who have not withdrawn from

the process to present their best and final offers with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place, and deadline for presenting best and final offers. Unless the PPP regulations and the tender documents otherwise permit, no negotiations shall take place between the contracting authority and the bidders with respect to their best and final offers.

(g) The winning bidder shall be selected from amongst the best and final offers submitted in accordance with this procedure, on the basis of the offer that best meets the needs of the contracting authority as determined in accordance with the applicable tender evaluation and selection criteria set out in the tender documents.

Article 20. Conclusion of the PPP contract

1. **Winning Bidder.** The winning bidder shall be the bidder who has submitted the most favourable compliant bid according to the evaluation criteria and methodology laid down in the tender documents. A formal announcement and publication of the identity of the winning bidder shall be made by the contracting authority promptly following determination of the same.

2. **PPP Contract Signatories.** The conclusion of the PPP contract shall not take place before the expiry of [fourteen days] from the date of publication of the identity of the winning bidder, inter alia to permit available procedures to be invoked for challenging the determination of the same where it is alleged that the procurement requirements of this law have not been met. The PPP contract shall be entered into by the contracting authority with the winning bidder (or with another private legal entity established by it for this purpose), which shall become the private partner in the PPP project for the purposes of this law. Any such other private legal entity or special purpose vehicle (SPV) established by the winning bidder shall meet any formal or substantive requirements for such entity specified by the tender documents or otherwise agreed with the contracting authority.

3. **Publication of Contract Award.** The contracting authority shall give notice of the contract award on its official website and publish the award through the official channels in accordance with the requirements of Article 10. The notice shall identify the private partner and include a summary of the essential terms of the PPP contract (subject to any applicable confidentiality restrictions).

4. **Public Disclosure of PPP Contracts.** Each PPP contract entered into pursuant to this Article shall also be subject to such public disclosure (but subject always to any applicable confidentiality restrictions) as may be provided for pursuant to this law (including Article 10) or the PPP regulations.

Article 21. Conclusion of PPP contract for unsolicited proposals

1. **Testing Competition.** Following a final decision by the contracting authority to implement an unsolicited proposal for a PPP project pursuant to Article 14 (either on the original or on any modified terms permitted thereby), the contracting authority shall, except in the circumstances set forth in Article 22, promptly initiate a competitive tendering procedure for the proposed PPP in accordance with this law, provided always that it considers that (a) the proposed PPP can be implemented without the use of unique intellectual property, trade secrets or other exclusive rights owned or possessed by the private initiator; and (b) that the proposed concept or technology involved is not truly unique or new.

2. **Requirements for Tendering Procedure.** If the contracting authority initiates a competitive tendering procedure in accordance with paragraph 1 above, it shall publish its implementation resolution for the PPP project on its website and the official channels in accordance with Article 13, together with a summary and description of the proposed PPP and its principal objectives, and any relevant documentation, inviting any third parties to submit expressions of interest in implementing the PPP project within a specified period of time.

3. **Exceptions: Contract with Private Initiator.** If the contracting authority does not consider that conditions (a) and (b) in the proviso to paragraph 1 have been met, or if no third party submits an expression of interest by the specified time limit referred to in paragraph 2, in circumstances where the contracting authority is satisfied that all reasonable steps have been taken to attract competing proposals, the contracting authority and the private initiator may proceed with the award of the PPP project and enter into a PPP contract for this purpose, subject to any direct negotiations permitted by Article 22 and the PPP regulations (and any specific procedure for this situation they may contain, including the need for any further approvals).

4. **Re-Testing Competition.** If the contracting authority is not satisfied that all reasonable steps have been taken to attract competing proposals, it shall be entitled to extend the time period for submitting third party expressions of interest, modify the documentation summarising and describing the proposed PPP as appropriate, and invite further expressions of interest.

5. **Tendering Proceedings.** If any third parties submit expressions of interest by the specified time limit(s) referred to above, the contracting authority shall organise tender proceedings for the PPP project in accordance with this law.

6. **Participation of Private Initiator in Tender.** The private initiator shall be invited to participate in any tender proceedings for the PPP project organised by the contracting authority, which may offer the private initiator any appropriate incentive, benefit, or compensation (if any) as may be provided for in the PPP regulations, in consideration of its development and submission of the proposal, including:

(a) Cash compensation (in a pre-agreed amount) for reasonable and documented costs and expenses incurred by it in connection with the development of the unsolicited proposal before the start of the tender proceedings, up to any specified maximum; and/or

(b) [Where applicable, an adjustment to the evaluation score of the private initiator under the tender documentation (in an amount pre-determined before issue of the tender documents)] and/or

(c) [Where applicable, waiver of certain specified bidding requirements].

7. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to this Article shall be subject to the publication and public disclosure provisions of Article 20.

Article 22. Direct negotiations

1. **Exceptions to Tendering Procedures.** The contracting authority may enter into a PPP contract with the private partner without conducting a competitive tendering process in accordance with this law (fully or at all, as the case may be), on the basis of direct negotiations between them, in and only in the following exceptional circumstances:

(a) [Where only a single bidder has pre-qualified and/or submitted a compliant bid in a tender process organised under Article 19];

(b) Where paragraph 3 of Article 21 so permits;

(c) [when there is an urgent need for ensuring continuity in the provision of the service and engaging in the competitive tendering procedures set forth in this Chapter would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part];

(d) Where the use of the competitive tendering procedures set forth in this law is not appropriate for the protection of the essential security interests of the state; or

(e) Where it has been clearly established to the proper satisfaction and confirmed by the contracting authority (and any competent body authorized by the PPP regulations for this purpose), following presentation of a thorough report to that effect by an independent expert, that there is only one source capable of implementing the PPP project as the private partner (such as in the case of indispensable patented technology or unique intellectual property, trade secrets or know-how, or other exclusive rights owned or possessed by such source), such that a competitive tender would not be feasible.

2. **Procedures Applicable to Direct Negotiation.** The detailed procedures, requirements, and conditions applicable to any such direct negotiations, including in the case of unsolicited proposals under Article 21, shall be specified in the PPP regulations, including in relation to any approvals required for the use of the same, the monitoring by and reporting of their progress and the terms and efficacy of any PPP project implemented as a result.

3. **Further Steps.** Where a PPP contract is negotiated on the basis of such direct negotiations, the contracting authority shall (except where a closed tender is necessarily required):

(a) Cause a notice of its intention to commence negotiations in respect of a PPP contract to be published in accordance with the PPP regulations.

(b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit.

(c) Establish appropriate evaluation criteria against which proposals shall be evaluated and ranked.

4. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to this Article shall be subject to the publication and public disclosure provisions of Article 20.

Article 23. Review and challenge procedures

1. **Remedies for Public Authority Breach.** Any bidder or potential private partner that claims it has suffered or may suffer loss or injury as a result of any alleged breach or non-compliance of a decision or action of the contracting authority or other competent body of or with the requirements of this law, the PPP regulations or any other relevant Applicable law, in connection with the selection, preparation, appraisal, procurement or implementation of a PPP project, may challenge the decision or action concerned and

pursue any available remedies in accordance with the relevant review and appeal procedures provided by this law or otherwise under Applicable law. The PPP regulations may provide specifically for such procedures.

2. **Grievance Procedures to provide for Effective Challenge.** Any such procedures specifically provided by the PPP regulations shall aim to ensure (inter alia) that any such decision or action can be effectively challenged and reviewed without delay and, if possible, before it is carried into effect in relation to the relevant PPP, and that powers to take appropriate interim or interlocutory measures and steps are accordingly available, with a view to correcting the alleged breach or non-compliance and mitigating the loss or injury concerned at the earliest possible stage. Such measures and steps may (subject to their terms) include the power to open up, review, revise and/or annul any decision, certificate, approval, document, order or resolution made or given hereunder, and/or to suspend or cancel any procedure or course of action being followed under this law. Such procedures may also (subject as aforesaid) include the power to award compensation or damages to the person suffering loss or injury and even to cancel or set aside a PPP project altogether in appropriate circumstances specified therein.

3. **Other Procedures to allow for Interim Measures.** The PPP regulations shall aim to ensure that the detailed procedures drawn up under this law, shall provide for sufficient time, following the taking of key decisions or the issue of key approvals or resolutions thereunder, to allow for the interim or interlocutory measures to be taken.

Chapter V. PPP contracts

A private partner's obligation to develop, finance, construct, rehabilitate, and/or maintain public infrastructure and/or deliver public services in a PPP project calls for a number of special rights and obligations not usually applicable to many other types of contracts between public and private sectors. As a result, PPP contracts often contain contractual and legal conditions designed to reflect their special circumstances and facilitate their success and this Chapter should be read in conjunction with Article 32, which contains special provisions addressing the delivery of public services in PPPs, such as one can find typically in Concessions.

Article 24. Main terms and conditions of PPP contracts

1. **Contract Terms as agreed by the Parties.** PPP contracts shall contain such terms, consistent with the implementation resolution and tender documents for the relevant PPP, as the parties to them may deem appropriate and agree between them, or as may otherwise be prescribed by law (expressly or by implication), including terms relating to the following:

(i) Recitals identifying the key premises upon which the parties are entering into the PPP contract.

(ii) The parties to the PPP contract.

(iii) The subject matter of the PPP contract, including the nature and scope of works to be performed and services to be supplied and the public infrastructure and/or the public services to which it relates.

(iv) The (relevant) technical and economic characteristics and requirements of the public infrastructure comprised in the PPP project.

(v) The specific rights and obligations of the parties in relation to the PPP project's implementation, including the nature and extent of exclusivity, if any, of the private partner's rights.

(vi) Identification of the applicable contract documents, including an order of precedence where needed.

(vii) Any conditions precedent to the parties' rights and obligations (in whole or part).

(viii) The duration of the PPP contract and any mechanism for extending it (subject to Article 8).

(ix) Applicable performance levels, volumes and/or standards for the works, good and/or services to be provided by the private partner, including KPIs and where applicable guarantees and any obligations of the private partner to modify public service levels to meet actual demand and ensure their continuity and provision under essentially the same conditions for all users.

(x) The rights of the contracting authority to monitor the project and ensure that the project is being properly operated and/or that the services are being delivered to the stated requirements.

(xi) Applicable performance penalties and other remedies payable by the private partner for failing to meet the requisite performance levels, volumes and/or standards.

(xii) Where applicable, the private partner's rights (if any) to charge third parties (including end users) for its works, goods and/or services, any conditions

applicable thereto (such as the amounts and methods of payment), any mechanisms for revising or modalities for varying them, and provision for any public subsidy where applicable.

(xiii) Any payments (if any) to be made to the private partner by the contracting authority and/or any other public authority for its works, goods and/or services (such as availability payments, "shadow tolls", output-based payments, other types of performance-based payment, off-take payments or otherwise), the methods and formulae for calculating them, any other conditions applicable thereto, any mechanisms for revising or modalities for varying them, and any relevant cost breakdowns and the applicable payment procedures;

(xiv) Any payments to be made by the private partner to the contracting authority (or the Government) for the PPP project (whether lump sum, regular, periodic or otherwise), including PPP fees and (where applicable) revenue sharing, and/or its obligations to collect tariffs on behalf of the Government.

(xv) Any requirements relating to the incorporation of the private partner (including a special-purpose vehicle formed in accordance with this law) and its corporate structure, requisite parties, and capitalisation, and to subsequent changes to them.

(xvi) Right of the contracting authority to review and approve certain contracts to be entered into by the private partner, or aspects therefor, such as contracts between the private partner and its major contractors and/or shareholders and/or affiliates.

(xvii) The nature of and responsibility for funding and/or financing the PPP project (whether by means of public support, private finance, debt, equity and/or other sources).

(xviii) Responsibility for obtaining relevant licenses, permits and consents from other public authorities and/or assisting with the processes involved.

(xix) Coordination of activities comprised in the PPP project with other public authorities.

(xx) Procedures for regular interfacing and co-operation between the parties, with a view to promoting collaboration and the amicable resolution of potential differences and disputes.

(xxi) Requirements for regular interfacing and consultation with project stakeholders, including those impacted by or making use of the project.

(xxii) Applicable design and construction (or reconstruction/ rehabilitation) obligations, requirements, and procedures (including where applicable procedures for the review and/or approval of plans and designs, resolving issues, testing and final inspection, approval and acceptance of the facility, and any requirements for the expansion or extension of an existing facility).

(xxiii) Applicable operational and maintenance obligations, requirements, and procedures.

(xxiv) Time periods for performance of specific obligations (and any mechanisms for extending them).

(xxv) Procedures for determining or certifying completion of specific obligations.

(xxvi) Identification of the respective physical assets and/or real property rights including responsibilities for acquisition, transfer, use and maintenance of the same for the PPP project and access to it, including any easements.

(xxvii) Responsibilities for protecting and securing the PPP project and the site.

(xxviii) The nature and allocation of property rights and interests relating to the PPP project, the site and the assets it comprises (including any assets which the private partner may be allowed to own outright or indefinitely).

(xxix) The nature of any supporting infrastructure, transport linkages and/or utility supplies, and responsibility for their provisions and maintenance.

(xxx) Development and use of facilities ancillary or incidental to the PPP project and any revenues generated from them.

(xxxi) Employment and labour-related (including "local content") requirements.

(xxxii) Requirements to comply with Applicable laws.

(xxxiii) The monitoring, review, inspection and approval rights and powers of the contracting authority throughout the term of the PPP contract.

(xxxiv) Information-provisions and the extent of the private partner's obligation to provide the contracting authority and/or other competent body with reports and other information on the PPP project including any applicable procedures.

(xxxv) Obligations of each of the parties to engage with stakeholders and address their legitimate grievances through appropriate grievance mechanisms.

(xxxvi) Sub-contracting and the private partner's responsibility and liability for its sub-contractors.

(xxxvii) Remedies available in the event of default by either party, including any "step-in rights" (as detailed

in Article 29) granted to the contracting authority.

(xxxviii) Any "step-in rights" (defined as aforesaid) granted to the private partner's lenders.

(xxxix) The private partner's rights to grant financial security interests in and over its PPP-related assets and rights.

(xl) Ownership and use of intellectual property.

(xli) Transfer of assets and ownership and any provisions relating to their re-transfer as appropriate at the end of the contract term.

(xlii) The rights and obligations of the parties with respect to confidential information and the disclosure of project information.

(xliii) Mechanisms and procedures for exempting the parties from liability and/or providing appropriate protection and/or compensation (including by modifying the PPP contract) to allow for the impact of events beyond the control of the affected party, such as force majeure, change in law and other exceptional events.

(xliv) Any variation (and related cost adjustment or recovery) mechanisms and procedures for making of other amendments to the PPP contract.

(xlv) Termination of the agreement, including grounds for termination, procedures, the effect of lender step-in rights, and provision for any compensation payments.

(xlvi) Appropriate steps to be taken with a view to minimizing the adverse impact of any early termination on the continuity of public service provision in connection with the PPP project.

(xlvii) Responsibilities relating to expiry of the term, including any hand-over of the PPP project assets (except where the private partner owns them outright) and related training and transfer obligations, and where appropriate decommissioning and associated financing responsibilities.

(xlviii) Insurance requirements (including if relevant insurance relating to climate-change events).

(xlix) Environmental and social obligations, including any specific requirements relating to the SDGs and the Guiding Principles, together with obligations to manage, monitor and report on relevant impacts and to implement corrective actions as necessary throughout the life of the project.

(l) Governing law and dispute-resolution and/or avoidance/settlement mechanisms, including any arbitration provisions and procedures.

(li) Liability and indemnities.

(lii) Waivers of sovereign immunity.

(liii) Representations and warranties.

(liv) Such other terms as the parties may agree.

2. **Available Contract Structures.** The parties to a PPP contract shall be entitled to agree on such contractual and commercial forms and structures as seem to them most appropriate for the PPP project concerned, and which they consider to be best suited to give effect to its principal characteristics and features, including any which are known and used as a matter of recognized international best practice.

Article 25. Amendment and termination of PPP contracts

1. **Termination of Contract.** The PPP contract shall terminate upon the expiry of its term (subject to any provisions expressed to survive termination). An early termination may occur where the agreement so permits and in accordance with Applicable law.

2. **Amendments and Termination by Agreement.** The parties may amend or vary any terms of the PPP contract or terminate it by mutual consent at any time, but subject always to its provisions, the terms of any direct agreement and any conditions or restrictions under Applicable law or the PPP regulations, including as to any further consents or authorisations required.

(a) [*Alternative 1*: In particular, any amendment or modification (other than one already provided for in clear and precise terms in the contract) which would materially alter any of the [fundamental or essential elements or aspects] of the PPP project or its terms and conditions, and which played a significant part in either its appraisal and approval under Article 12 and/or the decision to award the project to the private partner pursuant to any competitive tendering process held under this law, shall require the approval or endorsement of the competent body designated for this purpose (if any) herein or in the PPP regulations before such amendment or modification becomes effective. Such approval or endorsement may be subject to further specific conditions (including in certain cases even the re-tendering of the PPP contract). The basis on which any such competent body may give or withhold its approval or endorsement, and specify further conditions, shall be set out or reflected in the PPP regulations.]

(b) [*Alternative 2*: In particular, any amendment or modification (other than one already provided for in clear and precise terms in the contract) which would render the contract substantially different in

character from the one initially concluded shall require the approval or endorsement of the competent body designated for this purpose (if any) herein or in the PPP regulations before such amendment or modification becomes effective. An amendment or modification shall be deemed to be substantial where it meets one or more of the following conditions:

(i) The total value of the remuneration of the private partner resulting from the amendment or modification would exceed [__] per cent of the total value of all remuneration which the private partner is expected and entitled to receive from the PPP project over its term, assessed on a comparable, present value basis. Where several successive amendments or modifications are made, such value shall be assessed on the basis of the net cumulative value of the successive modifications, over a period of [__] [***months/years***].

(ii) The amendment or modification shall not introduce conditions which, had they been part of the initial contract award procedure for the PPP project, would have allowed for the admission of bidders other than those initially selected or for the acceptance of a proposal other than that originally accepted or would have attracted additional participants in the contract award procedure.

(iii) The modification extends the scope of the works to be carried out and/or services to be supplied by the private partner under the contract by more than [__] per cent.

(iv) Where a new private partner replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under this law.

3. **Unilateral Termination.** Where it so provides, the PPP contract may also be terminated unilaterally, by written notice from one party to the other, upon the occurrence of certain specified events (such as material unremedied breach of contract, insolvency, certain types of change in law or prolonged force majeure) and subject to the satisfaction of any relevant specified conditions specified in the agreement, such as the lapse of certain time periods, compliance with applicable procedures or, where Applicable law so requires, the decision of a competent court or tribunal.

4. **Termination Compensation.** Where the PPP contract so provides, either party shall be entitled to compensation from the other upon its early termination for any reason, in an amount and on a basis calculated in accordance with its terms and Applicable law. Due consideration shall be given by the parties concluding a PPP contract to the principles upon which any such compensation should be calculated, which may include or take account of (by way of illustration and without any double counting) any of the following:

(a) The fair, and where applicable non-amortized, value of any assets transferred to the contracting authority.

(b) Appropriate compensation for the value of equity investments in the PPP project and/or the returns expected by equity investors over the term of the agreement.

(c) Amounts necessary to discharge outstanding debt obligations at the time of termination.

(d) Compensation for costs and losses suffered by either party as a result of early termination, including lost profits.

(e) The amount of any outstanding liabilities of either party at the time of its termination.

The parties to the PPP contract shall be entitled to agree such terms for the payment of such compensation as seem to them most appropriate in all the circumstances, and which are consistent with Applicable law and any relevant constraints it may impose, such as the need to avoid unjust or undue enrichment or any disproportionate penalties for breach of contract.

5. **Other Termination Steps.** The PPP contract may provide, as appropriate, for any of the following upon or following its termination or expiry:

(a) Mechanisms and procedures for the transfer of assets to the contracting authority.

(b) The compensation to which the private partner may be entitled in respect of assets transferred to the contracting authority or to a new private partner or purchased by the contracting authority.

(c) The transfer of technology required for the operation and maintenance of the PPP project.

(d) The training of the contracting authority's personnel or of a successor private partner in the operation and maintenance of the PPP project.

(e) The provision, by the private partner, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the PPP project to the contracting authority or to a successor private partner.

(f) Mechanisms and procedures for the decommissioning of the PPP project, including the preparation of a decommissioning plan, the parties' respective obligations for carrying it out and their financial obligations in that respect.

Article 26. Property and related matters

1. **Provision of Necessary Property.** The contracting authority shall be responsible for ensuring the effective provision to the private partner of any and all existing land, buildings, facilities, structures, parcels or plots of land, easements, rights of access and egress, and all other real property-related assets, which are needed by it for the purpose of implementing the PPP project (whether or not owned or controlled by the contracting authority), in accordance with the requirements of the PPP contract, except where such assets have already been acquired by the private partner or the PPP contract provides otherwise.

2. **Rights of Access.** The contracting authority shall also make available to the private partner, or, as appropriate, assist it to enjoy the right to enter upon, transit through, do work or fix installations upon property of third parties, as appropriate and required for the purpose of implementing the PPP project in accordance with Applicable law.

3. **Transfer of contracting authority Property.** The contracting authority shall be entitled to transfer to the private partner the use and occupation (with or without ownership) of any available real property in its possession and/or under its control or operational management and which it is not precluded by law from transferring, including public infrastructure and any related land, buildings or similar property, which is needed for the purposes of the PPP project, in accordance with the terms of the PPP contract and any related documents.

4. **Third Party Property.** Where any property or assets referred to above are in the ownership or possession of third parties, the contracting authority shall (or shall procure that any other relevant public authority shall) either:

(a) Acquire or obtain the same by agreement with the relevant third parties;

(b) Arrange for their compulsory acquisition or alienation in accordance with Applicable law (and subject always to the requirements thereof, including as to appropriate planning, consultation, compensation, relocation, and monitoring duties); and/or

(c) Otherwise acquire or procure such other legal rights over and to such assets in accordance with Applicable law as may be necessary for the purposes of the PPP project and the discharge of its responsibilities under this Article.

5. **Grant of Legal Interests and Rights.** The parties to the PPP contract shall be entitled to grant each other such legal interests and rights, consistent with Applicable law and the terms of the PPP contract, in or related to any property the subject matter of the PPP project, as may be necessary to implement the PPP project. Such interests and rights may include (for example) outright ownership, leases, sub-leases, licenses, easements, rights of use and such other rights and interests as the parties may agree. All such rights and interests shall be provided or allowed for as appropriate under the terms of the PPP contract and/or any related agreements.

6. **"Back-to-Back" Interests and Rights.** The private partner shall be entitled to grant third parties equivalent or similar interests and rights in or related to any property to in this Article to those granted to it hereunder (including sub-contracts, sub-leases, sub-licenses, etc.) as may be necessary to implement the PPP project and permitted by the terms of the PPP contract and Applicable law.

7. **Identification of Assets.** The PPP contract may, if appropriate, identify which assets comprised in the PPP project are or shall be public property and which are or shall be the property of the private partner, and provide for the specific treatment thereof during its term or upon its termination or expiry. In particular, it may identify which assets belong in the following categories: (a) assets, if any, that the private partner is required to return or transfer to the contracting authority or another entity; (b) assets, if any, that the contracting authority may, at its option, purchase from the private partner; and (c) assets, if any, that the private partner may retain or dispose of.

Article 27. Types of payment under PPP contracts

1. **Payments to Private Partner: General.** The PPP contract may provide for such payments to be made to and/or levied and retained by the private partner, for the performance of its responsibilities, in such form and amounts and subject to such conditions as may be agreed by the parties to the PPP contract and not prohibited by Applicable law. These may include (as applicable to Concession and/or government-pay PPPs, as the case may be):

(a) Payments from end users, such as tolls, tariffs, fees, and other forms of usage or "direct user" payments, subject to any applicable legal or regulatory restrictions.

(b) Payments from the contracting authority to the private partner, such as availability payments, other performance-based payments, shadow tolls, capacity payments, off-take payments, subsidies, and other forms of regular or periodic payment or "revenue stream", subject to any applicable legal or regulatory restrictions.

(c) Any other legally available and permissible forms and types of payment.

The PPP contract may provide as appropriate for the methods and formulas for the establishment and adjustment of any such payments.

2. **Payments to contracting authority.** The PPP contract may also provide that the private partner shall make certain payments to the contracting authority, such as PPP fees, rents, royalty payments, revenue, or profit shares, whether lump-sum or periodic, or such other form of payment consistent with Applicable law as may be agreed by the parties to the PPP contract.

3. **Combinations of Payment.** The PPP contract may provide for a combination of any of the types or forms of payment referred to above.

Article 28. Liability of parties to the PPP contract

1. **General.** The parties to the PPP contract shall have such liability for any breach of its provisions and be subject to such remedies (including damages and penalties) as may be provided for under its terms and/or Applicable law.

2. **Sub-Contracts.** The private partner shall be entitled to sub-contract, sub-lease, or sub-license its rights and obligations under the PPP contract to third parties in accordance with the terms of the contract and shall have such liability for the acts and omissions of any such third parties as may be provided thereunder.

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

1. **Step-In Rights Permitted.** The parties to the PPP contract shall be entitled to include provisions in the contract and/or any related documents (including in a "direct agreement" with the lenders) which allow the contracting authority and/or the lenders, in specifically-defined circumstances and subject to Applicable law, temporarily to take over and manage, in whole or part, the operation of the facility and/or provision of the services comprised in the PPP project ("step-in rights") during the term of the PPP contract, to ensure their continued operation and/or provision, and the effective functioning of the PPP project, subject to the agreed conditions and procedures. Such conditions and procedures may (inter alia) require the parties to take all reasonable care to exercise any step-in rights in such a way as to avoid or minimise any material adverse impact on the provision of any relevant public services to end users or their use of any relevant public infrastructure.

2. **Lenders' Associated Rights.** It is acknowledged that the lenders' step-in rights under their direct agreement may include:

(a) The right to prevent any threatened termination of the PPP contract by the contracting authority from proceeding for specified periods of time and subject to specified conditions;

(b) The right to substitute the private partner, in whole or part, temporarily with another legal person, who shall be entitled to exercise the rights and obliged to perform the duties of the private partner under the PPP contract for a period of time, without transferring the PPP contract to another party;

(c) The right to replace the private partner altogether with another private partner on behalf of the lenders for the duration of the PPP contract term, and to transfer the PPP contract (and all the rights and obligations thereunder) to it; and/or

(d) The right to be paid termination compensation payments directly from the contracting authority in satisfaction of amounts owing to them in relation to the PPP project.

3. **No Further Tender.** It shall not be necessary for the contracting authority to hold any further public tender where any such step-in or substitution rights are exercised, provided that the relevant requirements and procedures are complied with.

Chapter VI. Support, protections and guarantees

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

1. **Exclusivity.** The contracting authority may grant the private partner exclusive rights to perform the activities specified in the PPP contract (subject always to Applicable law), in order to strengthen the technical, financial, and/or economic viability of the PPP project and facilitate the achievement of its objectives, including the public benefits envisaged for it.

2. **Licences and Permits.** The private partner shall have primary responsibility for obtaining and maintaining the necessary licences and permits for the PPP relating to its own activities, in accordance with Applicable law. The contracting authority shall provide all appropriate assistance to the private partner in connection therewith, including assistance with coordinating and facilitating their application and grant, and shall obtain or provide any relevant licences or permits in accordance with their terms for which it is itself responsible.

3. **No Undue Interference.** The contracting authority shall not take any steps or measures which would have the effect of unduly interfering with, obstructing

or prejudicing the private partner's freedom to control and manage the assets and activities comprised in the PPP project and to exercise its rights and perform its obligations thereunder, including its rights to receive and enjoy the revenues and returns on investment properly derived therefrom, save only as permitted by the express terms of the PPP contract and/or Applicable law.

4. **Adequate Returns from Payments.** The parties to the PPP contract shall be entitled to agree on and include such payment terms, and such mechanisms for revising and adjusting them from time to time, as can be reasonably expected to provide adequate compensation and returns to the private partner (and its investors and lenders) for its (and their) costs, expenses, investments and commitments in connection with the implementation of the PPP project, based upon the efficient performance of the private partner in accordance with the contract's terms.

5. **Exceptional Events.** PPP contract may also contain such provisions as the parties thereto may agree identifying or listing certain types of "special event", including changes in law, *force majeure*, or other exceptional events, which may trigger certain consequences under the contract designed to protect the party affected by such event and compensate it for the costs or losses sustained as a result, including financial or economic costs or losses, such as:

(a) Relief from liability of a party prevented from performing its obligations under the agreement.

(b) Amendments to the terms of the PPP contract, including (by way of illustration) amendments changing the scope of work, the time for performance, applicable standards or the contract's duration.

(c) Adjustments to charging and payment rates, amounts, and levels.

(d) Obligations to provide financial compensation.

(e) Unilateral rights of early termination of the PPP contract and the payment of related compensation.

6. **Essential Shareholders.** Except as otherwise provided in the PPP contract (but subject always to the PPP regulations), a controlling interest in the private partner or the interest of a shareholder whose participation therein is reasonably deemed to be essential for the successful implementation of the PPP project, may not be transferred to third parties without the consent of the contracting authority. The PPP contract shall set forth the conditions under which the consent and approval of the contracting authority may be given.

Article 31. Government and public support for PPPs

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).

Article 32. Protection of public service provision and contract equilibrium

A PPP shall be based on a series of contractual clauses and underlying legal requirements as identified in Article 24, however, this Article contains additional provisions that, if applicable, are designed to maintain the integrity of the public service in PPPs and the fair equilibrium between the respective rights and obligations of the parties under the PPP contract throughout the life of the project.

1. **Conditions for the operation of PPPs.**

(a) Equality of treatment for the users, continuity of the public service, and-if justified by the public interest-the adaptability of the public service to the needs of the project and users over time may be provided for as appropriate in the contract. More particularly:

(i) **Equality of treatment.** All users of the service in equivalent circumstances should be offered the same service on the same basis and for the same price without discrimination.

(ii) **Continuity.** The private partner should ensure the continuous delivery of the public service in accordance with the applicable performance parameters, save only where exceptional circumstances specified in the contract (such as force majeure) permit otherwise. A failure to do so may give rise to contractual and/or statutory remedies, including a right of the contracting authority temporarily to step in and take over the operation of the facility in order to ensure such delivery.

(iii) **Monitoring and restoring contractual equilibrium.** Unexpected changes in economic, political, and/or financial circumstances which adversely impact the economic and financial viability of the Project (subject to any specified thresholds) may be addressed through contractual mechanisms which allow the parties to restore the economic and financial viability of the Project and provide for appropriate relief and/or compensation. These events may include certain changes in law, changes in the tax and/or customs regime, unforeseen economic circumstances that cause hardship, and/or events of force majeure, as the contract may provide.

(iv) **Adaptability.** The private partner may be given certain obligations in the contract to change and adapt the public services as necessary in response to changing public needs during the term of the project, and/or to make proposals for the same to the contracting authority for its consideration. The terms of the contract may entitle the contracting authority, when public interest justifies it, to impose such changes and adaptations unilaterally, but subject to the economic equilibrium safeguards and mechanisms and other relevant conditions set out in the contract's terms (such as extensions of deadlines and/or increases in tariffs) and/or otherwise provided by Applicable law.

(b) **General Economic and Financial Provisions and Tariffs in Concessions.** The Project's economic and financial assumptions, and its investment and service provision requirements, as reflected in the PPP contract, should be designed in such a way as to make the PPP project practically, economically, and financially viable (including an appropriate return for the private partner). More particularly:

(i) **Tariffs and Charges.** The PPP contract should include principles and mechanisms for setting, calculating, and/or adjusting tariffs and charges payable under the contract so as to enable a reasonably efficient private partner to perform its obligations and deliver the public services over the life of the contract.

(ii) **Monitoring and restoring contractual equilibrium.** Unexpected changes in economic, political and/or financial circumstances which adversely impact the economic and financial viability of the Project (subject to any specified thresholds) may be addressed through contractual mechanisms which allow the parties to restore the economic and financial viability of the Project and provide for appropriate compensation. These events may include certain change in law, changes in the tax and/or customs regime, unforeseen economic circumstances that cause hardship, and/or events of force majeure, as the contract may provide.

(c) **Maintenance programmes.** The PPP project contract may include a maintenance and monitoring programme with respect to the delivery and operation of the public service and associated assets, subject to any requisite contracting authority approval. This may require the private partner to renovate, refurbish, and/or replace the relevant infrastructure on a multiyear basis with regular programme up-dates.

(d) **Cooperation.** The parties should, based inter alia on the common objective of satisfying the end users of the service, meet on a regular basis and in a structured manner to monitor the implementation of the contract and the project's practical, commercial and financial performance.

(e) **Reversion of the Assets.** In order to ensure the continuity of public services to the requisite standard on a hand-over of the PPP project to the contracting authority, whether at the end of its term or before, a PPP contract-especially one relating to a service-provision Concession-may need to contain specific provisions relating to:

(i) **Asset Transfer.** The identification of all assets to be transferred to the contracting authority on a termination or expiry of the contract, including fixed assets and infrastructure, movable assets, inventory, know-how, IP, supplies and equipment necessary for the continued delivery of the public service, and the condition in which such assets must be in (typically good operating condition, free of defects and of any liens, encumbrances, or other security). The transfer

and/or training of staff may also need to be provided for. The contract may also distinguish between assets to be transferred without compensation and others which the contracting authority has an option to purchase from the private partner.

(ii) **Early Termination.** These provisions may also apply on an early termination of the contract before the expiry of its term, including where the contracting authority has a right of "public interest" termination, exercisable without fault on the part of the private partner.

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

1. **General.** The PPP contract and/or any direct agreement may, for the avoidance of doubt, provide for such protections for and the rights and powers of the private partner's lenders and investors as the parties thereto may agree, consistent with Applicable law, as may be necessary and appropriate to ensure the successful financing of the PPP project.

2. **Direct Agreements Permitted.** Such protections, rights and powers may (*inter alia*) set out the detailed procedures and conditions applicable to the exercise of any step-in rights and rights of substitution and/or replacement of the private partner (in accordance with Article 29), together with any other specific entitlements of the lenders permitted thereby (such as direct payment of termination compensation or insurance proceeds).

3. **Permitted Security.** Subject to any restrictions that may be contained in the PPP contract, the private partner may grant or create any form of security interest over any of its assets, rights and interests comprised in or related to the PPP project, which are available under Applicable law, as may be required to secure any financing needed for the PPP project. These may include (by way of illustration) property mortgages, security over movable and immovable property and over tangible and intangible assets, enterprise mortgages, fixed and floating charges, assignments, pledges of bank accounts, pledges of the proceeds of the PPP project or of receivables owed to the private partner, and other available forms of security. No such security may be created over public property, or any other property, asset or rights needed for the provision of a public service where and to the extent that such security is prohibited by Applicable law.

4. **Shareholder Security.** The private partner's shareholders and other owners may grant or create any form of security interest over their shares or ownership interests in the private partner that may be available under Applicable law.

5. **No Replacement of Private Partner without Consent.** Save as otherwise provided in paragraphs 3 and 4 above and in Article 29, the rights and obligations of the private partner under the PPP contract may not (subject to its terms) be assigned and transferred to any third party in place of the private partner without the contracting authority's consent. The PPP contract shall set forth the conditions under which such consent and approval may be given, including valid acceptance by the relevant third party of all obligations transferred to it, their enforceability against it and evidence of its technical, managerial and financial capability to perform them. Provided always that no such restriction shall prevent the private partner from sub-contracting or sub-leasing its rights and obligations under the PPP contract in accordance with its terms.

Article 34. Protection of end users and the general public

1. **Detailed PPP Procedures: End Users and the General Public.** Any detailed procedures specified in the PPP regulations relating to the selection, preparation, appraisal, procurement and implementation of PPPs shall take due and reasonable account as appropriate of the legitimate needs and best interests of members of the general public and end users of the public services to which the relevant PPPs relate and who stand to be affected by the same.

2. **Grievance Procedures.** Such procedures shall provide as appropriate for the adoption of suitable mechanisms for lodging formal objections or other complaints or grievances by members of the general public and end users to or about any aspect of such implementation by which they may be materially adversely affected, including where appropriate a regulatory or parliamentary ombudsman procedure. No such mechanisms shall in any manner limit or prejudice any other rights and remedies available to such members of the general public or end users under Applicable law in relation to any PPP or its selection, preparation, appraisal, procurement or implementation. Any such procedures shall take account as appropriate of such other rights and remedies.

3. **Private Partner's Operational Grievance Mechanism.** Where the PPP project involves the provision by the private partner of services to the public or the operation of infrastructure facilities accessible to the public, the contracting authority shall require the private partner to establish simplified and efficient mechanisms for handling claims submitted by the members of the public receiving the services or using the infrastructure facility, as well

as other parties affected by the PPP project. The PPP contract shall provide for any such requirements. The private partner shall maintain accurate and complete records of the operation of any such mechanisms and the claims submitted and handled thereunder.

4. **Rules for Use of Infrastructure Facility.** Where the PPP project involves or relates to the use by third parties or members of the public of an infrastructure facility, the private partner shall have the right to issue and enforce rules governing such use of the facility, which shall be subject to any requisite approvals of the contracting authority or other relevant public authority (such as a regulatory body). The PPP contract may provide for the making of any such rules and their enforcement.

Chapter VII. Governing law and dispute resolution

PPP contracts are often long term, complex partnerships for the provision of a public service. PPPs should therefore set out clearly the necessary provisions to maintain the contracted public service for the life of the project but include provisions that allow the parties to resolve differences in how the project is to be delivered. In all cases, such provisions should allow for resolution in accordance with any stated objectives or principles of the project, the contractual documentation, and in the spirit of partnering and dispute avoidance where possible.

Article 35. Governing law

1. **Governing Law of PPP Contract.** The PPP contract shall, subject to Applicable law, be governed by the system of law chosen by the parties, but subject to a presumption that, save in exceptional circumstances, the law of [host county] shall apply. The law of [*host country*] shall apply where the PPP contract does not provide otherwise.

2. **Governing Law of Other Contracts.** Other contracts and documents entered into in relation to the PPP project (including any direct agreement) shall be governed by the systems of law chosen by the parties to them, taking account of any Applicable law requirements.

Article 36. Dispute avoidance and alternative dispute resolution

1. **Dispute Resolution Mechanisms as agreed.** Any differences or disputes arising out of the contracts or documents relating to a PPP project shall be resolved or settled through the mechanisms, processes and procedures agreed by the parties thereto, but subject always to any specific requirements relating thereto under Applicable law.

2. **Freedom of Choice.** The parties to such contracts and documents may (subject as aforesaid) freely choose the mechanisms, processes, and procedures for resolving such differences or disputes, including mediation, binding or non-binding expert appraisal or determination, national or international commercial arbitration or investment arbitration, and the procedural rules relating to the same.

3. **Partnering.** The parties may agree on a partnering process to promote the long-term development and success of the project, which may include (for example):

(a) Meetings organized on a regular basis.

(b) Involvement of personnel with the necessary skills, specialisms, and levels of responsibility for the parties to resolve issues.

(c) The establishment of any necessary procedures designed to foster a spirit of partnership, based on a consensus of the parties.

(d) A duty to disclose any potential issues and discuss any actual or potential disputes during partnering meetings before any other dispute resolution steps may be taken.

4. **Dispute Board.** The parties may agree on the establishment of a formal disputes board to promote the long-term development and success of the project, which may (for example) bring in outside experts, hold regular meetings and consider issues in dispute and facilitate their resolution.

5. **Mediation.** The parties may agree on the establishment of a mediation process to promote the long-term development and success of the project, which may include (for example):

(a) An optional or mandatory mediation process that may be invoked before referring a matter to arbitration.

(b) One or more senior or other authoritative experts selected by the parties to facilitate the mediation.

(c) The establishment of any necessary additional procedures by the facilitator(s) to structure the mediation, including the extent of due process to be used in the proceedings.

6. **Arbitration.** The parties may also (but subject always to Applicable law) agree on the use of arbitration, including domestic and/or international arbitration and related mechanisms, for the final determination/resolution of disputes, *inter alia* to enhance the long-term development and success of the project and allay any potential concerns (if any) about other available forms of judicial proceeding, which may include for example) the following:

(a) A requirement(s) that disputes first go to a dispute board and/or mediation prior to arbitration.

(b) Three or more arbitrators selected by the parties to conduct the arbitration.

(c) The establishment of any necessary additional rules or procedures based on accepted international arbitration standards.

7. **Waiver of Sovereign Immunity.** The contracting authority shall not to be entitled to any state or sovereign immunity in relation to any differences or disputes under any such contract or document which it has properly agreed to waive thereunder.

Chapter VIII. Implementation and monitoring of PPPs

Article 37. Monitoring and reporting on the implementation of PPPs

1. **Supervision by Contracting Authority.** Subject to the terms of the relevant PPP contract, the contracting authority shall be entitled to exercise such powers of supervision and monitoring of any PPP as may be necessary to satisfy itself that it is being implemented in accordance with its terms, including by means of regular reports, reasonable access to the site and physical assets comprised in it, access to and copies of any documentation relating to it and independent audits.

2. **Contracting Authority Reports.** Each contracting authority shall prepare regular reports on the implementation of the PPP projects for which it is responsible, as required by the PPP regulations or otherwise by the Government from time to time, which shall be made available to the Government and copied where required to the PPP Unit [or other applicable Competent Body]. Copies of all such reports shall generally be publicly available.

3. **Additional Information.** Each contracting authority shall also provide any additional specific information to the Government and/or the PPP Unit [or other applicable Competent Body] as it may reasonably require from time to time in relation to the implementation of any PPPs for which such contracting authority is responsible.

4. **Contracting Authority Records.** Each contracting authority shall maintain accurate and complete records in reasonable detail of the procedures followed, decisions made, and conclusions reached by it in connection with the identification, selection, preparation, procurement, and implementation of any PPP for which it is responsible.

Article 38. PPP Database and register

1. **PPP System Database.** The Government or the PPP Unit shall maintain a detailed database covering all PPPs implemented in [*host country*] [after the date of this law], containing such information as may be required by the PPP regulations. The database shall be designed to provide a reasonably comprehensive, up-to-date, and clear compendium of material information about the PPP projects that have been or are being implemented in [*host country*] at any one time.

2. **Database Publicly Available.** The PPP database shall be publicly available, subject to any applicable confidentiality or non-disclosure restrictions permitted by the PPP regulations or Applicable law.

Chapter IX. Transitional and final provisions

Article 39. Entry into force

1. **Effective Date.** This law shall enter into force on [__] but shall not (save to the extent otherwise provided herein, including under paragraph 2 or in the PPP regulations) apply to any PPPs or equivalent or similar projects implemented, or tenders or similar procedures held and substantially completed for their award, or agreements or binding commitments entered into by the contracting authority in relation to them, before that date.

2. **Monitoring Antecedent Projects.** The Government shall be entitled to require that any existing PPPs (or equivalent or similar projects) implemented before the date of entry into force of this law become subject to the monitoring and reporting requirements provided for in Article 37 (but without limiting any rights of cost recovery that the parties to any relevant agreements may have as a result of meeting any such requirements).

Article 40. Legislative acts to be invalidated upon entry into force of this law

1. **Invalidation.** The following legislative Acts shall be invalidated upon entry into force of this law: [*specify*]

2. **Conflict with Antecedent Laws.** In the event of any conflict or inconsistency between this law and any extant prior laws relating to or applying to PPPs in [*host country*], the provisions of this law shall prevail (unless specifically provided otherwise).

Article 41. Consequential revisions to existing legislation

1. **Disapplication of Specific Laws.** The provisions of the following laws shall not apply to PPPs awarded or implemented after the date of entry into force of this law pursuant to Article 39 above, subject to the additional qualifications specified below:

2. [*Alternative 1*] **Specific Amendments to Existing Laws.** The following amendments shall be made or be deemed to have been made to the following existing laws and legislative acts in order to give effect to the provisions of this law: [*specify*]

3. [*Alternative 2*] **Deadline for Consequential Revisions.** The Government shall, within a period of [__] months from the date of entry into force of this law, amend, modify or repeal any other Applicable laws relating to or affecting PPPs as necessary to bring the same into conformity with this law.

[ENACTMENT FORMALITIES TO BE SET OUT BELOW]

End of document

Annex I
List of participating members of the project team in phase I[3]

Team Leader: Christopher Clement-Davies

A. List of drafting group members

Name	Title	First name	Last name	Organisation
Motoko Aizawa	Ms.	Motoko	Aizawa	Independent Consultant. Former World Bank expert
Roman Churakov	Mr.	Roman	Churakov	Herbert Smith Freehills
Christopher Clement-Davies	Mr.	Christopher	Clement-Davies	C. Clement-Davies. (Independent Consultant and Investor)
John Crothers	Mr.	John	Crothers	Partner at Gide Loyrette Nouell
Bruno de Cazalet	Mr.	Bruno	de Cazalet	Independent Consultant
Alexander Dolgov	Mr.	Alexander	Dolgov	Squire Patton Boggs Moscow LLC
Richard Ginks	Mr.	Richard	Ginks	Partner at Linklaters
Thomas Hamerl	Mr.	Thomas	Hamerl	Partner, CMS
Vladimir Kilinkarov	Mr.	Vladimir	Kilinkarov	Dentons/PhD, Of Counsel, Head of Russian PPP Practice
Ian McGrath	Mr.	Ian	McGrath	Dentons, Istanbul
Konstantin Makarevich	Mr.	Konstantin	Makarevich	Squire, Patton, Boggs
Olga Revzina	Ms.	Olga	Revzina	Herbert Smith Freehills
Chris Shugart	Mr.	Chris	Shugart	Independent Consultant
Wim Timmermans	Mr.	Wim	Timmermans	Timmermans & Simons Int'l Business Lawyers, the Netherlands
Don Wallace	Mr.	Don	Wallace	International Law Institute (ILI)
Irina Zapatrina	Ms.	Irina	Zapatrina	Chairman of the Board, Ukrainian PPP Centre
Alexei Zverev	Mr.	Alexei	Zverev	EBRD

[3] This information was correct at the time of writing.

B. List of project team members

Name	Title	First name	Last name	Organisation
Motoko Aizawa	Ms.	Motoko	Aizawa	Independent Consultant. Former World Bank expert.
Amer Al Adhadh	Mr.	Amer	Al Adhadh	US Department of Commerce CLDP, Adjunct Faculty at Georgetown University
Saidi Amiri	Mr.	Saidi	Amiri	President, Tanzania Investment Centre
Wilfried Bassale	Mr.	Wilfried	Bassale	Senior associate, Lawyer, Etude d'Avocats Me Frabretti & associés
Patrick Blanchard	Mr.	Patrick	Blanchard	President, PM BLANCHARD CONSULTING
Tomas Brizuela	Mr.	Tomas	Brizuela	Head of PPP Procurements Department, part of The Technical Planning Secretary of Economic and Social Development, of the Paraguayan Government
Raushana Chaltabayeva	Ms.	Raushana	Chaltabayeva	Unicare, Law firm
Shaimerden Chikanayev	Mr.	Shaimerden	Chikanayev	Partner, GRATA Law Firm
Rubayet Choudhury	Mr.	Rubayet	Choudhury	Legal Director, Finance and Projects Group at DLA Piper
Roman Churakov	Mr.	Roman	Churakov	Herbert Smith Freehills
Christopher Clement-Davies	Mr.	Christopher	Clement-Davies	Clement-Davies Independent legal and policy adviser, consultant and investor
Anthony Coumidis	Mr.	Anthony	Coumidis	Director Engineering & Environmental Initiatives
John Crothers	Mr.	John	Crothers	Gide
Predrag Cvetkovic	Mr.	Predrag	Cvetkovic	Present, European PROGRES Program
Giovannella D'Andrea	Ms.	Giovannella	D'Andrea	Lexia
Bruno de Cazalet	Mr.	Bruno	de Cazalet	Independent Consultant
Natalia Diatlova	Ms.	Natalia	Diatlova	Partner, Maxima Legal LLC
Alexander Dolgov	Mr.	Alexander	Dolgov	Squire Patton Boggs Moscow LLC
Daniel Escauriza	Mr.	Daniel	Escauriza	PPP Projects Director, PPP Unit part of The Technical Planning Secretary of Economic and Social Development, of the Paraguayan Government
Marc Fornacciari	Mr.	Marc	Fornacciari	Dentons, Paris
Marc Frilet	Mr.	Marc	Frilet	Global Construction & Infrastructure Legal Alliance (GCILA)
Dominique Gatel	Mr.	Dominique	Gatel	Veolia Secretariat General/Vice President, Public Affairs/ Water
Richard Ginks	Mr.	Richard	Ginks	Senior partner at Linklaters

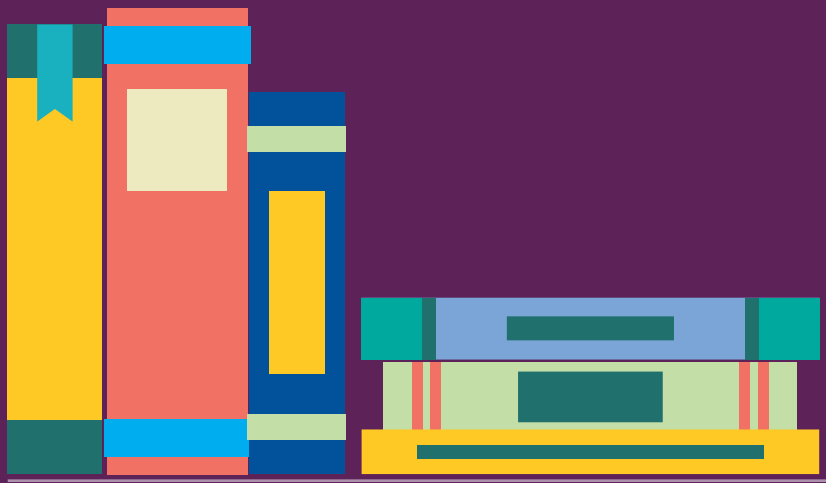
Name	Title	First name	Last name	Organisation
Bill Halkias	Mr.	Bill	Halkias	Managing Director, Attica Tollway Operations Authority
Sulaiman Hallal	Mr.	Sulaiman	Hallal	VP of Business Operation, Metito Utilities Ltd.
Thomas Hamerl	Mr.	Thomas	Hamerl	Partner, CMS
Carla Hancock	Ms.	Carla	Hancock	Legal Director, DLA Piper
Louise Huson	Ms.	Louise	Huson	Senior Professional Support Lawyer, DLA Piper
Rufin Serge Wilfrid Itoba	Mr.	Rufin Serge Wilfrid	Itoba	Secrétariat permanent du Comité de privatisation, Ministère de l'économie, des finances, du budget et du portefeuille public
Tomasz Jedwabny	Mr.	Tomasz	Jedwabny	Partner/Owner at JedwabnyLegal and partner at Arcliffe LLP
Daler Jumaev	Mr.	Daler	Jumaev	CEO, Pamir Energy Company
Vicky Kefalas	Ms.	Vicky	Kefalas	Investment Committee Member, EUROPEAN FUND FOR STRATEGIC INVESTMENTS (EFSI)
Vladimir Kilinkarov	Mr.	Vladimir	Kilinkarov	Dentons/PhD, Of Counsel, Head of Russian PPP Practice
Tham Lai Leng	Ms.	Tham	Lai Leng	Executive Board Member, Director of Finance & Administration, Meinhardt Infrastructure Pte Ltd
Shijian Liu	Mr.	Shijian	Liu	Junhe located in Bejing/NDRC
Veronica Lupu	Ms.	Veronica	Lupu	Lawyer
Atef Majdoub	Mr.	Atef	Majdoub	Head of the Office of the President of the Government Director General of the Concessions Monitoring Unit
Konstantin Makarevich	Mr.	Konstantin	Makarevich	Squire, Patton, Boggs
Svetlana Maslova	Ms.	Svetlana	Maslova	Head of the Center for PPP Studies, Graduate School of Management, St. Petersburg University
Ian McGrath	Mr.	Ian	McGrath	Dentons, Istanbul
Marija Musec	Ms.	Marija	Musec	Partner
Sreejith Narayanan	Mr.	Sreejith	Narayanan	IL&FS Transportation Networks Limited
Jörg Nowak	Mr.	Jörg	Nowak	ORCA Consulting Group GmbH
Rafael Pérez Feito	Mr.	Rafael	Pérez Feito	International Operations Director, FCC Aqualia, FCC Servicios Ciudadanos
Manuel Protásio	Mr.	Manuel	Protásio	Head of the Projects – Infrastructure, Energy & Natural Resources, Vieira de Almeida & Associados
Olga Revzina	Ms.	Olga	Revzina	Herbert Smith Freehills

Name	Title	First name	Last name	Organisation
Peter Rowen	Mr.	Peter	Rowen	Independent short-term Consultancy, Head - Centre of Excellence – Climate Resilience and Sustainability, Deloitte
Anastasia Rusinova	Ms.	Anastasia	Rusinova	"Legal Studio" Law Firm Associate office GRATA International in Saint-Petersburg
Chris Shugart	Mr.	Chris	Shugart	Independent Consultant
George Smyrnioudis	Mr.	George	Smyrnioudis	Infrastructure Advisory Services Leader, Ernst & Young Business Advisory Solutions
Irina Viktorovna Taranova	Ms.	Irina Viktorovna	Taranova	Professor of the Economic Analysis and Audit Department, Stavropol State Agrarian University
Wim Timmermans	Mr.	Wim	Timmermans	Timmermans & Simons Int'l Business Lawyers, the Netherlands
Eleni Tyrogianni	Ms.	Eleni	Tyrogianni	
Marius van Aardt	Mr.	Marius	van Aardt	Managing Director, Sembcorp Silulumanzi
David Joachim Lubbertus van Ee	Mr.	David Joachim Lubbertus	van Ee	Lawyer and Equity partner NautaDutilh
Marianne Viola	Ms.	Marianne	Viola	Director –Infrastructure & Energy, Lloyds Banking Group London
Don Wallace	Mr.	Don	Wallace	International Law Institute (ILI)
Lars Wellejus	Prof.	Lars	Wellejus	Frankfurt University of Applied Sciences
Parwana Zahib-Majed	Ms.	Parwana	Zahib-Majed	Legal Director, PPP Projects Group of DLA Piper
Irina Zapatrina	Ms.	Irina	Zapatrina	Chairman of the Board, Ukrainian PPP Centre
Alexei Zverev	Mr.	Alexei	Zverev	EBRD

Annex II
List of participating members of the group of experts in phase II[4]

Team Leader: Marc Frilet

Name	Title	First name	Last name	Organisation
Aman Amanullah	Mr.	Amanullah	Aman	OmVira India Pvt. Ltd
Primah Atungonza	Ms.	Primah	Atungonza	African Development Bank
Buchman Louis	Mr.	Louis	Buchman	Lexforce
Bueno Júlio César	Mr.	Julio César	Bueno	Pinheiro Neto Advogados
Jean-Christophe Barth-Coullaré	Mr.	Jean-Christophe	Barth-Coullaré	World Association of PPP Units & Professionals (WAPPP)
Deron Laure	Ms.	Laure	Deron	Cathaylex Avocat
Einbinder Fred	Mr.	Fred	Einbinder	Franco-American Attorney, Professor and Consultant
Fiszelson Roger	Mr.	Roger	Fiszelson	Confederation of International Contractors' Association
Hernández-García Roberto	Mr.	Roberto	Hernández-García	Comad SC
Hummel Gregory	Mr.	Gregory	Hummel	Bryan Cave Leighton Paisner
Marchais Bertrand	Mr.	Bertrand	Marchais	Business Development Advisor Europe, Multilateral Investment Guarantee Agency (MIGA), World Bank Group, Paris
Perry James	Mr.	James	Perry	PS Consulting
Piron Vincent	Mr.	Vincent	Piron	Piron Consulting
Sauvaget Guillaume	Mr.	Guillaume	Sauvaget	PS Consulting
Touroude Richard	Mr.	Richard	Touroude	Association of French International Contractors
Vallée Maude	Ms.	Maude	Vallée	African Legal Support Facility (ALSF)
Van Wassenaer Arent	Mr.	Arent	Van Wassenaer	The Faithful Goose b.v.



EBRD PPP regulatory guidelines collection

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

1. Preface

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

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

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

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

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

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

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

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

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

[3] United Nations Commission on International Trade Law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Textual commentary preamble

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

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

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

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

Chapter I. General provisions

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

Article 1. Scope

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

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

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

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

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

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

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

Article 2. Key terms and definitions

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

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

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

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

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

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

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

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

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

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

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

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

Article 3. PPP regulations and guidelines

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

Article 4. PPP criteria and fundamental requirements

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

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

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

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

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

threshold test over time without amending the primary legislation.

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

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

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

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

Article 5. Authority to award and enter into PPPs

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

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

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

Article 6. Applicable sectors and activities for PPPs

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

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

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

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

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

Article 7. Parties to a PPP contract

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

Article 8. PPP term

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

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

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

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

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

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

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

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

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

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

Chapter II. Institutional arrangements and roles

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

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

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

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

Article 9. Inter-ministerial committee and PPP unit

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

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

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

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

[20] See note 29 below.

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

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

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

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

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

Article 10. Information about PPPs

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

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

Chapter III. Initiation and preparation of PPPs

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

Article 11. Initiating and preparing PPPs

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

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

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

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

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

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

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

Article 12. Appraisal and approval procedures

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

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

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

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

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

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

Article 13. PPP Implementation resolutions

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

Article 14. Unsolicited proposals

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

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

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

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

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

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

Chapter IV. Selection of private partner

Article 15. Procedures for selection of private partner

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

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

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

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

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

Article 16. Tender structures and procedures: general

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

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

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

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

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

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

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

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

Article 17. Tender documents and criteria

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

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

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

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

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

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

[32] Which may lead to "dumping".

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

Article 18. Tender committee

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

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

Article 19. Tender stages

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

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

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

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

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

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

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

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

Article 20. Conclusion of the PPP contract

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

Article 21. Conclusion of PPP contract for unsolicited proposals

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

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

Article 22. Direct negotiations

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

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

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

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

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

Article 23. Review and challenge procedures

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

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

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

Chapter V. PPP contracts

Article 24. Main terms and conditions of PPP contracts

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

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

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

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

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

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

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

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

Article 25. Amendment and termination of PPP contracts

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

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

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

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

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

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

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

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

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

Article 26. Property and related matters

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

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

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

Article 27. Types of payment under PPP contracts

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

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

Article 28. Liability of parties to the PPP contract

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

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

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

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

Chapter VI. Support, protections and guarantees

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

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

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

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

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

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

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

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

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

Article 31. Forms of public support for PPPs

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

Article 32. Protection of public service provision and contract equilibrium

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

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

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

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

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

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

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

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

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

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

Chapter VII. Governing law and dispute resolution

Article 35. Governing law

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

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

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

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

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

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

Article 36. Dispute resolution

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

Chapter VIII. Implementation and monitoring of PPPs

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

Article 37. Monitoring and reporting on the implementation of PPPs

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

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

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

Article 38. PPP database

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

Chapter IX. Transitional and final provisions

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

[41] An unavoidable condition.

Appendices

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

Team Leader: Christopher Clement-Davies
UNECE Secretariat: Geoffrey Hamilton, Tony Bonnici and Claudio Meza
EBRD Legal Transition Team: Alexei Zverev, Zeynep Boba, Chris Tassis and colleagues

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

Team Leader: Christopher Clement-Davies

Name	Title	First name	Last name	Organisation
Motoko Aizawa	Ms.	Motoko	Aizawa	Independent Consultant. Former World Bank expert
Roman Churakov	Mr.	Roman	Churakov	Herbert Smith Freehills
Christopher Clement-Davies	Mr.	Christopher	Clement-Davies	C. Clement-Davies. (Independent Consultant and Investor)
John Crothers	Mr.	John	Crothers	Partner at Gide Loyrette Nouell
Bruno de Cazalet	Mr.	Bruno	de Cazalet	Independent Consultant
Alexander Dolgov	Mr.	Alexander	Dolgov	Squire Patton Boggs Moscow LLC
Richard Ginks	Mr.	Richard	Ginks	Partner at Linklaters
Thomas Hamerl	Mr.	Thomas	Hamerl	Partner, CMS
Vladimir Kilinkarov	Mr.	Vladimir	Kilinkarov	Dentons/PhD, Of Counsel, Head of Russian PPP Practice
Ian McGrath	Mr.	Ian	McGrath	Dentons, Istanbul
Konstantin Makarevich	Mr.	Konstantin	Makarevich	Squire, Patton, Boggs
Olga Revzina	Ms.	Olga	Revzina	Herbert Smith Freehills
Chris Shugart	Mr.	Chris	Shugart	Independent Consultant
Wim Timmermans	Mr.	Wim	Timmermans	Timmermans & Simons Int'l Business Lawyers, the Netherlands
Don Wallace	Mr.	Don	Wallace	International Law Institute (ILI)
Irina Zapatrina	Ms.	Irina	Zapatrina	Chairman of the Board, Ukrainian PPP Centre
Alexei Zverev	Mr.	Alexei	Zverev	EBRD

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

CIS model PPP law

PPP (or equivalent) laws for the following countries

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

Relevant EU legislation

Appendix 2

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

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

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

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

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

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

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

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

- **CIS PPP Model Law**

- **The EPEC PPP Guide 2011**

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

EBRD PPP regulatory guidelines collection

Chapter 3. Introduction and executive summary to model regulatory outlines

The attached documents, which are divided into six modules, contain an extensive set of guidance notes on regulations and guidelines (the **Guidance Notes**) to support the EBRD/UNECE Model Law on PPP/Concessions[1] (referred to in the Guidance Notes as the **Model PPP Law** or simply the **Model Law**). The Model Law was developed and drafted over the past five years as a joint project between the EBRD and the UNECE[2] Working Party on PPPs (the **Working Party**) and approved and adopted by the former in 2021. Following some further minor drafting and structural changes to it in 2021-22, on behalf of the Working Party, it was formally adopted and published (in December 2022) by the United Nations[3] as a standard, forming part of the suite of standards and guidance notes commissioned and published by the Working Party over the past few years on the subject of PPPs. The EBRD has also published the Model Law on its website and included it, along with an accompanying commentary (the **Commentary**) in its PPP Regulatory Guidelines Collection. The Working Party continues to focus and carry out valuable work on the subject of how to make PPP projects as compliant as possible with the SDGs, based on its novel concept of **SDG PPPs** and the **SDG Guiding Principles**[4], including its PPP Evaluation Methodology for the SDGs (the **Evaluation Methodology**, also published in 2022).[5]

These Guidance Notes are designed to provide guidance to governments, regulators, PPP units and others involved in developing or refining the subsidiary documents that often support and accompany PPP laws, on how to prepare and draft them. Supporting documents of this kind will typically fall into two broad categories, namely regulations and guidelines. Both are defined in the Model Law, the former as legally binding secondary legislation, covering the detailed procedures and mechanisms necessary to give effect to a PPP Law, the latter as guidance documents which describe, explain and advise on their application.

Some countries make clear distinctions between these two categories, treating the former as consisting only of legally binding provisions, while the latter is made up of documents which may be persuasive but do not have the force of law. The Model Law also makes that distinction. Other countries, however (particularly in certain former Soviet Union jurisdictions, at least at a regional or municipal level), are arguably somewhat less precise and clear-cut about the distinction, sometimes lumping them together in one broad category and referring to them with the collective title “regulations and guidelines”. Some of these countries tend to treat this broad category as essentially or largely binding anyway, and to refer to them generally as simply regulations.[6]

In the former case, countries which make definite distinctions between the two categories, different drafting approaches should be taken to the two types of **supporting documents**. The regulations will have to be written as legal provisions and contain only clauses which are appropriate for legal documents. The guidance documents, by contrast, can be descriptive and discursive, written in whatever style is considered most helpful, with explanations, notes, descriptions of procedures, examples, precedents, pro formas and so on. In the latter category, countries which do not make such a clear-cut distinction, there tends to be rather less concern about exact style and content, as the broad category of “regulations and guidelines” is often thought (as we have said) to be largely mandatory anyway.

[1] Sustainable Development Goals.

[2] United Nations Economic Commission for Europe.

[3] With the (slightly different) full title of UNECE Legislative Standard on PPP/Concession Laws for the SDGs. For internal organisational reasons, only the United Nations Commission on International Trade Law is allowed to publish model laws on behalf of the United Nations, which means that a different title had to be adopted for the document by the Working Party. Nevertheless, a model law it is, and the EBRD accordingly prefers to give it that title in the version published as part of its PPP Regulatory Guidelines Collection.

[4] For further information about the SDG PPP concept, please see the Preamble to the Model Law and the accompanying commentary.

[5] The evaluation methodology is referred to repeatedly in these Guidance Notes and discussed in more detail in the relevant chapter on the PPP Legal Framework.

[6] See, for example, Chapter 10, Volume I of the EBRD PPP Regulatory Guidelines Collection, containing a set of detailed model regulations in support of the Commonwealth of Independent States Model PPP Law.

In preparing the Guidance Notes, it was thought unnecessary to distinguish clearly between the two categories. We refer to them all, both regulations and guidelines, without distinction in these Guidance Notes as simply the supporting documents. The Guidance Notes do not consist of model provisions. They offer compressed descriptions of what the supporting documents might aim to cover and contain, the issues that typically arise as they are developed and the key objectives of the provisions concerned. They could be thought of as a set of principles and guidelines for preparing such documents.

This approach is especially appropriate given that countries may decide to adopt legislation that diverges in some ways from the Model Law. Providing broader guidance for supporting documents (regulations and guidelines) rather than model text to fit under the Model Law permits greater flexibility. It therefore did not seem necessary or appropriate to explain which category each document or provision might fall into – regulation or guideline – but to leave that to the draftsmen in each jurisdictions, who would have to work anyway within their legal and jurisprudential traditions and craft appropriate documents accordingly in an appropriate style.

In any event, legislators in host countries preparing these documents should always be mindful of the exact conceptual differences in their local jurisprudence between primary and secondary legislation, between governing laws and decrees, on the one hand, and supporting regulations, on the other (whichever terms are used for them; there are many). There will be internal rules about what exactly the latter are permitted to do in relation to the former, in terms of applying, completing or interpreting them – and what they must not do. The relevant limits will always have to be scrupulously respected. The usual practice (if such a statement can legitimately be made about different jurisdictions around the world, with their widely differing legal traditions and principles) is that the former – the governing legislation, acts and decrees – should be relatively immutable, once they have been finalised by the legislature and passed into law, while the latter – supporting regulations – should be relatively easy to modify and refine over time, as need dictates. The former should create the stable legal framework, embodying the principles underlying it, while the latter can be used as a more flexible device to apply that framework in practice, supplying many of the details that need to be completed for it to have operational effect.

However, for that reason, it is usually important that the regulations should operate entirely within that legal framework and subject to its constraints, or they may risk coming into conflict with the proper legislative and constitutional channels and procedures that apply to the law-making process. Nothing in the Model Law is intended to suggest otherwise. As a general rule, regulations should be used to complete the details of their governing laws, not rewrite or make significant changes to them. Each host country should have this distinction very much in mind, based on the way the jurisdiction approaches it, as it draws up its PPP laws and regulations.

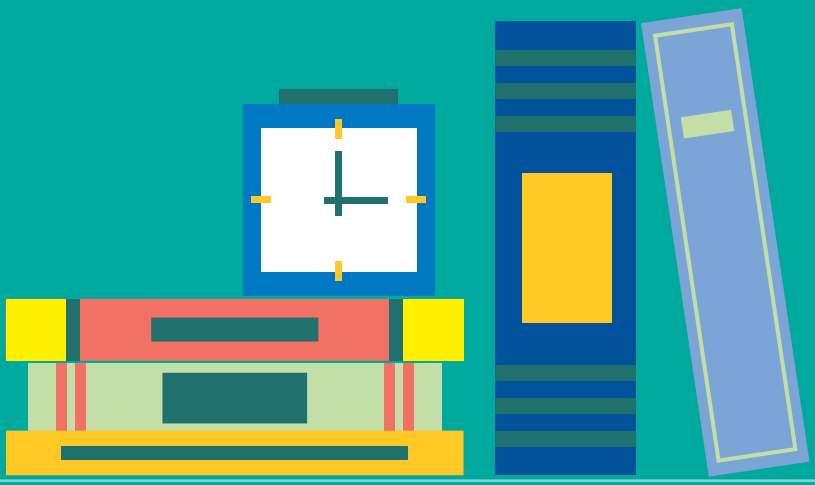
Regulations and guidelines, then, always need a context, as they are supporting documents "fleshing out" or explaining the workings of the primary legislation or legal framework they support. They may be difficult to interpret outside that context, and the same is true of a set of precedents for them, or guidance on how to prepare them. Their contents will depend very much on the structure and contents of the wider framework. In the case of PPP systems, that context would be the PPP law (if there is one) or the legal principles that make up the framework (if there is not). The context we have used in this case is the Model Law. Many of the articles of the Model Law refer to the regulations and guidelines to be drawn up under its aegis. We felt that the Model Law would therefore be a somewhat incomplete precedent for governments to draw on when developing their PPP legislation, in the absence of guidance as to what those supporting documents might cover or address, or how they might be approached and structured. Rather than trying to prepare model documents of this kind, then, we thought it best just to describe their typical or likely contents, in a way which avoided this question of whether regulations, guidelines or a mixture of the two should be used. The Guidance Notes have been drafted accordingly.

The Guidance Notes cover six main categories that represent the areas in which the supporting documents are likely to have their principal focus.

These are:

- PPP Criteria and Requirements
- Forms of Government Support
- Tendering Procedures and Requirements
- Unsolicited Proposals and Direct Negotiations
- Appraisal and Approval Procedures
- Review and Challenge Procedures

A short explanation of the contents of each can be found in their introductory sections (those contents should, in any case, be fairly self-evident from their titles). More detailed guidance and discussion then follows in each one.



Chapter 4. Tendering procedures and requirements

1. Introduction

Tendering requirements. The Model Law sets out a clear legal framework for the procurement of PPP projects, based on tender structures and stages which will be familiar to readers experienced in procuring major projects. It allows for one- and two-stage tenders, preselection of bidders, competitive dialogue and direct negotiation. Open, public tendering is the general principle and should be applied in most cases, as the Model Law indicates (Chapter IV (introductory text) and Article 15.1). Direct negotiation with one bidder and closed tenders can take place in certain limited, closely defined circumstances. Tenders can use electronic trading systems where available (many countries, including members of the European Union, now make them compulsory). Host countries should think carefully about any specific conditions that they wish to apply to each option and reflect in subordinate legislation.

The widely accepted rationale for insisting on open, competitive tendering is that it promotes transparency, fairness, integrity and efficiency – and therefore optimal results and best value for money/people. (This is in keeping with the introductory words to Chapter IV, which explicitly requires PPP procurement to comply with the fundamental principles of open access, equal treatment, fairness, transparency and free competition. It specifically includes "value for people and the planet", which means compliance with the SDGs). Public tendering gives all potentially interested (and plausible) bidders an opportunity to participate if they wish. This helps to generate a thriving market for PPPs. It also leads to more competitive pricing and strengthens the bargaining position of the contracting authority. Depending on the tender structure adopted, it can leave relatively little or even no scope for negotiation with bidders. The whole process is transparent to all participants, which minimises any room for abuse or corruption.

The broad bid evaluation criteria typically involved (for example, "the most economically advantageous offer") mean that bidders are pressured to enhance the appeal of all aspects of their bids, while allowing the authority to select a winner that genuinely offers the most appealing proposal considered in the round. Studies also show that projects which have been competitively tendered are less at risk of being subsequently renegotiated or cancelled than ones that have not. The timescales involved may be longer, but the feasibility analyses, due diligence and thorough project definition tend to lead to more robust long-term solutions.

Scope of supporting documents. The supporting documents can develop all aspects of the PPP procurement procedures in as much detail as the host country considers appropriate. This chapter outlines how the supporting documents might be approached in this context and the grounds they might need to cover. It highlights a number of ways that the SDGs and SDG Guiding Principles can be factored into them. Where the PPP law is integrated with a country's existing procurement regime, under its general procurement legislation, other laws or regulations may already set out these details, making further elaboration unnecessary. Where it disapplies that regime, however, and defines a self-standing procurement system for PPPs, as the Model Law does, it may be necessary to provide for them extensively in subordinate legislation and guidelines. Care should be taken to ensure that important areas of detail do not "fall through the gaps", with parties assuming that well-defined details in the procurement laws apply, when in fact they do not.

2. Strategy and structure: initial decisions

The contracting authority should reflect carefully about the most appropriate procurement strategy to select the private partner, to obtain the best value for money/people, and make an early decision about the route it plans to follow. The tender documents which follow will differ, depending on which process is chosen. Practical questions include:

- Which of the available structures can and should be used?
- Which structure will best give effect to the SDGs and SDG Guiding Principles?
- The timing and duration of each stage?
- Suitable bidder profile (experience and capabilities)?
- Prequalification and evaluation criteria?
- Anticipated interaction/dialogue with bidders?

A two-stage open tender is arguably the norm for PPP projects, at least in emerging markets. A pass/fail prequalification mechanism allows the contracting authority to preselect only those bidders which meet the preselection criteria. The applicants first submit their qualifications. The contracting authority shortlists those that meet the criteria set out in the request for qualifications and then invites them (either all or a limited number) to prepare and submit their proposals.

The timing and duration of each stage of the tender process will need precise definition. Obviously, larger and more complex projects will call for longer periods

of time to prepare both tender documents and bids. If a competitive dialogue is used, sufficient time will be needed to make possible the extensive discussions and iterations with bidders that are typically required to make the process effective. In that case, fewer bidders will be allowed to participate, so the process remains manageable. The contracting authority should maintain and update a **project schedule** as it defines the various stages, bearing in mind that this will eventually be released to bidders with the tender documents. At this stage, however, it will also be useful to the contracting authority as a management tool, to control and allocate resources and plan ahead.

Tender committee and advisers

The Model Law requires (Article 18) the contracting authority to form a tender committee. This is to give it its formal title, but, at least in the case of smaller projects, it may simply be described as a tender assessment or evaluation team. Its principal functions remain much the same, however. Some degree of formal recognition also helps to underscore its importance, impartiality and integrity. Its purpose is to help ensure the efficient and transparent application of the tender process in accordance with its stated requirements and to advise on or make certain key decisions during that process. The regulations should provide in some detail for its structure, composition and functioning, although with a degree of flexibility about all these matters, to allow the most suitable mechanism to be devised for each project.

One important conceptual question the host government will need to address as the regulations are prepared is the extent to which the tender committee should be independent of the contracting authority. On the one hand, the contracting authority must (in the normal course) take full "ownership" of the PPP project it is awarding, for which it has ultimate responsibility, and therefore stand behind the key decisions made in the process. On the other, an element of independence helps safeguard the transparency and integrity of the system and bidders' trust in it. The need for independent expertise can be allowed to vary in accordance with the evaluation criteria being applied to a project and the scope this gives to subjective judgements. Most countries prefer to provide for at least an element of independence.

The professional skills represented by the members of the tender committee should include expertise in the relevant technical, legal and financial areas, at a level appropriate to the task of reviewing and evaluating the bids concerned. An understanding of the SDGs and SDG Guiding Principles should also be a requirement. Different government authorities or regulators may need to be represented, depending on the nature of the project. Expertise in public procurement will be important. Professional advisers can be brought in if necessary from the contracting authority's team, to reinforce the capabilities of the committee.

The contracting authority may have already hired professional advisers in connection with the preparation of the PPP project. These may include financial/commercial, legal and accounting advisers and technical consultants. The need for them will depend on the nature and scope of the project as well as the experience and capabilities of the internal project team. If they have not already been hired, the need for them (in whole or part) is likely to be reinforced at this stage of the process (that is, the tendering stage). The contracting authority may face additional challenges as it finalises the terms of the project and interfaces with private-sector bidders. The advisory team may have to assist with a range of important tasks, such as confirming the feasibility and risk analysis, preparing the tender documents and PPP contract, supporting the tender committee, conducting market assessments, managing tender activities (for instance, data room, pre-bid conference, site visits), responding to questions and comments, negotiating and amending the tender documents, and producing the final award.

The contracting authority and its advisers should then start to implement a **stakeholder consultation plan**. Adequate stakeholder consultation is one of the main requirements of the SDG Guiding Principles. The supporting documents can create a helpful framework for it. It should extend to all stakeholders identified during the project preparation phase. They may include other relevant authorities with powers over aspects of the project, other political bodies, perhaps a regulator, potential private-sector participants (sponsors/contractors/lenders), relevant property owners and community stakeholders, and, of course, the general public. Good communication is widely regarded as vital to a project's success these days. The Model Law highlights it. The SDG Guiding Principles require it. Projects can be killed off by public or political opposition. It is a matter of elementary fairness and transparency that the views of those who stand to be affected by the project should be consulted and taken properly into account.

Therefore, the ways that the contracting authority interfaces with each stakeholder group and processes the feedback received need thought and planning. A community advisory group, for example, comprising members of the population segments most directly affected by the project, may be appropriate, especially from the perspective of the SDG Guiding Principles. Taking appropriate account of feedback will play

a vital part in defining sustainable features of the project.

The tender committee and the advisers should then complete any **final preparatory reviews** – and any steps that must be taken – before the project can be formally tendered. The implementing regulations can set out a checklist for them, although the list will always vary with the nature of the project and the contents of the feasibility study. A comprehensive, project-specific **action plan** should be drawn up each time. Examples might include:

- Specify any legislative or regulatory changes necessary to implement the project
- Identify land, buildings and property interests that need to be acquired or provided for
- Confirm the formal identity of the public entity/entities that will sign the PPP agreement
- Plan any staffing and labour-related provisions and changes to be made (for example, numbers, duties and liabilities)
- Determine the exact legal ownership of the assets which the project will comprise
- Ensure that the SDGs and the SDG Guiding Principles have been given due consideration and factored into the process

A "greenfield" project is likely to call for fewer and simpler steps under this heading than a "brownfield" one, where the private partner is to take over existing public assets, operations and staff.

3. Preparing the tender documents

Great care always needs to be taken in drawing up the tender documents. Rushing them out to tenderers in the hope of getting quick results will be counter-productive if they contain errors and omissions or lack sufficient clarity. They need to be fully consistent with the detail of the project as defined, prepared and formally approved. This includes its risk allocation and evaluation criteria. The supporting documents should therefore provide for their thorough preparation, with all the guidance required, but with sufficient flexibility to allow for the variations that will inevitably arise between one project and another and between projects of very different sizes and sectors.

Key elements and requirements of the tender documents are set out in the main text of the Model Law (Article 17). The tender documentation package will usually include the following principal elements:

1. Project and tender procedure summary
2. PPP contract
3. Request for qualifications (RFQ), where a two-stage tender is used
4. Request for proposals (RFP), issued after the RFQ stage in a two-stage tender
5. Conclusions/key documents from feasibility study

Each of these is outlined below.

3.1 The project and tender summary

This should contain a relatively brief description of the project and its key features to enable potential bidders to judge their possible interest in participating. These are likely to include the sector, background and objectives, core infrastructure, relevant public service, PPP modality (for instance, concession, build-operate-transfer or government-pay structure), estimated capital cost, outline risk allocation and KPIs, timeframes, indicative schedule, elements of public sector support and any other essential features. SDG-related requirements might also be highlighted here. It should be possible to extract many of these details from the project's implementing resolution, which will already have been published (see Article 13.3 of the Model Law). Certain documents may also be annexed to the tender document package, such as the PPP contract, the feasibility study and standard formal templates.

The summary should also describe the procurement process being applied, including procurement method and evaluation criteria, timetable and milestones, other relevant details (such as language and cost) and legal parameters (for example, disclaimers, period of validity of bids or grounds for disqualification) and the scope for bidders to submit questions and comments on the tender documents.

3.2 The PPP contract

The PPP contract will be the project's "cornerstone" document. PPPs are fundamentally contract-based structures, as their definition in the Model Law makes clear. It will set out the respective rights and responsibilities of the parties, the assumed risk allocation, the main commercial and financial terms, the principal technical parameters and performance requirements, SDG-related requirements, the payments provisions, key deadlines and the mechanisms for responding to unanticipated events and resolving disputes. It will be based on the feasibility study. Experienced outside legal advisers, working in collaboration with the technical and financial consultants, normally draft the PPP contract.

It should take account as appropriate of helpful existing precedents and any model clauses in the host country and (ideally) provisions which reflect international best practice, especially as most larger PPPs these days have a cross-border dimension of one kind or another. If the project is privately financed, it will also need to be "bankable", and therefore acceptable to lenders as a basis for their (typically non-recourse) loans. Article 24 of the Model Law contains a summary of the main terms often found in a PPP contract. The Commentary on the Model PPP Law provides further explanation. Perhaps the key recommendation in this context is that the better structured and drafted the PPP contract is, the more beneficial it will be to the wider tendering process.[1]

The draftsmen of the PPP contract should make allowance for the wider contractual matrix which will be put in place to give effect to the whole project structure. PPPs comprise a kaleidoscope of interlocking agreements and documents, all of which need to be consistent with the PPP contract. These may include contracts with main contractors, designers/engineers, suppliers, off-takers (where relevant), landowners, other third-party contractors (for example, an operator), investors and shareholders, insurers and, of course, lenders. They will typically be divided into "project contracts", on the one hand, and "financing and security documents", on the other. All of them will have to be mutually consistent and symbiotic, down to the terminology used. The final corpus of documents will have to constitute a seamless whole. Drafting and negotiating them will be the task of the private partner and its lenders, not the contracting authority's advisers, and will largely happen after the PPP is awarded to the successful bidder. The drafting team behind the tender documents should be aware of their likely contents and requirements, however, and take account of them as appropriate. A major impediment in the PPP contract could threaten the project's ability to close. The tender committee should closely review the PPP contract to ensure that all the above requirements have been adequately met.

4. Request for qualifications

It is often in the best interests of both the PPP project and the tendering procedure to limit formal proposals for its implementation to a relatively small group of private bidders with the skills, credentials, experience and resources to carry it out. PPPs are complex, sophisticated structures which can usually only be undertaken by experienced, well-resourced companies. The bidding process also tends to be lengthy and demanding. Throwing the door open to any interested party can therefore be pointless and time-consuming.

A contracting authority that takes a more restrictive approach will need to issue a request for qualifications and manage the preliminary qualification process before it gets to the proposal stage. Only the qualified, shortlisted bidders will then be invited to submit proposals. They, in turn, are likely to put more resources and effort into their bids than they otherwise might if the field is left wide open to competitors and any interested party can submit a proposal. A two-stage process may also allow bidders to highlight any unacceptable or unworkable aspects of the project, which can lead to a healthy dialogue with the contracting authority and/or tender committee at an early stage, and constructive, corrective action (see further below). The supporting documents should set out the key elements of this process.

The format of the RFQ can be either a pass/fail test or based on more complex criteria which produce a smaller shortlist of leading bidders. It will not yet contain a comprehensive project specification, but should describe the PPP in sufficient detail for bidders to make an informed decision about their participation, identify their most relevant qualifications and make preliminary judgements about the key risks and performance standards and their ability to handle them. The information sought from bidders should not place too heavy an administrative burden on them, but at the same time provide the tender committee with sufficient detail to apply its evaluation criteria accurately.

The RFQ should then set out instructions to interested parties for submitting their qualifications. These are likely to include:

- Process (time, date and place for submitting qualifications) and formalities (documentary/electronic)
- Questions and clarifications (meetings/conference/documentary)
- Selection criteria or minimum conditions to be met by bidders, including detailed instructions as to how credentials and qualifications are to be identified, presented and verified.

Careful thought and precision are needed in defining the selection criteria that will apply to the process, as determined by the tender committee. Prequalification

[1] See also the EBRD PPP Regulatory Guidelines Collection Chapter 3 of Volume III on Structuring, Negotiating PPP Contracts for a detailed discussion of their provisions and issues. See also the model heads of terms and commentary for a seaport concession contract and a healthcare sector PPP in Chapters 14 and 15.

is a sensitive phase, where particular attention should be given to avoiding excessive and/or overly precise requirements (which may exclude potentially qualified bidders) and, conversely, unduly vague requirements (which may include inadequately qualified ones). The principle of proportionality should apply, especially when the tender is carried out through an auction or is essentially price-based.

The prequalification criteria should accurately define the minimum capabilities needed to be confident of delivering the PPP project in all its aspects, while attracting innovative and competitive bids. A balance should always be struck between the high standards sought and the intensity of the competition. Allowance should also be made for the idiosyncrasies of individual projects. Each project is likely to have at least some unique features; the criteria should always be customised to fit them properly. They should also be defined with sufficient precision and rigour to filter through only those bidders that are genuinely likely to be able to add value to the project, in all its aspects.

As we have seen, a pass/fail evaluation basis can be used, or a ranking system whereby only a given number of highest-scoring bidders are shortlisted. This should, of course, be made clear in the tender documents. The criteria are likely to fall into three broad categories:

a. **Technical capabilities.** Evidence/proof of the bidder's experience and ability to meet and perform all the project's technical needs and requirements, such as:

- **Design and/or construction:** Experience designing and/or constructing projects of a similar size, complexity and difficulty as the present one, taking account in particular of its SDG-related objectives.

- **Operation and maintenance:** Experience operating and/or maintaining projects of a similar size, complexity, duration and user numbers as the present one, with particular emphasis on long-term sustainability (a key SDG requirement).

- **PPP implementation:** Experience in successfully implementing similar PPP projects to the present one, including reaching commercial and financial close, managing the associated investment and financing arrangements, and seeing the projects through the construction phase to operation and revenue generation. This will also highlight the project's "replicability", which is a specific SDG Guiding Principles test.

b. **Financial standing and capabilities**. Evidence/proof of the bidder's financial health and credibility and commercial viability. This ranges from financial good standing to adequate funding resources to cover equity investments and the ability to raise long-term (limited recourse) bank debt. Applicable tests may include audited financial statements (balance sheets/profit and loss accounts) covering a number of years and financial ratios such as leverage and debt-to-equity ratios. The criteria should be as objective as possible, which means the instructions to bidders about how to present the data must be clear and precise.

c. Legal and administrative requirements. This covers any requirements under the host country's applicable laws or regulations which bidders must satisfy to submit proposals, together with relevant commercial agreements. They can include:

- Evidence of legal **existence**, **capacity** and **good standing**

- Evidence of the **power and authority** of named individuals to act on behalf of their companies (for instance, power of attorney)

- Copies of any requisite **registration documents or licence** to operate (especially if a foreign company is involved)

- Evidence of **tax returns** and up-to-date **corporate filings**

- A **consortium agreement** where a bidder consists of a group of companies (as it often will)

- Conversely, any **ineligibility or disqualification criteria** should also be identified (for example, conflicts of interest/vested interests or previous breaches of procurement laws involving criminal offences).

Consortia. With each of these criteria, allowance will have to be made for their application in appropriate ways to consortia rather than simply individual companies. No individual company may be able to satisfy them all, but a consortium can – hence the frequency with which consortia put forward PPP bids. This calls for an evaluation of individual consortium members for the qualities and strengths they represent, together with those of the consortium in terms of their combined qualifications, respective roles, the relationships between them and their ability to meet the project's needs over the long term. Their management arrangements for the project company and commercial incentives to collaborate over time will need careful scrutiny, especially if they have not functioned as a consortium in the past. A consortium and/or shareholders' agreement among them would need to be reviewed, as well as the heads of terms for the future project contracts that they (some of them) will enter into with the project company. The tender documents should also be very clear about

any restrictions on members of one consortium participating in another in the same process.[2]

Application. A clear and rigorous methodology should be used to evaluate submissions from bidders against the qualification criteria (including their SDG-related criteria). This can be documented in a (project specific) evaluation guide or manual. The evaluation team, drawn from the tender committee's members and advisers, should be identified, with clearly defined responsibilities matching their professional skills, and properly prepared for the process. The formal issue of the RFQ would, in effect, be the beginning of the public tender process.

5. Requests for proposals

The request for proposals must include all information needed by bidders (either those prequalified where (typically) a two-stage open tender is used, or any interested and eligible bidders in an (unusual) single-stage process) to submit complete, detailed, compliant bids for the PPP project being tendered. This should include:

- All the information described in the project and tender summary referred to above, but in sufficiently final form to remove any uncertainties or lack of clarity about the project's main features and components. SDG-related components should be spelled out. Construction and service requirements should be complete and specific. The output specification, performance indicators/KPIs and payment mechanisms should be precise. The risk allocation should be comprehensive and clear. The PPP contract should be fully drafted and complete, leaving little or no scope for further negotiation once the preferred bidder has been selected.

- Any other relevant background information about the project about which bidders should be aware

- A process description for the following stages of the tender. This should include a timetable, applicable rules, instructions to bidders and relevant administrative details (for instance, the documents and information to be submitted, their format, time, date and location/form of submission, period of validity of bids, procedures for communications and questions, access to the data room).

- The evaluation criteria, any relevant weightings/thresholds and the (disclosable) methodology for their application, ideally emphasising their SDG-related elements

- Any bid security required

Evaluation criteria. The tender committee will need to develop a cogent set of evaluation criteria by which proposals will be judged. They should be clear and precise enough for both parties to be able to work with them confidently. At the same time, they should not be so detailed or extensive that they over-complicate the process. PPP projects are, by definition, based on output specifications, not inputs. The emphasis should be on "deals not rules",[3] on outcomes and performance results, more than how they are achieved.

When a single-stage process is used, the criteria described in the RFQ stage above would, in effect, need to be combined with the RFP ones. More generally, however, when a two-stage tender takes place, the latter are condensed into a smaller set of critical quality-based and cost-based factors that will determine the selection of the most favourable bid. These will need to be suitably project-specific, and so will differ from one type of project to another. They are generally divided into two broad categories, labelled "technical" and "financial".

Technical criteria. These will focus on the key quality elements of each bid that are likely to lead to optimal results for the project, including at the level of design and construction (for instance, reliability/innovation/timing and sequencing/quality assurance factors), operation (for instance, operating regime/resourcing/management systems/quality of KPI assurance undertakings) and maintenance (for instance, quality and robustness of maintenance plans/major maintenance programmes/hand-back and transfer arrangements). In practice, the term "technical criteria" tends to refer to all project elements being evaluated, other than the financial and price elements. Most of the elements reflecting the SDGs and the SDG Guiding Principles are likely to be included here. In particular, it may be helpful for the project team to draw on elements and aspects of the evaluation methodology for PPPs for the SDGs published by the UNECE Working Party on PPPs; this is designed to provide governments and sponsors with a range of tests, outcomes and indicators that will help them to ensure that PPP projects are SDG compliant.[4]

[2] For example, the EBRD's consulting procedures usually allow subcontractors to appear in more than one consortium, but not main contractors.

[3] Cf the Treasury Taskforce in the context of the Private Finance Initiative in the United Kingdom.

[4] See the discussion of this subject in Chapter 7, Criteria and Requirements.

Financial criteria. These will test the assurances given to the contracting authority that the bidder will be able to invest and/or arrange the financing (if any) that it is being asked to provide. Considerations will include the quality and robustness of the overall financial plan, the identity and standing of the proposed equity investors, the identity and reputation of the commercial and/or multilateral lenders, confidence in the availability of the funding sought, the nature of any partial guarantees or contributions sought from the public sector, and so on. Bidders should be instructed, however, not to disclose the overall price being offered in these more specific components of their financial proposals.

Evaluation methodology. The proposal evaluations need to be based on a clear and well-conceived methodology. This needs to be as robust, transparent and objective as possible, if it is to do its job effectively of selecting the most favourable bid(s). The tender committee should define it well in advance of submission of the proposals. At least certain aspects of it will have to be disclosed to bidders in the tender documents (although not necessarily all the details, to avoid enabling bidders to "game the system" too much). The methodology determines how the various evaluation criteria are applied to each bid and how their respective marks are combined into a single final score, which then allows each bid to be compared to others. It determines the balance between the different criteria, in other words, their respective importance, as well as their individual calculation.

Typically, a weighted average mathematical formula is used to reach a final result. An example[5] would be:

A*(technical score/100) + B* (financial score/100) = C where

- A is the weighting for technical criteria (for example, 50-70 per cent)
- B is the weighting for financial criteria (for example, 30-50 per cent)
- C is the bidder's total score

The technical score should usually have a higher weighting than the financial one. But the exact balance between them, like the components of each, will differ from project to project. Technically challenging projects, for example, may call for much greater emphasis on the former, more conventional ones a higher weighting for the latter. Sub-weightings may also be used within each category on more complex projects, or at least clear sets of relevant factors to take into account (such as the criteria and indicators to take into account for the SDGs, listed in the evaluation methodology for PPPs referred to above).

Occasionally, price alone ("least-cost selection") will be the final determinant. There are various ways to approach this, such as lowest user charges (where charges are not regulated), lowest construction or operation and maintenance costs (where they are), lowest availability payments or shadow tolls on a government-pay project, highest concession fee payable to the contracting authority, highest revenue share offered to the contracting authority, minimum levels of government support required, and so on. Several different "numerical criteria" may be brought to bear simultaneously, rather than a single one. Where least-cost selection is used, the technical and quality-related criteria may then be applied on a simple pass/fail basis, although weighted in ways which allow appropriate comparisons to be made between bidders in this context. The price test is then used to choose between the bidders with the highest technical scores. The price test on some projects may also have to be considered on the basis of net present value or internal rate of return, especially where bidders can propose differing payment profiles or structures.

More usually, however, contracting authorities choose to apply a more mixed and complex final test than pricing. This makes eminent sense in the PPP world, where projects are unusually complex and long-term. The most familiar test of this kind is the "economically most advantageous offer" (or an equivalent phrase). PPPs depend on a range of factors and qualities for their success. This more inclusive and sophisticated test allows them to be drawn together and their combined significance gauged in the evaluation process.

Applying the evaluation criteria. The members of the tender committee and the evaluation team will need to be intimately familiar with the evaluation methodology, so it can be applied efficiently and objectively. This means documenting it clearly and carefully, perhaps in a comprehensive evaluation manual. Some prior training of the team may be helpful. The manual is sometimes supplemented by a performance computer model, where this strengthens the process, into which inputs from bids can be fed and specific evaluations quickly carried out.

The evaluation team should be organised according to members' relevant skills and experience. Where evaluation criteria are particularly qualitative or subjective, subject matter experts should apply them;

[5] Often used by the EBRD in its consultancy evaluations.

these may be external advisers. Final decisions nevertheless remain the responsibility of the contracting authority (or other awarding authority, if there is one). The team's work should be structured and managed in such a way that criteria are applied consistently, accurately and reliably across all bids.

Proposal requirements. These need to be itemised very clearly in the tender documents, as they will elicit all the information needed by the tender committee to evaluate the bids, while non-compliant bids can be disqualified. They will include precise statements of all documents to be provided and rules for their presentation, including forms, guidance notes and evidential requirements (for instance, letters of commitment/comfort, formal proposals or undertakings from lenders, investors, insurers). In addition:

- **A deadline for submission** must be given. PPPs are complex projects and bidders must be allowed sufficient time to carry out their project analysis and due diligence and prepare high-quality, compliant bids. A minimum of 60 days is normal, and up to 120 days far from unusual. Tenders involving dialogue or detailed interaction with bidders will need longer.

- The **formalities of submission** must be specified. These may be documentary, electronic or a combination of the two. Technical and financial proposals (covering the technical and financial criteria respectively) must usually be kept rigidly separate. Mixing the two is usually against the rules and can result in disqualification. Legal and administrative documents may also need to be supplied, if they have not already been (fully or at all) at any prequalification stage; these may include company formation and registration records, for example, or a shareholders' agreement for a special-purpose vehicle to be formed if the bid succeeds. Separate envelopes may be required for the various categories of document, if physical submission is used.

- **Bid security** may be required, with its form, amount, duration and applicable terms set out in the tender documents. The regulations should clarify the factors that determine its use, value and content. Bid bonds are frequently demanded from tenderers in competitive tenders. They are irrevocable, unconditional bank or surety guarantees, in favour of the contracting authority, callable on demand in specified circumstances. The usual circumstance is that the project has been awarded to a bidder who then fails to enter into the PPP contract within a specified period of time, or (more unusually) abandons the tender before the validity period has expired. The cash payment helps defray the administrative cost of continuing or even redoing the tender, and provides a disincentive to bidders from walking away from the process. It therefore also further tests the bidder's seriousness of purpose and capabilities. The contracting authority will set the bond's value, but it is often around 1 per cent of the project's estimated capital cost. A pro-forma bond should be included with the tender package.

- A **validity period** should be specified for the proposals, making clear the period of time for which tenderers must hold them valid. This help to drive the efficient management of the process and prevents bidders' resources and offered terms from being tied up for unrealistic periods. If the tender needs to continue beyond that time, the contracting authority can always try to negotiate extensions with bidders who wish to remain involved.

- Modern tenders frequently require a **financial model**, at least for the more complex projects. Financial models are often an intrinsic part of PPP contracts, determining how certain critical financial calculations are made, such as compensation amounts following unforeseen circumstances/special events or termination compensation payments. Their use can therefore enhance the adaptability and flexibility of the contract during its term, and so the sustainability and governance of the project. They also facilitate an analysis of important fundamentals of a bidder's financial proposal, such as its financial structure, debt-to-equity ratios, internal rate of return, net present value, capital expenditure, operating expense assumptions and so on. When the submission of the financial model is made a bid requirement, the tender documents should provide precise instructions to bidders about how it should be constructed, which standard assumptions and calculations to include, and what data and calculations it should display. It is vitally important that all bidders' models are prepared on a consistent basis, so the financial evaluation criteria can be applied fairly and objectively.

6. Launching the tender

Once the tender documents have received all the approvals they need, the contracting authority can proceed to the formal launch of the tender. This needs to be handled with care, as the requisite legal formalities must be satisfied and the process marketed in a way which generates maximum interest from a competitive spectrum of potential bidders.

Publication. The supporting documents should be precise about where and how tender announcements and any RFQ/RFP are to be published, and the range of their contents. The website of the contracting

authority and any national or regional print media ordinarily used for this purpose (such as an official gazette) are the obvious choices. Trade magazines and certain international media may also be used. The notice should explain where the tender documents can be obtained and how to register for subsequent communications.

Tender strategy/pre-launch. It will probably make sense to work out a tender launch strategy and conduct preliminary marketing activities before the formal launch of the tender. This allows each step involved to be thought through and planned in advance, and potential bidders to be informed about the process, so they can gear themselves up to respond. (It can take months for consortia to be formed and their teams lined up for a bid.) This may go as far as a "soft launch" of the project ahead of the formal one. Key information about the project and its defining features (for example, nature and size, main risks, revenues) can helpfully be disclosed, together with any available (non-confidential) studies which will promote an understanding of it. Again, industry journals and notices are usually the most appropriate media for publishing data of this kind. National/international newspapers can also be used and press releases/conferences organised.

Data access. The tender documents should make it clear to bidders how they can access all the documents and data they will need to prepare their bids. The supporting documents should describe the available options. Where bids are to be presented in a particular form, as they usually are, it may help to provide electronic templates.

A data room is usually set up, at least for the larger projects. This consists of a store of relevant information about the project, which is too extensive to be included in the tender documents and which bidders can investigate as they develop their tenders. It can be voluminous. Generally, the higher its quality, the higher the quality of the proposals put forward, provided the information is well-organised and pertinent. When a brownfield project is involved, with existing facilities, operations and staff which are to be taken over by the private partner, exhaustive information about the project's arrangements as they stand will be critical to bidders. Similarly, if the private partner is to take demand risk on a user-pay (concession) PPP, full data about the state of existing demand, usage, charges and collections will be indispensable to the formulation of viable proposals (although bidders will also have to carry out their own market analysis). It is also likely to be helpful to identify those aspects of the project which embody SDG values and the SDG Guiding Principles very clearly in the data room.

The data room may be physical or virtual or (occasionally) a combination of the two. A virtual one is the norm these days, using webpages to provide electronic access to bidders. Security of access needs to be protected, as does the confidentiality of elements of the date. Bidders should be required to sign non-disclosure agreements. A typical data room might have the following contents:

- The feasibility study
- Existing design and construction reports/preliminary design studies
- Diagrams/maps/plans/cadastral studies
- Inventories/asset registers
- Existing operations and maintenance regime and records
- Any existing service contracts/third-party contracts
- Customer database
- Audited financial statements of the contracting authority
- Any relevant regulatory requirements
- Other legal/financial/technical/commercial records and reports

When the project involves major construction works, allowance should also be made for a site inspection or "walk through" by bidders and their advisers, hosted by the tender committee. This may prompt further detailed questions from bidders about design and construction issues. A record should be maintained of all such visits and the questions and answers they elicit.

Buying the tender documents. Given the time and effort that must be invested in pulling together all the tender documents and data room, it is not unusual for contracting authorities to charge bidders a fee for providing and/or granting access to them. This is particularly so with larger projects, where a two-stage process is used. The practice also helps to weed out the more inexperienced, "fly-by night" participants, who are not likely to win the tender, but whose submissions would nevertheless need to be properly assessed by the tender committee. The cost of purchasing the documents is also likely to be insignificant compared to the cost of preparing a final submission, and so is not going to deter the serious qualified "players".[6] Indeed, they may take it as a sign of the seriousness of the process.

[6] In the competitive tender for the Channel Tunnel Rail Link in the United Kingdom, for example, at the time perhaps the largest infrastructure project in the world, the four shortlisted consortia spent an estimated £5 million each to prepare their final proposals. The process took around 12 months.

6.1. Interaction with bidders

Allowance should always be made within the tender process for suitable interaction with bidders between the launch of the tender and the submission of proposals (and thereafter if a dialogue process is involved). This is to ensure that they fully understand the tender requirements and have an opportunity to ask questions about the tender documents and comment on them as appropriate.

Questions and clarifications. It should be possible to raise questions with the tender committee about the tender documents and process at essentially any point during the prequalification/tender preparation phase. There should be a formal channel of communication (for example, questions should be addressed by e-mail to [name] at [electronic address]) and a final deadline for doing this. The opportunity should be about clarifications, not changes of substance (although the latter cannot be entirely ruled out if mistakes have been made or unexpected material improvements come to light). It is primarily about removing uncertainties about what bidders are being asked to provide, when and how. Both the questions and the responses should be made available to all bidders in a consistent, transparent way, without disclosing the identity of the bidders raising them.

Meetings. Meetings can be an important part of this process. It is good practice for the contracting authority and/or tender committee to organise a formal presentation or "bidder's conference" at the outset of the tender process, at which the main aspects and priorities of the project and tender can be explained and discussed. Its purpose is to elucidate the information reflected in the tender documents and perhaps provide any significant updates. Suitably senior representatives of the contracting authority (and perhaps other relevant authorities) should speak, to signal the public sector's commitment to the project. The meeting should be carefully prepared and structured in advance by the tender committee, with a protocol or rules of conduct circulated to bidders, to help ensure its efficient management and avoid any accusations of bias. It may be helpful to single out and explain the project's SDG-related aspects. A project information memorandum may also be circulated. A prepared script covering key points usually makes sense (there could be many), with several public sector delegates present. Full attendance records and minutes should be kept. It is critical to ensure that all information supplied at the meeting is made available to all bidders, including those who were unable to attend it. This may mean posting it on the contracting authority/tender website.

Meetings should generally be open to all bidders (or shortlisted bidders) simultaneously. Separate meetings with individual bidders can immediately raise concerns about unfairness or bias, and so should only happen where an element of dialogue is structured into the process (see further under "Competitive dialogue" below).

Material changes. Even when the tender documents have been drafted and the process structured with all due skill and care, interactions with bidders before proposals are submitted may suggest ways either can be improved. Fatal flaws or major deficiencies may have been spotted in the documents or ways identified to modify the proposal requirements that will benefit the project (for example, certain design or standard changes, perhaps, or rephasing some aspects of it or redrafting some clauses of the PPP contract). The tender committee should consider requests for such improvements or changes fairly and with an open mind, taking advice from its professional advisers. If accepted, all bidders will have to be notified and instructed to modify their bids accordingly. The bidding period may have to be extended as a result, if the legal framework permits it (the Model Law allows this in Article 17.3).

Competitive dialogue. The Model Law allows for competitive dialogue to be one of the options for structuring a competitive tender (Article 19.9).[7] This entails extensive, structured interaction between bidders and the tender committee/contracting authority during the tender. It can be well-suited to the complexity and sophistication of large PPPs, although the refined dialogue involved can make it impractical in countries which do not yet have advanced PPP systems. It is used:

(a) primarily (as in the case of EU procurement) when it is not feasible for the full project requirements to be defined in detail before a dialogue with bidders has taken place, or

(b) sometimes (as in Australia), when the contracting authority can see an opportunity to refine and strengthen bids in discussion with tenderers before they are finalised.

The process can help ensure that the project's requirements are feasible in all their aspects and that bidders fully understand them and can embody maximum value for money in their proposals. Both the importance and novelty of making projects SDG-compliant may reinforce the relevance of this option. By definition, it will form part of a two-stage tender, whereby only certain bidders are prequalified and a

[7] As with all the tendering provisions in the Model Law, the text is close to the UNCITRAL PPP Model Legislative Provisions, as requested by both UNECE and UNCITRAL itself.

small group of the highest-scoring ones pre-selected to prepare proposals and take part in the dialogue. Contracting authorities should consider whether the tender structure for their larger, more demanding projects may be made more effective by using it.

In situation (a), the contracting authority needs the dialogue to take place to tie down a realistic and feasible set of requirements. The bidders are given a draft of the request for proposals, begin preparing their bids and provide feedback to the contracting authority. The contracting authority then refines the RFP and PPP contract based on the responses received, and issues them in final form as an invitation for final proposals.

In situation (b), the contracting authority has already finalised its RFP, project requirements and PPP contract. It then wants to encourage bidders to put forward their most attractive proposals on the basis of a full understanding of its objectives. Bidders are allowed to submit elements of their proposals to the tender committee as they are developed and receive individual feedback, which they can then take into account as their final bids are prepared. The idea is to elicit the highest-quality bids and greatest value for money by this means.

Any competitive dialogue procedure will need careful planning and definition, which must be set out very clearly in the tender documents. Clear rules and protocols will be necessary, with timetables and detailed procedures. There is a heightened risk of collusion or corruption where parallel discussions are taking place about central features of the project, which the process definition should try to minimise. Successive stages of dialogue may be conducted with participating bidders, usually starting with technical and design issues. Contractual provisions may have to be adjusted in response to different proposals, resulting in somewhat different contracts for each. Separate workshops may need to be organised with individual bidders.

Bidders should be treated equally at each stage of the process, with equal opportunities to interact, although a "tapering" mechanism may be used to allow bidders whose proposals do not convincingly meet the contracting authority's requirements to be "selected down" (that is, dropped from the process). Differences in information released to bidders may also open up as the differences between solutions widen. The tender committee should take great care to respect each bidder's confidential information and intellectual property rights and not disclose them to other bidders, except in very well-defined and accepted circumstances. Great care also needs to be taken to treat all bidders equally and fairly. The transparency of the process remains critical.

Probity safeguards. It is common these days, at least at an international level and where extensive interaction with bidders is to take place, for contracting authorities to appoint an independent observer to oversee the tender process and monitor the fair and equal treatment of bidders. Sometimes labelled a "probity adviser" or "fairness auditor", the observer's main task is to ensure that no particular bidder or group of bidders is gaining an unfair advantage and that the rules of the tendering procedure are being observed and obeyed.

6.2. Evaluation and selection

Once pre-qualification submissions and tender proposals (or simply the latter, in the case of single-stage tenders) have been received, the process of assessing and evaluating them in accordance with the applicable criteria is carried out. This must always be done in strict accordance with the tender documents and the process and methodology described both there and in the preselection/evaluation manuals. As we have seen, the tender documents will reveal aspects of the criteria, but not necessarily all their details, to prevent bidders from "gaming" the system. But the evaluation team must scrupulously follow all aspects of the process, as any departure from the criteria, methodology or system may breach the principles of transparency and fairness, and lead to the result being challenged.

The process is conducted primarily by the tender committee, although suitably senior responsible officers of the contracting authority will need to be closely involved (if they are not already members) in decisions which have serious commercial implications or call for negotiation with bidders and/or changes to the project requirements or PPP contract. Ultimately, the contracting authority, which must retain overall "ownership" of the PPP, should make or endorse all decisions relating to the structure of the project and the applicable commercial terms and risk allocation.

Bidder preselection. The tender documents must specify a time limit for assessing prequalification submissions. The regulations should set out the available options. Periods of between 30 and 45 days from the due submission date are fairly standard. There should be sufficient time for the tender committee to examine the submissions, ask for any clarifications it needs and prepare a draft decision on a shortlist which it then submits to the contracting authority for its approval. The timescale should be tight nevertheless, so bidders and their resources are not tied up in a state of "limbo" for too long, which may be detrimental to the whole tender process and the future interest of potential bidders. Bidders should be notified of the prequalification decision promptly after it is made.

The results of the prequalification assessment should be recorded in a log or report which documents the application of the criteria to each bidder and the basis for the conclusions reached. The shortlisted bidders are then invited to the RFP stage, where they will prepare and submit their detailed project proposals.

The question always arises as to what consequences can follow if fewer than expected submissions are received in response to an RFQ (for example, only one or two). There may be legal restrictions about what is permissible in this situation, which the regulations can spell out in detail. Subject thereto, the contracting authority should be left with at least some discretion as to how to react. If it is fully confident of the viability and appeal of the project nevertheless, it may decide to proceed to the next stage with just one or two bidders. If it has significant doubts about the market's response to the project, it may decide to re-tender it after amending those aspects of the project or process which appeared to be off-putting or unacceptable to bidders. Perhaps elements of it were not feasible after all, or too technically ambitious or commercially restrictive? Perhaps the risk allocation needs to be re-examined or even a more effective marketing programme undertaken, to ensure it is receiving sufficient exposure in the eyes of potential bidders? The Model Law provides a flexible legal framework to address this situation, allowing for both possibilities (see Articles 16.11 and 22.1(a)).

If only one bidder is left in the loop, however, this will inevitably weaken the contracting authority's bargaining position in any negotiations that have to take place. That is not something the bidder will necessarily exploit, as the main parameters of the project will already have been set and the contracting authority will have a statutory duty (or equivalent) not to agree to arrangements which are inconsistent with its public-interest responsibilities, which will limit the scope for commercial exploitation of the project. Nevertheless, the contracting authority should always reserve the right (in the tender documents) to terminate the process and re-tender the project, just in case the bidder's final proposal turns out to be too problematic or to represent poor value for money. It should also place clear limits in advance on any aspects of the project that are actually subject to negotiation (see further below). In the end, it is not obliged to accept any of the proposals on offer.

Evaluating bidders' proposals. The tender committee then carries out its evaluation of the proposals received, again in strict conformity with the defined criteria, methodology and tender documents.

The first step is to carry out a compliance check, to ensure that each bid has observed all formal requirements. This will be about checking that the information called for has been provided, in the required format; verifying the authority of signatories to bind the parties they represent; confirming that any legal preconditions have been met (local incorporation/licences and registers, bid security and so forth); and perhaps carrying out certain due diligence enquiries, such as good standing, absence of legal proceedings for winding up, fraud or tax evasion. The compliant bids (or those that are not materially non-compliant) are then taken through to the evaluation stage. If no compliant submissions are received, the tender committee should investigate whether this is down to flaws in either the project definition or the tender process, which can be rectified, allowing a new tender to take place.

As the evaluation of the proposals received proceeds, the tender committee should seek any clarifications it needs of any of their aspects, to clear up uncertainties or omissions and resolve any ambiguities. The technical and financial elements of each proposal should be evaluated separately, to ensure that the judgements made on the basis of one set of criteria are not influenced by those applicable to the other. Both physical and information barriers should be put in place for this purpose, ideally with different teams allocated to each part. Objectivity is the aim. On the more complex projects, as mentioned, it is a matter of international best practice these days to appoint a probity or fairness adviser or auditor to monitor the evaluation and confirm that due process has been followed. This reduces the risk of challenges by losing bidders to the way it was conducted, by bringing to bear an element of independent oversight.

The tender committee should carefully record the evaluation process in a detailed evaluation report, listing the actions taken, the discussions and meetings held, and the decisions made. This will map the evaluation scores obtained by each bidder against the applicable criteria and show how the conclusion on the selection of a preferred bidder (tender winner) was reached. Host countries may wish to require the evaluation report to bring out the SDG-related aspects of the conclusions (and the application of SDG Guiding Principles to them,) specifically; if so, the supporting documents should make this clear. It will be subject to the approval of whichever governance body is responsible for approving the process[8] before final award. The tender committee will then submit the report to the contracting authority for its own approval and adoption, confirming that the applicable procedures were followed and recommending the award of the project to the preferred bidder. The final (formal) decision is the contracting authority's. The regulations (or the PPP law itself) need to be clear and precise about this stage of the process. Once it has been reached, the tender award decision can be announced.

7. Contract award

Once the tender evaluation process has been completed, the contracting authority formally notifies its decision to all bidders and awards the PPP contract to the winning tenderer selected accordingly. The regulations should specify the publicity requirements for this announcement, such as entering it on its official website and/or publishing it in an official gazette or equivalent media outlet. The PPP law or regulations may provide for a limited time following the announcement during which unsuccessful bidders can challenge the award on the basis of a procedural breach or omission (see Article 20.2 of the Model Law). This standstill period should be short enough to bring out any planned challenges promptly and avoid them being strategically delayed. The contracting authority and/or tender committee will have to deal with any claims launched during its duration in accordance with the applicable legal framework.[9] Once it is over, the parties can move on to contract signature.

Finalising the PPP contract/commercial close. Signature of the PPP contract should follow as soon as possible after contract award, but some final matters will inevitably have to be dealt with before this can happen. Some detailed aspects of the tender documents may still remain to be negotiated; these will ideally have been carefully identified and circumscribed by the time proposals were submitted. These should not change the fundamentals of the project or those terms of the contract indicated as non-negotiable in the RFP. For example, the preferred bidders' lenders (if they are involved at this stage) may have some reasonable requirements which need to be addressed.

There may also be certain inconsistencies between the contract form issued with the tender documents and the preferred bidder's final proposal. These would need to be ironed out, ensuring that the final contract was fully consistent with the proposal. Strictly speaking, this is not a negotiation, but simply a process of finalising the documents. It should not lead to a (significantly) more favourable outcome for the bidder and/or a less favourable one for the contracting authority or the public. It should not have the effect of changing any of the evaluation marks awarded to the proposal, especially ones that might have made it less competitive than rival bids or resulted in a different outcome. In other words, the scope for any negotiation at this stage should be severely limited.

Certain additional steps will need to be taken before or by the time of signature of the PPP contract (although some of them may instead take the form of "conditions subsequent", to be satisfied promptly during the development period following signature). These should be spelled out in the tender documents so the winning bidder is in a position to line them up rapidly following contract award. They may include (almost invariably) formation of a special-purpose vehicle to execute the PPP contract with the contracting authority and become the private partner counter-party to it; issue of a performance guarantee of the private partner's obligations in favour of the contracting authority, replacing the bid bond; the injection of at least a portion of the equity funds committed to the project into the project company; and perhaps taking out certain insurance policies under a specified insurance programme. The PPP contract can be executed once these conditions have been met. Some of its provisions – though typically not all – will then become binding and enforceable. This stage is commonly referred to as "commercial close". A further period then typically follows, often taking a good six months, during which all the finance and security documents are drafted, negotiated and executed, the remaining project contracts placed with contractors and subcontractors, permits obtained, the site prepared (if it has not already been) and any remaining conditions precedent to drawdown of the finance satisfied. Once the (initial) funds have been drawn down, the private partner can start implementing the project in earnest. The supporting documents may touch on this area, particularly in terms of descriptions and explanations of it in the guidelines, in the interests of clarity and understanding. They are unlikely to provide for it in much detail, however, as this development period is very much about the private partner's responsibilities vis-à-vis its own lenders and contractors.

[8] See further in Chapter 8, Appraisal and Approval Procedures.

[9] See further in Chapter 9, Review and Challenge Procedures.

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Chapter 5. Unsolicited proposals and direct negotiations

1. General

1.1 The Model Law[1] provides for the implementation of PPPs based on unsolicited proposals (USPs). A USP is a proposal for a PPP put forward by a private-sector entity (the "private initiator") on its own initiative and based on its own project concept, rather than in response to a government invitation. The private initiator hopes and expects to be selected as the private partner to implement the PPP if it is adopted by the government. The law precludes parties from putting forward proposals for PPPs which have already been identified in the government's "pipeline" of future developments, to prevent attempts to force the pace over what are in reality government-initiated projects.

1.2 The challenge for legislators, then, is to foster competitive tension around USPs while preserving the enthusiasm and legitimate interests of their originators. As the Model Law makes clear, there are circumstances in which direct negotiation may have to take place between the parties to them, as well as for certain other types of PPP projects, without applying (in whole or part) the competitive tendering mechanisms envisaged as the standard basis for procurement. USPs therefore should be handled with care in the PPP supporting documents. Clarity and precision are needed in the rules and guidelines applicable to their submission, preparation, review, approval and award.

1.3 USPs can be controversial. As the UNCITRAL Legislative Guide notes, they can raise concerns about transparency, accountability and value for money. Some commentators believe they should not be permitted at all and some PPP laws prohibit them. Some limit them to certain types of PPP only (for example, concessions, as in Georgia). There is a perception that they often involve or encourage corruption and that the lack of competitive pressure sometimes found behind their award and implementation can result in defective projects and poor results. They may also give rise to difficulties at the level of government fiscal planning if they have budgetary implications which have not been taken into account in the routine planning processes. And if the public sector is struggling to develop the capacity it needs to use and apply PPPs within its staff, they may become a further impediment if officials feel they can rely too heavily on them being put forward by the private sector. The absence of competitive tendering may heighten any political sensitivities associated with the project and make it difficult or impossible for bilateral and multilateral lending institutions to fund them. Appropriate safeguards therefore need to be put in place where they are permitted.

1.4 The more widely held view, however, is that USPs can be beneficial, if handled correctly. They can add to the country's total stock of viable PPPs and levels of PPP activity by accelerating "deal flow". They can thus help to develop its new PPP market and encourage the private sector's active participation in it. They can help overcome challenges related to early-stage project identification and assessment, while generating innovative solutions to infrastructure needs. The Model Law accordingly allows for them. It makes special provision for their submission, preparation and procurement. Nevertheless, contracting authorities should limit themselves to the more convincing, high-quality USPs which are likely to have successful outcomes. The law and the regulations should reinforce this by ensuring that proposals are subject to rigorous early-stage evaluation.

2. Process overview

The Model Law envisages six main stages for the submission, assessment, award and implementation of an unsolicited proposal. These are:

- submission of the proposal by the private initiator
- preliminary response and assessment by the contracting authority/oversight body
- preparing the project and carrying out the feasibility study and associated studies/reports
- review and approval of the project under the applicable formal procedures
- procurement of the unsolicited proposal project and contract award
- implementation of the project (the construction and operation phases)

It goes without saying that all the principles that apply to PPPs generally should also apply to PPPs procured from unsolicited proposals. They must meet all the relevant requirements and criteria, such as public interest, long-term risk sharing, value for money and affordability, social and environmental feasibility and sustainability, accountability and fair market pricing.[2] They should be just as compatible with the United Nations Sustainable Development Goals (SDGs) and the SDG Guiding Principles, as other types of PPP. The contracts for them should contain all the same types of provision as contracts for other types of PPP, reflecting the usual appropriate and rational allocation of risk, flexibility and partnering considerations. The same forms of

[1] See Articles 14 and 21.

[2] See Article 4 of the Model Law.

government support will potentially be available. The regulations and guidelines applicable to them should be drawn up on this basis and fully aligned with the rest of the PPP law. A separate policy framework may need to be drawn up on the subject, to sit alongside the wider PPP policy paper, and fully integrated with it. Institutional capacity building should include specific training in aspects of this process.

3. Submission and review of unsolicited proposals

3.1 **Preliminary review.** The supporting documents – and the implementing regulations in particular – should contain a clear, standard set of policy and legal requirements for assessing USPs when they are submitted, which the contracting authority can apply rigorously and efficiently. This will clarify and streamline the process and ensure it is properly aligned with the government's wider policy and objectives for PPPs. The regulations should include guidance as to whether the contracting authority should have a simple discretion to decline to consider the USP; the Model Law allows for this (in Article 14.1), on the basis that its resources may be too constrained at the time to consider it fully, or that its development priorities may lie in other directions at the time. It should be a simple matter, however, for a private initiator to take preliminary soundings from the contracting authority about its potential interest in the project before formal submission of the USP. This should help minimise the risk of resources being wasted by the former in preparing a proposal which then makes no headway. The Model Law makes it clear, in an "open door" provision, that discussions can take place at any point between public and private sectors about a potential project concept (Article 14.3).

If the contracting authority gives the USP initial consideration (a "preliminary review"), the regulations must be clear about what this process entails and by when it should be carried out. They should introduce (an) appropriate time limit(s) for doing so. They should include an exhaustive list of possible reasons for rejection of a submission, to avoid excessively subjective decisions or challenges based on a claim that the decision was not made on legitimate grounds. It may be helpful to charge the project initiator a reasonable review fee, to help discourage the submission of rushed, poor-quality or incomplete proposals.

3.2 **Qualifications.** The preliminary review will inevitably include at least an initial assessment of the private initiator's qualifications for undertaking the project. This should include many (sometimes all) of the tests included in a formal prequalification stage for a government-initiated PPP project (see further in Chapter 5, Tender Procedures and Requirements). The contracting authority will want sufficient information about the private initiator's corporate existence and capacity, good standing and reputation, relevant prior experience, technical skills, resources, management expertise, integrity, funding arrangements and so on, to be confident that it would be an effective private partner under a PPP contract for the project (if it is awarded it). In theory, some of these requirements could be left until a later tendering stage. But a tender may never take place, for one reason or another, and it would be sensible to cover them off before any detailed preparation work is carried out.

3.3 **Intellectual property and confidentiality.** The PPP law/regulations should be clear and explicit on the subject of the treatment of the private initiator's confidential and proprietary information and intellectual property (IP). In principle, these should be fully protected during the USP process. They are protected anyway by law, and the regulations should not change this. If there is doubt about this, private initiators may try to create unnecessary protections for themselves, which may affect the transparency of the process. Or they may be deterred altogether from submitting proposals. Any rights to transfer such data or property to other bidders for the project would need to be very carefully justified and circumscribed and very precisely stated in the law/regulations. (The Model Law provides for this in Article 14.5, in terms of "respecting" these rights.) They may have to be the subject of specific compensation if the private initiator does not win the tender (see further below). But contracting authorities should be wary of private initiators overstating their IP rights in a USP. The output specifications on which PPPs are fundamentally based may well mean that reliance does not actually need to be placed on any unique IP to achieve the outputs, as it may simply operate at the level of inputs.

3.4 **Assessments and feasibility.** The USP should be subject to essentially the same procedures and criteria for assessing project viability, efficiency and value as government-initiated PPPs, at both the preliminary review and project preparation stage. These should be subject to the self-same SDG criteria and considerations as other types of PPPs. Benchmarking can be an appropriate tool in this context, given that the project concept will have come from the private sector. This involves comparing the USP with similar projects in the same or similar sectors and market settings, on a qualitative and quantitative basis. The comparison can focus on the type of solution being proposed, cost components, proposed timelines, proposed risk allocation, the extent of market interest – indeed, on any aspect which seems to be relevant and informative.

3.5 **Monitoring authority.** It is recommended that the PPP law or regulations provide for an additional tier of approvals for USPs from an appropriate decision-making authority in addition to the contracting authority to which

the USP has been submitted (and which will become the public partner under its PPP contract). This helps to ensure full impartiality in assessing proposals, mitigate the risk of corruption and signal the transparency and fairness of the whole process to the market. Where such an authority exists, its approval should be sought at the preliminary review stage as well as at the time of final approval of the fully developed project. The authority need not necessarily be specially created for the purposes of the PPP system – unnecessary bureaucracy is always undesirable! It may make sense to use an existing body with more wide-ranging supervisory or anti-corruption functions. An authority of this kind can also develop dedicated expertise in this area, which can benefit all involved.

3.6 **Preparation.** Once the USP has passed the preliminary review stage, it will need to be fully developed and formally prepared as a project proposal, in the same way as any government-initiated PPP, so it can be awarded to a private partner and implemented. At this point, the law's procedures applicable to PPPs at the same stage come into full play (see Article 14.4 of the Model Law). The only difference is that it may be necessary or helpful for the private initiator to be involved in this process, to a greater or lesser extent, as Article 14.4 acknowledges. (Some countries also allow the private initiator to be charged for the cost of at least some of the preparation work, such as the feasibility study.) The advantage of this is that the private initiator is likely to be intimately familiar with the project, and to have many of the ideas, capabilities and skills needed to develop it effectively. The disadvantage is that this will further strengthen the private initiator's competitive advantage in relation to it, which may be problematic if the contracting authority launches a tender for it. Other potential bidders may feel that it is simply not worth competing for it, given the former's inside knowledge of the project. The contracting authority will also lose a degree of control over the project's structuring, and perhaps incur a loss of negotiating power due to information asymmetries.

3.7 **Direct negotiation permitted.** Partly for that reason, the Model Law creates an exception to the principle of competitive tendering for awarding PPPs for USPs which involve IP, trade secrets or other exclusive rights of the private initiator and are based upon new or unique technology or concepts that cannot be legitimately reproduced by third parties (see Article 21). The supporting documents may need to explain or elaborate on this exception, which needs precision if it is to be fairly applied. After all, the basic premise of the legislation is to encourage competitive tendering when possible. Where the exception applies – which in simple terms is when tendering is unlikely to be practicable or appropriate for the project in question – the PPP contract can be negotiated and entered into with the private initiator, once the project has been fully developed and approved in accordance with the applicable procedures. The regulations should provide for an early-stage decision to be made about whether the exception applies, during the preliminary review, as this would potentially obviate many of the concerns about the private initiator being closely involved in the development process where it does.

3.8 **Competitive tendering.** When the exception does not apply, the USP project should be subject to competitive tendering procedures in the usual way (Article 21(1) and (2)), so it can benefit from the competitive pressures they entail. The implementation resolution for the project should be published on the official website of the contracting authority and in any applicable official journal, and expressions of interest in implementing it invited from bidders. It should be made clear that the project is based on a USP. This usually involves a two-stage tender process, with a request for prequalifications, partly because of the uncertainty about the extent of competitor interest. If sufficient interest is expressed at this stage, the competitive tender can proceed in accordance with the usual procedures (under Article 21(5)) for selecting the private partner. If not, provided the contracting authority is satisfied (subject to any requisite approvals) that enough has been done to generate competing bids, it can go ahead with a direct negotiation of the PPP contract with the private initiator. If the contracting authority is not satisfied that adequate competitive pressures have been brought to bear, it can repeat the request for expressions of interest, under an extended deadline and modified documents (Article 21(4)).

3.9 **Compensation and incentive mechanisms.** It is widely accepted at a policy level that the use of competitive tendering to award USP projects means the private initiator behind a USP should normally be allowed some form of bonus/incentive arrangement, to reward it for the time and effort it has already invested in the project, or compensate if it loses, for fear that the private sector may otherwise be deterred altogether from putting USPs forward. The Model Law allows for this in general terms (Article 21(6)). Some mechanisms are more convincing and appealing than others, however. Governments should think carefully about which ones to make available and provide for them clearly and precisely in the regulations. The most common forms of incentive/compensation mechanism for private initiators are as follows:

(a) **Cash compensation.** One option is to provide for the payment of cash compensation to the private initiator for the (pre-tender) costs it has incurred in putting together and developing the USP, if it does not win the tender. The costs reimbursed should typically be reasonable, documented, direct costs actually incurred, up to a specified ceiling (which may, for example, be set

as a small percentage – perhaps 2 per cent or 2.5 per cent – of total project costs). The regulations should set out the options and the basis for calculating a maximum amount which will not have the effect of distorting competition. The tender documents should then state precisely how the calculation is made and who bears the liability (if it were the winning bidder, the PPP contract would need to provide for it).

(b) **Exemptions.** Another option is to exempt the private initiator from the need to provide security for its obligations during the tender process (for example, a bid bond), which will reduce its overall tendering costs, on the basis that it is not likely to walk away from its own project proposal, having invested in developing and submitting it to the public sector. Similarly, it may be exempted from certain other obligations at the stage of preliminary selection and/or competition, in particular the prequalification requirements (at least those which have already been satisfied – see above).

(c) **Bid bonus.** A third option is to provide the project initiator with a bid bonus, such as an additional percentage added to its evaluation score. This can be difficult to apply, however, and may distort the competitive process. If the private initiator's bid has only received a certain score from the application of the evaluation criteria and methodology, how will it help the process or its transparency and objectivity to increase that score artificially, and how exactly is the adjustment calculated? A clear and logical linkage would need to be found between the criteria and the value attributed to the initiator's project concept, which still maintains the fairness and balance of the overall process. And the use of this mechanism may also deter other potential bidders.

(d) **Automatic shortlisting.** Another possibility is to include the private initiator automatically in the shortlist of firms invited to submit final proposals for the project. This is likely to happen in nearly every case, given its previous involvement in defining the project and perhaps in its preparation.

(e) **"Swiss challenge."** Some countries give the private initiator the right to match the terms offered by the highest-scoring bidder, and allow the project to be awarded to it if it does so. This option (sometimes called a "Swiss challenge" option) may also be difficult to apply in practice, though, as the winner's evaluation score is likely to include marks that reflect its particular combination of capabilities for implementing the project, and quite possibly unique suggestions or designs for aspects of its implementation with which the private initiator may not be able to compete. It assumes that the final evaluation methodology puts financial and commercial criteria at the forefront. The mechanism also runs a serious risk of undermining the competitive process. Why should other bidders put serious resources and effort into shaping competitive proposals, if the private initiator can still take it from them at the very end of the process? For that reason, many countries strongly discourage this mechanism.

4. Direct negotiations

4.1 **Permitted circumstances.** The Model Law provides for direct negotiation of PPP contracts in Article 22. These are specific exceptions to the general requirement for competitive tendering laid down at the beginning of Chapter IV (Article 15), and the Model Law highlights their "exceptional" nature ("in and only in the following exceptional circumstances…"). These are:

(a) where only one bidder has prequalified or submitted a tender under Article 19

(b) where Article 21 so permits (in the case of USPs)

(c) where there is an urgent need to ensure the continuity of public services (such as an emergency), provided this is not the fault of the contracting authority (failure to anticipate or act swiftly)

(d) to protect the essential security interests of the state

(e) where it has been clearly established and confirmed, on the basis of an independent report, that there is only one source realistically capable of implementing the PPP project (due to the private partner's exclusive rights, such as IP, technology or trademarks) such that a tender would not be feasible

4.2 **Applicable procedures.** The Model Law then requires (para 2) the procedures and conditions governing such direct negotiations to be set out in the regulations, including approvals, monitoring and reporting. Some host countries may wish to lay down and describe the applicable procedures and terms in some detail, in their implementing procedures and/or guidelines, to address the matters discussed below and compensate for the loss of precision and rigour resulting from the disapplication of all the Model Law's carefully structured tendering provisions. It should be noted, though, that some countries are happy to leave a high degree of flexibility and discretion to the contracting authority as to what procedures will apply in these circumstances. As UNCITRAL points out (in Part III), this is only likely to be the case when the country concerned has a well-established tradition of structuring and negotiating PPPs successfully on this basis, such as France, as it calls for experience, sophistication, skill and judgement in its application. It presupposes deep PPP capacity within the public sector. Countries not in this position may prefer to provide in considerable detail for the applicable procedures and considerations concerned, notwithstanding the fact that a greater degree of flexibility will be present than in the case of formal

tendering (the Guide to the Enactment of the UNCITRAL Model Law on Public Procurement encourages this). These will include some of the emerging-market countries to which the Model Law is primarily addressed. The wording of para 2 calls for it. In any event, the fundamental procurement principles of fairness, transparency, efficiency and equal treatment should still apply. The supporting documents can provide for these procedures in whatever detail is thought desirable.

Paragraph 3 of the Article "starts the ball rolling" in structuring the process, with several requirements for notifications and publicity of the project and negotiations, the drawing up of applicable criteria and the application of competitive pressure. Paragraph 4 reinforces this by applying the Model Law's publication requirements to the resulting contract. Even though a formal tender is not to take place, the contracting authority is obliged to bring that pressure to bear by engaging in negotiations "with as many persons as it deems capable of carrying out the project as circumstances permit". There may, of course, be only one such person, and the security interests of the state may preclude any publicity of any highly confidential process. But the basic assumption is that at least some competition, publicity and transparency would be desirable and beneficial, if possible. The absence of formal tendering procedures should not automatically imply an absence of competition.

4.3 **Considerations.** The key factors that should be taken into account in preparing the supporting documents for the direct negotiations will include the following:

(a) **Flexibility.** As already noted, a high degree of flexibility is often found in the procedures applicable to direct negotiations. Host countries should decide how much to permit and make its ambit clear in the supporting documents. Which aspects of the process should the contracting authority be free to change and revise, and which should remain firm and settled? The regulations can provide for the latter, while the guidelines can discuss the former.

(b) **Procedural elements**. Whatever the scope of the contracting authority's freedom to modify them, the direct negotiations should be well-defined by it before they get underway. The supporting documents can explain and elaborate on this. As mentioned above, the absence of a formal tendering process does not necessarily mean the absence of competition. Quite the opposite. The Model Law provides for the application of competitive pressures to direct negotiations wherever possible. The laws of some countries require a minimum number of bidders to be included in the frame, where the process does not have to be limited to a single source. Others prefer to leave more discretion about numbers to the contracting authority, as a set figure may be hard to specify for all situations. The qualifications and capabilities of the bidders should be laid down. Bidders should be given adequate details of all the key elements of the process in advance, to ensure that it is a fair, clear, transparent, efficacious process that can be followed by all throughout. Relevant timescales, documentary requirements, critical bid elements (for instance, output specs and key performance indicators), formalities, evaluation criteria (such as technical aspects, innovativeness, pricing and economic aspects, operations and maintenance costs), and so on should all be particularised.[3] The final selection criteria should be absolutely clear and transparent (the "most economically advantageous offer' is the usual test in the case of complex PPPs). Scope for adjusting bids and requirements for best and final offers should be spelled out.

(c) **Approvals.** As we have seen with USPs, it may well make sense to subject the decision to use direct negotiation to the approval of a higher authority, to ensure no abuse is involved and that the correct procedures are being followed. Host countries will need to decide which this is (it could be a contracting authority, such as a municipality or line ministry). The approving body should have appropriate standing for this purposes, so a high-level body such as an inter-ministerial committee may need to be involved. The PPP unit is another obvious possibility. The question also arises as to whether the contracting authority should have to submit its entire negotiation procedure (once it has settled it) for approval, or simply the decision to use it. Specific aspects of it, such as the number and capabilities of the bidders to be included, the criteria to be applied and the final outcome, may also need to be approved. The formalities and timescales of this approval process should be made clear.

(d) **Notice of contract award.** The publication and disclosure provisions of Article 20 will then apply to the award of the PPP contract and its key terms (unless state secrecy considerations stand in their way). The supporting documents should also explain why direct negotiation can be used in these circumstances without tendering procedures. The Model Law's mechanisms for monitoring and reporting on the project's implementation and performance (see Article 37(4)) will provide an additional safeguard.

[3] See the more general discussion of these considerations in Chapter 4, Tender Procedures and Requirements (although in the context of the Model Law's formal tendering processes).

Chapter 6.
Forms of government support

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.

Chapter 7.
Criteria and requirements

Introduction

The Model Law provides for the criteria and requirements applicable to PPPs on several different levels. This chapter examines the ways the supporting documents may need to develop and explain them, discussing some of the central concepts and processes involved. They consist of both the essential features which PPPs need to display – the criteria – to meet the Model Law's requirements for them, and the stages that each project is likely to go through as it is identified and prepared, to ensure that those criteria are being met and the projects properly prepared. The supporting regulations and guidelines under many PPP laws provide for these areas in considerable detail, as they represent some of the most critical aspects of PPP projects and the vital steps involved in defining them before they are implemented. This area can therefore take up a large part of the "manuals" drawn up by some host countries to guide the implementation of their PPP laws.[1]

This chapter is divided into four numbered sections. It starts by summarising the relevant provisions of the Model Law in this area. It then discusses the criteria and requirements applicable to PPPs at a general and abstract level, and goes on to describe in some detail the steps involved in (respectively) identifying and preparing PPPs.

1.Model law provisions

General. Several provisions of the Model Law deal with the criteria and requirements applicable to PPPs on a relatively general and abstract level. The main ones are:

• **Requirements and objectives.** Article 4.1 contains an opening "catch-all" provision that is designed to underpin the comprehensive nature of the Model Law. It states that any PPP project undertaken in the host country shall comply with all the applicable requirements of the law, including the procedural requirements governing its various stages. It must also be designed and structured to accomplish the public interest purposes and objectives referred to in the preamble, and in particular to be compatible with and give effect to the SDG Guiding Principles, with their five specific outcomes. These are: (1) access and equity; (2) economic effectiveness and fiscal sustainability; (3) environmental sustainability and resilience; (4) replicability and (5) stakeholder engagement.

• **Main characteristics.** Article 4.2 summarises a PPP's main characteristics. A PPP project involves a contract structured around functional specifications and performance indicators. It should provide for a fair allocation or sharing of risks and rewards between the parties, based on the common objective of best serving the public interest during the project's life cycle. Compensation is provided by way of a government revenue stream or end-user charges (or perhaps a combination of the two). The project's term is designed to enable the private partner to amortise its costs and make a reasonable return. Both tangible and intangible assets can be involved.

• **Criteria.** Article 4.3 lists the criteria and features which a PPP project must meet or display. These develop the general statements in Article 4.2 with more precision. It shall:

(a) be long-term in nature and based on a contract

(b) if required by the host country, have a minimum initial value established in accordance with any applicable criteria/methodology (if any)

(c) relate to public infrastructure, public services and/or services of general interest

(d) involve the long-term participation of a private partner on a risk-bearing basis, and the sharing of risks between the parties, throughout its life

(e) unless the project is entirely government-funded, involve an element of private finance

(f) be implemented in accordance with its contractual terms, which shall include appropriate functional specifications and performance indicators

• **Term.** Article 8.1 of the Model Law provides that any PPP contract shall have a minimum term of either a specified number of years or one established in accordance with the regulations. The provision is in square brackets, as not all host countries will view this requirement as necessary (many do not, in fact). Article 8.2 says the PPP contract shall set forth its term, which must consider the project's purposes and objectives identified as part of its appraisal and approval process. The term should also take the project business case into consideration, including the asset depreciation period and any relevant competition policies and constraints affecting the infrastructure or sector concerned. Article 8.3 then allows for extensions of the term, in exceptional circumstances, in accordance with either the contract's provisions or where local law otherwise so permits, in circumstances where the contracting

[1] Ukraine's Public-Private Partnership Manual, prepared with the help of the World Bank, is an outstanding recent example. This chapter of the PPP Regulatory Guidelines Collection has drawn extensively on its helpful contents.

authority has acted in the public interest in ways that have a substantial adverse impact on the project's economics. The regulations can set out a methodology for determining any such extension.

Process. The Model Law then deals with the process of identifying, preparing and approving a PPP project, in a range of provisions which are designed to ensure that the criteria and requirements summarised above are met and properly applied to its structure. They are set out in Chapter III. These contain further criteria and requirements, linking back to those listed above.

- **Overview.** Article 11 deals with the subject of initiating, identifying and preparing PPPs. A precise framework is provided for this process, structured around the three distinct stages involved. These are discussed further below. It is usually helpful for the supporting documents to elaborate in detail on these activities, developing the framework procedures and requirements set out in the Model Law to a suitable level of depth, where all the complex tasks involved can be described and explained.

- **Initiation.** A contracting authority or (in the case of unsolicited proposals) its private initiator (11.2) can initiate a PPP. If it moves ahead, the contracting authority must set up a project team (11.3) to manage the process, comprising a suitable range of skills, expertise and experience (including in the SDGs and SDG Guiding Principles). The contracting authority (11.4) must normally carry out or manage the detailed work of identifying and preparing the PPP, although a private initiator can also be closely involved in the case of an unsolicited proposal (USP).

- **Stages.** The Model Law distinguishes between the preliminary phase of identifying and defining a project, and the detailed work of preparation in the next phase. The latter specifies all the project's essential features and so enables it to form the basis of the formal review and appraisal required by the Model Law, and then of firm implementation tender proposals by the private sector (11.5). It envisages that all the detailed steps involved will be set out in the regulations, with flexibility to distinguish between different types and scale of project. The first phase is accompanied by an "identification report" covering fundamental aspects of the project (11.5). These include a summary of scope, relative priority, delivery options, principal features and its acceptability to users and stakeholders. The identification report is subject to the PPP unit's approval, in terms of whether the project is at that stage in compliance with the law's requirements and seems to represent a plausible basis for a PPP (11.6). If approved, the project moves to the next stage of detailed preparation, based around a feasibility study and related assessments and reports (11.7).

2. Criteria and requirements – general

Given the complexity of PPPs and the range of factors needed for a new PPP system to succeed, one of the crucial elements of a PPP law is a requirement for a well-structured, thorough and rigorous planning and preparation phase. This is meant to ensure that each project is properly designed and prepared, and meets the various specific requirements and criteria for it set out in the law.[2] The detailed aspects of this part of the legislation are typically set out in the supporting documents, which can run to dozens or even hundreds of pages (not unusually in the form of a PPP "manual").[3]

The supporting documents should provide an appropriate structure for both the initial identification and definition (early-stage preparation) of the PPP and its subsequent detailed preparation. They should also take account of and link in with the law's mechanisms for mandatory reviews and approvals of the project's assumptions and expectations, allowing both the contracting authority and the competent reviewing body (or bodies) to be confident about the project's viability and suitability as a PPP. The project's underlying studies – especially its feasibility study – should address its economic and financial aspects, including costs and revenues, and its anticipated social and environmental impact. They should highlight its SDG-related features and its application of SDG Guiding Principles. They should specify its outputs, provide a convincing rationale for the investment involved and show how private-sector participation will enable those outputs to be accomplished over the project's entire life cycle. The core studies involved will need to address (among other things) the following:

2.1 Value for money

As the UNCITRAL PPP Legislative Guide explains, the concept of value for money (VfM) is essentially a synthesis, applied specifically to PPPs, of the twin concepts of economy and efficiency, which have long been treated as fundamental aspects of procurement systems. "Economy" (also known as "best value") means "an optimal relationship" between the price

[2] See the discussion of this subject in the UNCITRAL Legislative Guide.

[3] See, for example, Ukraine's PPP manual, referred to in note 1, published in 2021. It runs to several hundred pages.

paid and various other aspects of the project, such as its efficacy and quality. "Efficiency" in procurement, on the other hand, stands for a proportionate relationship between the time and cost of the procurement process and its value. This can be measured on both an individual project basis and a system-wide one. The terms acquire a somewhat broader meaning in the PPP context than in traditional public procurement, given the significantly different structures involved and the different approaches taken by government to project design, award and implementation.

Price is a more prominent test in traditional procurement. It is less so with PPPs, where it usually has to be demonstrated that the project's implementation on a PPP basis will be both more economical and more efficient than the traditional route, that – in the round and taking account of all relevant factors – it represents better value for money. A PPP will often be more expensive in the short term than a traditional procurement due to the higher preparation, transaction and financing costs involved. But it can offer compensating advantages, which constitute vital components of the overall value judgement. These include the more effective deployment of the private sector's skills in terms of management, cost control, innovation and adaptability. The VfM test generally includes both a quantitative and qualitative analysis of the costs, benefits and quality of the project, which conclusively shows that implementing it as a PPP is the best available option. The test is then repeated at the end of the contract award process, to verify the accuracy and consistency of the judgements made. The supporting documents should set out in detail the principles and methodology to be applied to the VfM test.

It should be kept in mind, though, that those principles and methodology are likely to evolve as the country's PPP system develops. They should be reviewed periodically and refined. Conducting accurate and reliable VfM analyses calls for sophisticated public accounting and management techniques and appropriate comparison tools (such as a "public sector comparator"), which may simply not be available in a country initiating PPPs for the first time. Extensive use of expert outside advisers is usually needed, reinforcing a long-term capacity-building programme within government. A great deal of published or accessible guidance on international best practice in this field is now available (and constantly evolving).

The VfM tests should also be combined with "value for people and the planet" tests to reflect the SDGs and the SDG Guiding Principles. PPPs implemented under the Model Law need to further the SDGs, and the fundamental tests applied to them to verify their viability should allow for this. They should seek to result in PPPs which advance the five "outcomes" at the heart of the SDG Guiding Principles,[4] summarised in the preamble to the Model Law, namely (i) access and equity; (ii) economic effectiveness and fiscal sustainability; (iii) environmental sustainability and resilience; (iv) replicability and (v) stakeholder engagement.

There are many ways to achieve this. The United Nations has published a set of detailed guidance materials to do so, called the Evaluation Methodology for PPPs for the SDGs,[5] together with an accompanying self-assessment tool and user's guide, which show exactly how these key outcomes can be measured and realised in the case of individual projects. The five outcomes are in turn filtered down into 22 specific criteria (about four each), and then broken down again into 95 individual indicators. These represent a broad and detailed range – a "smorgasbord" – of tests and factors which are designed to help host governments and private participants to structure and implement SDG-compliant PPPs. They are obviously not all compulsory, in any sense,[6] and do not need to be used in their entirety on any one project. Together, they represent the "catch-all" concept of "value for people" or VfP, translated into a corpus of precise questions and answers, measures and indices which are meant to have concrete, practical results. The more they are reflected in an individual project, the more SDG-compliant it will be.

Each host country should decide to what extent it wishes to build these VfP tests and requirements into its supporting documents. Many of them will already be present in the criteria and studies described below. Others can be added in wherever this is thought to be helpful. The "people-first PPP" concept is evolutionary, not revolutionary. It is about emphasising and heightening the SDG-related aspects of PPPs, not creating something fundamentally new and different.

[4] There are 10 SDG Guiding Principles, but these are then encapsulated in the five outcomes described above. Principle 7 expressly refers to the concept of value for people.

[5] https://unece.org/ppp/em

[6] The work of the UNECE Working Party on PPPs never has a binding legal effect on member states. It consists of guidance and recommendations, model documents and standards.

2.2 Business case

The purpose of a VfM analysis is to confirm the project's business case accurately and convincingly. This requires an examination of its anticipated costs, revenues, risks and liabilities over the course of its life, measured (at least in part) on a commercial basis which is in harmony with the private sector's approach. This is also a necessary part of its financial and fiscal impact assessment. Especially if the PPP is to be project-financed – in the sense of a debt-driven, limited recourse financing structure, where the lenders look primarily to the project's future cash flows to guarantee their repayment – a comprehensive, whole-life business case will need to be drawn up, using an appropriate financial model. Although the bidders for the project will need to prepare their own financial models as part of their tender proposals, the contracting authority will need to develop one itself as part of the project's definition and preparation. This will enable it to select the most suitable funding structure and demonstrate its financial viability.

Closely related to this will be the fiscal impact assessment, which involves an early-stage assessment of the potential impact on the public finances ("fiscal risk") of the project's cost and risks. This involves confirming that the project will not expose the public sector to unexpected and excessive costs in the form of contingent or deferred liabilities, especially ones that have not been properly estimated or accounted for under the relevant budgeting processes. In practice, this analysis often forms part of the VfM assessment. It links in with the "fiscal sustainability" outcome reflected in the SDG Guiding Principles. It is integral to the risk analysis and contractual allocation of risk. The project's budgetary implications throughout its life cycle must be estimated and analysed. Relevant variables will include the contracting authority's fiscal status and sources of funds (for example, central or local government), the payment structures proposed (user charges or government-pay) and the nature and extent of government control over the asset and of any government support being provided.[7]

2.3 Social impact assessment

In addition to the essentially economic and monetary assessments described above, the project should be carefully reviewed during its preparatory phase from the perspective of its impact on society and local communities. This is a fundamental aspect of its SDG compliance and compatibility with the SDG Guiding Principles. The interests and views of the wider stakeholder group must be considered, in addition to those of the commercial parties to the project, as the "stakeholder consultation" outcome requirement makes clear (see above). Popular enthusiasm and support for the project need to be built.

- Is the project compatible with the government's wider policies for social and infrastructure development and public services?
- How effectively does it advance them?
- How can its benefits be enhanced and any harmful consequences be avoided or mitigated?
- How sustainable is it?
- How well-aligned is it with the host country's wider commitments under the SDGs and other ESG priorities and criteria?

2.4 Environmental impact assessment

Closely related to this, a rigorous environmental impact assessment should be carried out, at least where significant construction works or potentially polluting activities form part of the PPP.[8] This is another critical aspect of the project's sustainability, and therefore its SDG/SDG Guiding Principles compliance. The assessment should identify and assess the project's risks and potential impacts on the environment and local communities, taking account of the host country's policies and priorities in this area. The steps needed to avoid or minimise the harmful ones should be described and listed. The process should be open and inclusive (as required by the United Nations Aarhus Convention[9] as well as the SDG Guiding Principles). All affected stakeholders should be drawn in, to ensure their access to the relevant information.

2.5 Competition review

The commercial and financial assessment of the project will also need to examine the extent to which the private partner may need or request exclusive rights to operate it and/or provide the related services. The project's economics may mean that at least some degree of insulation from competition will

[7] See, in particular, the guidance published on this subject by the World Bank and the International Monetary Fund.

[8] As called for by the Rio Declaration on Environment and Development (report of the United Nations Conference on Environment and Development, Rio de Janeiro, from 3 to 14 June 1992).

[9] The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted by the Environment for Europe Ministerial Conference in Aarhus, Denmark, on 25 June 1998.

be necessary for sponsors to be confident that their investment will be recovered. Government competition policy and law in relation to the sector and/or activities in question will therefore be important considerations, as well as (conversely) available forms of government support. The review should clearly set out the rationale for any such protections from competition and their scope.[10]

2.6 Risk allocation

PPPs, like the project-finance structures so often used to fund them, are all about risk allocation. The many risks to which a project may be subject need to be identified, evaluated, allocated and mitigated on an appropriate basis, with each borne (as the familiar mantra goes) by the party best placed to manage it. Because this is a well-understood aspect of PPPs, the supporting documents may not need to go too far "back to basics" in explaining it.

But the approach taken to it, and the methodology for carrying it out, may need to be described in detail. As we have seen, the process of preparing and implementing a PPP goes through several different stages and iterations: the initial identification stage, the preparation and feasibility stage, the formal approval stage, the contract drafting and tendering stage, any final negotiations and then the subsequent financing stage. Decisions about specific risks and responsibilities must be made and modified at each stage. It is always an evolving pattern – in other words, subject to repeated refinement. Nevertheless, the early preparation stages need to examine risk reasonably thoroughly and accurately, in a balanced and well-informed way, as assumptions about risks and their allocation must be robust and reliable throughout. This will form an essential part of the VfM assessment and the drafting of the PPP contract. The more competently it is done at an early stage, the more efficient and confident the approval and award processes are likely to be.

Let us now look rather more closely at the steps involved in preparing and implementing a PPP. Many PPP systems subdivide them into four broad phases.[11] These are:

- Identification and initial design
- Detailed preparation and approval
- Procurement
- Implementation

The Model Law's does the same, applying various criteria and/or requirements to each one. The criteria involved are particularly relevant to the first two, however, when a PPP's structure and viability are being established, and its compliance with applicable laws and regulations (including those under the PPP law) confirmed. This chapter focuses on these first two phases. Chapter 5, on Tender Procedures and Requirements, discusses procurement, while implementation of a PPP project is primarily a matter of the terms of the PPP contract for it, which is the subject of separate chapters of both the Model Law[12] and the PPP Regulatory Guidelines Collection.

3. Phase 1. Project identification

As we have seen, Article 11 of the Model Law distinguishes carefully between the preliminary identification phase and the subsequent preparation phase. It envisages an "identification report" being prepared in the first phase, covering fundamental aspects of the project (11.5), which will later be subject to the approval of the competent reviewing body (for instance, the PPP unit). These include scope, relative priority, delivery options, principal features and acceptability to users and stakeholders. The supporting documents should describe and explain clearly and in detail the various steps involved.

Phase 1 should have a number of key objectives, including the following. It should define the project in conceptual terms and show that it represents the most appropriate and attractive solution to the infrastructure and service needs in question from the options available. Its scope and principal features should be set out, a preliminary risk analysis carried out, an initial costing and cost-benefit analysis made, a preliminary socio-economic and environmental assessment conducted, the project's affordability and acceptability to users and stakeholders examined, and its relative priority in the context of the government's wider infrastructure development plans established. If different options for structuring its delivery are available, these should be discussed and compared.

This should lead to preliminary conclusions about whether it is appropriate and worthwhile to implement the project as a PPP. This should all be done in a way that ties in logically with the review and approval criteria to be applied by the relevant reviewing body.

[10] See also the more detailed discussion of this subject in Chapter 6, Forms of Government Support.

[11] See, for example, the selection and preparation stages described in Ukraine's PPP manual, referred to above.

[12] Chapter 5.

It should result in a clear plan and set of issues for further examination in the next phase, Phase 2, which centres around a feasibility/efficiency study. It can be helpful to think of Phase 1 as a pre-feasibility study phase and Phase 2 as a feasibility study phase.

While Phase 1 involves a necessarily preliminary assessment, it still makes sense to carry it out with due thoroughness and accuracy. This will help appropriate early-stage decisions to be made and robust assumptions formed, and so avoid wasting resources in revisiting them unnecessarily during Phase 2 (which is always an expensive exercise anyway). The aim should be to "get it right" as far as possible from the start.

For that reason, it may make sense for Phase 1 itself to be subdivided into two separate stages, namely an initial one, which describes and discusses the project in summary, conceptual terms, followed by a more detailed one, which involves a more in-depth analysis (but which still falls short of a full feasibility study).[13] There could be a concept paper followed by a pre-feasibility study, for example. This will depend in part on the nature of the approvals (if any) that the contracting authority must obtain from the relevant competent body to the project concept and the Phase 1 studies. If a very early-stage approval is required, then a concise summary of what is proposed is likely to be suitable, delineating key features and outcomes, before the time and resources needed for the more in-depth studies are committed. Once a "green light" has been received, the contracting authority can move to the next stage of Phase 1. Conversely, if no external approvals are needed until a full pre-feasibility report has been drawn up, it may be sufficient for the contracting authority simply to structure Phase 1 as it considers most appropriate, to allow resources to be used and decisions made in the most efficient manner.

The supporting documents can break down the different tasks involved in this phase and describe them in as much detail as is thought to be helpful. Note that these tasks are not designed to be performed sequentially, but structured and ordered in relation to each project in a way which makes most practical and organisational sense. They should all be seen as inherently flexible and capable of adaptation to meet project specifics and needs. They should also not be seen as a comprehensive requirement. The host country may prefer to shift some of them into the next stage, Phase 2. Or it may choose to simplify and shorten some of them; that is entirely a matter for it. However Phase 1 is structured, the conclusions reached at the end of it should be fully documented in an appropriate form (an "identification report" in the Model Law). The review and approval process should then aim to confirm the project's suitability as a solution to the infrastructure need or service in question, as well as screening it as a potential PPP structure. Set out below are the main elements of a Phase 1 pre-feasibility study.

3.1 The Infrastructure or service need and options for meeting it

The project's starting point is the infrastructure and/or service need which it is designed to meet. It should be based on a firm understanding of that need and its ramifications, set in the context of the government's wider strategic plans and priorities for infrastructure and social development. The SDGs and SDG Guiding Principles can also be taken into account at this stage.

There will usually be a range of possible options for meeting that need. Each distinct and plausible one should be clearly identified and described. The advantages, disadvantages and principal risks of each option should be compared and contrasted on the basis of a consistent set of criteria. The exact criteria or characteristics involved will to some extent differ from project to project, but are likely as a minimum to include:

- Estimated capital and operating costs
- Affordability
- Resulting benefits
- Major risks and uncertainties
- Construction and/or operating period(s)
- SDG compliance

PPP feasibility will not need to be considered at this stage (except perhaps in a very preliminary sense). A comparative assessment of the available options should then be carried out. This may be done on the basis of a cost-effectiveness analysis, where the costs and risks are relatively certain, or a multi-criteria analysis, where they are not. The supporting documents can elaborate on this methodology. The most convincing and attractive option should then be selected for further development.

[13] "It is widely accepted now in international practice that the first information submitted (formally or informally) by a contracting authority to a higher authority (e.g., PPP unit) describing an intended PPP project should be very short and focus on just the essentials. A simple form or fiche de projet (max. 10 pages) is a more appropriate way to describe it than a report. The reason is that many project ideas (perhaps 50-80 per cent, depending on the country) can be rejected at that stage as simply not being potential PPPs in their present form. Some can then be sent back, highlighting key issues and gaps so the project idea can be reworked and resubmitted." (Chris Shugart written commentary on draft chapter.)

3.2 Pre-screening

Some jurisdictions and PPP systems then require the project selected to be subjected to a PPP "pre-screening", in conjunction with other proposed projects that have reached the same stage. In simple terms, the purpose of this exercise is to carry out a preliminary review of the project's viability as a PPP, to justify moving ahead with its preparation work. The supporting documents can set out and explain the applicable tests and questions precisely and in detail. They are likely to include:

- Adequacy of available data and resources to prepare the project
- The project's compatibility with relevant public-policy and development priorities, including the SDGs and SDG Guiding Principles
- Long-term stability of the project and the facilities or services it will provide or support
- Clear apparent benefits of structuring the project as a PPP, as opposed to a traditional procurement (for example, more effective use of private-sector skills and resources, use of private funding, greater efficiency, opportunities for innovation)
- A preliminary confirmation of the project's technical, commercial, legal and financial viability
- The contracting authority's capacity and resources to prepare, award and implement it as a PPP (with the help of external advisers where needed)
- Extent of stakeholder support for its implementation as a PPP

The exercise is essentially a "filtering tool" to allow the most plausible projects to move forward from among the many proposals that may be under consideration, allowing the available (and inevitably limited) public resources to be allocated to the most promising opportunities. This turns a spotlight on those projects most likely to succeed as PPPs. SDG compliance can be highlighted in this analysis as a major factor. The projects selected can then be "conceptualised" for implementation, and prioritised among themselves. The analysis is a high-level one, using questions which prompt simple "yes/no" answers. All of it will be subject to further review and refinement.

3.3 Initial project scope

The next step is to prepare an outline describing the project's scope and a plan for implementing it. This should discuss the sector, the project's main features and technical aspects, relevant outputs and key indicators (or at least some of them, to the extent they can be identified), its location and site, its likely impact on users and the local community, significant linkages or interfaces with related infrastructure or services, and any other key parameters. This is still a high-level definition, however, which will focus on principal features, standards and benchmarks. This is a good opportunity to apply to the project the relevant SDG tests and the criteria and indicators set out in the UNECE's evaluation methodology tool,

3.4 Project site

If a new site is needed for the project, the available options should be described, their respective "pros" and "cons" summarised, and a process outlined for making a final selection. Legal questions such as ownership, access, third-party interests and acquisition procedures should be considered, as should any clear site-related risks which may affect the project, such as site conditions, antiquities and environmental/contamination hazards. Any expropriation needs should be very carefully considered. These tests will also form an intrinsic part of the SDG-related and SDG Guiding Principles assessment.

3.5 Preliminary legal analysis

A preliminary legal analysis should be carried out to identify any legal parameters which may affect the project's structure and implementation. In addition to site-related issues, these may include sector-specific laws and rules and regulatory requirements.

3.6 Economic analysis

A broad-brush economic analysis should be undertaken to test the socio-economic impact of the solutions under consideration and their positive and negative dimensions. The SDGs should be factored into those dimensions. This will help to rule out options which offer only very limited benefits or do not represent good use of public funds. Public investment projects always need a clear economic justification (regardless of the procurement basis used). Each of the project's main costs and benefits should be assessed on a quantitative and/or qualitative basis. This preliminary cost-benefit analysis will also underpin the financial analysis.

3.7 Social and environmental analysis

A preliminary analysis of the project's social and environmental impact will form another core element of Phase 1. Its purpose is to test whether the project conforms to the host country's social and environmental legislation, policies and standards. This will support the project scope and economic review. The social "limb" of the analysis can examine a spectrum of considerations affecting the way people live and work, such as health and safety, gender and minority rights, working conditions and poverty reduction. The environmental one looks at the way the project may impinge on the surrounding environment and local communities, including air and water quality, biodiversity and ground conditions. The supporting documents should allow for a wide range of studies in this category, as the specific questions asked will vary widely from project to project. The SDG Guiding Principles and the UNECE evaluation methodology can form critical elements of these studies.

3.8 Risk analysis

A preliminary risk analysis will form another core element of the project identification and definition in Phase 1. Again, it will be a relatively crude and high-level analysis at this stage, focusing on the main risks and their allocation which will affect project structure, and any "show-stopping" ones that cast serious doubt on the project's viability. It will be more qualitative than quantitative at this stage, as the data and detailed assumptions needed for the purposes of the latter will only be available in Phase 2. The supporting documents can set out a suitable methodology for carrying it out, including (for example) preparing a risk register listing the principal risks that may impinge on costs and benefits, with a qualitative assessment of their probability and potential impact. This will allow the risks to be ranked in importance and prioritised. An example is given below.[14]

The methodology should explain the process for measuring the significance of risks and prioritising them. The greater the significance of a risk, the more closely it may have to be monitored and managed. This can be done with a simple scoring mechanism (for instance, impact multiplied by probability). The analysis can then be converted into a tabular risk matrix. An elementary risk allocation chart can also be drawn up, using the basic categories of "retain" (by the public partner), "transfer" (to the private partner) or "share".

Skill, experience and judgement are needed in the allocation process, as inappropriate decisions can adversely affect a project's structure and VfM/VfP, and ultimately its financial viability and bankability. If the public partner retains too much risk, the project may not benefit fully from private-sector participation and leave the public sector over-exposed to fiscal risk. If too much risk is transferred to the private partner, on the other hand, the risk premiums factored in by bidders may increase its cost of capital unduly, or undermine its financial viability. VfM may be compromised either way.

The familiar core principles of risk allocation should therefore be carefully observed, with risks being allocated to the party best able to control and manage them. The supporting documents can provide as much guidance on this subject as the host country considers necessary and helpful, with pro-forma tables and examples attached as appendices. The analysis needs to be done comprehensively and perceptively for each project, as each is in some respects unique. It also needs to make proper allowance for the fact that the precise causation of risks when they occur can affect the parties' responsibilities for managing them. (For example, a construction cost overrun caused by poor construction management is a private partner risk, while one caused by political events or certain types of change in law will usually be a contracting authority one.) In any event, the exercise will need to be done

1	2	3	4	5	6	7	8
Risk	Description	Aspect of project affected	Probability	Impact of occurrence	Party responsible for managing	Mitigation measures	Cost impact

[14] Cf Ukraine's PPP manual.

in more detail and more definitively in Phase 2. The Phase 1 exercise is about defining basic parameters and identifying areas that will need more analysis in the feasibility study.

3.9 Preliminary financial analysis

The purpose of this review is to confirm that the project seems financially viable and affordable. Payment mechanisms should be explored and compared, and the financial resources needed should be estimated. The financial analysis is more narrowly focused than the economic one mentioned above. The latter is carried out at the infrastructure planning level, and turns on a socio-economic cost-benefit analysis. The former, on the other hand, concentrates on project costs and cash flows in isolation. If anticipated revenues (inflows) can cover anticipated costs (outflows), especially capital expenditures and operating expenses, the project will look financially viable. The process also allows early-stage judgements to be made about the project's funding requirements – its potential for raising the necessary debt and equity investments – and therefore its bankability. The analysis has several distinct components:

- **Cost estimation.** The project's capital and operating costs should be estimated with reasonable thoroughness, using available industry data and benchmarks. These should cover costs before, during and after construction, including project preparation award, site acquisition, design development and construction, together with the costs of operating, managing and maintaining the project and any other material "life-cycle costs". Sensitivity analyses can be factored into the process.

- **Affordability.** The cost estimates will allow a preliminary view to be formed about the project's affordability at a public-sector level, looking at costs at this point on a traditional procurement basis and comparing them with other relevant government commitments, in a budgetary context, to assess the project's affordability for the government.

- **Funding sources.** The question of how the project should be funded can then be addressed. This refers to its non-recoverable payments to be made by either users or the contracting authority (or a mixture of the two), which are used to repay debt and provide a return on equity investments, as opposed to the recoverable payments represented by the different financing sources involved.[15] Some precision should now be given to these funding sources and mechanisms so their exact nature can start to be understood (for example, user charges, government-pay, demand-based, availability-based, subsidies, cash contributions). Wider affordability notions should also form part of this analysis – for example, the ability and willingness of users to pay charges or the government's capacity to do so ("fiscal scope").

- **Revenue generation.** The project's revenue-generating potential should also be examined, using relevant industry data and benchmarks. Where there is scope for greater asset utilisation (for example, ancillary facilities such as shops and restaurants, rents, advertising), this should also be taken into account.

- **Financial viability.** Preliminary conclusions can then start to be reached about the project's financial viability. Are anticipated revenues sufficient to cover costs or do they fall short of them? What sources and mixture of finance make most sense, how realistic are they and how well do they match payment mechanisms? This will help to determine the project's commercial appeal and the possible need for viability gap funding, as well as for other forms of available government support.

These estimates and calculations can then be reflected in assessments of the net present value and internal rate of return of the cash flows, with costs and revenues compared in a discounted cash-flow analysis. The nature and amount of any government support can also be indicated at this stage, whether in the form of direct or indirect liabilities, asset contributions, supporting infrastructure connections (e.g., utilities and related facilities) and any viability gap funding.[16]

3.10 Stakeholder consultations

Proper stakeholder consultation is a vital part of the success of any PPP project. It is also a key component of today's environmental, social and governance standards, such as those reflected in the United Nations SDGs and SDG Guiding Principles. An initial list of stakeholders who may be directly or indirectly affected by the project or influence its outcome should be drawn up.[17] This will be important to project planning and design and encourage adequate engagement. It will be developed into a stakeholder management plan in Phase 2.

[15] To use recognised World Bank terminology.

[16] See further in Chapter 6, Forms of Government Support.

[17] See the IFC Stakeholder Engagement Handbook 2007.

The list of stakeholders is likely to include users of the infrastructure or service and people affected by it, private-sector participants (developers, contractors, suppliers), affected landholders and local communities, finance sources (investors, development banks, commercial banks), relevant government bodies (ministries, agencies such as the PPP unit), competent bodies with approval powers (for example, an inter-ministerial committee), institutions and civil society representatives (for example, non-governmental organisation and trade unions) and the media. The socio-economic and environmental impact of the project should be fully considered as the list is drawn up. A framework engagement strategy for consulting all those listed should be sketched out, covering needs, potential concerns and channels of communication, to be developed in Phase 2. Preliminary soundings should be taken from the most directly relevant bodies.

3.11 PPP scope and review

Taken together, these studies should make it possible for a preliminary PPP scope to be defined for the project and given an initial validation. This will be refined in Phase 2. The project's compliance with all the applicable criteria and requirements under the PPP law and regulations should be systematically confirmed. A preliminary decision can be made about the most appropriate funding mechanism. Parts of the project that are of doubtful value to its PPP structure can be stripped out and planned and organised separately (for instance, early demolition or ground clearance works, connecting infrastructure or services which the government prefers for policy reasons to retain in public hands – such as clinical services in hospitals or teaching services in schools).

This "scoped" project can then be analysed in terms of a series of qualitative criteria to test and confirm its suitability as a PPP. These should be listed in the supporting documents and can include:

• **Whole-life approach.** How appropriate is a whole-life approach to project implementation? PPPs combine construction/refurbishment works with operation, maintenance and management, under a single contract with single-point responsibility, for the useful life of the asset. This is designed to lead to better results and greater efficiency, compensating for the higher financing cost of using private-sector finance. Whole-life costing becomes possible, which can lower operation and maintenance costs, thus strengthening the project's VfM (and potentially its VfP).

• Output specification. Can suitable output specifications be drawn up for the project? Again, this is fundamental to PPPs, which are designed in terms of "clear, measurable and enforceable" outputs (as the familiar mantra goes) which can be turned into a set of performance indicators in the PPP contract, often tied to the payment mechanism to incentivise performance (at least on government pay PPPs, that is. On user-pay concessions, exposed to demand risk, the performance standards will to some extent be self-policing). The project's many "inputs" are then left to bidders to determine.

• **Project size.** How appropriate is the project size? Is it large enough to appeal to the market, or so large that its financial viability for sponsors and lenders becomes questionable? Conversely, is it too small to attract experienced PPP developers and investors, or to justify the higher preparation and transaction costs typically involved, compared to traditional procurement? PPPs can be complex and slow to design, award and implement, especially when the market is still immature. The benefits and efficiency gains need to outweigh the costs. If the project is too large or too small, it may need to be redesigned or phased (in the case of the former) into more manageable components, or bundled together with other similar projects (in the case of the latter) as part of a larger and more viable whole.

• **Market appetite.** How much interest does there appear to be on the part of the private sector to implement the project and bid for it as a PPP? This raises questions about the depth of the local market, the capabilities of its participants (sponsors, lenders and investors), the extent of any international interest, the project's size and difficulty, and the country's wider economic and political environment. New PPP systems can be very slow to take off and require painstaking efforts to build capacity, market experience and appetite.

• **New technology** If unique or innovative technology is needed to implement the project, this may limit private-sector interest and the room for competitive tendering.

• **Risk allocation.** Does the preliminary risk analysis indicate a pattern of risks which are readily capable of identification, valuation and allocation? Can those risks which rationally should be allocated to the private partner to maximise VfM/VfP be transferred to and managed by it at reasonable cost? Conversely, does the contracting authority need to retain risks and responsibilities, especially to make the project financeable, in a way which undermines VfM and increases fiscal risk to unacceptable levels?

• **Precedents.** Have similar projects been implemented successfully in the host country or similar countries in recent years? A great deal can be learned from helpful precedents.

The extent to which the project satisfies these criteria will determine whether it goes ahead to the next (feasibility study) phase (Phase 2). If it does so adequately, the identification report should be completed with the results of the Phase 1 analyses, and a suitable management plan for Phase 2 included. This should describe the resources and expertise needed to prepare the project fully and carry out the feasibility study, set a budget for it, appoint a team leader, discuss the need for external advisers, and plan and schedule the work involved. The supporting documents can set out precisely how this is done.

3.12 Approving the identification report

The competent body authorised to review and – if required[18] – approve the identification report can then evaluate it. This should be essentially a matter of reviewing the report and confirming that the applicable tests and procedures have been followed and convincing conclusions reached. It would not be appropriate for the competent body to try to second-guess all the analysis carried out by the contracting authority, but self-evident flaws or omissions can certainly be picked up and acted on, perhaps leading to certain aspects of the studies being reconsidered or carried out again. The Model Law allows the PPP unit or (in square brackets) another competent body to carry out this review. Some host countries may prefer to use a higher-level body. But the review need not be as definitive or final as that which comes at the end of Phase 2, or involve a formal approval. The project is still at a preliminary stage. Once the report has been reviewed and/or approved, the contracting authority can move to the next stage, Phase 2, the feasibility study.

4. Phase 2. The feasibility study

The next phase of the preparation of a PPP project, Phase 2, centres on a feasibility (and in some respects an efficiency) analysis. It applies to projects that have been approved at the end of Phase 1 and to unsolicited proposals s that have been accepted for further development. It is sometimes referred to simply as the "feasibility study", although some of the studies and reports it comprises can obviously be undertaken as separate exercises (as the Model Law [Article 11.8 and 9] makes clear. In the interests of simplicity, we refer to them all in this chapter as the feasibility study). It enables firm decisions to be made about a project's viability and sustainability by means of a detailed assessment, which builds on the preliminary one carried out in Phase 1.

Further changes can be made to its design, as appropriate, and its structure then settled for the purposes of procurement and implementation. The feasibility study should review and develop the project's technical, economic, social, environmental, institutional, regulatory and financial elements. This will allow the contracting authority to decide, perhaps with the help of a final "efficiency analysis", whether to implement the project as a PPP and the relevant competent body or bodies (for example, the PPP unit and/or inter-ministerial committee, under the Model Law) to approve it (or otherwise), drawing on the results and conclusions of the feasibility study. Formal approval of the feasibility study is a common feature of PPP systems.

The supporting documents should describe and explain the different tasks comprised in Phase 2 in as much detail and provide as much guidance as are thought necessary or helpful.

4.1 Project team

The first step in Phase 2 is to appoint the professional team ("project team") to carry out the feasibility study. This team will usually go on to lead and manage the next task of procuring and awarding the PPP project and drafting and negotiating the PPP contract. The supporting documents should describe its likely composition, but with sufficient flexibility to allow it to be varied as appropriate in response to the size, nature and characteristics of each project. The project team should include civil servants (two or three, for example) from the contracting authority, reinforced as required by specialist advisers (internal and/or external). Its members should ideally have already been involved in preparing the Phase 1 identification

[18] The Model Law puts the word "approve" in square brackets, as formal approval may not be thought necessary at this still relatively early stage.

report, to make the process consistent and efficient. They should represent a suitable range of skills and expertise covering the various specialisms needed, together with extensive management, project and (ideally) PPP experience. An understanding of the SDGs and the SDG Guiding Principles should be part of the expertise needed.

Where more than one public authority is responsible for the project (as in the case of several municipalities or state-owned enterprises, for example), special institutional arrangements may need to be put in place to constitute the project team and allow decisions to be made. The supporting documents should allow for this. A suitably qualified team leader (project manager) should be appointed and a detailed work plan, timetable and budget drawn up for Phase 2. The available sources of funding for the exercise should be made clear. The supporting documents can describe in detail the functioning of the project team and its procedures.

4.2 Technical requirements

As we have seen, the project's technical components will have to be expressed essentially in terms of an "output specification" and performance requirements that describe what they will be capable of achieving at a technical and performance level, rather than how that is done. These objectives and standards should be "clear, measurable and enforceable", and represent a robust basis for the project's further development and definition. That calls for skill and experience in defining the relevant "outputs", which governments embracing PPPs for the first time and used to the habits of "input" control associated with traditional procurement (that is, defining the "how" as well as the "what") may lack. The supporting documents can provide detailed guidance as to how this should be approached.

Output specifications can embrace a wide range of relevant categories and characteristics. The supporting documents can explain and illustrate them. They typically cover minimum quality, required capacity (for example, volumes of production or usage), the timing and duration of performance, and reliability levels (for example, availability as a given percentage of time). These should be clearly defined for each main, discrete component of the project assets. The output specification is then translated into a series of contractual performance requirements and key performance indicators (KPIs) which enable the private partner's performance to be closely monitored and its remuneration to be adjusted as appropriate. Thought should be given to the question of how far to reflect the SDGs and SDG Guiding Principles in these KPIs. They should be reflected where appropriate in the output spec.

A further costing exercise can be carried out at this stage, based on the design, construction and service requirements, with revised estimates of capital costs, operation and maintenance costs and other life-cycle costs (such as renewals and reinvestments) being prepared. Appropriate risk adjustments can be made to these estimates. The applicable methodology can be set out in the supporting documents.

5. Demand review

Anticipated demand for the infrastructure or service will need to be examined as part of the feasibility study. The supporting documents should explain how this is done. In essence, this means the volume of availability or service that the contracting authority, off-taker or end-user will need from the project over its useful life. This may vary considerably over time, with scoping implications. Affordability and willingness to pay will be intrinsic elements of the analysis (not least because they form important elements of the SDG Guiding Principles). The variables that should be allowed for in the process can be discussed.

6. Economic feasibility

The supporting documents should describe the methodology for reviewing and updating the economic analysis carried out in Phase 1. The economic costs and benefits of the project should be reviewed, using appropriate conversion factors, and verified. This should lead to a more confident economic feasibility assessment with an economic net present value, based on a calculation of the net present value of the stream of costs and benefits over the project's life. This can be a sophisticated exercise, with a range of variables and sensitivity analyses.

7. Financial feasibility

The central purpose of the financial feasibility study is to determine the amount and range of payments (revenues) needed by the private partner to cover all project costs and provide a sufficient return to its investors and lenders, for the project to be financially viable. The tests involved will differ, depending on the payment mechanisms proposed (for example, user-pay or government-pay) and their scope (for example, allowance for revenues from ancillary facilities or greater asset utilisation). The underlying methodologies need clarity, thoroughness and rigour, and should be explained in detail in the supporting documents. They will enable the contracting authority to decide the exact payment mechanism to be adopted and its structure (including possible adjustments, such as those linked to KPIs), taking account of a range of relevant factors. Views can then be formed about whether the project will be self-sustaining (where revenues cover costs) or subject to a funding gap. If the latter, available forms of government support may have to be considered[19] or elements of the project redesigned. The analyses should be detailed, flexible and transparent, showing calculations and assumptions and the conclusions and recommendations reached by the project team.

This part of the feasibility study will also allow recommendations to be made for a suitable term for the project. Various factors will drive this decision, as the Model Law makes clear (Article 8). The decisive one, however, is usually the amount of time needed by the private partner to repay its lenders and offer its investors an adequate return. Other factors include the useful life of the assets, amortisation/depreciation periods, relevant sector policies, competition considerations and any statutory or regulatory limits. Governments often hold firm views about how the project term should be determined. The supporting documents should describe the approaches to be used. They (or the PPP law) may also impose a statutory maximum on any PPP contract's term, in part to prevent abuse.

A critical part of the financial feasibility analysis is the financial model used. The supporting documents should explain when and why exactly it is needed and the detailed methodology involved to prepare and refine it. Pro-forma and/or precise instructions can be attached to them. Various options will be available. It should be made clear that this tool is the financial model used by the public sector to facilitate and support judgements about the project's viability, affordability and VfM, and to define its assumed financial structure. It is also used to calculate the government/budgetary support needed for the project. It is distinct from the financial models the bidders will develop themselves to support their tenders, which often become the basis of the model eventually attached to the PPP contract. But its assumptions and projections will be reflected in the tender documents, and so taken into account by bidders in the meantime.

The project team can use the financial model to delineate a series of cash-flow projections and a business plan. The former should initially be prepared as a "base case", reflecting conservative assumptions. The latter can be used to help define the project's financial KPIs (for example, equity internal rate of return, debt tenor and debt service cover ratio). Various sensitivities can be applied to test the robustness of the project's financial feasibility. The model can be adjusted and refined as necessary during the course of project preparation. All its elements should be capable of revision. Its design should be transparent in all respects, showing inputs and results, technical data, capital expenditure and operating expense data, revenue assumptions, the proposed financial structure (including sources and amounts of finance and any government support), a cash-flow analysis, profit-and-loss statements and a balance sheet. Calculations and the assumptions behind them should be explained and readily capable of analysis. The final version should confirm the project's financial feasibility, affordability and VfM.

8. Fiscal feasibility

This analysis seeks to establish whether the project is affordable for the public sector. The analysis is set in the context of the government's aggregate exposure to PPPs across the board, taking account of all its direct and contingent liabilities under them. If the project exceeds the contracting authority's affordability limits, it may have to be redesigned, cut back or even cancelled. Fiscal affordability and sustainability are important express elements of the SDG Guiding Principles. All the contracting authority's direct and contingent liabilities relating to the project will need to be considered within the parameters set by the public finance procedures and fiscal rules, together with its own competing commitments (if any).

[19] See further in Chapter 6, Forms of Government Support.

Direct liabilities include the sum of all committed payments to be made by the contracting authority to the private partner over the term of the project, whether in the form of availability payments, deferred fixed payments, subsidies or grant funding (for example). These should be calculated in nominal, real and relative terms. Account should also be taken of the value of other contributions to be made by the public sector, such as land acquisition, ancillary construction works, the cost of preparing and awarding the project, the cost of monitoring and managing the PPP contract, and the value of any services to be provided to the project during its term. Any government revenues or savings, such as concession fees or a share of incidental business profits, should also be factored in.

Contingent liabilities are harder to assess, as they are, by definition, uncertain. They can include payments under guarantees (for instance, minimum revenue guarantees), risk-related payments or costs under the PPP contract (for instance, for exceptional or force majeure events, or early termination payments) and additional forms of government support that become necessary during the project's life.[20] There are various ways to measure and calculate them, including "scenario analysis" (based on certain assumptions) and "probabilistic analysis" (based on probabilities).

Once these estimates have been made, their fiscal implications can be worked out and the public sector's capacity to absorb them within its budgetary limits calculated. Again, there are various ways of doing this, which the supporting documents should discuss and compare. One is to compare commitments with projected tax revenues. Another is to compare them with budget appropriations. A third is to examine the project's compatibility with relevant budget constraints. The different options and their pros and cons should be explained.

9. Social and environmental feasibility

The preliminary social and environmental impact assessment carried out in Phase 1 can now be explored in more detail, guided by the project's closer definition and deeper understanding achieved in Phase 2. Its purpose is to review the project's impact on the social and natural environment and to identify the main risks and adverse impacts on it flowing from construction and operation. It is a critical part of the SDG/SDG Guiding Principles assessment. Both direct and indirect (secondary) impacts should be considered.

The analysis needs to look closely at the full range of consequences that the project might have for the local community's society, economy and even culture, together with the natural environment. These can range from employment issues, prices and land values to demographics, minority and ethnic concerns, social disturbances, access to clean air and water, local public services and governance issues. Impacts should be examined as objectively and precisely as possible, and strategies developed to mitigate or avoid the adverse ones. The supporting documents can discuss the range of possible consequences, issues and solutions, and attach examples and pro formas. Comprehensive plans and questionnaires should be drawn up for each project, together with a cost estimate and social and environmental action plan. This can prompt changes to the projects design. The importance and complexity of the assessment, coupled with the need for accurate, full local data, can make it a time-consuming exercise. It should be undertaken without delay as Phase 2 starts. It will also form a vital part of the economic and financial assessments and risk analysis.

Note that the successful bidder for the project will typically have to prepare a further environmental impact assessment, based on its detailed design. This is often a legal requirement of construction works. This does not in any sense, however, qualify the importance of the public sector's environmental impact assessment as the project is being prepared, which will inform the feasibility analysis.

[20] See further in Chapter 6, Forms of Government Support.

10. Risk analysis

In Phase 2, the project team will need to review and update the risk analysis and register prepared in Phase 1, to take account of the risks identified and highlighted in the various feasibility analyses performed in this phase. The aim is to produce a more exact and definitive risk analysis and allocation to support the project's viability; this will then be reflected in the tender documents.

• **Identification.** The supporting documents should describe how to identify and describe the various risks most effectively. It is likely to work best when carried out on a wide-ranging, inclusive basis, with many different experts taking part. Meetings, workshops and discussions can be used as well as written communication. All material stakeholders should be considered and – where feasible – consulted, so risks can be described and understood as accurately and fully as possible (bearing in mind that no two projects are identical). The PPP contract will, of course, reflect project-related risks following its award. This exercise should have a somewhat wider remit, however, capturing ancillary risks such as land acquisition and incidental infrastructure works or service provisions (which may be the public sector's responsibility), or procurement-related ones such as market risk/investor appetite and the scope for competitive tendering. The different risks can then be described in the risk register. Their probability and impact can be examined in a related risk matrix. These documents will need to be periodically updated as the project team works its way through Phase 2.

• **Allocation.** Firm decisions then need to be made about the allocation of the various risks among the parties, giving responsibility (in the usual way) for managing, controlling and mitigating (or eliminating) them to the party best-placed to do so at reasonable cost. The principles underlying this process can be described in as much detail as necessary in the supporting documents (although the fundamental principles at work have been extensively written about and are often well understood). Guidance as to how best to prioritise risks, optimise and value them (for VfM purposes) will be helpful. Subtle variations should also be explained, such as the ways causation can qualify their primary allocation or the payment mechanisms affect or respond to their occurrence and impact.[21] The supporting documents should explain that an appropriate allocation of risks should strengthen the project's VfM, minimise its fiscal risks and allow for healthy private-sector returns on investment.[22] This will help the project to succeed and encourage the wider development of the nascent PPP market.

• **Quantification.** The largely qualitative risk analysis done in Phase 1 can now also be translated into a quantitative one. This may involve estimating the cost implications of each risk, its probability of occurrence and then its probability-weighted cost. The supporting documents can explain the applicable costing and probability methodologies. Sophisticated expertise – which may have to be hired in – is usually required to do this. The quantitative analysis can then be fed into the economic and financial feasibility studies to test their possible impact on the project structure and generate a set of risk-adjusted cost and revenue estimates. This will add further precision to the conclusions being drawn about VfM and forms of government support.

• **Mitigation.** Risk-mitigation measures can then be revisited as appropriate, to firm up decisions about the best steps to manage and control each one. Mitigation tools can include changing the design or scope of the project, optimising data flow, improving due diligence, contractual mechanisms (for example, clarity of responsibilities plus suitable clauses for addressing the unexpected, such as change in law, force majeure or exceptional events), government support (committed and contingent) and contingency funding. These will all form part of a risk-mitigation strategy designed to underscore VfM and strengthen the project's appeal to investors and lenders. Pro formas or examples of such strategies can be attached to the supporting documents.

[21] For example, the less tightly controlled a private partner's remuneration is, at least on a user-pay concession, and the greater its ability to manage and adjust its revenues to absorb the impact of unforeseen events, the simpler it may be to transfer certain risks to it. If the private partner can protect itself against the impact of unforeseen events, by adjusting its user charges, it may not need additional protection from the contracting authority.

[22] "The cost of the project to government should align with fiscal priorities, so thatthe optimal allocation is achieved at the lowest possible cost to taxpayers." (cf Ukraine PPP manual)

11. Value assessments

• **VfM assessment.** The largely qualitative VfM assessment carried out in Phase 1 can now be given a more robust quantitative foundation, taking account of the results of other aspects of the feasibility study and the numerical data available. Many features of the project will have been modified to some extent during its detailed preparation; these will need to be allowed for. The VfM assessment is essentially a comparison of the whole-life costs and benefits of the different procurement options by which a project can be implemented. It uses risk-adjusted, discounted cash flows to produce a net present value for each option, coupled with sensitivity testing and scenario analyses. These provide a basis for comparison. This allows the VfM benefits for the government and society as a whole to be pinpointed and measured, which should allow a judgement to be made about whether the PPP option is a more attractive and efficient basis for implementing the project than any other, such as traditional procurement. It is a sophisticated process, and a challenging one to get right. There can be wide differences of view about the optimal approach to take to some of its elements, such as how to construct and apply a public sector comparator. The supporting documents should therefore set out a detailed methodology for it, reflecting the host country's preferences and showing how exactly it should be carried out. Even then, certain assumptions and matters of interpretation will still form part of the process, giving it a significant subjective element, notwithstanding its quantitative core.

• **People-first assessment.** The SDGs and SDG Guiding Principles should form an intrinsic part of this VfM analysis, which, as we have seen, should ideally be approached as a "VfM/VfP" analysis ("P" referring to "people and the planet"). The extent to which the project promotes the SDGs, and gives effect to the SDG Guiding Principles, should be considered as part of the evaluation, as the benefits for government and society are measured. The PPP evaluation methodology could be an extremely helpful tool in this exercise, as its offers detailed guidance as to applicable outcomes, criteria and indicators in this context, in both a qualitative and quantitative form (it contains a scoring and weighting system). The supporting documents could explain and demonstrate exactly how the evaluation methodology could be applied to the exercise.

12. Market analysis

Another important part of the feasibility study is testing the market's appetite for the PPP project as structured in Phase 2. This may involve consulting the private sector before the procurement phase gets underway. Further adjustments can be made to the project's design in response to feedback received. The project's marketing can effectively start at the same time. The responses received can be collated in a market study report. The project's business case and structure should only be finalised after this has been done, and any consequential adjustments made to its scope, risk allocation and financial assumptions.

As with the stakeholder consultation process, of which it really forms an extension, the exercise should be suitably wide-ranging. It should take in potential developers, contractors, investors and lenders, especially those with relevant PPP experience. This will allow views to be formed about the extent and depth of market interest and the private-sector skills and resources needed to implement the project, as well as the degree of competition likely to be generated by a competitive tendering process. The supporting documents should describe the steps and tools that can helpfully be included in the exercise, such as meetings, presentations, questionnaires, issues on which to focus and a project information memorandum.

The opportunity this offers to start the project's marketing process should be exploited at the same time. This should help to generate interest and so prepare the ground for the competitive tender process (if one is to be used, as it usually will be).[23] A detailed communication plan should be drawn up and periodically updated (this will anyway form part of the stakeholder consultation exercise, as we have seen). Again, explanations, a pro forma and guidance notes can be attached to the supporting documents. The tools involved (for example, conferences, online notices, media statements and advertisements) as well as the target audience will to some extent vary from project to project.

[23] See Chapter 4 on Tender Procedures and Requirements.

13. PPP effectiveness review

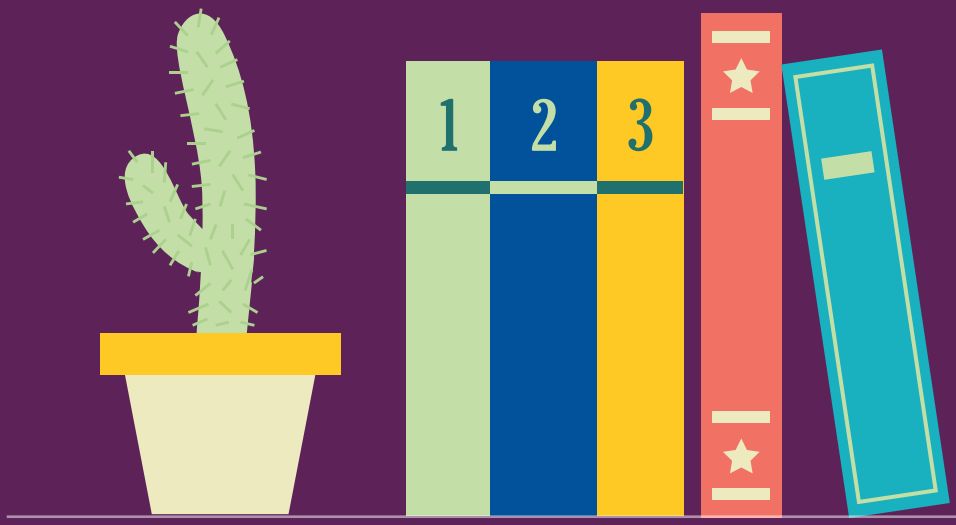
The final stage of this phase is likely to be a PPP efficacy or efficiency analysis of some kind, based on the conclusions reached in the feasibility study. The responsible public body (usually the contracting authority) should examine all the component parts of the study and then confirm if it believes the project can and should be implemented as a PPP. The supporting documents should spell out the criteria driving this judgement. They are likely to include[24] questions about whether:

- The project represents a robust, practical and cost-effective technical solution to the infrastructure/service need in question
- The project's social and environmental impacts are acceptable
- The project complies with all applicable laws and regulations
- The project is affordable
- The project's economic benefits outweigh its economic costs
- The project is commercially viable and likely to attract sufficient private-sector interest
- The project is financially viable and bankable
- The project is fiscally sustainable
- The project is sufficiently compliant with the SDGs and the SDG Guiding Principles
- The project is suitable for procurement as a PPP

The supporting documents should then set out the procedure for a further review and approval of this decision by the relevant competent approving body/bodies, in accordance with the Model Law's requirements,[25] specifying precisely what supporting data are required and its documentary, submission and retention requirements. Several different public authorities may be involved in this review (for instance, finance ministry for financial questions, economy ministry for economic ones, environment ministry for environmental ones). One body is likely to be responsible for organising the process, coordinating and compiling the different reviews, and reaching a final conclusion based upon them. Further (minor) design modifications may result from it. At its end, if the requisite approvals have been received, the contracting authority will be in a position to decide to implement the project as a PPP and pass an appropriate implementation resolution (under Article 13 of the Model Law). It can then move to the next phase of the process, the procurement and award stage.

[24] Cf Ukraine PPP manual.

[25] See further in Chapter 8 on Appraisal and approval procedures.



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.

EBRD PPP regulatory guidelines collection

Chapter 9.
Review and challenge procedures

1. Introduction

An important aspect of laws providing for the creation and implementation of complex, high-value infrastructure projects and systems, such as a procurement law or a PPP law[1], is a mechanism for overseeing and, if necessary, enforcing the application of the law's rules and procedures.

The host country will usually have legal tools in place for this purpose, some of them under its wider legal and administrative system. They will include rights and remedies under its civil and criminal legal systems, such as judicial review (or its equivalent) for breach of public administrative process, competition law powers, civil law sanctions or prosecutions for criminal offences. But they can also include "internal" mechanisms, forming part of the law itself, comprising challenge and grievance procedures, whereby specified persons are given the right to challenge or lodge complaints about the decisions, actions or omissions of bodies exercising powers or performing functions under the law. This chapter of the supporting documents focuses solely on this last category of provision. Other areas of a country's wider legal system are not discussed in any detail (as a PPP Law will not need to address them). Nor are the other forms of dispute resolution[2] which are found in the main contracts governing implementation of a PPP, such as the PPP contract and related agreements comprising the project's "contractual matrix", including design and construction, off-take, supply and operation, and maintenance contracts. These are essentially a matter of contractual provision and are addressed in Chapter VII of the Model Law.

Internal mechanisms of this kind reinforce the law's efficacy (as the UNCITRAL Guide to its Model Law on Public Procurement Law points out[3]), by giving it self-enforcing and self-policing tools. Mistakes can be corrected, and failures put right, in a rapid and efficient way. This avoids time-consuming and costly legal proceedings through the courts and perhaps serious disruption to the lengthy and intricate process of preparing and awarding a major project or PPP. It also helps to build confidence in the law's provisions and operation, and to prevent and deter their abuse. In the words of the UNCITRAL Legislative Guide on PPPs: "The existence of fair and efficient review procedures is one of the basic requirements for attracting serious and competent bidders and for reducing the cost and the length of award proceedings."

Giving bidders rights to seek review of the acts of competent bodies in violation of the law's rules is an important safeguard of the adherence to those rules and their proper application. For that reason, the United Nations Convention against Corruption (Article 9.1(d)) requires procurement systems to include them, structured around a mechanism of "domestic review" and appeal.[4] The World Trade Organization's Government Procurement Agreement (GPA) encourages a similar approach. The Model PPP Law reflects these principles and invites host countries to elaborate on them in their PPP laws and regulations.

The Model Law contains two articles providing for mechanisms of this kind:

- **Article 23 Review and Challenge.** Article 23 deals with decisions by government bodies in connection with the structuring and award of a PPP. It provides (in summary terms) that any bidder or potential private partner that suffers loss or injury as a result of a breach or non-compliance of a decision or action of a contracting authority (or other competent authority) with the law's requirements, in connection with essentially any aspect of the process of selecting, preparing or awarding a PPP project, may challenge the decision or action and pursue any available remedies, in accordance with the review and appeal procedures laid down by the PPP law or applicable law.

Those procedures can be drawn up under the implementing regulations. They should aim to ensure (para 2) that any such decision or action can be challenged without delay and, if possible, before goes into effect. Appropriate powers to apply interlocutory and interim measures can accordingly be included. Any decision or document can be opened up, reviewed, revised and annulled, and any procedure or course of action (not excepting the implementation of the project) suspended or cancelled. Powers to award compensation or damages are also permissible (subject to applicable law). The Article further provides

[1] A PPP law is essentially a form of public procurement law.

[2] Including court mediation, arbitration and court proceedings.

[3] The summary procedures set out in this regulation draw extensively on the Model Law on Public Procurement and its helpful and detailed accompanying Guide to Enactment, adapted to the provisions of this Model PPP Law (which differ in certain respects from the UNCITRAL Model PPP Legislative Provisions).

[4] This is also echoed in the UNECE Working Party on PPPs' standard on zero tolerance for corruption.

(para 3) that detailed procedures drawn up under other articles of the law and regulations should make allowance for such powers as appropriate.

• **Article 34 Grievance Procedures.** Article 34, dealing with protection of the general public, then provides for a specific grievance procedure. It states (in para 2) that the procedures drawn up in the implementing regulations shall provide as appropriate for the adoption of suitable mechanisms for lodging objections, complaints or other grievances by users or members of the general public in relation to any aspect of implementation of a PPP project by which they may be adversely affected. This can include an ombudsman or similar regulatory procedure. No other available rights or remedies under applicable law are to be in any way restricted or qualified by any such procedures, however. Paragraph 3 then requires the contracting authority to ensure that a PPP contract which involves public services or infrastructure facilities accessible to the public contains simplified and efficient mechanisms for handling claims of this kind by members of the public.

These two articles are summary provisions setting out the key elements of effective challenge and grievance procedures. Host countries should develop them in detail as appropriate in their regulations and guidelines. They also help to give effect to the transparency, fairness, access and equity, and consultation principles of the SDGs (and the SDG Guiding Principles). The following sections of this chapter of the supporting documents indicate how that might be done.

2. Review and challenge procedure

There are various ways in which the implementing regulations can build on Article 23. The extent to which they do so will depend on how prescriptive the host government wishes them to be, and what other provisions of the PPP law and the wider legal system – especially its general procurement regime – allow for or prescribe. The general procurement regime may already contain procedures of this kind (following UNCITRAL), in which case it may be a simple matter of carrying them over or cross-referring to them in the PPP law and regulations.[5] Equally, the country's administrative or judicial review procedures may contain the essential elements of this type of procedure. As explained above, however, Article 23 is designed as an "internal mechanism" within the framework of the PPP law, which should be a self-standing tool, largely obviating the need to use other legal fora and procedures.[6]

It should be kept in mind that the PPP law will also contain other provisions designed to safeguard the smooth and effective operation of the PPP preparation and award process, and to reduce the risk of challenges or disputes. These include broad information provision and transparency requirements, clear phasing, closely defined procedures and review and approval roles and powers. The "standstill period" under Article 20.2, between selection of a preferred bidder and the entry into force of the PPP contract, is also designed to have this effect, by creating a window of opportunity for bringing legitimate challenges before the commitments and expense of performing the contract are incurred.

The essential components of an effective challenge procedure would typically include[7] a general right of challenge and appeal, an (optional) right to require a competent body to reconsider a decision or action it has taken, and provision for review and intervention by a suitable independent body and/or court (following an appeal). As Article 23 states, the procedure should ideally allow for:

• The opening up, review and revision, modification or reversal of any decision or action (or failure to decide or act) by the competent body under the PPP process

• Rapid intervention (where possible)

• Power to suspend or cancel the relevant proceedings and to forestall the execution (or entry into force) of the relevant PPP contract while the dispute is continuing

• The power to apply interim/interlocutory measures, such as restraining orders, directions to perform specific steps and financial sanctions

• Power to award compensation or damages (especially where reversing the decision or step is no longer possible)

• Generally, rapid/compressed timescales for these measures

• The original challenge and any appeal respectively should be the subject of separate proceedings involving two different bodies, such as an independent

[5] The country's procurement laws may have been disapplied by the PPP legislation, but it should be a relatively simple matter to reproduce the challenge procedures in the PPP implementing regulations.

[6] Which are accordingly not discussed here.

[7] See the UNCITRAL Guide to Enforcement of its Model Public Procurement Law ("Guide to Enforcement") https://uncitral.un.org/en/texts/procurement.

body and the courts (or, if necessary, two independent bodies)

Note that some jurisdictions do not allow contracts to be cancelled once they have been awarded. As the UNCITRAL Guide to Enforcement points out, the mechanism always needs to strike an appropriate balance between protecting the integrity of the system and minimising disruption to the procurement process. Certain aspects of the procedure need careful structuring from that perspective, including limits on who can invoke them (that is, bidders and potential private partners), tight timeframes and discretionary powers to suspend proceedings or cancel contracts.

Set out below is a set of summary procedures for a challenge mechanism based on Article 23[8] and designed to meet these objectives. Host countries should develop them into a set of comprehensive and fully drafted legal procedures, compatible with local law and legal traditions. These should address matters such as documentary and evidential requirements, precise timeframes, the place of hearings, detailed rules of operation and procedure, rights of attendance and so on. It should be borne in mind that there are wide differences in the way countries approach these challenge mechanisms and the subject of administrative review generally, some of them involving "fundamental conceptual and structural aspects of the legal system and system of state administration".[9] Detailed provision may therefore be very different from country to country. There is not a single perfect model. The framework options and elements set out below should be used and adapted as host countries judge best.

The summary procedures below allow for three main options for hearing a challenge at first instance. The first (para (3)) is by the competent body itself. The advantage of this is that it gives the competent body an opportunity to correct the mistake or breach in question. This will only be appropriate when the competent body can still correct or reverse the act or decision (for example, when the PPP contract has not yet come into force). This option is appealing in terms of simplicity and efficiency. It is likely to constitute the quickest, most straightforward solution, which avoids the trouble and expense of burdening third-party tribunals with formal proceedings. The challenge procedure should be primarily about finding rapid remedies involving fair and constructive results and minimising "litigation risk". It may also facilitate matters that the competent body will be fully aware of the practical and factual context of the challenge – that is, the events in question – and may be keen to find a helpful, amicable solution if possible. But the competent body may also act defensively and obstructively, which is why having an alternative route available for mounting a challenge is essential. This is why it is also likely to make sense for the detailed procedures to include a system for monitoring or overseeing the functioning of this "peer review" option.

Accordingly, the second option is for an independent third party to hear the challenge. This procedure is summarised in para (4) below. It may be possible to base this, at least to some extent, on the country's existing administrative review procedures (if there are any) or to adapt and extend those procedures in this context. On the other hand, some countries may prefer simply to use their judicial review system and dispense with an independent body altogether.

Under this option (assuming it is adopted), the review body can be given a somewhat broader scope and range of powers than the competent body under the reconsideration mechanism in para (3) below, together with a longer time horizon in which to apply them. (The viability of those powers under local law should be carefully considered and verified.) The body selected for this purpose should be genuinely independent of the relevant competent body and of any standing procedures for confirming or approving its decisions, as these are likely to have already been applied to the decision or action being challenged. It should also be insulated from political pressures. This may call for the involvement of independent experts, removed from the legislative and executive functions. The host country will need to identify this body clearly and ensure that its functions and powers are well-deliberated. Its operating procedures will need to be closely defined. A permanent body to oversee the country's entire procurement system or handle administrative review cases in general may be appropriate.

Allowance is made in the summary procedure under the first two options for the possible suspension of any procurement proceedings taking place at the time of a challenge. This is a discretionary power, not an automatic device, as it may be impractical or counter-productive to use it in the circumstances of the claim, and an automatic requirement to suspend could lead to abuse of the system by unscrupulous or overly aggressive bidders or participants, or to unnecessary delays and disruption. The competent

[8] Based on the UNCITRAL model statutory provisions for public procurement, adapted to the PPP Model Law.

[9] Cf UNCITRAL Guide to Enforcement (https://uncitral.un.org/en/texts/procurement).

body or independent third party (as the case may be) is accordingly given power to order a suspension, in whole or part, which it must decide to exercise or not, in response to the application. The regulations should be very precise about the steps and criteria involved. Additional regulatory controls may need to be superimposed. It may also be appropriate to identify very limited circumstances in which suspension should, in fact, be compulsory, at least in the case of an application to an independent body.[10] The summary below allows for this.

A third option is to allow the challenge to go straight to the courts (or a specified court) if – again – the country's legal system permits this and includes a well-defined administrative or judicial review procedure[11] (ideally one which is consistent with recognised best practice and investor expectations and is sufficiently reputable and trusted). As that option would need to be a matter of formal procedure under local law, its elements are not summarised in the outline regulations, which only cover rules and requirements that are "internal" to the PPP law. Host countries should be encouraged to ensure that all the powers and remedies available to an independent third party will also be available to the court(s) hearing a challenge application or appeal.

The summary procedures below also allow for appeals against first-instance challenges, to either the independent review body or the courts, depending on where the challenge being appealed was heard and the confidence that can be placed in an appeal through the courts. It is likely to make sense to give the complainant an option to choose between the different possibilities, although countries may differ about how much freedom of choice should be available to complainants in this context.

3. Summary procedure

3.1 Rights to challenge and appeal

General provision: The regulations should allow challenge proceedings under Article 23 of the PPP law to be brought either by way of an application for reconsideration to the competent body being challenged (contracting authority or other body) under para (3) below, an application for review to an independent body under para (4) or an application or appeal through the courts. (The regulations might specify the relevant court, if necessary.) Any decision taken in challenge proceedings should also be capable of being appealed to the independent body (where appropriate) or in the court(s).

3.2. Effect of a challenge

The competent body being challenged should not be permitted to take any step that would bring into force a PPP contract in the PPP proceedings concerned, where it has received notice that these challenge procedures are being invoked and in process. This is to avoid a challenge or appeal being unfairly nullified by being overtaken by events. This restriction should lapse within a specified number of days of the challenge being decided. However, a contracting authority should be allowed to seek special permission from an independent body or court to go ahead and bring the PPP contract into force if urgent public interest considerations justify it. Decisions on these matters should be promptly notified to all participants in the PPP proceedings and made part of the formal record.

3.3 Application for reconsideration before the competent body

3.3.1 The section addresses the option of asking a competent body to reconsider a decision or action it has taken. The regulations should specify the deadlines by which an application must be submitted. For example, these could be:

- where the application relates to a key stage in the PPP process (such as the solicitation of Expressions of Interest (EoIs) or proposals, prequalification or preselection, or to decisions or actions taken during those stages), before the final deadline for concluding the relevant stage

- where it relates to any other decisions or actions, within any applicable standstill period identified and applied by the PPP law, following the PPP contract award,[12] if there is one, or, if no such period applies, before the entry into force of the contract.

3.3.2 The competent body should publish notice of the application promptly after its receipt and decide whether it is to be entertained or dismissed within a specified number of days (three, for example) of its submission. If it is to be entertained, a decision should also be made (by the contracting authority) whether any procurement proceedings in process are to be suspended in the meantime. The competent

[10] See the UNCITRAL Guide to Enforcement (https://uncitral.un.org/en/texts/procurement).

[11] Adequate judicial and administrative review procedures are a requirement of the UN Convention against Corruption.

[12] See Article 20.2 of the Model Law.

body may dismiss the application if it decides that it is manifestly without merit, the application was not submitted within the specified deadlines or the applicant does not have the necessary standing to submit it (a dismissal would also constitute a decision on the application). All other participants in the PPP process should be notified of the application and the decisions made, with reasons.

3.3.3 In deciding on an application, the competent body may open up, review, revise, overturn, correct or uphold any decision or action it has taken in the PPP proceedings to which the application relates. Its decision must be issued within a specified number of working days from receipt of the application and immediately communicated to the applicant, all other parties the challenge proceedings and all other participants in the relevant PPP proceedings.

3.3.4 The applicant should have a right of appeal against the decision of the competent body, or its failure to comply with the procedural requirements above, by immediately starting proceedings before the independent body (as provided below) or the courts. The start of any such proceedings should immediately vitiate the authority of the competent body to entertain the application any further.

3.3.5 All decisions of the competent body under this article should be in writing, should state the action taken and the reasons for them, and should promptly be made part of the record of the procurement proceedings (together with the application itself).

3.4. Application for review before an independent body

3.4.1 The bidder or potential private partner should also be entitled to take its challenge to a specified independent body, by applying for a review of the decision or action of the competent body or its failure to issue a decision under para (3) above within the prescribed time limits (or at all).

3.4.2 The regulations should again specify the time periods within which any such review application should be submitted. This should be essentially the same as under para (3) above, except that allowance can also be made in this context for submissions after the PPP contract has come into force. In that case, the time limit should be a specified number of days or weeks after the applicant became (or should have become) aware of the circumstances giving rise to the application, and in any event no later than a specified number of days or weeks after the PPP contract has come into force. The time periods can be "flexed" to some extent, where the independent body is asked to entertain the application at a (somewhat) later stage on the grounds that it raises significant public interest considerations, and it is satisfied that those grounds justify it.

2.4.3 The regulations should spell out the powers of the independent body once it has received an application for review. These could include – as a preliminary matter – the power to order the suspension of the relevant PPP proceedings before the PPP contract has come into force, or to order the suspension of the contract's performance where it has already done so, if and for as long as the suspension is thought necessary to protect the applicant's interests (unless urgent public interest considerations demand otherwise). There should also be an express power to extend or lift any such suspension (taking account again of any urgent public interest considerations). The issue of a suspension order can be made virtually automatic and obligatory in certain circumstances (subject to the applicable time limits). Conversely, the independent body may dismiss the application and lift any suspension applied if it decides that the application is manifestly without merit, was not presented in compliance with the applicable deadlines or the applicant does not have the requisite standing to submit it.

3.4.4 The independent body should be obliged to decide about any suspension promptly on receipt of an application, and to notify the relevant competent body and all other identified participants in the PPP proceedings of the application and its substance, and of its decision, with details and reasons. It should publish a notice of the application.

3.4.5 The competent body being challenged should have to provide the independent body with prompt access to all documents in its possession relating to the relevant PPP proceedings, in an appropriate manner. In deciding on an application which it agrees to entertain, the independent body should have the right to declare the legal rules or principles governing the application. Its other available powers can include the following:

- Prohibit the competent body from acting, taking a decision or following a procedure that is not in compliance with the provisions of the PPP law
- Require the competent body to act, to take a decision or to proceed in a manner that complies with the provisions of the PPP law
- Overturn (in whole or in part) a non-compliant act or a decision of the competent body
- Open up, review and revise any non-compliant decision by the competent body
- Confirm a decision of the competent body

• Overturn the award of a PPP contract that has entered into force in a manner not in compliance with the provisions of the PPP law (and order the publication of the decision if appropriate)

• Order that the relevant PPP proceedings be terminated

• Dismiss the application

• Require the payment of compensation for any reasonable costs incurred by the person submitting the application and resulting from the non-compliant act, decision or procedure, together with any loss or damages suffered (which may be subject to specified limits, such as the costs of preparing the relevant submission or those relating to the application)

• Take such alternative action as is appropriate in the circumstances

The independent body should have an express obligation to take one or more of these actions. All its decisions under this para (4) must be taken within specified time limits (for example, within 20 working days after receipt of the application), and immediately communicated to the applicant, the competent body and all other participants in the application for review and the PPP proceedings. All decisions must be in writing, state the action taken and the reasons for it, and become part of the record of the PPP proceedings.

4. Rights of participants in challenge proceedings

4.1. Any bidder or potential private partner participating in the PPP proceedings to which the application relates, as well as any other competent body whose interests could be affected by the application, should also have an explicit right to participate in challenge proceedings under this Article of the PPP law. Any such person who fails to do so having been duly notified of the proceedings should be barred from subsequently challenging the decisions or actions the subject matter of the application.

4.2. The participants in challenge proceedings under this Article should have explicit rights in the regulations to be present, represented and accompanied at all hearings during the proceedings; to be heard; to present evidence, including witnesses; to request that any hearing take place in public; and to seek access to the record of the challenge proceedings (subject to the provisions of para (6) below).

5. Confidentiality in challenge proceedings

The regulations should provide for the confidentiality of proceedings under the Article. For example, no information should be disclosed in challenge proceedings, and no public hearing under this Article should take place, if doing would impair the protection of essential security interests of the state, be contrary to law or impede law enforcement, prejudice the legitimate commercial interests of the bidders or impede fair competition.

6. Grievance procedures

Article 34 of the Model Law calls for rather less precise and legalistic procedures than Article 23. Its aim is to ensure that users of the infrastructure facilities or public services in question – and especially members of the public – have a suitable mechanism available for "lodging objections, complaints or other grievances" in relation to "any aspect of implementation of a PPP project" that may affect them adversely. This is essential to the SDG principles of ensuring access and equity to the beneficiaries of public services, as well as transparency and accountability.

There are various ways to do this. The supporting documents[13] should describe the options and explain their pros and cons. Formal legal procedures are not envisaged so much as relatively simple and usable arrangements by which people can bring their concerns and complaints to the attention of those responsible for the design, award and implementation of PPPs. This is also an essential aspect of the public consultation requirements which are now considered fundamental to the good governance of PPPs and their environmental, social and governance/SDG credentials. It is about ensuring that the public's interests are properly protected and considered at each stage of the process of implementing a PPP.

The Article recognises that mechanisms of this kind can be worked into a range of different procedures to be developed in the supporting documents. They can be brought out in the processes for identifying and preparing PPPs, for example (prefeasibility and feasibility studies), where they focus on the social and environmental impact assessments of projects. They can be worked into the formal consultation processes with stakeholders and/or mentioned in the approval procedures that apply to a prepared PPP and its tendering (to ensure that any grievances and complaints have been properly considered). They are

[13] These procedures and mechanisms are likely to be somewhat less legalistic than the challenge procedures discussed in the previous section, so it may be more appropriate to set them out and explain them in the guidelines rather than the regulations.

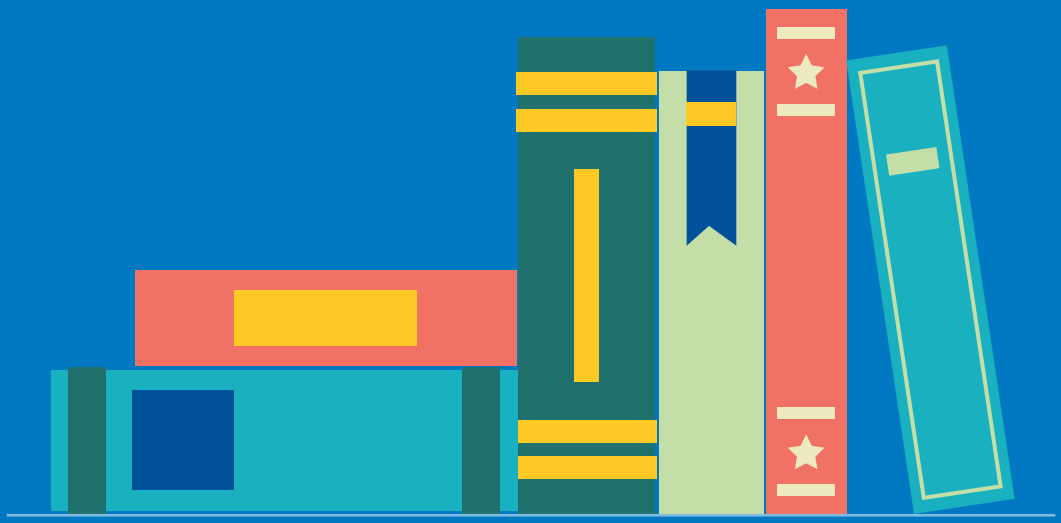
obviously relevant to the implementation of the PPP project by the private partner once the PPP contract has been entered into. In all of these, the draftsman should think carefully about the ways they can most effectively reflect the SDGs and the SDG Guiding Principles.

During the implementation phase, the relevant procedures can be set out more fully in the PPP contracts than in the supporting documents, although the latter can also helpfully indicate what form they might take. The PPP contracts can contain a schedule setting out the structure and requirements of a complaints procedure which the private partner must put in place and operate competently throughout the term of the contract. Indeed, Article 34 obliges contracting authorities to ensure that PPP contracts provide adequately for such procedures when the project involves public services or infrastructure facilities accessible to the public.

These mechanisms will always be additional to – and not a substitute for – the rights, remedies and protections that members of the public will normally have in any event under the host country's wider legal system. These may include sanctions under both criminal and civil law (for instance, for dangerous or harmful acts or breaches of regulations) and rights to bring individual claims through the courts for negligence, nuisance (or their equivalent), breach of statutory duty or judicial review. Consumer protection law will often contain protections of this kind. Users of facilities or the beneficiaries of services may also have certain contractual rights and claims against the private partner if the service or facility gives rise to a contract between them (as it sometimes will). Breaches may give rise to injunctions, restraining orders, conduct orders and claims for damages and compensation. Article 34 makes it clear that the procedures must not limit or qualify these wider rights and remedies in any manner. Equally, the supporting documents should not need to provide for them or (necessarily) discuss or explain them in any detail.

The grievance procedures should make it clear how exactly a user or member of the public can lodge an objection or complaint, with precise contact details (including e-mail and postal addresses and telephone numbers), especially if a special office has been created to handle them; provide for written and oral statements as appropriate (with a standard online claim form); state what details need to be provided in connection with the objection or complaint; spell out the rights and remedies to which a complainant may be entitled under the procedure; set specific, efficient time limits for responding, with clear indications of the officials responsible for doing so; and provide for an appropriate appeal mechanism if the complainant is dissatisfied with the response.

This last step would usually call for a form of ombudsman or similar regulatory agency for dealing with appeals by a dissatisfied user or customer. If an ombudsman is to be effective, however, it needs an additional set of rules and procedures of its own, underpinning its creation, functions, powers and staffing. It needs to be adequately staffed by people with suitable qualifications and experience, its duties and powers in relation to appeals made crystal clear, and its precise legal standing properly defined. A poorly defined, empowered and manned ombudsman's office will have little value and is likely to discharge its responsibilities tentatively and ineffectually, which can undermine confidence in the wider system. To work well, it needs "teeth" and decisiveness. Once a PPP system reaches a certain size and complexity, having a well-structured, standing office of this kind is likely to be an advantage. The supporting documents can provide for it.



EBRD PPP regulatory guidelines collection

Chapter 10.
CIS model PPP law

Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States

Model law
on public-private partnership

Article 1. Purpose and object of regulation of this law

1. This law has been adopted with a view to ensuring uniform and systematic regulation of public-private partnerships; achieving social and economic development goals by public-law entities of the states; improving affordability and quality of goods, works, and services the provision of which follows from the functions and powers of the states; increasing the efficiency of budgets of public-law entities of the states; attracting investments into the economies of the states by combining resources of public and private partners for the purpose of investments and implementation of projects in various economic sectors; ensuring that risks associated with the preparation and implementation of public-private partnership projects are allocated fairly; guaranteeing the rights and legitimate interests of private partners, public partners, and financing organisations; ensuring the protection of the environment, informational transparency and other public interests.

2. This law shall form the legal foundation for regulation, coordination of policies and practical actions in the course of preparation and implementation of public-private partnership projects, as well as when entering into and performing public-private partnership agreements.

Article 2. Principal terms used in this law

In this law, the following principal concepts shall have the following meanings:

Public-private partnership means mutually beneficial cooperation of public and private partners which is legally documented for a specified period of time, based on their pooling of resources (including monetary funds and other property, professional and other knowledge, expertise and skills) and allocation of risks among them (including financing and construction risks, risks associated with ensuring accessibility of or demand for a public-private partnership object or respective public services as well as other related risks) to attain any governmental, municipal or other public interest goals within the area of public interests and control.

Public-private partnership project means a project being implemented by a private partner and a public partner which involves making investments in any form with a view to attaining any governmental, municipal or other public interest goal, in particular, a design and engineering project, a project involving construction, development and operation of new infrastructural facilities or reconstruction, upgrading, expansion, other improvement and/or operation of existing infrastructural facilities or another project enabling a public subject represented by respective authorities to perform its statutory duties in a greater scope and/or at a higher quality level.

Public-private partnership objects means immovable things, movable things, other property, including property rights, or a number of such objects related to each other as well as results of works and services falling within the area of public interests and control and being the object of a public-private partnership agreement.

Public-private partnership agreement means a civil law agreement setting forth the terms and conditions of implementation of a public-private partnership project.

Direct agreement means an agreement by and between a public partner, a private partner and one or more financing organisations and/or other parties retained by the private partner with a view to implementing a public-private partnership project which sets forth the terms and conditions of their cooperation in connection with the implementation of such project.

Improvement of a public-private partnership object means measures on reconstruction and/or modification of the public-private partnership object or its individual components based on introduction of new technologies, automation and mechanisation of production processes, replacement of obsolete and worn equipment by new, more efficient equipment, change of technological or functional designated uses of such object or its individual components, and/or other measures aimed at improving parameters and performance characteristics of the object or its individual components.

Private partner's fee means a fee payable to a public partner by a private partner under a public-private partnership agreement during the term of use (operation) of a respective public-private partnership object.

Availability payment means a fee payable by a public partner to a private partner under a public-private partnership agreement during the term of use (operation) and/or maintenance of a respective public-private partnership object by the private partner.

Public-private partnership company means a commercial corporate-type entity established to implement a public-private partnership project and involving both private and public partners.

Article 3. Legislation on public-private partnership

1. Legislation on public-private partnership shall be based on the state's constitution and provisions of its national civil, budgetary, land, and other legislation.

2. National legislation on public-private partnership shall consist of a law on public-private partnership, other national legislative acts enacted pursuant thereto and other regulatory legal acts as well as municipal legal acts.

Article 4. Principles of public-private partnership

Legal regulation of relations arising in the course of preparation and implementation of public-private partnership projects shall be based on the following principles:

• equality of public and private partners before the law;

• that goals of a public-private partnership should be attained with due account of interests of its private and public partners, general public, consumers, users of a respective infrastructural facility and other interested parties;

• transparency and accessibility of rules and procedures in the framework of public-private partnership;

• that a private partner should be selected on the basis of a tender, except in instances provided for by national legislation;

• free access of private parties to participation in a tender for the right to enter into public-private partnership agreements and non-discrimination of bidders taking part therein;

• that risks, benefits, guarantees and duties relating to performance of any agreements entered into to implement a public-private partnership project should be fairly allocated among the project's public and private partners;

• bona fide and mutually beneficial cooperation of the parties to an agreement entered into to implement a public-private partnership project;

• efficient management of a public-private partnership project with participation of its public and private partners and, should this be necessary, financing organisation, while maintaining the balance between their rights and legitimate interests;

• stability of the legal framework existing as of the entering into a public-private partnership agreement throughout its term; and

• other principles set forth by national legislation and international treaties.

Article 5. Legal regime of activity of foreign parties

1. Unless otherwise is provided for by an international treaty or national legislation, foreign parties shall enjoy a national regime in relation to any and all procedures, conditions, rights, and duties arising out of this law and a public-private partnership agreement. Foreign legal entities shall be allowed to participate in a private partner selection process for the purpose of entering into a public-private partnership agreement on the same terms and conditions as any domestic parties.

2. The regime provided for by this Article shall apply to a foreign party provided that a similar regime is established by the state, of which the foreign individual in question is a citizen or in which the foreign legal entity in question is registered, in respect of its domestic parties.

Article 6. Forms of public-private partnership

1. A public-private partnership project may be implemented by public and private partners by means of their entering into and performance of a public-private partnership agreement, participation in a public-private partnership company as well as in any other forms pursuant to national legislation and a respective international treaty.

2. Implementation of a public-private partnership project by public and private partners through their participation in a public-private partnership company may be accompanied by entering into and performing a public-private partnership agreement between the public partner and the public-private partnership company. In such a case, the rules of Chapter V of this law shall apply to the relations between the participants of the public-private partnership project.

Chapter II. Preparation of a public-private partnership project and passing resolution on its implementation

Article 7. Preparation of a public-private partnership project

1. A public-private partnership project shall be prepared by an authorised public body pursuant to a procedure set forth by national legal acts and within the limits of budgetary powers vested in such public body.

2. A public-private partnership project shall be prepared on the basis of preliminary financial and economic calculations that help assess its rationality and efficiency as well as identify its optimal form for the purpose of its successful implementation.

3. To take account of the interests of the general public, consumers, users of an infrastructural facility and other interested parties, a public-private partnership project should be prepared along with holding public hearings which shall be held based on the results of preparation of a financial feasibility study in respect of the project.

4. Requirements to professional qualifications of the public body employees who will be in charge of preparation of a public-private partnership project should be set forth by national legal acts.

Article 8. Unsolicited proposals

1. A proposal on implementation of a project in the form of a public-private partnership project may be developed and submitted to a body authorised to pass a resolution on implementation of such project by a potential private partner. When developing a proposal on implementation of a public-private partnership project, a potential private partner may negotiate with a proposed public partner. The body authorised to pass a resolution on implementation of the public-private partnership project shall be obliged to consider such proposal and pass the resolution thereon pursuant to a procedure and within time limits provided for by national legislation. A resolution against implementing a public-private partnership project (resolution against entering into a public-private partnership agreement) may only be passed by the body authorised to pass the resolution thereon in a limited number of instances, a list of which shall be provided for by national legal acts.

2. If a tender commission resolves that a public-private partnership agreement should be entered into with a different private partner, the potential private partner that has developed and submitted to the authorised body the above-mentioned proposal on implementation of the project in the form of a public-private partnership project shall be entitled to be fully compensated by the public partner or, if provided by respective tender documents, by the winner of the tender for the right to enter into the public-private partnership agreement for its reasonable and justified costs incurred by such potential private partner in connection with the development of that proposal.

Article 9. Preparing a financial feasibility study for a public-private partnership project

Methodologies of financial and economic calculations and application of criteria of social, financial and economic efficiency of public-private partnership projects, as well as maximal and minimal values of such criteria for the purpose of preparing a financial feasibility study for a project shall be selected pursuant to a procedure set forth by national laws and other legal acts and shall be based on the following criteria:

- conformance of a goal to be attained through implementation of a project to the social and economic development strategies of a respective public-law entity;

- demonstration of comparative benefits of implementation of a public-private partnership project in a particular form in comparison with other possible arrangements which can be used by the public partner to perform the public function imposed thereon by national legislation;

- ensuring, as a result of implementation of the project, continuous supply of a respective public service to the general public at a required quality level;

- budgetary implications of the decision to implement the public-private partnership project, its effects on the amount of revenues and long-term expenditure commitments of the governmental (local) budget along with other consequences of the implementation of the public-private partnership project;

- cost of the project and expected social and economic effects of its implementation;

- ensuring a fair balance between positive effects for the partners that are expected to be achieved as a result of the project implementation and allocation of identified risks between them;

- innovativeness of the project and the extent it uses knowledge-intensive, energy-saving or resources-saving technologies;

- environmental implications of the project implementation and possible measures designed to mitigate its adverse effects on the environment; and

- other criteria provided for by national legislation.

Article 10. Requirements in respect of qualified assessment of public-private partnership projects

1. The public body in charge of preparation of a public-private partnership project shall ensure that financial and economic calculations are submitted for approval,

pursuant to an established procedure, to the financial authority of a respective public-law entity as well as to the body authorised to carry out executive functions in the area of economic development of a respective territory or other authorities as provided for by national legislation.

2. The procedure for preparing a public-private partnership project approved by regulatory legal acts of a public-law entity shall set forth, in particular, the limits and rules of carrying out an independent expert examination of a financial feasibility study underlying the project.

Article 11. Passing a resolution on implementing a public-private partnership project

1. An authorised executive authority of a respective public-law entity shall pass a resolution on implementing a public-private partnership project upon the results of the project preparation, provided that the requirements set forth by national legal acts are met.

2. The resolution on implementing a public-private partnership project shall contain major financial and economic characteristics of the project which may include, amount other things: the composition and parameters of a public-private partnership object; form of implementation of the public-private partnership project; expected (projected) minimum amount of investments to be made by a private partner; expected (projected) amount of budgetary financing, a procedure for, the amount and terms and conditions of provision of any governmental or municipal guarantees to the private partner, as well as any other obligations of the public partner; financial and economic rationales for the public-private partnership project; mechanism of and time limits for repayment of the private partner's investments; terms and conditions of the general public's access to public services to be provided using the public-private partnership object in respect of which the public-private partnership project is to be implemented; and other characteristics, as may be required. A procedure for, the amount and terms and conditions of the public partner's undertaking to cover expenses and provision thereby of governmental or municipal guarantees to the private partner should be specified in the resolution on implementation of the public-private partnership project and/or in the tender documents.

3. A resolution on implementing a public-private partnership project should set forth a procedure to select a private partner, time limits therefor and how it should be done.

Chapter III. Public-private partnership agreement

Article 12. General provisions of public-private partnership agreements

1. Unless otherwise is provided for in this law, under a public-private partnership agreement, the private partner undertakes, whether in part or in full, for its own account, including out of funds raised thereby, to design and/or build or otherwise create and/or reconstruct or otherwise improve a public-private partnership object specified in the agreement, carry out other works and/or provide services relating to the object to be so designed, built, reconstructed or otherwise improved as well as to transfer the results of such works to the public partner to subsequently be granted the right to possess and/or use the public-private partnership object or the ownership right therein, including with an option of transferring the same to the public partner into lease and the public partner's option to subsequently purchase it, with a view to using (operating) the object of the public-private partnership agreement, including by providing public services using such object or by rendering technical and other services in respect of the public-private partnership object (maintaining the same) until the expiration of a respective term set by the public-private partnership agreement.

A public-private partnership agreement may provide that a newly created, reconstructed or otherwise improved public-private partnership object may be transferred into ownership of a respective private partner without the latter's obligation to transfer the same into the public partner's ownership.

2. A public-private partnership agreement may provide for the duty of the public partner to grant to the private partner, on the terms and conditions set forth by this law and the agreement, the rights to possess and/or use a public-private partnership object or other objects, including land plots, results of intellectual activity or means of individualisation, with a view to conducting operations under the public-private partnership agreement. In such a case, the private partner shall have duties, as provided for by the public-private partnership agreement, to use (operate) such public-private partnership object or provide technical or other services in relation thereto (maintain the same).

3. A public-private partnership agreement may provide that the public partner shall assume part of expenditures required to create and/or reconstruct or otherwise improve a public-private partnership object or to use (operate) the same as well as that it shall

provide governmental or municipal guarantees to the private partner.

If the amount of financing provided by the public partner to create and/or reconstruct or otherwise improve the public-private partnership object exceeds the amount of financing provided by the private partner and if the ownership right to the object of that agreement (after the object was built, reconstructed or otherwise improved) arose or passed to the private partner, then, upon the expiration of the term of public-private partnership agreement, the private partner, if so provided by the above agreement, shall be obliged to transfer the ownership right to such object or provide respective compensation to the public partner on the terms and conditions set out in the public-private partnership agreement.

A public-private partnership agreement may provide for other forms and mechanisms of financial or other property-based participation of public and private partners in a public-private partnership project which shall be consistent with applicable legislation.

4. If a public partner does not have funds or has an insufficient amount of funds in a respective budget or has no other property or has insufficient property at its disposal, this shall not be grounds for modification or termination of such partner's obligations under a public-private partnership agreement or for its release from liability for failure to perform or improper performance of any such obligations.

5. A public-private partnership agreement may be a mixed contract. In such a case, rules of civil law on those contracts whose elements are contained in the public-private partnership agreement shall apply (to a respective extent) to relations arising thereunder, unless otherwise follows from this law or the substance of the agreement in question.

A public-private partnership agreement may provide for other elements or a combination thereof than those referred to in paragraph 1 of this Article, unless this contradicts the substance and principles of public-private partnership or any mandatory rules of this law or other acts of the civil legislation.

6. A public-private partnership agreement shall be a non-gratuitous contract. A public-private partnership agreement may provide that the public partner is obliged to pay to the private partner an availability payment in the amount, form, within time limits, pursuant to a procedure and on terms and conditions set forth by this law and the public-private partnership agreement, with due account of the private partner's right to receive revenues from sale of goods, works, or services to the general public and other consumers, as well as of other circumstances.

A public-private partnership agreement may provide that the private partner shall be obliged to pay a fee to the public partner.

The amount of such fee to be paid by the private partner, its form, procedure and time limits for its payment as well as other terms and conditions thereof shall be set forth in the public-private partnership agreement.

A private partner's fee may be set in the form of fixed-amount payments to be made regularly or as a lump sum in favour of the public partner; or in the form of a specified portion of products or revenues to be received by the private partner as a result of its operations under the public-private partnership agreement; in the form of transfer into the public partner's ownership of property owned by the private partner as well as in other forms consistent with the law. A public-private partnership agreement may also provide for a combination of different forms of a private partner's fee.

7. A public-private partnership agreement may provide that the private partner is obliged to obtain the consent of its public partner in respect of granting a pledge or other encumbrance over and/or disposal of a controlling block of shares in the charter capital of the private partner's entity in favour of any third parties.

A public-private partnership agreement may provide that the private partner shall be obliged to obtain the consent of a financing organisation retained thereby in respect of granting a pledge or other encumbrance over and/or disposal of a controlling block of shares in the charter capital of the private partner's entity in favour of any third parties.

8. In instances provided for by national legislation, risks of liability of the private partner and other parties involved in implementation of a public-private partnership project for any obligations arising as a result of harm caused to life, health, or property of third parties or the environment must be insured against.

9. General information about a public-private partnership agreement, particularly about its parties, date and place of its execution and other information about the agreement and amendments thereto, if any, should be published, as provided for by national legislation, in mass media and/or on a generally accessible website.

A list of general information to be published, place of and procedure for its publication shall be set forth by an authorised governmental authority or a local self-government body.

It shall not be allowed to charge a fee or demand registration or set any other conditions or restrictions in relation to one's access to such website.

Article 13. Sectors where public-private partnerships can be implemented

A public-private partnership may be used in respect of public-private partnership objects in any sectors, including:

- transportation
- housing and utilities sector
- energy sector
- public and municipal management
- national defence, security and law enforcement
- telecommunications
- scientific research, education, training and culture
- social services
- healthcare, physical education, and sports
- tourism
- agriculture.

Article 14. Parties to a public-private partnership agreement

1. Subject to any restrictions that may be imposed by national legislation, a private partner to a public-private partnership agreement may be an individual entrepreneur, a domestic legal entity, a foreign legal entity or two or more legal entities and/or individual entrepreneurs acting on the basis of an agreement without creating a legal entity.

No party that, pursuant to this law, other national laws or other legal acts, may act as a public partner in public-private partnerships and no legal entity controlled thereby may act as a private partner.

A legal entity is deemed to be under control of a public partner if the latter or any parties controlled thereby hold(s) a majority stake in the charter (share) capital of the legal entity in question and/or if such controlling party (parties) has (have) the right (powers), whether on the basis of an agreement or otherwise, to determine actions or decisions of such legal entity, appoint its one-person executive body and/or more than 50 per cent of members of its collective executive body and/or if such controlling party (parties) is (are) unconditionally able to elect more than 50 per cent of members of such legal entity's board of directors (supervisory board) or other collective management body.

A party that, pursuant to this law, national laws or other legal acts, may act as a public partner in public-private partnerships may not be a member of an association of legal entities and/or individual entrepreneurs acting without creating a legal entity which is deemed to be a private partner for the purpose of its participation in a public-private partnership.

2. Subject to any restrictions that may be imposed by national legislation, the following parties may act as a public partner under a public-private partnership agreement:

- a state, municipality or other public entity represented by an authority authorised, within the limits of its powers, to enter into a public-private partnership agreement, or other organisation vested, by virtue of a law or other legal act, with the authority to enter into a public-private partnership agreement;

- any other organisation which is vested by a political subdivision with special powers to enter into a public-private partnership agreement by virtue of a law or other legal act.

3. Several public bodies and organisations (public subjects) may act on the side of a public partner. The rights and duties of such subjects in connection with their joint participation on the side of the public partner shall be determined by an agreement to be entered into between them. Such agreement should contain terms and conditions regarding:

- the scope and forms of participation (in particular, financial and/or other property-based participation) of the public subjects in a respective public-private partnership agreement;

- a procedure for exercise by the public subjects of their rights under the public-private partnership agreement, including for allocation of rights to a public-private partnership object upon its commissioning between by the public subjects, where the public partner acquires any rights to the public-private partnership object under the agreement; and

- a procedure for performance by the public subjects of their obligations under the public-private partnership agreement.

A copy of that agreement or an extract from it containing all the provisions affecting the private partner's rights and legitimate interests should be attached to the public-private partnership agreement when entering into the same or otherwise provided to the private partner prior to the entering into the public-private partnership agreement, or, alternatively, all such provisions affecting the private partner's rights and legitimate interests should be included in the main body of the public-private partnership agreement.

4. A respective public body may delegate the exercise of individual rights and duties of public bodies related to the implementation of a public-private partnership project to a legal entity.

A respective mandate should contain data enabling one to identify the legal entity to which the public body's powers have been so delegated, the scope of such powers, their term, and the date of the mandate. If any of the above details are missing, the mandate shall be invalid.

Article 15. Terms and conditions of a public-private partnership agreement

1. A public-private partnership agreement should include the following terms and conditions:

1) subject matter of the agreement: the scope, content of and other requirements to works and services relating to a respective public-private partnership project as well as other terms and conditions relating to the subject matter of the agreement, depending on particular types of agreements whose elements are contained in the public-private partnership agreement in question;

2) time limits and procedure for carrying out works (provision of services) relating to the public-private partnership project and purposes of use (operation) of a respective public-private partnership object;

3) time limits and procedure for transfer of the ownership rights, rights of possession and use of the public-private partnership project and, where applicable, rights to land plots and other property rights as may be required to implement the public-private partnership project;

4) a description (including technical and economic parameters and the composition) of the public-private partnership object and other property to be transferred under the agreement, purposes and term of their use (operation), and, where applicable, terms and conditions of, time limits and procedure for their return to the party that has provided the same, requirements to the quality of the public-private partnership object and other property being provided and returned;

5) terms and conditions as well as time of transfer of the burden of maintenance of any property to be transferred under the agreement, as well as risks of accidental loss of or damage to that property and procedure for allocating other risks provided for by the public-private partnership agreement between the parties;

6) methods, the amount of collateral, and term of securing performance by the private and public partners of their obligations provided for by the subject matter of the agreement, as well as the obligations to transfer the property under the agreement;

7) term of the agreement and/or a procedure for determining the same;

8) forms, amounts, terms and conditions of, time limits or a procedure for payment of remuneration: an availability payment, a private partner's fee payable to the public partner and/or other payments, in particular, allocation of revenues in connection with the implementation of the public-private partnership project; and

9) other material terms and conditions provided for by this law and national legislation.

2. A public-private partnership agreement may also contain other terms and conditions, including:

1) obligations of the parties on preparing a territory required to create and/or improve a public-private partnership object and/or conduct operations provided for by the agreement;

2) technical and economic parameters and characteristics of designing, creating (reconstructing or otherwise improving) and/or operating a public-private partnership object;

3) obligations of the private partner to sell manufactured goods, perform works, or provide services on a domestic market during a time period set forth by the agreement;

4) obligations of the private partner to sell manufactured goods, perform works, or provide services at regulated prices (tariffs) and a procedure for approval of such prices (tariffs) for the private partner;

5) obligations of the private partner to provide certain benefits to consumers, including discounted prices of goods, works, or services, as provided for by the legislation and regulatory legal acts of a local self-government body;

6) target indicators of quality and volume of production of goods, performance of works, or provision of services when conducting operations provided for by the agreement;

7) obligations of the parties to insure against risks of accidental loss of and/or accidental damage to the object of the agreement and other property to be transferred thereunder;

8) obligations of the public partner to provide governmental or municipal guarantees to the private

partner, a procedure for and terms and conditions of provision of the same;

9) terms and conditions of approval by the public partner of termination (suspension) of operation of a public-private partnership object by the private partner, except in instances when such termination (suspension) is caused by a force majeure event, as well as other instances provided for by the legislation and the agreement between the parties, unless otherwise is provided for by the legislation;

10) terms and conditions of approval by the public partner of organisations being retained by the private partner to design, build or otherwise create, improve and use (operate) the object of the agreement, as well as of material terms and conditions of agreements with such organisations;

11) the possibility of the private partner granting, without the need to enter into an additional agreement, a pledge or other encumbrance over the public-private partnership object or its disposal under a condition precedent or the possibility of assignment of rights, in particular, if certain events specified in the agreement occur;

12) a procedure for giving a consent to a transfer by the private partner of the latter's rights and duties under the agreement, including by way of assignment of claims and/or transfer of a debt or to granting a pledge or other encumbrance over the public-private partnership object with a view to securing performance of any obligations under the agreement, as well as terms and conditions on which the public partner will give its consent to the transfer of rights and duties under the agreement, including various aspects of assumption by a new private partner of all the obligations under the agreement and presentation of evidence confirming that the new private partner has required technical and financial capabilities;

13) warranty obligations of the private partner relating to the results of the works to be performed under the agreement and property to be transferred thereunder;

14) a procedure for control by the public partner over the performance of the agreement;

15) rights and duties of other parties participating in the agreement, including in relation to exercising control over the parties' compliance with the terms and conditions of the agreement, giving a consent to certain actions, in particular, in relation to approval of retaining third parties for the purpose of implementation of the public-private partnership project or dismissing third parties from its implementation, or to collection and allocation of funds under the agreement, or to making other payments in the amount and pursuant to the procedure provided for by the agreement;

16) the right of the public partner or, if so provided by a direct agreement entered into with a financing organisation, the right of such financing organisation, to dismiss, on a temporary basis, the private partner or other parties from implementation of the public-private partnership project, in particular, from its operation and to set forth a procedure for temporary replacement of the private partner or another party in the event that the private partner has materially violated any terms and conditions of the agreement, including through the fault of third parties, or in the event that any terms and conditions of implementation of the public-private partnership project have been violated by third parties and such violation has not been remedied within a reasonable time allowed for this purpose by the public partner as may be provided under the public-private partnership agreement or other agreement between the public and private partners, as well as upon the occurrence of other circumstances specified in the agreement, in particular, to prevent, mitigate, or eliminate risks or effects of emergencies, protect human health or ensure security or safety of any property or other rights and legitimate interests of individuals and legal entities, as well as to protect the environment;

17) warranties and representations of the parties regarding any circumstances that may be relevant to the implementation of the public-private partnership project;

18) the amount, terms and conditions of a procedure and time limits for payment of a cancellation penalty as well as a procedure for applying other consequences of a violation by the parties of their obligations under the public-private partnership agreement;

19) a procedure for amending the agreement;

20) exceptional instances when it shall be allowed to unilaterally change term and conditions of the agreement and/or unilaterally repudiate it, as well as a procedure for determining the amount of compensation to the private partner due and payable by the public partner in the event of early termination of the public-private partnership agreement;

21) a condition on measures of support to be provided by the public partner to the private partner, in particular, on assistance in obtaining licences, authorisations and approvals, in granting easements or setting reduced rent rates for use of any property owned by the state and/or a municipality;

22) a condition on a procedure for resolving disputes arising out of or in connection with the agreement, including using mediation procedures where the parties would retain an independent expert, as well as on choice of a court, including a state court, an arbitral tribunal or a court of international arbitration that would have jurisdiction over or be authorised to resolve any such disputes; and

23) other terms and conditions as may be agreed on by the parties to the public-private partnership agreement.

3. If national legislation provides that provision of goods, works, and services to individuals and other consumers may be fully funded out of the state budget, a public-private partnership agreement should not provide that such goods, work, or services shall be paid for at the expense of individuals and other consumers.

4. In respect of certain public-private partnership objects, an authorised national body may approve model (indicative, template) public-private partnership agreements intended to be recommendatory by nature.

5. A public partner, a private partner and a financing organisation may enter into a direct agreement on cooperation throughout the term of implementation of a public-private partnership project (direct agreement with the financing organisation) which may include the following terms and conditions:

1) a procedure for approval of a proposed new private partner and criteria that such partner should meet, in case of assignment by a private partner of its rights and transfer of its obligations under the public-private partnership agreement and/or if a private partner becomes unable to perform its obligations under the public-private partnership agreement, as well as in the event of other substitution of the private partner under that agreement, as well as the consequences of such substitution;

2) a procedure for giving a consent to the private partner's granting a pledge or other encumbrance over a public-private partnership object to secure performance of its obligations under the public-private partnership agreement and/or agreements with financing organisations;

3) exceptional instances when it shall be allowed to unilaterally change term and conditions of the direct agreement and/or unilaterally repudiate it, as well as a procedure for determining the amount of compensation to the private partner and financing organisation due and payable by the public partner in the event of early termination of the direct agreement;

4) instances of, a procedure for and consequences of modification and/or termination of the public-private partnership agreement upon the agreement between the parties or unilaterally;

5) instances of, a procedure for and consequences of dismissal, upon the initiative of the financing organisation, of the private partner or other parties from operation of a public-private partnership object; and

6) other terms and conditions consistent with the existing national legislation.

6. A public partner, private partner, financing organisation (where applicable) and a party (parties) retained by the private partner to implement a public-private partnership project, including contractors, operators, parties providing property required to implement the project and/or parties assuming respective obligations to ensure the implementation of such project, may enter into direct agreements regarding their cooperation throughout the term of its implementation (other direct agreements) containing any terms and conditions consistent with the existing national legislation.

Article 16. Conclusion, modification and termination of a public-private partnership agreement

1. A public-private partnership agreement shall be entered based on the results of a selection of a private partner in accordance with the provisions of Chapter IV of this law.

2. A public-private partnership agreement may be amended or terminated upon the agreement of the parties, unless otherwise is provided for by national legislation or by such agreement.

3. A public-private partnership agreement may be amended or terminated at the request of either party on the basis of a court judgment:

• in the event that the agreement has been materially violated by either party thereto and such violation has not been remedied within a period provided for by the public-private partnership agreement or another agreement entered into between the public and private partners or, if no such period is set, within reasonable time, where the other party is substantially deprived of what it was entitled to expect at the time of the conclusion of the agreement;

• in the event of a fundamental change of circumstances on which the parties relied at the time they entered into the agreement, when the circumstances have changed to such extent that, if the parties could have reasonably foreseen such change, they would not have entered into the agreement or

would have entered into it on substantially different terms and conditions; and

• in other instances provided for by national legislation or the public-private partnership agreement.

4. Unless otherwise provided for by a public-private partnership agreement, it may be amended or terminated at the request of the private partner on the basis of a court judgment:

1) in the event of a delay in completion or suspension of a respective public-private partnership project resulting from any circumstance beyond the control of any of the parties;

2) in the event of suspension of the public-private partnership project as a result of any action on the part of the public partner, public bodies of the state or local self-government bodies;

3) if the public partner, a public body of the state or a local self-government body passes a resolution or takes an action preventing the private partner from performing its obligations under the public-private partnership agreement, including if any such party interferes with business operations of the private partner;

4) if the private partner's costs in connection with its performance of the agreement have significantly increased or if the value that it receives as a result of such performance has significantly decreased as a result of any action or omission on the part of the public partner or public bodies of the state, provided that the private partner cannot recover such costs without amending the public-private partnership agreement;

5) if the public partner or a public body of the state materially violates its obligations relating to the public-private partnership agreement;

6) if any actual data are found to be different from the data specified in tender documents or other data provided by the public partner to the private partner when entering into the public-private partnership agreement, or if any errors or irregularities are identified in any information so provided that prevent the private partner from performing its obligations under the public-private partnership agreement;

7) if there has been identified any encumbrance over a land plot or other movable or immovable property provided to the private partner in connection with the implementation of a public-private partnership project or other defect thereof which was not and should not have been known to the private partner when entering into the agreement; and

8) in other instances provided for by this law, national legislation or the public-private partnership agreement (unless otherwise covered by the public-private partnership agreement and/or respective direct agreements), the private partner, financing organisations and/or other interested parties taking part, directly or indirectly, in a public-private partnership project, may demand full compensation of losses, fair amendment of any terms and conditions of agreements that they previously entered into with a view to restoring the position that existed prior to the occurrence of any circumstances referred to in this paragraph, as well as application of other consequences provided for by the public-private partnership agreement and/or other agreements.

5. A public-private partnership agreement may be terminated by a court at the request of the public partner:

1) for any reason relating to public interests, provided that compensation is paid to the private partner and other parties in accordance with this law, other national legislation, and the public-private partnership agreement;

2) in other instances provided for by national legislation or the public-private partnership agreement.

6. A public-private partnership agreement may provide for instances when it may be terminated unilaterally, without applying to court.

7. A public-private partnership agreement shall terminate upon the expiration of its term or if the parties agree.

8. A party may apply to court seeking an amendment to or termination of a respective public-private partnership agreement only after it has received the other party's refusal to amend or terminate the same or has failed to get a response from the latter within a time period specified in a respective proposal or provided for by the agreement, or, if such period is not so specified or provided, within a time period provided for by national legislation.

9. Unless otherwise is provided for by a public-private partnership agreement and/or respective direct agreements, if the public-private partnership agreement is amended or terminated because of any circumstance for which the public partner or private partner is responsible or none of the parties is responsible, the private partner, financing organisations and/or other participants in a respective public-private partnership project that have entered into agreements with the public partner, may demand that the public partner fully compensate them for

losses or pay fair compensation thereto without being required to prove the amount of losses inflicted thereon, or demand restoration of the position that existed prior to the occurrence of any circumstance referred to in this paragraph, as well as application of other consequences provided for by the public-private partnership agreement and/or such other agreements entered into with the public partner and/or by national legislation.

10. The amount of compensation referred to in paragraph 9 of this Article and/or other consequences of modification or termination of a public-private partnership agreement shall be determined in accordance with the public-private partnership agreement and/or other agreements entered into with the public partner.

In any case, the amount of such compensation and/or such other consequences shall be proposed by the public partner or another party referred to in paragraph 9 of this Article, or, if no agreement has been reached thereon, shall be determined by a court subject to respective provisions of the existing agreements, on the basis of the public-private partnership principles and with due account of the need to fairly allocate among the parties any costs incurred thereby in connection with their performance of that agreement as well as any revenues that have been received or are reasonably expected to be received by a respective party.

Article 17. Property used in the course of implementation of a public-private partnership project

1. A party to a public-private partnership agreement that has respective rights shall be obliged to grant to the other party thereto the rights of possession and/or use of land plots, other real properties and movable things, rights to use results of intellectual activity and/or means of individualisation, as well as other property rights within the limits required for implementation of a respective public-private partnership project and subsequent use (operation) and maintenance of a respective public-private partnership object by the other party.

2. The public partner must provide reasonable assistance to the private partner in respect of acquisition by the latter and other parties that take part in implementation of the public-private partnership project, of any rights held by third parties and required to implement such project under the public-private partnership agreement, including rights of limited use of such third parties' land plots, other real properties, other rights in rem, intellectual property rights as well as other property rights.

3. The parties shall use property provided thereto for implementation of the public-private partnership project in accordance with national legislation and the public-private partnership agreement solely to attain the goals set forth in the agreement in question, unless otherwise is provided for by this law and such agreement.

4. A party to a public-private partnership agreement may transfer, with the consent of the other party and pursuant to a procedure set forth by national legislation and/or that agreement, a respective public-private partnership object and other related property into use to third parties for a term that shall not exceed the term of use (operation) of such object set forth by the public-private partnership agreement, provided that such third parties comply with obligations of the transferor under that agreement. The transferor shall be liable for any actions of the third parties in question as if they were its own actions.

5. Unless otherwise is provided for by a public-private partnership agreement or national legislation, no party to such agreement may grant a pledge or other encumbrance over a public-private partnership object and other related property as well as over future receipts and accounts receivable owing to the private partner in connection with the use of the public-private partnership object or services provided thereby or dispose of such property without the consent of the other party to the agreement, except when a pledge or other encumbrance over such property is granted to secure funding for the public-private partnership project. A public-private partnership agreement as well as a direct agreement between a respective public partner, private partner and financing organisation may provide that the private partner shall be obliged to obtain the financing organisation's consent to its granting a pledge or other encumbrance over or disposal of a public-private partnership object and other property referred to in this paragraph, including in favour of the public partner or to secure the performance by the private partner of its obligations under the public-private partnership agreement and/or agreements with other financing organisations.

6. Any property, including property rights that has (have) been created and/or acquired by a party to a public-private partnership for its own account when implementing a public-private partnership project and has (have) not been transferred to the other party under the public-private partnership agreement, shall be property of such first party, unless otherwise is provided for by the public-private partnership agreement.

7. A public-private partnership object and other property that has been transferred by the public partner to the private partner under a public-private partnership agreement shall be recorded in the balance sheet of the private partner and shall be segregated from its property. The private partner shall maintain separate accounting records in respect of such property in connection with the performance thereby of its obligations under the public-private partnership agreement, and depreciation amounts shall be accrued thereon by the private partner.

Article 18. Operation of a public-private partnership object

1. A public-private partnership agreement may provide for the following obligations of the private partner in respect of operation of a respective public-private partnership object:

1) to adapt parameters of services to be rendered, works to be performed, and goods to be provided so as to meet the demand for such services, works or goods;

2) to ensure continuous rendering of services, performance of works or provision of goods;

3) to ensure non-discriminatory access for consumers to services, works, and goods;

4) to ensure non-discriminatory access for other service providers, parties performing works or providing goods to any public infrastructural network that is operated by such private partner; and

5) other obligations of the private partner in relation to the operation of the public-private partnership object.

2. The private partner may introduce, in consultation with the public partner or an authorised body of the state, any rules governing the operation of the public-private partnership object and ensure that they are complied with, within the limits set forth by national legislation.

3. The private partner may not give preference to one consumer over another consumer in relation to rendering services, performance of works or provision of goods, except in instances provided for by national legislation.

4. The price of goods, works, and services, as well as other terms and conditions of a respective agreement shall be set in such a way that they would be the same for all consumers of a particular category, except in instances when certain privileges may be provided to individual groups of consumers in accordance with national legislation.

5. If the private partner or another party under a public-private partnership agreement renders services, performs works, or provides goods to the general public or operates an infrastructural facility accessible by the general public and, if so provided by the public-private partnership agreement, the public partner may demand that the private partner should introduce simplified and efficient procedures for considering complaints filed by consumers or users of such infrastructural facility.

Article 19. Securing performance of obligations arising out of a public-private partnership agreement

1. One or more of the following methods may be used to secure performance of the private partner's obligations arising out of a public-private partnership agreement as may be selected by such private partner:

1) an irrevocable bank or other independent guarantee;

2) granting by the private partner of a pledge over its rights under a fixed-term bank deposit agreement to the public partner;

3) insurance against risks of liability of the private partner under the public-private partnership agreement, if a respective insurance agreement prohibits early termination of such insurance agreement by the private partner as well as by the insurer, except for any grounds on which the insurance agreement may be terminated by the insurer and which are expressly provided for by national legislation;

4) granting a pledge over rights and/or the object of the public-private partnership agreement (where applicable); and

5) other methods that are not prohibited by national legislation.

2. An authorised body of a state may approve requirements to organisations whose independent guarantees or bank deposits in which may be accepted as security for performance of a private partner's obligations under a public-private partnership agreement as well as any requirements to insurance organisations that are eligible to provide insurance coverage against risks of liability under the public-private partnership agreement or risks associated with any obligations arising as a result of personal injury or damage caused to any property of third parties as a result of implementation by the private partner of a public-private partnership project to secure the performance of the private partner's obligations under the public-private partnership agreement.

3. In the event of modification or termination of an independent guarantee or an insurance agreement providing coverage against risks of liability of a private partner or in the event of early repayment by a credit institution of a deposit (or part thereof) as well as in other instances when performance of the private partner's obligations under a public-private partnership agreement becomes unsecured or secured other than in full, the private partner shall be obliged, within 10 business days from such termination of the above-mentioned security, unless another time limits therefor are provided by the public-private partnership agreement, to provide the public partner with other eligible collateral securing the performance of the private partner' obligations under the public-private partnership agreement.

4. Performance of a public partner's obligations under a public-private partnership agreement may be secured by governmental and municipal guarantees, any methods referred to in paragraph 1 of this Article, as well as other methods that are not prohibited by national legislation.

5. The scope of and time limits for securing the performance by the parties of a public-private partnership of their obligations under a respective public-private partnership agreement shall be determined, respectively, on the basis of the scope and term of the private and public partners' obligations under the public-private partnership agreement, the performance of which the partners secure.

Article 20. Substitution of persons in an obligation under a public-private partnership agreement

1. Substitution of persons in an obligation arising out of a public-private partnership agreement on the side of the private partner by assigning a claim or transfer of debt shall be allowed at any stage of implementation of a respective public-private partnership project with the consent of the public partner, unless otherwise is provided for under the public-private partnership agreement, and, in instances provided for by such public-private partnership agreement or a direct agreement with a financing organisation, with the consent of the financing organisation in question.

2. Substitution of a private partner in a public-private partnership agreement shall be effectuated by holding a tender or without holding the same where the public-private partnership agreement may be entered into without holding a tender, as well as in other instances provided for by national legislation or by a direct agreement with a respective financing organisation.

If the public partner resolves to substitute the private partner, the parties shall be released from the performance of their duties under the public-private partnership agreement vis-à-vis each other, and the private partner shall also be released therefrom vis-à-vis third parties, as of the moment when the public partner enters with a new private partner into an agreement on substitution of the private partner in the public-private partnership agreement, unless otherwise is provided for by the parties in the public-private partnership agreement.

3. In the event of reorganisation of the private partner, its rights and duties should pass to another legal entity only on the condition that the legal entity created as a result of such reorganisation meets the requirements contained in the respective tender documents.

4. In the event of substitution of the private partner in the public-private partnership agreement, its terms and conditions may be amended with the account of obligations that have been actually performed by the private partner by the time when a respective tender is held, as well as of any proposals made by the tender winner in the course of substitution of the private partner, provided that such proposals do not worsen the position of the public partner and that of any third party as compared with the terms and conditions of the original public-private partnership agreement. Any amendments to be made to the public-private partnership agreement shall be made in the same form in which such agreement was entered into.

Article 21. Guarantees in respect of rights and legitimate interests of a private partner

1. A private partner shall be guaranteed the rights provided for by national legislation, a legal regime of its operations that rules out the possibility of applying any discriminatory measures which would prevent it from freely managing and disposing of its investments, products and revenues obtained as a result of its activity provided for by a respective public-private partnership agreement.

2. The private partner shall be guaranteed that its rights and legitimate interests will be protected as provided for by international treaties and national legislation.

3. The private partner shall have the right to be compensated for any losses inflicted thereon as a result of any illegal action (or failure to act) on the part of any public bodies of the state, local self-government bodies or their officials in accordance with national legislation.

4. If the private partner sells goods, performs works or renders services at regulated prices (tariffs), then, when setting such prices (tariffs) for the private partner's goods, works or services, the tariff

regulatory bodies shall do so with due account of the amount and time limits for making investments in the design, creation and/or improvement of a respective public-private partnership object or related property set forth in the public-private partnership agreement.

In addition, in such a case, the private partner may demand, at its own discretion, that the public partner and/or respective public bodies of the state or local self-government bodies should ensure the approval of long-term prices (tariffs) containing elements of indexation in accordance with the public-private partnership agreement.

5. No public bodies of the state, local self-government bodies or their officials may interfere with the activity of private partners relating to their performance of public-private partnership agreements, except in instances provided for by national legislation or a respective public-private partnership agreement.

6. No transfer of ownership rights to a public-private partnership object or other property required to implement a public-private partnership project, from the public partner or other owner to another party shall be grounds for modification or termination of a respective public-private partnership agreement.

7. If, during the term of a public-private partnership agreement, an international treaty of the state, its legislation, or any regulatory legal act issued by a governmental body or local self-government body establishes rules that worsen the position of the private partner in such a way that it becomes substantially deprived of what it was entitled to expect at the time of its entering into the public-private partnership agreement, in particular, if the private partner's costs of performance thereby of such agreement have significantly increased or the value that it receives as a result of such performance has significantly decreased or will decrease as compared with the originally planned costs and value, as well as in other instances of a fundamental change of circumstances, the terms and conditions of the public-private partnership agreement should be amended by its parties with a view to securing property interests of the private partner that existed as at the execution date of the public-private partnership agreement, as may be subsequently amended, unless other consequences of such circumstances are provided for by the public-private partnership agreement.

The following support measures may be provided to the private partner upon its application and subject to the provisions of the public-private partnership agreement: a deferral of performance of obligations, subsidies, compensations as well as other payments aimed at reimbursing costs and/or other losses of the private partner suffered thereby in connection with its worsened position or a fundamental change of circumstances, privileges in relation to payments to/from the public partner, including in the form of payment by instalments, deferral, full or partial exemption of the private partner from making respective payments and/or other measures of support, regardless of whether such measures were provided for by the public-private partnership agreement and/or other agreements with the public partner.

8. In instances provided for by this law, national legislation and a public-private partnership agreement, the private partner shall have the right to amend the terms and conditions of such agreement to secure its property interests that existed as at the execution date of the agreement, as may be subsequently amended.

9. A procedure for amending a public-private partnership agreement, as well as any terms and conditions of provision of subsidies, compensations, or privileges to the private partner shall be set forth by the public-private partnership agreement, unless otherwise is provided for by this law or national legislation.

10. National legislation, regulatory legal acts of local self-government bodies and a public-private partnership agreement may provide for other guarantees of rights and legitimate interests of the private partner.

Article 22. Guarantees in respect of rights and legitimate interests of a public partner

1. A public partner shall be guaranteed that it would be able to exercise control over the progress of implementation of a public-private partnership project, including by providing it with unrestricted access to a respective public-private partnership object and documents relating to any operations provided for by a respective public-private partnership agreement, pursuant to a procedure and on terms and conditions set forth by such agreement.

However, the public partner may not interfere with any business activity carried out by the private partner or other parties taking part in the implementation of a respective public-private partnership project; nor may it disclose any confidential data, including those falling within the category of commercial secrets, or perform any other action which may result in a breach of the public-private partnership agreement.

2. A public-private partnership agreement and/or direct agreement may provide for the public partner's right to dismiss the private partner or other parties from operation of a public-private partnership object

and cause the same to be operated by the public partner itself or by another party on the terms and conditions set forth in the public-private partnership agreement, if the private partner has materially violated any terms and conditions thereof and such violation has not been remedied within a reasonable time allowed by the public partner that may be set by such public-private partnership agreement or other agreement between the public and private partners, as well as upon the occurrence of other circumstances specified in the public-private partnership agreement, in particular, to prevent, mitigate or eliminate risks or effects of emergencies, protect human health or ensure security or safety of any property of individuals and legal entities, as well as to protect the environment.

3. A public-private partnership agreement may provide that where the public-private partnership object is a movable asset which is owned by the private partner and will be subsequently transferred to the public partner, such asset shall be deemed to be pledged to the public partner until the state registration of transfer of the ownership rights to the object to the public partner.

4. No execution may be levied, in connection with any debts of the private partner, on the public-private partnership object and other related property owned thereby and relating to the implementation of the public-private partnership, except in instances where, pursuant to this law, an encumbrance may be granted over such property to secure financing of the public-private partnership project and where the consent of the public partner has been granted to such encumbrance.

5. National legislation, regulatory legal acts of local self-government bodies and a public-private partnership agreement may provide for other guarantees of rights and legitimate interests of the public partner.

Article 23. Liability of parties for failure to perform or improper performance of obligations under a public-private partnership agreement

1. The parties to a public-private partnership agreement shall bear property liability for non-performance or improper performance of their obligations in accordance with national legislation and the public-private partnership agreement.

2. If the public partner fails to perform or improperly performs its obligations under the public-private partnership agreement, the private partner shall have the right to be compensated for actual damages caused as a result of the foregoing and, if provided by the public-private partnership agreement, also for its lost profit.

3. It shall not be allowed to limit liability of the public partner for non-performance or improper performance of its obligations under a public-private partnership agreement.

4. Reimbursement by a party to a public-private partnership of any inflicted losses or payment thereby of a cancellation penalty in the event of non-performance or improper performance of its obligations under the public-private partnership agreement shall not relieve the respective party to the agreement from the performance of such obligation.

Article 24. Dispute resolution

1. Any disputes arising out of a public-private partnership agreement, including those relating to its execution, performance, modification, termination or invalidation, may be resolved by a state court or non-governmental arbitration tribunal of the home country of the public partner, as well as using other alternative means of dispute resolution, subject to any restrictions provided for by national legislation.

2. Any dispute referred to in paragraph 1 of this Article and involving foreign parties, as well as other disputes, as provided for by national legislation, may be referred to and resolved by any international commercial arbitration court regardless of the location of the public partner.

Chapter IV. Selection of a private partner for implementation of a public-private partnership project

Article 25. Procedures of selection of a private partner

1. A private partner for the purpose of entering into a public-private partnership agreement shall be selected on the basis of the resolution to implement a public-private partnership project pursuant to any of the following procedures:

1) a tender for the right to enter into the public-private partnership agreement (hereinafter referred to as the “tender”); or

2) negotiations on entering into the public-private partnership agreement with a potential private partner without holding a tender.

2. A public-private partnership agreement shall be entered into by holding a tender, except for the following instances when such agreement shall be entered into on the basis of negotiations:

1) if a public subject needs certain goods, works, or services in connection with the occurrence of a force majeure event or other emergency which makes it impossible to hold a tender;

2) when implementing a short-term public-private partnership project (i.e., with a term of up to five years) whose value does not exceed a threshold amount set by national legislation;

3) when implementing a public-private partnership project needed to ensure defence capability and security of the state;

4) if nobody except for a particular party (because such party owns exclusive rights in results of intellectual activity, other exclusive rights, a land plot or other real property or other assets that constitute a mandatory prerequisite for implementation of a public-private partnership project) is able to carry out respective works, render services or perform other actions as may be required to implement the same; or

5) in other exceptional instances which may be provided for by national legislation provided that the entering into a public-private partnership agreement without holding a tender is most consistent with the public interests.

3. The private partner selection procedures must conform to the following principles:

1) openness and transparency;

2) equal non-discriminatory attitude to any participants in such procedures;

3) equal access of such participants to information; and

4) clarity, certainty, completeness and adequacy of the criteria to be used for selection of a private partner.

4. Selection of a private partner for participation in a public-private partnership company shall be conducted in accordance with the rules set forth by this chapter, provided that it does not contradict the nature of relations in a public-private partnership being implemented through participation in the public-private partnership company and unless otherwise follows from this law.

Article 26. Tender for the right to enter into a public-private partnership agreement

1. A tender for the right to enter into a public-private partnership agreement shall be held upon the resolution to implement a respective public-private partnership project and on the basis of approved tender documents.

2. A tender may be an open or closed one.

In the case of an open tender, bids to participate therein may be submitted by any party. In the case of a closed tender, bids to participate therein may be submitted by any person that was sent an invitation to take part therein pursuant to the resolution on implementation of a respective public-private partnership project.

A tender shall be open, save for the following instances provided for by national legislation in which a closed tender must be held:

1) information about a public-private partnership object falls within the category of state secrets;

2) a public-private partnership object is of strategic importance for defence capability and security of the state; and

3) in other instances provided for by national legislation.

3. A procedure for holding a tender must include the following stages:

1) publication of an announcement about the tender;

2) acceptance of bids for the tender;

3) preliminary selection of bidders;

4) submission of tender bids;

5) evaluation of the tender bids and determining the winning bidder;

6) negotiations with the winning bidder regarding terms and conditions of the agreement other than those set forth by the tender documents and the winning bidder's bid; and

7) entering into the public-private partnership agreement.

In accordance with a resolution on implementation of a public-private partnership project, a tender may be held without the stages referred to in subparagraphs 2 and 3 of this paragraph. In the case of a closed tender, it shall be held without the stage referred to in subparagraph 1 of this paragraph, and in such a case, the parties entitled to take part in the tender shall be informed thereof by a written notice.

4. An authorised body of a state shall determine the contents of tender documents, procedures for forming tender commissions, publication of announcements about tenders and their results, submission of bids for participation in tenders, preliminary selection of bidders, and evaluation of bids on the basis of regulatory legal acts governing the procedure for holding tenders.

5. Tender documents of a tender may contain the following criteria:

1) technical and economic parameters of a public-private partnership object;

2) time limits for creation and/or improvement of the public-private partnership object;

3) quality guarantees in respect of the public-private partnership object to be provided by a partner;

4) amount of financing, a list of property or property rights to be provided by the public partner to perform the agreement;

5) amount of the private partner's funds to be raised to perform the agreement;

6) security of performance by the partners of their obligations under the agreement;

7) maximum and minimum prices (tariffs) for goods to be manufactured, works to be performed, and services to be rendered, and mark-ups to such prices (tariffs) in the course of activity provided for by the public-private partnership agreement;

8) risks to be assumed by the partners; and

9) other criteria provided for by the tender documents.

6. In the case of a particularly complex public-private partnership project, where it is objectively impossible for a public subject to identify the most efficient technical, legal, and financial forms of project implementation, it shall be allowed to hold a competitive dialogue with private parties with a view to identifying the most advantageous form of the project implementation.

1) Only those parties to whom invitations were sent for participation in a competitive dialogue procedure may take part therein.

2) In the framework of a competitive dialogue, negotiations shall be held with each private party invited to participate on all aspects of implementation of a public-private partnership project, with a view to identifying most efficient forms of its implementation.

3) Negotiations shall be held until one or two forms of project implementation are identified in respect of which further procedures will be held to select a respective private partner.

4) Upon completion of the competitive dialogue procedure, its participants shall be sent invitations to submit their bids in relation to the chosen form of project implementation.

7. Tender documents may contain requirements to qualifications, professional and business qualities of the bidders, including the requirement whereby a bidder must have no overdue obligations to pay rent, taxes, or make other mandatory payments to the state budget.

8. An authorised body of the state may amend tender documents provided that information about such amendments is published and the term for submission of tender bids is extended for at least 30 business days from the date of such amendments.

9. Tender documents may provide for the following stages of submission of tender bids:

1) submission of a tender bid based on criteria set for the purpose of the tender and other issues of technical nature (first stage);

2) submission of a final tender bid based on all of the tender criteria (second stage).

If there are several stages of submission of tender bids, respective tender documents may be clarified and/or supplemented based on the results of consideration of tender bids that were submitted during the first stage.

10. If, in accordance with tender documents, there are several stages of submission of tender bids:

1) requirements to decisions which may be made by the tender commission upon the results of evaluation of any pre-final stage shall be set in the tender documents;

2) unless otherwise is provided for by the tender documents, the results of evaluation of any pre-final stage shall not be taken into account when evaluating tender bids submitted at any subsequent stage of their submission; and

3) the winning bidder shall be determined at the final stage of submission of tender bids.

11. A bidder may change or revoke its tender bid at any time until the expiration of the term for submission of tender bids to the tender commission.

A bidder may not submit two or more bids at the same stage of submission of tender bids.

12. Criteria for evaluation of tender bids shall be set in the tender documents and should meet the requirements of completeness and adequacy for selection of the private partner that has offered the best terms of implementation of a public-private partnership project.

13. The winning bidder shall be the bidder whose tender bid was found by the tender commission to offer the best terms and conditions as compared with tender bids of the other bidders.

14. The tender commission shall issue its decision on evaluation of tender bids and determining the winning

bidder within the time limits set forth by national legislation, and that decision should be well-founded and substantiated.

15. The results of consideration and evaluation of tender bids shall be recorded in a respective protocol which shall be published subject to any restrictions and pursuant to a procedure provided for in respect of publication of an announcement about the tender, within time limits provided for by national legislation.

The bidders shall be sent written notices about the results of consideration and evaluation of the tender bids.

16. If, by the time tender bids are evaluated, no tender bid has been submitted or if, upon the results of their consideration, it has been resolved that none of the tender bids met the tender criteria set forth in the tender documents, the tender shall be declared void.

17. If, by the time tender bids are evaluated, there is just one tender bid, the tender commission shall evaluate it and, provided that this bid conforms to the tender documents, the tender shall be declared void. In such a case, the public-private partnership agreement may be entered into with the respective bidder without holding a tender.

18. If the tender documents contained a draft public-private partnership agreement, the tender commission shall send that draft to the winning bidder concurrently with sending thereto a protocol of the results of the tender.

19. A public-private partnership agreement shall be entered into the winning bidder pursuant to a procedure set forth by the tender documents. The public-private partnership agreement must be entered into within the term set by the tender documents. Such term should include a period for discussing the terms and conditions of the public-private partnership agreement to the extent that this does not affect any material terms and conditions set forth by the tender documents and the winning bidder's bid in respect thereof.

20. If the winner refuses to enter into the agreement within the time limits set by the tender documents, an authorised body of the state may resolve to enter into the agreement with another bidder whose bid, based on the results of consideration and evaluation of the tender bids, offers the next best terms which are second only to the terms offered by the winning bidder.

21. If the bidder that has submitted the second best bid (that is second only to that of the winning bidder) refuses to enter into the agreement, the tender shall be declared void.

Article 27. Negotiations regarding conclusion of a public-private partnership agreement without holding a tender

1. Negotiations regarding the conclusion of a public-private partnership agreement shall be held on the basis of the resolution to implement a public-private partnership project in instances provided for by this law and other national legislation.

2. A resolution to hold negotiations regarding the conclusion of a public-private partnership agreement shall be published subject to any restrictions and pursuant to a procedure provided for in respect of publication of announcements about tenders, within time limits provided for by national legislation.

3. The authority authorised to arrange for such negotiations should ensure that they are held with a maximum possible number of potential partners.

4. In the course of such negotiations, a private partner shall be selected on the basis of criteria ensuring the conclusion of such a public-private partnership agreement that would be most consistent with the public interests.

Chapter V. Public-private partnership company

Article 28. General provisions on a public-private partnership company

1. A public-private partnership may be implemented through participation of the public and private partners in a public-private partnership company.

2. A public-private partnership company shall be created solely with the purpose of implementation of a public-private partnership project in one of the corporate forms provided for by national legislation.

3. A public-private partnership company shall have a special legal capacity and may only carry out activities aimed at implementing or facilitating the implementation of a public-private partnership project.

The name of a public-private partnership company should include the words "public-private partnership".

A public-private partnership company shall be established for the term of implementation of a public-private partnership project, whereupon it shall be liquidated.

4. Members of a public-private partnership company shall not be liable for the company's debts, except in instances provided for by national legislation.

5. National legislation may provide for a minimal and/or maximal limit of a public partner's participation in a public-private partnership company. However, a public-private partnership company should not be controlled by its public partner.

6. Accounting (financial) statements of a public-private partnership company must be audited annually.

Article 29. Corporate relations in a public-private partnership company

1. Unless otherwise is provided for by national legislation, corporate relations of the members in a public-private partnership company may be governed by an agreement on its establishment and activities and/or a shareholder agreement and/or other agreement (hereinafter referred to as an "agreement between the public-private partnership company members") to the extent this does not contradict the national legislation and articles of association of the public-private partnership company.

2. The provisions of this law on substitution of parties in an obligation arising out of a public-private partnership agreement shall apply mutatis mutandis to relations in connection with a disposal by a private partner of its share(s) in the charter (share) capital of a public-private partnership company.

A public partner may dispose of or grant a pledge or other encumbrance over its share(s) in the charter (share) capital of a public-private partnership company in favour of third parties only with the consent of the other members of such company, or, in instances provided for by the company's articles of association, an agreement between its member or a direct agreement with a financing organisation, with the consent of the financing organisation.

Unless otherwise is provided for by national legislation, an agreement between the public-private partnership company members or the articles of association of a public-private partnership company, the private partner may not, without the consent of the public partner or, in instances provided for by the articles of association, agreement between the public-private partnership company members, or a direct agreement with a financing organisation, without the consent of the financing organisation, grant a pledge or other encumbrance over its share(s) in the charter (share) capital of the public-private partnership company, except in instances where such encumbrance over this/these share(s) is established to secure financing for a public-private partnership project.

3. The object of an public-private partnership agreement and other related property owned by a public-private partnership company may be pledged or otherwise encumbered upon the resolution of the general meeting of its members (shareholders) passed by a simple majority vote of its members (shareholders) unless a higher majority vote is prescribed by its articles of association or, if all or some of those issues fall within the jurisdiction of its board of directors, upon the resolution of the company's board of directors passed by a simple majority vote of its members.

4. Instances where a party is allowed to exit or otherwise terminate its participation in a public-private partnership company, apart from disposing of such party's share(s) in the charter capital of the company, provided that such termination is allowed by national legislation and the company's articles of association, as well as a procedure for termination of such participation shall be set forth in the articles of association of the company.

5. None of the following shall be allowed without the consent of the public partner of a public-private partnership company:

- public placement of shares in the company;
- increase of the company's charter capital or any amendments to its articles of association, except for amendments that must be made pursuant to national legislation or the agreement between the public-private partnership company members;
- issuance of bonds or other securities by the public-private partnership company;
- reorganisation or liquidation of the public-private partnership company;
- any other action which requires the public partner's consent under the agreement between the public-private partnership company members or such company's articles of association.

6. A procedure for granting consent by the public partner of a public-private partnership company in instances referred to in this Article should be set forth in the agreement between the public-private partnership company members or such company's articles of association.

7. Any disputes arising out of corporate relations between members of a public-private partnership company or agreements between them may be resolved by a governmental court, non-governmental arbitration tribunal as well as by other alternative means of dispute resolution, subject to any restrictions provided for by national legislation.

Chapter VI. Authorised bodies and organisations in the public-private partnership area

Article 30. Powers and authority of executive authorities in the public-private partnership area

1. The supreme executive authority of a state or other public-law entity shall:

1) adopt regulatory legal acts on procedures for preparation and implementation of public-private partnership projects;

2) approve long-term specialised programmes providing for measures to be taken in the framework of public-private partnership, as well as lists of projects to be implemented in the form of a public-private partnership for a certain period of time (infrastructural plans);

3) designate a public body that will be in charge of implementing, on behalf of the public-law entity, policies in the public-private partnership area, as well as bodies and organisations authorised to enter into public-private partnership agreements on behalf of such public-law entity;

4) ensure education/training for representatives of public authorities on various aspects of public-private partnerships;

5) approve regulations on a procedure, time limits for and terms and conditions of property and/or financial participation of the public-law entity in public-private partnership projects and a methodology of evaluation of efficiency of such participation;

6) approve a procedure for holding a tender for the right to enter into a public-private partnership agreement, pass the resolution on holding such tender, approve a list and contents of tender documents as well as the composition of a tender commission or designate the respective public body authorised to approve the tender documents and form the tender commission in relation to the tender in question;

7) approve a procedure for holding public hearings in relation to a public-private partnership project;

8) approve a procedure for holding negotiations regarding conclusion of a public-private partnership agreement without holding a tender;

9) approve standard forms of public-private partnership agreements, methodological guidelines on entering them, and a procedure for entering into such agreements and monitoring their implementation;

10) pass resolutions on conclusion of public-private partnership agreements by the authorised body or enter therein on its own;

11) monitor the implementation of public-private partnership agreements; and

12) make decisions on cooperation with other public subjects with a view to jointly participating in public-private partnership projects and submit such cooperation agreements for approval by the representative body of the respective public-law entity.

2. An executive authority in charge of implementing policies in the public-private partnership area shall:

1) develop regulatory legal acts on procedures for preparation and implementation of public-private partnership projects;

2) develop long-term specialised programmes providing for measures to be taken in the framework of public-private partnership;

3) coordinate actions in the public-private partnership area taken by other executive authorities and organisations authorised by the public subject;

4) take part in negotiating and preparing a draft agreement on cooperation with other public subjects with a view to participating jointly in public-private partnership projects;

5) develop a methodology of evaluation of efficiency of the public subject's property and/or financial participation in a public-private partnership;

6) develop regulations on a procedure, time limits for and terms and conditions of the public subject's property and/or financial participation in a public-private partnership;

7) develop a procedure for holding a tender for the right to enter into a public-private partnership agreement, as well as a list and contents of tender documents;

8) develop a procedure for holding negotiations regarding conclusion of a public-private partnership agreement without holding a tender;

9) develop standard forms of public-private partnership agreements, methodological guidelines on entering them, and a procedure for entering into such agreements and monitoring their implementation;

10) upon resolutions of the supreme executive authority of the state, a municipality or other public-law entity, enter into public-private partnership agreements;

11) monitor public-private partnership projects and exercise control over compliance with terms and conditions of respective public-private partnership agreements; and

12) disclose information about public-private partnership projects in mass media and ensure constant availability of such information on a generally accessible website.

3. In the event that other authorised bodies and organisations act under a public-private partnership agreement on the side of a respective public partner and on behalf of a respective public-law entity, forms of their participation in the agreement, their powers, rights and duties shall be determined by the public-law entity in question.

Article 31. Control in the public-private partnership area

1. The supreme executive authority of the state, a municipality or other public-law entity and/or the executive authority in charge of implementing polices in the public-private partnership area, as well as other authorised bodies within the limits of their jurisdiction (hereinafter referred to as the "supervisory bodies") shall exercise control over preparation and implementation of public-private partnership projects, and monitor whether budgetary funds are used in the framework of public-private partnership projects efficiently and in accordance with their designated purposes.

2. Supervisory bodies shall check whether the terms, conditions of and procedures for holding tenders for the right to enter into public-private partnership agreements are complied with.

3. The parties to a public-private partnership agreement shall inform supervisory bodies of the progress of implementation of a respective public-private partnership project pursuant to a procedure set forth by national legislation or, as appropriate, by regulatory legal acts of local self-government bodies.

Article 32. Development agencies in the public-private partnership area

1. National legislation may provide for measures designed to help the creation and operation of development agencies in the public-private partnership area, i.e., non-profit organisations created with a view to providing informational, advisory, methodological, organisational and other appropriate assistance to authorised authorities, other organisations and individuals in the public-private partnership area, including in the form of pre-trial and out-of-court dispute resolution using means of mediation, arbitration and other means as well as through expert evaluation of public-private partnership projects at the stage of their preparation.

2. It shall be allowed to create national, regional and municipal development agencies in the public-private partnership area whose powers will be limited to a respective territory.

Development agencies in the public-private partnership area may be created by the state, a municipality or other public-law entity or, if provided by national legislation, by private organisations and individuals.

Chapter VII. Final provisions

Article 33. Procedure for giving effect to this law

1. This law shall enter into force as of the date of its official publication, unless otherwise is expressly provided for by this law.

2. This law shall have no retroactive effect and shall apply to relations that arise after its entering into force, unless otherwise is expressly provided for by this law.

As to any relations which arose prior to the entering of this law into force, it shall apply to those rights and duties that arise after its entering into force.

Guidance document 2024

Introduction to direct agreements for public-private partnership projects

1. Overview of direct agreements

1.1 A direct agreement is a contract between the lenders, the project company (private partner) and the procuring authority (public partner) in a public-private partnership (PPP) project. This type of agreement provides the lender with certain protections and remedies against the threat of the project company defaulting or the PPP agreement (PPPA) being terminated, which are not available or sufficiently detailed in either the credit agreement or security documents.

1.2 **Rationale.** The main purpose of a direct agreement in a PPP is to enhance lender security under limited-recourse finance structures, where debt repayment depends on the future revenues to be generated by the project. A direct agreement is designed to forestall a potential termination of the PPPA by the public partner. This is done to ensure the continuity of the project and its revenue generation. If the future revenue stream is lost as a result of the project's termination, at least a portion of the lenders' future debt could also be lost. To avoid this, compensation payments to the lenders will be required by the public partner upon termination. By taking action to prevent the termination of the project, direct agreements help avoid these potential losses and compensation payments. This safeguards the interests of the private partner, the public partner and even the wider public, as the project's completion will provide a public good.

1.3 **Mechanisms.** Where a threat of default or PPPA termination arises, direct agreements are accordingly used to:

- **Grant lenders step-in rights:** This allows them to take over the project company if the private partner defaults on its obligations. The lender can then attempt to fix any defaults (at least for a period of time) and so prevent the termination of the PPPA.
- **Grant lenders substitution rights (novation):** This allows them to replace the project company with a new entity (which will have to meet certain tests agreed with the public partner), to which the PPPA and other project contracts are then novated.
- **Outline consent requirements for collateral assignment:** Notice to, and the consent of the parties, is required to perfect the collateral assignment of contract rights, detailed in the credit agreement. This would grant the lender the right to assign the project agreement and other project contracts to itself or its nominees in the case of termination and/or for the enforcement of security.
- **Reinforce the lenders' rights to information and access:** Under the credit agreement the lenders will have extensive rights to information from the project company, including access to the company's records and project site. The direct agreement can provide the public partners consent to these rights, as well as agreement to provide the lenders with copies of any notices of default or intended termination that it may serve under the PPPA, which would then trigger the direct agreement "step-in" mechanism.
- **Waive or limit the procuring authority's rights of set-off, counterclaim or abatement against the project company:** This protects the project company from certain claims or damages that the procuring authority may have against it. This means the procuring authority cannot reduce or cancel payments to the project company, thus protecting the lenders' investments.

1.4 **Key benefits.** Signing a direct agreement is, therefore, usually one of the main conditions for the provision of limited recourse debt financing for PPP projects. It offers benefits for all parties involved, by:

- **Reducing the risks and costs of project failure:** The direct agreement gives lenders the opportunity to intervene in a distressed project, which means the project can be rescued, preventing project termination.

- **Enhancing the bankability and creditworthiness of the project:** The direct agreement provides lenders with contractual assurances and protections over the project assets and revenues, in addition to their security package.

- **Improving the efficiency and transparency of the project:** The direct agreement facilitates communication and cooperation among the lenders, the project company and the procuring authority.

- **Preserving the public interest and service delivery:** The direct agreement can thus help ensure that the project goes ahead and operates to the required standards.

2. Best practices and recommendations for direct agreements in PPP projects

2.1 The optimal design of a direct agreement depends on the specific features of each PPP project (such as the asset type, scope of services, payment mechanism and legal framework). Generally, however, direct agreements tend to resemble each other, conforming to certain standard terms. Common provisions that should be incorporated into the design of direct agreements include:

- **The definition and scope of the direct agreement:** To be effective, the parties need to be clearly identified and the direct agreement provisions need to be consistent with the key project documents. This includes the project agreement, the project contracts, the loan agreement and the security documents. This calls for careful structuring.

- **Step-in right procedures:** This refers to the conditions and procedures that lenders and the public partner must follow in relation to the exercise of step-in rights. Procedures include the events of default, the notice period, the cure period, the duration and the termination of the step-in right.

- **The terms and conditions for the assignment of the project agreement and other project contracts:** This includes the consent requirements, the novation formalities, the liability transfer and the fees.

- **Any waivers or limitations of the procuring authority's rights of set-off, counterclaim or abatement against the project company** (which need to be specified in the direct agreement).

- **Dispute resolution mechanisms.**

2.2 The negotiation of direct agreements should attempt to achieve balanced and fair outcomes for all parties, while ultimately promoting the viability, bankability and successful implementation of the PPP project. Factors facilitating the negotiation process include:

- **Timetables:** The development of a well-mapped project timetable that allows reasonable flexibility and contingencies in the case of unforeseen events.

- **Stakeholder engagement:** All the affected parties should be involved in the consultation and communication of the proposed PPP project and direct agreement.

- **Expert advice and assistance:** Including transaction advisers, legal counsels and technical consultants with relevant experience and knowledge of PPP projects and direct agreements.

2.3 Effective management of the credit agreement and project contracts can aid the successful implementation and performance of the PPP project, forestalling the need for direct agreement provisions to be evoked. Effective management practices include:

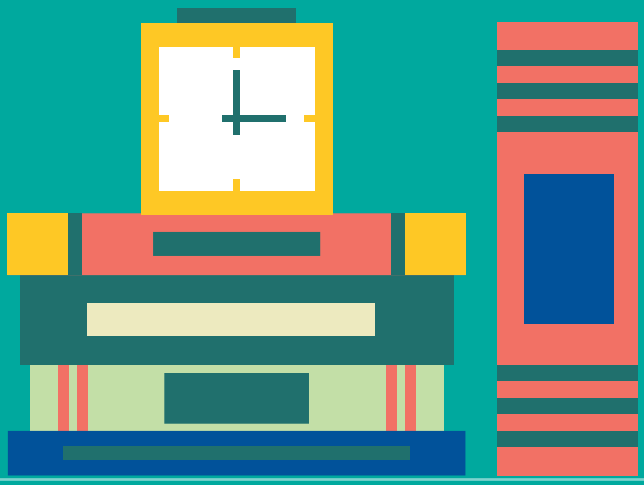
- **A contract management team:** Members should have clear roles and responsibilities and the required skills and resources to carry them out.

- **The monitoring and evaluation of the project progress and performance:** This can be done using key performance indicators, quality standards and reporting systems. This is also important for identifying the threat of project termination or credit default, activating the direct agreement.

- **Dealing with change and uncertainty:** This can be done through the application of agreed procedures and mechanisms for changes, force majeure and termination.

- **Clear dispute resolution mechanisms:** Aimed at seeking amicable solutions.

The following section will provide a model template (which should be tailored to a specific PPP project) of a direct agreement.



Chapter 11.
Model direct agreement template

THIS DIRECT AGREEMENT (the "**Agreement**") is dated [●] and made

BETWEEN:

(1) [●] (the "**Public Authority**");

(2) [●], in its capacity as Agent for the Lenders under the Facilities Agreement (the "**Agent**")[1]

(3) [●] (the "**Project Company**")

the parties referred to in points (1)(3) above are together hereinafter referred to as the "parties".

WHEREAS:

(A)The project company and the public authority have entered into an agreement for the [financing, design and construction] and [the provision of certain services in connection with][2] operation of [●] (the "project" and the "project agreement", accordingly).

(B)The lenders have agreed to make debt facilities available, on the terms set out in the facilities agreements, for the purpose of providing finance for the project.

(C)It is a condition precedent to the debt facilities being made available by the lenders that this agreement is executed by the parties hereto.

(D)The parties agree to set up mutual rights and duties arising out of their relations with the project company based on the project agreement and facilities agreements as appropriate. For this purpose, they enter into this agreement under the following terms and conditions.

IT IS AGREED AS FOLLOWS:

1. Definitions and interpretation

1.1 Definitions

Except as explicitly defined in this agreement, capitalised terms defined in the project agreement shall have the same meanings when used in this agreement. In this agreement:

"**Affiliate**" has the meaning given to it in the project agreement.

"**Appointed Representative**" means a representative that has been notified to public authority pursuant to a step-in notice.

"**Arbitration Procedure**" has the meaning given to it in Clause 28.3.

"**Business Day**" has the meaning given to it in the Project Agreement.

"**Commencement Date**" means the Effective Date of the Project Agreement.

"**Discharge Date**" means the date on which all the obligations of the Project Company under the Facilities Agreements have been irrevocably and fully discharged.

"**Dispute**" has the meaning given to it in Clause 10.5.

"**Effective Date**" has the meaning given to it in the Project Agreement.

"**Enforcement of Pledge**" has the meaning given to it in Clause 4.1.2(A) or 4.1.3(A).

"**Enforcement Transfer**" has the meaning given to it in Clause 4.1.1(A).

"**Equity**" has the meaning given to it in the Project Agreement.

"**Holding Company**" means a controlling entity pursuant to [●][3], as amended.

"**Facilities Agreement**" has the meaning given to it in the Project Agreement.

["**ICC**" means the International Chamber of Commerce.]

"**Insurance Proceeds Account**" has the meaning given to it in the Project Agreement.

"**Law**" has the meaning given to it in the Project Agreement.

"**Lenders**" has the meaning given in the Facilities Agreements.

"**Lender Notice**" has the meaning given to it in Clause 9.2.

"**Loan Default**" means any of the "Events of Default" (as defined under the Facilities Agreements).

[1] Where the financing structure of the Project warrants the difference between the lists of Secured Parties and Lenders Secured Parties will nominate a Security Agent under the Security Documents. The Security Agent will need to be a party to this Agreement. If the Agent is a bank and acts as a Security Agent a wording needs to be added that it acts for itself also. If there is only one lending institution under the Project, the figure of an Agent may be superfluous and can be replaced with this lender.

[2] Insert if other parties will be responsible for the operation mandate in addition to the Project Company and its retained contractors.

[3] Reference usually to the Facilities Agreement or the sponsor support agreement.

"**No Liquid Market Notice**" has the meaning given to it in Clause 8.1.

"**Nominee**" has the meaning given to it in Clause 4.1.1(A).

"**Notice Period**" means:

(a) the period commencing on the date that the Public Authority receives a Lender Notice in accordance with the provisions of Clause 9.2 and ending one hundred and twenty (120) days thereafter unless the Public Authority and the Agent have agreed to extend such period; or

(b) the period commencing on the date the Agent receives a Public Authority Notice in accordance with the provisions of Clause 7.1 and ending 120 days thereafter unless the Public Authority and the Agent have agreed to extend such period,

provided that, in each case:

(i) notwithstanding the above, the Notice Period shall in any event end on any Security Enforcement Date occurring before the end of such period;

(ii) if there is a Dispute which is referred to a dispute resolution procedure in accordance with Clause 28 and is so referred prior to the end of the Notice Period (disregarding this paragraph (B)), the period shall be extended until the date falling twenty (20) days after resolution of such Dispute;

(iii) the Notice Period shall end if and to the extent the Public Authority and the Agent agree on a Rectification Plan prior to the date on which the Notice Period will expire otherwise and the provisions of Clause 11 shall apply in respect of such Rectification Plan;

(iv) the Notice Period shall end on the later of the Agent and the Public Authority agreeing that the underlying circumstances which gave rise to the Notice Period are not capable of remedy or rectification through a Rectification Plan or within one hundred and twenty (120) days after receipt by the Public Authority of a Lender Notice or by the Agent of a Public Authority Notice (as applicable) unless the Public Authority and the Agent have agreed to extend such period;

(v) the Notice Period shall end if the Agent gives notice to the Public Authority, for and on behalf of the Lenders, that the Lenders cannot, or do not wish to, agree a Rectification Plan; and

(vi) the Notice Period shall end if the circumstances set out in Clause 12 apply.

"**Occupation Permit**" has the meaning given to it in the Project Agreement.

"**Occupation Permit Longstop Date**" has the meaning given to it in Project Agreement.

"**Performance Point**" has the meaning given to it in the Project Agreement.

"**Petition**" has the meaning given to it in Clause 10.1.2.

"**Physical Damage Policies**" has the meaning given to it in Project Agreement.

"**Project**" has the meaning given to it in the Project Agreement.

"**Project Agreement**" means the agreement dated [●] and entered into between the Public Authority and the Project Company as relating to the [financing, design and construction and [the provision of certain services in connection with] operation] of the Project, amended, supplemented, replaced or novated from time to time.

"**Project Company Default**" has the meaning given to it in the Project Agreement.

"**Project Document**" has the meaning given to it in the Project Agreement.

"**Project [●]**" has the meaning given to it in the Project Agreement.

"**Proposed Replacement**" has the meaning given to it in Clause 3.1.1

"**Public Authority Notice**" has the meaning given to it in Clause 7.1.

["**Public Procurement Procedure**" means the procedures for the legal and valid award of a non-concession project on the same or substantially similar terms to the Project Agreement, by the Public Authority or another public authority in [specify country of origin of the Public Authority], set out in applicable Law as the same may have been, or may from time to time be, amended or reenacted.]

"**Rectification Period**" means the period commencing on the date a Rectification Plan has been agreed in accordance with Clause 10.2 or settled in accordance with Clause 28 and ending on the earlier of:

(c) the date on which the Rectification Plan is implemented in accordance with its terms; and

(d) the date on which there is a material failure by the Project Company to comply with the Rectification Plan as agreed, in accordance with Clause 10 or settled in accordance with Clause 28,

provided that, in each case:

(i) notwithstanding the above, the Rectification Period shall in any event end on any Security Enforcement Date occurring before the end of such period; and

(ii) the Rectification Period shall end if the Public Authority and the Agent (on the instruction of the [Lenders / Secured Parties]) agree that the Rectification Plan is not capable of being successfully implemented in accordance with its terms.

"**Rectification Plan**" has the meaning given to it in Clause 10.2.

"**Refinancing**" has the meaning given to it in the Project Agreement.

"**Representative**" means:

(e) the Agent, any Lender and / or any of their Affiliates;

(f) an administrative receiver, receiver or receiver and manager of Project Company appointed under the Security Documents;

(g) an administrator of Project Company;

(h) a person directly or indirectly owned or controlled by the Agent and/or any Lender; or

(i) any other person approved by the Public Authority (such approval not to be unreasonably withheld or delayed).

["**Secured Parties**" has the meaning given to it in the Facilities Agreements.][4]

"**Security Documents**" has the meaning given to it in the Facilities Agreements.

"**Security Enforcement Date**" means the date on which:

(j) any action is taken by the Agent to enforce any of the Security Documents in accordance with their terms (other than enforcement of the Security by the Shareholders in favour of the Agent (on behalf of the [Lenders / Secured Parties]) with regard to their shareholding in the Project Company in accordance with Clause 4);

(k) any instructions are given by the required proportion of [Lenders / Secured Parties] in accordance with the Facilities Agreements to enforce the Security Documents (including in part only) to the Agent (other than any instructions to enforce the Security by the Shareholders in favour of the Agent (on behalf of the [Lenders / Secured Parties]) with regard to their shareholding in the Project Company in accordance with Clause 4); or

(l) without prejudice to Clause 3.4, any Petition is presented in respect of the Project Company.

"**Security**" has the meaning given to it in the Facilities Agreements.

"**Shareholders**" has the meaning given to it in the Project Agreement.

"**Shareholder Agreements**" means any shareholders agreement, equity subscription agreement or other agreements entered into by the Shareholders in relation to the Project in connection with (i) the Equity; (ii) the Subordinated Debt; and/or (iii) their arrangements inter se in respect of the Project Company.

"**Statement**" has the meaning given to it in Clause 3.6.3.

"**Step-In Date**" means the date on which the Agent gives Public Authority a Step-In Notice.

"**Step-In Notice**" means the notice given by the Agent to Public Authority pursuant to Clause 13.1 stating that the Agent is exercising the step-in rights under this agreement and identifying the Appointed Representative.

"**Step-In Period**" means the period from the Step-In Date up to and including the earlier of:

(m) the Step-Out Date;

(n) the date of any transfer under Clause 16.1;

(o) the date of any termination for breach under Clause 14.1;

(p) the date of expiry of the Project Agreement.

"**Step-Out Date**" means the date falling 20 Business Days after the date of a Step-Out Notice.

"**Step-Out Notice**" means a notice from the Appointed Representative or the Agent to Public Authority pursuant to Clause 15.1.

"**Subordinated Debt**" has the meaning given to it in the Project Agreement.

"**Subsequent Transfer**" has the meaning given to it in Clause 4.1.1(B).

"**Sub-Contractor**" has the meaning given to it in the Project Agreement.

"**Suitable Substitute Contractor**" means a person or entity duly incorporated and existing under [applicable

[4] Hereinbelow refer to footnote 1 for explanation.

Law] / [the laws of [●]][5] approved by the Public Authority as (such approval not to be unreasonably withheld or delayed):

(q) having the legal capacity, power and authority to become a party to the Shareholder Agreements and/or perform the obligations of a Shareholder under the Shareholder Agreements;

(r) having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial and technical resources) which are sufficient to enable it:

(i) to perform the obligations of a Shareholder under the Shareholder Agreements; and

(ii) to perform or to procure the performance of the obligations of the Project Company under the Project Agreement; and

(s) not being subject to a sanction or embargo of the United States of America or the European Union or any member state of the European Union or whose shares are held in whole or in part, directly or indirectly by any entity that is subject to a sanction or embargo of the United States of America or the European Union or any member state of the European Union.

"**Termination**" means termination of the Project Agreement in accordance with clause [early termination and compensation on termination] of the Project Agreement.

"**Termination Date**" has the meaning given to it in the Project Agreement.

"**Termination Sum**" has the meaning given to it in the Project Agreement.

"**Tribunal**" has the meaning given to it in Clause 28.2.

"**Unrestricted Assets**" has the meaning given in Clause 17.2.

1.2 Interpretation

Save where the contrary is indicated, any reference in this Agreement to:

1.2.1 words importing the singular shall include the plural and vice versa;

1.2.2 any gender includes all other genders;

1.2.3 any person (including, without limitation, a [Lender / Secured Party]) shall be construed so as to include its and any subsequent successors, transferees and assignees in accordance with their respective interests;

1.2.4 this Agreement or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document as the same may have been, or may from time to time be, amended, varied, novated, replaced or supplemented;

1.2.5 the Law includes references to the respective Law as amended or superseded;

1.2.6 time of day shall be a reference to [applicable time] time

1.2.7 the words "herein", "hereto" and "hereunder" refer to this agreement as a whole and not to the particular clause in which such word may be used

1.2.8 "party" means a party to this agreement and references to "parties" shall be construed accordingly

1.2.9 all monetary amounts are expressed in [applicable currency]

1.2.10 the word "includes" or "including" is to be construed without limitation

1.2.11 the obligations of any party under this agreement are to be performed at that party's own cost and expense;

1.2.12 a "Clause" and a "Schedule" shall, respectively, be construed as a reference to a clause of or schedule to this Agreement;

1.2.13 the "winding up", "dissolution", "administration", "insolvency" or "reorganisation" of a company or corporation and references to the "liquidator", "assignee", "administrator", "receiver", "administrative receiver", "manager" or "trustee" of a company or corporation shall be construed so as to include any equivalent or analogous proceedings or, as the case may be, insolvency representatives or officers under the law of the jurisdiction in which such company or corporation is incorporated or constituted or any jurisdiction in which such company or corporation or, as the case may be, insolvency representative or officer carries on business including without limitation, the seeking of liquidation, winding up, reorganisation, dissolution, administration, arrangement, adjustment, protection or relief of debtors.

[5] A general approach would be not to restrict the law of incorporation of the Suitable Substitute Contractor, but in some instances, primarily revolving around the nature of the Project, the public side may be willing to impose a certain jurisdiction of incorporation.

1.3 Headings

Headings are for ease of reference only and shall not affect the construction or interpretation of this Agreement.

2. Effectiveness of the provisions of this agreement

2.1 Subject to Clause 2.2, this Agreement and the rights and obligations of the Parties thereunder shall come into effect on the date of this Agreement.

2.2 The Parties agree that the rights and obligations of each respective party set out in Clauses 3 to 12 (inclusive) and Clause 22 (No Set Off) shall take effect from (and not before) the Commencement Date.

3. Undertakings

3.1 The Parties agree that:

3.1.1 during a Notice Period the prior written approval of the Public Authority to any replacement Sub-Contractor or replacement Independent Engineer (a "**Proposed Replacement**") to the extent required in accordance with the Project Agreement shall still be required;

3.1.2 in respect of any Proposed Replacement, the Agent will, or will cause the Project Company to, provide the Public Authority with:

(A) certified copies of the Proposed Replacement's most recent financial statements (and if available such financial statements for the three preceding financial years);

(B) a certified copy of the Proposed Replacement's constitutional documents;

(C) details of the Proposed Replacement's work history and services performed;

(D) a copy of the proposed agreement with the Proposed Replacement prior to its execution.

3.1.3 all insurance proceeds received under the Physical Damage Policies established in connection with the Project shall:

(A) be paid to the Insurance Proceeds Account;

(B) be applied to repair and reinstate the Project [●] in accordance with the Project Agreement;

3.1.4 this Agreement shall not affect any obligation of the Project Company under the Project Agreement to obtain future approval from the Public Authority regarding amendments to the existing Facilities Agreements or to any other agreement in relation to any future Refinancing.

3.2 The Public Authority shall, notwithstanding any terms of the Project Agreement:

3.2.1 following the receipt of written notice from the Agent stating that a Loan Default has occurred (such notice being conclusive evidence to the Public Authority only of the matters stated therein) and until further notice from the Agent, make any further payment of any monies due to the Project Company under the Project Agreement to the Agent to an account designated for such purposes by the Agent. Project Company acknowledges and consents to the obligations of Public Authority under this Clause;

3.2.2 following termination of the Project Agreement and prior to the Discharge Date, pay any Termination Sum or instalment of any Termination Sum payable by the Public Authority pursuant to the Project Agreement to the Agent to any account designated for such purposes by the Agent;

3.2.3 give notice (reasonably in advance of, or at the same time, as any notice or other communication is issued to the Project Company) to the Agent of any of the following events:

(A) any notice or other communication issued to the Project Company in accordance with the Project Agreement;

(B) any proposed step-in[6] [or other action[7] pursuant to clause [the Public Authority's intervention right] of the Project Agreement], and the Public Authority shall provide to the Agent, together with such notice, (i) a detailed description of the reasons for the taking of such action and (ii) a detailed explanation for the rejection of any proposed remedial plan;

(C) any proposed step-in into any agreements with the Sub-Contractors;

(D) any proposed adjustment of the fixed rent under any of the Lease Agreements.

[6] Reference is to the government step-in event under the Project Agreement.

[7] Such actions may include the right of the Public Authority to step in to reduce the impact of an emergency which the Project Company is unable to handle, or in case the Project Company stops the operation of the object and does not cooperate to resume the operation, if the relevant regulation is provided by the Project Agreement.

3.3 The Project Company agrees that any payment made in accordance with Clause 3.2 shall constitute a complete discharge of the Public Authority's payment obligations to the Project Company to the extent of the amount actually credited to the account designated by the Agent in accordance with Clause 3.2.

3.4 The Public Authority shall not prior to the Discharge Date (or if earlier, the date on which the Agent has given its written consent to such exercise following a request by the Public Authority or otherwise) present a Petition.

3.5 The Public Authority agrees that in case of the insolvency of the Project Company or in the case of dissolution of the Project Company by liquidation or any analogous procedure the receivables and rights of the Public Authority against the Project Company (in part or in whole) in relation to the Project shall be satisfied (by way of enforcement of claims under the Project Agreement or otherwise) only after satisfaction of the receivables and rights of the Agent (including receivables and rights arising from its position as joint and several creditor with the [Lenders / Secured Parties]). Any amounts received by the Public Authority in violation of this Clause shall be immediately remitted to the account designed by the Agent.

3.6 The Public Authority shall:

3.6.1 following receipt of a written notice from the Agent, terminate the Project Agreement in accordance with the procedures set out in clause [early termination and compensation on termination] of the Project Agreement if:

(A) any of the Project Company Events of Default set out in clause [Project Company default] of the Project Agreement occurs;

(B) the Agent has served notice on the Project Company under the Facilities Agreement requiring repayment of all or part of the debt under the Facilities Agreement following a Loan Default or it has not been able to do so because the law did not permit service of such notice

3.6.2 and such Project Company Event of Default or Loan Default is, or the consequences of such Project Company Event of Default or Loan Default are, continuing for a period of not less than ninety (90) days from the date of the occurrence of such Project Company Event of Default or Loan Default, as applicable;

3.6.3 and within 10 days of:

(A) the receipt of a Step-in Notice served in accordance with this Agreement;

(B) the transfer referred to in clause 16.1 becoming effective; or

(C) the receipt of a request from the Agent,

provide the Agent with a statement of all amounts due and payable by the Project Company to the Public Authority under the Project Agreement and each relevant Project Document as of the date of such statement and a description (in reasonable detail) of the nature of all outstanding or unperformed non-monetary obligations (if any) of the Project Company under the Project Agreement and each relevant Project Document (each, a **"Statement"**).

4. Transfer of shares during enforcement

4.1 Without prejudice to any other rights or remedies of the [Lenders / Secured Parties] under the Security Documents:

4.1.1 if the Security Documents establish a security transfer of the shares in the Project Company:

(A) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice, the [Lenders / Secured Parties] may (where permissible in accordance with the Law and the Security Documents) enforce security by transferring shares in the Project Company from the Shareholders to the Agent appointed under the Facilities Agreements or a nominee company (a **"Nominee"**) wholly owned and controlled by the [Lenders / Secured Parties] which satisfies the definition of a Suitable Substitute Contractor (an **"Enforcement Transfer"**);

(B) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice and transfer under Clause 4.1.1(A) above, the Agent or the Nominee may (where permissible in accordance with the Law and the Security Documents) only transfer shares in the Project Company acquired by it pursuant to Clause 4.1.1(A) (a **"Subsequent Transfer"**) to a person satisfying the definition of a Suitable Substitute Contractor;

4.1.2 if the Security Documents establish a pledge over the shares or any other legal instrument with a similar effect in the Project Company:

(A) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice, the [Lenders / Secured Parties] may (where permissible in accordance with the Law and the Security Documents) enforce security by transferring shares in the Project Company from the Shareholders to a person satisfying the definition of a Suitable Substitute Contractor (**"Enforcement of Pledge"**);

(B) the [Lenders / Secured Parties] and the Project Company shall ensure that this condition (to the extent permissible in accordance with the Law) permitting transfer will be contained in the relevant Security Document provided always that nothing contained in the relevant Security Document shall permit transfer of the shares in the Project Company to a person who is not a Suitable Substitute Contractor.

4.1.3 if the Security Documents establish a pledge over the enterprise of the Project Company or a significant part of such enterprise:

(A) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice, the [Lenders / Secured Parties] may (where permissible in accordance with the Law and the Security Documents) enforce security by transferring such enterprise or significant part of it to a person satisfying the definition of a Suitable Substitute Contractor ("Enforcement of Pledge");

(B) the [Lenders / Secured Parties] and the Project Company shall ensure that this condition (to the extent permissible in accordance with the Law) permitting transfer will be contained in the relevant Security Document provided always that nothing contained in the relevant Security Document shall permit transfer of such enterprise or significant part of it to a person who is not a Suitable Substitute Contractor.

4.2 In respect of any proposed Enforcement Transfer where this is to a Nominee other than the Agent, or any proposed Subsequent Transfer or Enforcement of Pledge, the Agent will provide the Public Authority with such information as may be reasonably necessary to decide whether the proposed transferee is a Suitable Substitute Contractor including:

4.2.1 certified copies of the proposed transferee's most recent financial statements (and, if available, its financial statements for the three preceding financial years) or in the case of a special purpose company its opening balance sheet and the most recent financial statements of its Holding Company (and, if available, its Holding Company's financial statements for the three preceding financial years);

4.2.2 a certified copy of the proposed transferee's constitutional documents;

4.2.3 documents, in form and substance satisfactory to the Public Authority, evidencing that the proposed transferee would:

(A) meet the legal, financial, economic and technical criteria; and

(B) not be precluded from participating in the Public Procurement Procedure for any reason,

if the Project were to be re tendered in accordance with the Public Procurement Procedure;

4.2.4 details of the proposed transferee's work history and services performed or, in the case of a special purpose company, details of what financial resources and technical expertise are available to it with details of the work history and services performed by the organisation and/or individuals providing such technical expertise.

4.3 If, within twenty (20) Business Days after the later of: (i) the date of service of notice of a proposed Enforcement Transfer, Subsequent Transfer or Enforcement of Pledge pursuant to Clause 4.1 (as the case may be), or (ii) the date of receipt of the information required pursuant to Clause 4.2, the Public Authority fails to respond to such notice, the approval of the Public Authority shall be deemed to have been given.

5. Consent to security

5.1 The Public Authority acknowledges notice of, and consents to the Security granted over the Project Company's rights under this Agreement, the Project Agreement [and the Independent Engineer Agreement][8] in favour of the [Lenders / Secured Parties] and/or the Agent. The Public Authority confirms that, to the best of its knowledge and as at the date of this Agreement, it has not received any notice of any other Security granted over the Project Company's rights under this Agreement, the Project Agreement [or the Independent Engineer Agreement].

5.2 The Project Company and the Public Authority shall promptly cooperate in case their cooperation will be necessary for the repeated creation, in case the then existing Security might be considered invalid, ineffective or non-existent, of the Security in the scope approved by the Public Authority pursuant to Clause 5.1 or otherwise subsequently approved by the Public Authority, in favour of the [Lenders / Secured Parties] and/or the Agent.

5.3 The creation or maintenance of the security created in favour of the [Lenders / Secured Parties] and/or the Agent over the assets of the Project Company under the Security Documents shall not impose any additional obligations on the Public Authority not otherwise set out in the Project Agreement or this Agreement.

[8] Remove if not applicable.

6. Project company default

6.1 The Public Authority shall notify the Agent in writing as soon as reasonably practicable after becoming aware of the occurrence of a Project Company Default.

7. Public authority notice

7.1 If at any time the Public Authority intends to exercise any rights to:

7.1.1 terminate in accordance with clause [Project Company default] of the Project Agreement; or

7.1.2 without prejudice to Clause 3.4, present a Petition,

it shall give prior written notice of its intention to do so to the Agent (a "**Public Authority Notice**").

7.2 The Public Authority shall specify in the Public Authority Notice:

7.2.1 the proposed date of Termination;

7.2.2 the nature and circumstances of the Project Company Default, in reasonable detail, with reference to the relevant provisions and clauses of the Project Agreement,

and not later than the date which falls 20 Business Days after the delivery of the Public Authority Notice, the Public Authority shall also provide details of:

7.2.3 all amounts due and payable to the Public Authority by the Project Company under the Project Agreement, and any other liabilities or obligations of the Project Company, in each case of which the Public Authority is aware (having made reasonable enquiry) on or before the date of issue of such Public Authority Notice and which remain unpaid at such date;

7.2.4 to the extent the Public Authority is aware (having made reasonable enquiry), the nature and the amount of any monetary claim, asserted by the Public Authority against the Project Company under the Project Agreement which arises from or in connection with the Project Company Default in respect of which such Public Authority Notice was served; and

7.2.5 to the extent the Public Authority is aware (having made reasonable enquiry), the amount of any payment obligation of the Project Company to the Public Authority the Public Authority reasonably foresees will fall due during the applicable Notice Period (including any Rectification Period).

7.3 At the request of the Agent the Public Authority shall, and at its own discretion the Public Authority may, update or amend the information provided under Clauses 7.2.3, 7.2.4 and 7.2.5.

7.4 If the Public Authority Notice does not contain the information required by Clauses 7.2.3, 7.2.4 and 7.2.5 the applicable Notice Period shall be extended by the number of days equal to the period between the date of the Public Authority Notice and the date on which all such required information is provided to the Agent.

8. [9]No liquid market

8.1 At any time during the Notice Period the Agent may issue a written notice (the "**No Liquid Market Notice**") to the Public Authority setting out the reasons why the [Lenders / Secured Parties] do not believe that a Liquid Market exists.

8.2 On or before the date falling fourteen (14) days after the date on which a No Liquid Market Notice is received by the Public Authority, the Public Authority shall notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Public Authority believes that a Liquid Market does exist, such notice shall set out the reasons for the Public Authority's belief. If the parties do not agree whether or not a Liquid Market exists, then either party may refer the dispute to be determined in accordance with Clause 28.

8.3 If the parties agree or it is determined in accordance with Clause 28 that no Liquid Market exists, then there shall be deemed to be no Liquid Market for the purpose of the Project Agreement and the provisions of clause [procedure for determining the estimated market value of the Project Agreement][10] of the Project Agreement shall apply.

8.4 [If any dispute relating to this Clause 8 has been submitted for determination in accordance with Clause 28:

8.4.1 the Public Authority shall not be entitled to retender the provision of the Project as long as it has not been determined in accordance with Clause 28 that the Liquid Market exists; and

8.4.2 the period of set out in clause [period within which the Public Authority shall notify the Project

[9] Remove this section if under the Project Agreement the termination payment does not factor the open market value of the Project into the calculation.

[10] This applies in case the Public Authority is not entitled to or elects not to retender the Project following the Project Agreement terminating through the Project Company's default (if retendering is envisaged in the Project Agreement).

Company of its intention to retender the Project after the termination] of the Project Agreement shall be extended until the date falling [20 business days] after the determination under Clause 28.]

9. Lender undertaking and lender notice

9.1 [The Agent shall notify the Public Authority in writing as soon as reasonably practicable after becoming aware of the occurrence of a Project Company Default or a Loan Default (the **"Lender Notice"**).][11]

9.2 [The Agent may give a written notice to the Public Authority at any time after a Lender becomes entitled after a Loan Default has occurred to exercise its remedies under a Facilities Agreement (whether or not a Public Authority Notice has been served).][12]

9.3 The Agent shall specify in its Lender Notice reasonable details of the circumstances and nature of any Loan Default.

9.4 The Agent shall give a written notice to the Public Authority of the occurrence of any Security Enforcement Date contemporaneously with the action, instruction or Petition giving rise to such Security Enforcement Date and of any event arising or action taken pursuant to Clause 4.

9.5 Where the Agent serves a Lender Notice, the Public Authority shall provide to the Agent the same information as set out in Clauses 7.2.3 to 7.2.5 above.

10. Notice period

10.1 The Public Authority undertakes not to:

10.1.1 terminate the Project Agreement, pursuant to clause [the Project Company's default] of the Project Agreement; or

10.1.2 present any petition for the administration, dissolution, any insolvency proceedings, restructuring or winding up or any analogous procedure of the Project Company (a "Petition"),

prior to the expiry of the Notice Period, provided that such undertaking shall not prevent the Public Authority from taking actions which are permitted under Clause 12 of this Agreement.

10.2 During any Notice Period the Public Authority and the Agent shall cooperate to establish jointly an acceptable rectification plan setting out the proposed methodology to remedy the circumstances giving rise to, and described in, the Public Authority Notice or Lender Notice (as the case may be) (the **"Rectification Plan"**). The Agent shall submit a draft rectification plan to the Public Authority within sixty (60) Business Days of commencement of a Notice Period. Such draft Rectification Plan shall set out in detail the proposed timetable to implement the plan and must include:

10.2.1 all necessary actions, measures and provisions that must be taken to secure the ongoing and continuous construction and/or reconstruction works and the future continuation of the Project or the ongoing and continuous current or future operation and maintenance thereof, as the case may be, at all times in accordance with the provisions of the Project Agreement;

10.2.2 an obligation to make payment, no later than the Business Day falling on or immediately following the last day of the Notice Period, of all amounts:

(A) specified in the Public Authority Notice referred to in Clause 7.2 as may be updated in accordance with Clause 7.3;

(B) falling due to be paid during the Notice Period (including any Rectification Period);

10.2.3 any actions that must be implemented to remove the causes or to limit the consequences of the event that led to the Public Authority Notice or Lender Notice (as the case may be), along with an estimate of technical aspects of the work to be undertaken;

10.2.4 a summary of the estimated financing required to implement the Rectification Plan (and the manner in which this shall be provided) and to comply with the current obligations on the basis of the Project Agreement;

10.2.5 details of all claimable amounts the Public Authority owes the Project Company and all other unfulfilled obligations on the part of the Public Authority on the basis of the Project Agreement;

10.2.6 all other matters that the Public Authority and the Agent shall reasonably agree to be included in the Rectification Plan; and

10.2.7 the duration of the Rectification Period.

10.3 In the event that a Loan Default or a Project Company Default occurs prior to issue of the Occupation Permit, the Occupation Permit Longstop

[11] These undertakings are more commonplace in authority direct agreements entered into in relation to projects in developing countries where termination payments often cover not only 100 per cent of gross senior debt but may also include equity. In these scenarios authorities feel the need for a greater level of control over the Project Company performance.

[12] Remove if the Agent is required to serve such notice pursuant to the previous paragraph.

Date may be postponed and revised in accordance with and pursuant to the dates set out in the agreed Rectification Plan, provided that the revised dates shall not in any circumstances be more than twelve (12) months later than the previously applicable dates.

10.4 In the event that a Loan Default or a Project Company Default occurs on or after the date of issue of the Occupation Permit, the Rectification Period shall not be longer than six (6) months unless the Agent can demonstrate that a period of six (6) months is unreasonably short for the completion of the Rectification Plan.

10.5 If the Public Authority and the Agent are unable to agree an acceptable Rectification Plan, either party may refer any dispute arising in connection with establishing a Rectification Plan (a "**Dispute**") to a dispute resolution procedure in accordance with Clause 28.

10.6 For the purposes of Clause 10.2 the Public Authority agrees that it shall not withhold its consent to any replacement Sub-Contractor proposed in a draft Rectification Plan [unless the proposed replacement Sub-Contractor or the proposed replacement Sub-Contract do not satisfy the requirements of the Project Agreement][13].

10.7 Within ten (10) Business Days of receiving the draft referred to in Clause 10.3, the Public Authority shall enter into consultations with the Agent on:

10.7.1 the draft Rectification Plan;

10.7.2 all other matters which the Public Authority or the Agent believe still have to be included in the Rectification Plan;

10.7.3 where relevant, the appointment of experts to assist them in preparing the Rectification Plan.

These consultations must be completed within twenty-five (25) Business Days.

10.8 The Project Company shall, when requested, cooperate fully in preparing and completing the Rectification Plan.

10.9 The Agent shall submit the proposed final Rectification Plan for approval to the Public Authority within twenty (20) Business Days after the conclusion of the consultations referred to in Clause 10.7.

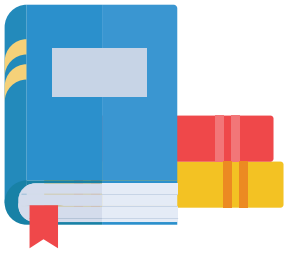
10.10 The Public Authority shall inform the Agent whether it has approved the Rectification Plan within twenty (20) Business Days of receipt of the Rectification Plan. The Public Authority may only withhold approval if the Rectification Plan is factually inaccurate or the Public Authority has reasonable grounds to believe the requirements of Clause 10.6 above have not been satisfied so as to enable the works referred to in Clause 10.2.3 to be completed and to otherwise fulfil the Project Company's obligations pursuant to the Project Agreement. The Rectification Plan is, once approved, deemed to have been adopted on such approval date.

10.11 If the Public Authority does not inform the Agent whether it has approved the Rectification Plan within the period stipulated in Clause 10.10 above then the Public Authority is deemed to have approved the Rectification Plan.

10.12 Approval by the Public Authority of the Rectification Plan:

10.12.1 does not constitute an acceptance of any additional liability or obligation on the part of the Public Authority in respect of the Project;

10.12.2 does not affect the obligations of the Project Company on the basis of the Project Agreement and/or this Agreement, unless the Rectification Plan expressly deviates from the Project Agreement.



[13] Remove text in square brackets if the Project Agreement does not establish these requirements.

11. Rectification period and suspension of performance points

11.1 On and from the date on which a Rectification Plan is agreed pursuant to Clause 10.10, deemed to be approved pursuant to Clause 10.11 or settled pursuant to Clause 28 and throughout the Rectification Period, the Project Company shall continue with the performance of its obligations under the Project Agreement and shall comply with the Rectification Plan.

11.2 The Public Authority undertakes not to:

11.2.1 terminate the Project Agreement pursuant to clause [the Project Company's default] of the Project Agreement; or

11.2.2 present any Petition,

prior to the expiry of the Rectification Period, provided that such undertaking shall not prevent the Public Authority from taking actions which are permitted under Clause 12.

11.3 During the period after the Rectification Plan has been agreed or determined and during which a Rectification Plan is being complied with and following successful implementation of a Rectification Plan, Performance Points arising pursuant to schedules [●] (Public Authority's Services Requirements and Payment Mechanism) to the Project Agreement prior to the commencement of the Notice Period shall not be taken into account during the Notice Period or Rectification Period but shall be taken into account after the end of the Notice Period or Rectification Period.

12. Preservation and revival of remedies

12.1 The Public Authority may terminate the Project Agreement if, in respect of the Project Company Default was the reason for the issuance of a Public Authority Notice, (i) on the termination date specified in the Public Authority Notice the grounds for that notice are continuing and have not been remedied or waived, and (ii) no Rectification Plan has been agreed between the Public Authority and the Agent pursuant to Clause 10.10, deemed to be approved pursuant to Clause 10.11 or settled pursuant to Clause 28.

12.2 The Public Authority may terminate, exercise its rights under the Project Agreement and/or present a Petition, at any time:

12.2.1 on the basis of any Project Company Default arising during a Notice Period or Rectification Period that

(A) is not the reason for initiating the Notice Period or Rectification Period (as the case may be), or

(B) is not set out in the Rectification Plan or violates the Rectification Plan (as the case may be),

in accordance with the terms of the Project Agreement;

12.2.2 after the end of the Rectification Period, if at that time the Rectification Plan has not been implemented in accordance with its terms.

12.3 Notwithstanding Clauses 10.1 and 11.2 (but without prejudice to Clause 3.4), the Public Authority may terminate, or exercise any of its rights under clause [early termination] of the Project Agreement and/or present a Petition, at any time if:

12.3.1 any amount referred to in Clause 7.2 or 7.3 above has not been paid to the Public Authority on or before the Business Day falling on or immediately following the last day of the Notice Period or any Rectification Period (as applicable); or

12.3.2 any amount referred to in Clause 7.2.5 has not been paid on or before the Business Day falling on or immediately following the last day of the Notice Period or any Rectification Period (as applicable);

12.3.3 amounts of which the Public Authority was not aware (having made reasonable enquiry) at the time of the Public Authority Notice or which were not known at the time of submission of the Rectification Plan, subsequently become payable and are not discharged on or before the later of:

(A) the date falling 20 Business Days after the date on which the liability for these amounts is notified to the Agent;

(B) the date falling 20 Business Days after the date on which the liability for these amounts falls due;

(C) the last day of the Notice Period; or

12.3.4 grounds arise during the Notice Period or Rectification Period in accordance with the Project Agreement unless such grounds are a direct and reasonably unavoidable effect of the Project Company Default serving the reason for the issuance of a Public Authority Notice or are waived pursuant to the Rectification Plan.

12.4 The Public Authority shall not terminate the Project Agreement during the Notice Period or any Rectification Period on grounds:

12.4.1 that the Agent has served a Lender Notice or enforced any Security Document, including any action taken under Clause 4; or

12.4.2 that arose prior to the commencement of the Notice Period of which the Public Authority was aware (having made reasonable enquiry) and whether or not continuing, unless:

(A) the grounds arose prior to the date of issue of the Occupation Permit, and such issue does not occur on or before the Occupation Permit Longstop Date, as the same may be revised in accordance with Clause 10.4;

(B) the grounds arose after the date of issue of the Occupation Permit, and neither the Agent nor the Project Company is using all reasonable endeavours (including implementation of any Rectification Plan) to remedy any breach of the Project Agreement that:

(i) arose prior to the Notice Period;

(ii) which is continuing (and capable of remedy);

(iii) which would have entitled the Public Authority to terminate the Project Agreement; or

(C) the grounds (whenever they first arose) did not give rise to any right to terminate until after the commencement of the Notice Period; or

12.4.3 arising solely in relation to the Project Company.

13. Representative

13.1 Subject to Clause 13.2 and without prejudice to the Agent's rights under the Security Documents, the Agent may give the Public Authority a Step-In Notice at any time:

13.1.1 during which a Project Company Event of Default is subsisting (whether or not a Termination Notice has been served); or

13.1.2 during the Notice Period.

13.2 The Agent shall give Public Authority not less than five business days' prior notice of:

13.2.1 its intention to issue a Step-In Notice;

13.2.2 the identity of the proposed Appointed Representative.

13.3 On the issue of the Step-In Notice, the Appointed Representative shall assume jointly with Project Company the rights of Project Company under the Project Agreement and thereafter, until the end of the Step-In Period Public Authority shall deal with the Appointed Representative and not Project Company.

13.4 The Public Authority shall grant to any Appointed Representative or Suitable Substitute Contractor as the case may be (and, as applicable, the grant of) rights equivalent to those granted to Project Company under clause [the Lease of Project assets] of the Project Agreement.

14. Step-in period

14.1 Notwithstanding Clause 7, the Public Authority may terminate the Project Agreement if:

14.1.1 any amount referred to in Clause 7.2.3 above has not been paid to Public Authority on or before the Step-In Date; or

14.1.2 any amount referred to in Clause 7.2.5 has not been paid on or before the last day of the Notice Period;

14.1.3 amounts of which Public Authority was not aware (having made proper enquiry) at the time of the Public Authority Notice, subsequently become payable to the Public Authority and are not discharged on or before the date falling 20 Business Days after the date on which the liability of Project Company for these amounts is notified to the Agent or if later the Step-In Date; or

14.1.4 grounds arise after the Step-In Date in accordance with the terms of the Project Agreement provided that Performance Points that arose pursuant to schedules [●] (Public Authority's Services Requirements and Payment Mechanism) to the Project Agreement prior to the Step-In Date shall not be taken into account during the Step-In Period but such Performance Points (to the extent applicable under the terms of the Project Agreement) shall be taken into account after the Step-Out Date.

14.2 The Public Authority shall not terminate the Project Agreement during the Step-In Period on grounds:

14.2.1 that the Agent has served a Step-In Notice or enforced any Security Document; or

14.2.2 arising prior to the Step-In Date of which Public Authority was aware (having made proper enquiry) and whether or not continuing at the Step-In Date unless:

(A) the grounds arose prior to the [Project Operation Date], and the [Project Operation Date] does not occur on or before the date 180 Days after the date on which Public Authority would have been entitled to terminate the Project Agreement for non-completion of the Works under clause [Project Company default] of the Project Agreement; or

(B) the grounds arose after the [Project Operation Date], and neither the Appointed Representative nor Project Company is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Project

Agreement that:

(1) arose prior to the Step-In Date;

(2) which is continuing (and capable of remedy);

(3) which would have entitled Public Authority to terminate the Project Agreement; or

(C) the grounds (whenever they first arose) did not give rise to any right to terminate until after the Step-In Notice; or

14.2.3 arising solely in relation to the Project Company.

15. Step-out

15.1 The Agent or the Appointed Representative may at any time during the Step-In Period deliver to Public Authority a Step-Out Notice which shall specify the Step-Out Date.

15.2 On expiry of the Step-In Period:

15.2.1 the Appointed Representative will be released from all of its obligations and liabilities to Public Authority under the Project Agreement arising prior to the end of the Step-In Period and rights of the Appointed Representative against Public Authority will be cancelled; and

15.2.2 the Public Authority shall no longer deal with the Appointed Representative and shall deal with Project Company in connection with the Project Agreement.

15.3 The Project Company shall continue to be bound by the terms of the Project Agreement, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the Agent or Appointed Representative or the Lenders and/or any provision of this Agreement.

16. Novation

16.1 Subject to Clause 16.2, at any time:

16.1.1 after a Project Company Event of Default has occurred; or

16.1.2 during the Step-In Period,

the Agent may, subject to Clause 16.2, on not less than 20 Business Days' prior notice to Public Authority and any Appointed Representative, procure the transfer of Project Company's rights and liabilities under the Project Agreement to a Suitable Substitute Contractor in accordance with the provisions of Clause

16.2 Public Authority shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Company's rights and liabilities under the Project Agreement is a Suitable Substitute Contractor, on or before the date falling 20 Business Days after the date of receipt from the Agent of all information reasonably required by Public Authority to decide whether the proposed transferee is a Suitable Substitute Contractor.

16.3 Public Authority shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor. In the absence of a notification from the Public Authority within the period of time specified in Clause 16.2 a person to whom the Agent proposes to transfer Project Company's rights and liabilities under the Project Agreement shall be deemed a Suitable Substitute Contractor.

16.4 Upon the transfer referred to in Clause 16.1 becoming effective:

16.4.1 Project Company and Public Authority will be released from their obligations under the Project Agreement to each other (the discharged obligations);

16.4.2 the Suitable Substitute Contractor and Public Authority will assume obligations towards each other which differ from the discharged obligations only in so far as they are owed to or assumed by the Suitable Substitute Contractor instead of Project Company;

16.4.3 the rights of Project Company against Public Authority under the Project Agreement and vice versa (the discharged rights) will be cancelled;

16.4.4 the Suitable Substitute Contractor and Public Authority will acquire rights against each other which differ from the discharged rights only in so far as they are exercisable by or against the Suitable Substitute Contractor instead of Project Company;

16.4.5 any then subsisting ground for termination of the Project Agreement by Public Authority shall be deemed to have no effect and any subsisting Public Authority Notice shall be automatically revoked;

16.4.6 the Public Authority shall enter into a direct agreement with the Suitable Substitute Contractor and a representative of Lenders lending to the Suitable Substitute Contractor on substantially the same terms as this agreement;

16.4.7 any Performance Points that arose pursuant to schedules [●] (Public Authority's Services Requirements and Payment Mechanism) to the Project Agreement prior to that time shall not be taken into account in determining whether a Project Company Event of Default has occurred.

16.5 Public Authority shall act reasonably in relation to consenting to any request by the Agent to effect a share transfer rather than a novation under this Clause 16, and in such circumstances, the provisions and process set out in this Agreement shall be complied with to the extent possible.

17. Miscellaneous

17.1 Subject to the effectiveness provisions set out in Clause 2, this Agreement shall commence on the date hereof and shall continue in full force and effect until the Discharge Date.

17.2 On the Termination Date, the Agent acting on behalf of the [Lenders / Secured Parties] agrees that, notwithstanding the terms of the Project Agreement and Security Documents, the Public Authority may exercise its rights to have transferred to it or its nominee (or to have any security assigned to it or its nominee in respect of) any assets in the possession of the Project Company (or other parties specified in the Project Agreement) that may be required by the Public Authority, its nominee, or a replacement successor Project Company for the delivery of the Project after termination of the Project Agreement (the **"Unrestricted Assets"**). [On or following the Termination Date, the Agent will not exercise or seek to exercise any enforcement rights, and shall, on or before the date any Unrestricted Assets are transferred to the Public Authority or its nominee, as the case may be, release its security over them.]

17.3 [On the Expiry Date, the Agent, acting on behalf the [Lenders / Secured Parties] shall release or assign to the Public Authority or its nominee any security granted in its favour over any Unrestricted Assets which have not previously been released, assigned or transferred to the Public Authority or its nominee, as the case may be.][14]

17.4 The Project Company is a party to this Agreement and acknowledges and consents to the arrangements set out herein and agrees to observe the provisions of this Agreement at all times and not do or omit to do anything that may prevent any other party from, or prejudice any other party in, enforcing its rights under this Agreement. The Project Company acknowledges that, for the avoidance of doubt, the conclusion of this Agreement shall not affect its obligations of due and proper performance of the Project Agreement.

17.5 All costs and expenses arising in connection with the preparation, preservation or enforcement of this Agreement shall be borne by the Project Company.

17.6 Notwithstanding clause [the prevalence of the Project Agreement over other project documents, if applicable] of the Project Agreement, if there is any conflict or inconsistency between the provisions of this Agreement and the provisions of the Project Agreement, the provisions of this Agreement shall prevail.

17.7 The Public Authority hereby acknowledges that it has received copies of the Facilities Agreements and Security Documents and is aware of their terms, as well as (i) the structure of the Project accounts and (ii) the insurance coverage, in each case of (i) and (ii) required pursuant to clauses [clauses relating to Accounts and Insurance] of the Facilities Agreement. The Project Company shall provide the Public Authority with copies of any additional agreements to the Facilities Agreements entered into between the Project Company and the Lenders.

18. Representations and warranties

18.1 The Public Authority represents and warrants to the Project Company and the Agent (for the benefit of the [Lenders / Secured Parties]) that:

18.1.1 it has the power to enter into and perform, and has taken all action necessary to authorise the entry into, performance and delivery of this Agreement, the Project Agreement and any relevant Project Document;

18.1.2 each of this Agreement, the Project Agreement and any relevant Project Document is its legal and binding obligation (subject to applicable bankruptcy laws), and does not conflict with any law or agreement to which it is a party and that it has obtained all consents and authorisations required to be obtained by it in connection with the execution and delivery of this Agreement, the Project Agreement and each relevant Project Document and the performance by it of its obligations thereunder and such consents and authorisations are in full force and effect, are final and not subject to appeal and/or renewal and are held in its name;

[14] In most cases Lenders prefer to keep the security until the termination payment. At balance, the parties may agree to have security released and termination payment procured on the same date.

18.1.3 the Project Agreement constitutes sufficient legal basis for the Public Authority to make the budgetary funds allocations in each respective [annual] budget law in connection with the performance of its obligations under the Project Agreement and this Agreement;

18.1.4 in any proceedings (or measures taken in connection with the enforcement of rights) taken in [specify country of origin of the Public Authority] in relation to this Agreement, it shall not be entitled to claim for itself or any of its assets immunity from suit, execution, attachment or other legal process (other than that set out by the Law);

18.1.5 its execution of this Agreement constitutes, and its exercise of its rights and performance of its obligations hereunder will constitute, private and commercial acts done and performed for private and commercial purposes.

18.2 The Agent represents and warrants to the Public Authority and the Project Company that:

18.2.1 it has the power to enter into and perform, and has taken all action necessary to authorise the entry into, performance and delivery of this Agreement and any relevant Project Document; and

18.2.2 each of this Agreement and any relevant Project Document is its legal and binding obligation (subject to applicable bankruptcy laws), and does not conflict with any law or agreement to which it is a party and that it has obtained all consents and authorisations required to be obtained by it in connection with the execution and delivery of this Agreement and each relevant Project Document and the performance by it of its obligations thereunder and such consents and authorisations are in full force and effect, are final and not subject to appeal and/or renewal and are held in its name.

18.3 The Project Company represents and warrants to the Public Authority and the Agent (for the benefit of the [Lenders / Secured Parties]) that:

18.3.1 it has the power to enter into and perform, and has taken all action necessary to authorise the entry into, performance and delivery of this Agreement, the Project Agreement and any relevant Project Document;

18.3.2 each of this Agreement, the Project Agreement and any relevant Project Document is its legal and binding obligation (subject to applicable bankruptcy laws), and does not conflict with any law or agreement to which it is a party and that it has obtained all consents and authorisations required to be obtained by it in connection with the execution and delivery of this Agreement, the Project Agreement and each relevant Project Document and the performance by it of its obligations thereunder and such consents and authorisations are in full force and effect, are final and not subject to appeal and/or renewal and are held in its name.

19. No assignment

19.1 Except as expressly provided herein, no party to this Agreement shall assign or transfer any part of its respective rights or obligations under this Agreement.

19.2 The Agent may assign or transfer its rights and obligations under this Agreement to a successor Agent appointed in accordance with the relevant Facilities Agreements without the consent of the other Parties to this Agreement.

20. No waiver

20.1 No failure or delay by either Party in exercising any right under this Agreement shall operate as a waiver thereof or prejudice any other or further exercise by such Party of any of its rights or remedies under this Agreement. The rights and remedies under this Agreement may be exercised as often as necessary and are cumulative and not exclusive of any rights or remedies provided by law.

21. Counterparts

21.1 This Agreement may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

22. No set off

22.1 All amounts payable under this Agreement shall be paid without set off or deduction.

23. Notices

23.1 Except as otherwise expressly provided in this Agreement, all notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by registered or certified mail or fax addressed as follows:

23.1.1 if to the Public Authority:

Address: [●]
Attention: [●]

Email: [●]
Fax No.: [●]

23.1.2 if to the Project Company:

Address: [●]
Attention: [●]
E-mail: [●]
Fax No.: [●]

23.1.3. if to the Agent:

Address: [●]
Attention: [●]
E-mail: [●]
Fax No.: [●]

23.2 Each notice shall be in the [English] language and shall be deemed delivered upon receipt.

23.3 Any party may by notice of at least 15 days to the other party change the address and/or other contact details set out above to which such notice and communications addressed to it are to be delivered or mailed.

24. Partial invalidity

24.1 If, at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

25. Amendment

25.1 Changes and amendments to this Agreement shall be made in writing.

26. Effect of breach

26.1 Without prejudice to any rights a Party may otherwise have, a breach of this Agreement shall not by itself give rise to a right to terminate the Project Agreement.

27. Third party rights

27.1 It is agreed for the purposes of the [Contracts (Rights of Third Parties) Act (Cap 53B)] that this agreement is not intended to, and does not, give to any person who is not a party to this agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this agreement is assigned or transferred in accordance with this Agreement.

28. Governing law and arbitration

Governing law

28.1 This Agreement has been executed in the English language. The Agreement, including the arbitration agreement at Clause 28.2 and any non-contractual obligations is governed by the Law of [●].

Arbitration

28.2 [All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the Project Agreement. The parties shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this agreement.]

OR

28.3 [Any Party may submit the dispute to arbitration under the [ICC Rules of Arbitration]. Any arbitration procedure initiated in accordance with this Clause 28.3 (the **"Arbitration Procedure"**) shall be conducted with the participation of an arbitration tribunal consisting of three arbitrators (the **"Tribunal"**), one being nominated by the Public Authority, one by the Agent. The third arbitrator shall be appointed by the other two arbitrators and shall act as Chairperson. The decision of the Tribunal shall be final and binding and not appealable.

28.4 The place of arbitration shall be [●] and the language of the arbitration shall be [English].

28.5 The Tribunal shall apply the terms of this Agreement.

28.6 The Tribunal is entitled, within the scope of a pending legal dispute, to make decisions for interim measures.]

IN WITNESS whereof this Agreement has been entered into as a Deed the day and year first above written.

Signatories

PUBLIC AUTHORITY
SIGNED as a DEED by
[●] as the Public Authority

_____

Name:
Title:

SECURITY AGENT
SIGNED as a DEED by
[●] as the Agent

_____

Name:
Title:

PROJECT COMPANY
SIGNED as a DEED by
[●] as the Project Company

_____

Name:
Title:

EBRD PPP regulatory guidelines collection

Chapter 12. Explanatory memorandum to the model direct agreement template

1. Background

1.1 This explanatory memorandum ("memorandum") is intended to provide an overview of the key provisions of the model form non-concession Direct Agreement (Model DA) prepared by us, elaborate on its significance and purpose in the context of a project finance transaction, as well as possible negotiation issues, benefits and risks for the parties to a direct agreement (DA or Direct Agreement).

1.2 The Model DA and this memorandum have been produced under a premise that a non-concession DA is a Direct Agreement under a project where the Public Authority assumes the demand risk to the extent that the Project's profile is such that the source of all or most revenues received by the Project Company is the public side.

1.3 Save as otherwise provided herein, capitalised terms used in this memorandum shall have the meanings ascribed to them in the Model DA.

2. Direct agreement: overview

What is a DA?

2.1 A DA is a mechanism commonly used in project finance transactions which provides additional assurances to financial institutions financing an infrastructure project as to their ability to intervene in a project in case of a threat of a default. In particular, the Lenders would typically be entitled to temporarily take over the running of the project on the Project Company's side (step-in), novate the Project Agreement and related contracts to a new Project Company selected by the financiers, instruct payments to be made to their accounts or to an account over which the Lenders hold security interest, agree on a rectification plan with the government and otherwise keep the project going.

2.2 The rationale behind the use of DAs is that, in large-scale project finance transactions, Lenders are usually critically dependent on future cash flows of the Project for repayment of their loan. In the case of an ailing Project, Lenders will have limited recourse against the Project Company, its controlling entities (sponsors) and their respective estate and in many cases will not be able to levy execution on the public infrastructure constituting the subject matter of the Project Agreement. A DA therefore offers a practical alternative, putting the Lenders in a position to keep the Project alive by means of a suite of contractual rights to forestall a termination of the Project Agreement. Even though step-in rights under DAs are rarely formally used or enforced in practice, their existence facilitates a negotiation when a Project runs into trouble.

Parties to a DA

2.3 In a project finance transaction, the Project Company, the representative of the financiers (Agent) and the Public authority typically enter into a DA. Where the financing structure of the Project warrants the difference between the lists of Secured Parties and Lenders, the Secured Parties will nominate a Security Agent under the Security Documents. The Security Agent will need to be a party to the DA as well. If the Agent is a bank and acts as a Security Agent, wording must be added into the DA that the former acts for itself also. If there is only one lending institution in the project, the figure of an Agent may be superfluous and can be replaced with this Lender.

Nature and aim of a DA

2.4 Although not a security document in a legal sense as it does not create security interests, the DA is typically perceived as a quasi-security document giving Lenders a contractual alternative to a security, which the Lenders would usually seek in the case of a conventional "corporate" loan and which in a project finance transaction is either unavailable or limited in value. The DA is closely connected to the relevant Project Agreement between the Project Company and the Public Authority and to the Facilities Agreement(s) between the Project Company and the Lenders.

2.5 The primary aim of a DA is to regulate the relationships of the above three parties in case of termination or threatened termination of the Project Agreement and/or the financing agreements through the Project Company's fault with a view to allow the Project to survive and to protect the interests of the financing organisations.

2.6 As the termination of the Project Agreement is likely to lead to the suspension of the Project's operation or the collapse of the Project altogether, the DA will typically contain mechanisms enabling the Lenders to rectify the existing deficiencies while maintaining the operation and hence the cashflow of the Project, such as the obligation of the Public Authority to give notice before exercising its right to terminate the Project Agreement and Lenders' step-in right.

2.7 In this context, DAs are viewed as being beneficial not just for the Lenders but for the Public Authority as well, because they allow for keeping the project functioning in an otherwise imminent Project Agreement termination scenario. A good starting point for the direct agreement may be the United Kingdom's Standardisation of PF2 Contracts (SoPC) model. It is well known, universally accepted by the lending community and has been followed in many countries

around Europe (most recently we saw that the equivalent document in Norway and Singapore drew heavily on the UK model, and we have previously seen it in many other countries across the world). In the United Kingdom, the SoPC model has been used for projects across all sectors, most of which have been accommodation-based projects such as hospitals, schools, prisons and government buildings.

DA: market practice

2.8 Typically, DAs follow a fairly standard approach which has been honed by the market practice. In many countries across Europe, non-concession DAs are frequently based on the recommendations and the model form contained in the Standardisation of PF2 Contracts guide published in 2012 by the UK HM Treasury (although no longer used in the United Kingdom since 2018, save for antecedent projects), subject to variations concerning aspects of the applicable law and commercial specifics of the particular project. The Model DA has been designed with reference to the market practice to reflect bespoke terms which have been tested across a variety of sectors and jurisdictions.

2.9 Non-concession DAs will not usually manifest a striking difference with concession direct agreements. That said, one may expect more emphasis on the terms of termination compensation in concession direct agreements because Lenders will want enhanced security over the single source of income, being the termination compensation. The Lenders' position on the release of security at termination of the Project Agreement may be less flexible in concession direct agreements because at the time of inking of a DA they would perceive themselves to be exposed to a higher degree of risk of not being repaid.

2.10 The signing of a DA will typically be one of the Public Authority's key obligations and a condition precedent to a Project's financial close. In some instances, debt may be extended to the Project Company before a DA is signed, but this will likely take the shape of a corporate rather than project finance borrowing, subordinated to that of the senior Lenders.

3. Key provisions of a direct agreement

3.1 Below, we have listed some of the key provisions of a DA. These will be explained in the next sections below.

3.1.1 Subject matter and key undertakings (optional)

A general section titled Undertakings which sets out the key undertakings of the parties to the DA. This section is a remnant of a conventional procurement, usually found in civil law countries.

3.1.2 Security

This section would include acknowledgement of the Security by the Public Authority and may also contain provisions regarding enforcement of the Security.

3.1.3 Public authority notice and lender notice

- The procedure for the termination of the Project Agreement by the Public Authority, including its obligation of the Public Authority to give notice to the Lenders of a (i) Project Company default and/or (ii) the Public Authority's intention to terminate the Project Agreement.

- An obligation of the Lenders to give notice before taking any adverse action, such as accelerating the debt and enforcing the security, may also be included.

- Obligation of the Public Authority to divert all payments due to the Project Company to a Lender's account after the receipt of a Lender's notice to that effect.

- Obligation of the Public Authority not to terminate a DA before the expiry of the Notice Period, the Rectification Period or the Lenders' decision not to step in or step out.

3.1.4 Lenders' step-in

A section of a DA which sets out the conditions and procedure for a Lender's step-in, the scope of control the Lenders' nominee acquires over a project and the process to step out.

3.1.5 Novation and transfer of control

A section of a DA designed to effect permanent transfer over a project to the Lenders' nominee or, in some instances, an entity selected on tender. This section also establishes the modus to replace the Project Company, being either through share transfer or novation of the Project Agreement (transfer of rights and obligations). A statement is also made in this part to the effect that antecedent violations committed by the Project Company shall not be counted against the

Lenders' nominee for the purposes of termination of the Project Agreement.

3.1.6 Other provisions

Other sections of a DA may cover tax gross-up in relation to any payments made to the Lenders under the Lenders Direct Agreement, as well as representations and warranties, waiver of sovereign immunity, no set-off, governing law, arbitration clause and the usual "legal boilerplate".

3.2 In certain challenging jurisdictions with limited experience of international financings, Lenders are known to require additional rebalancing of the project risk profile, including around the following:

3.2.1 right to call termination of the Project Agreement upon occurrence of an event of default under finance documents;

3.2.2 right to demand repayment of "gross" senior debt, that is, senior debt deposited on reserve accounts which has not been used to finance the Project;

3.2.3 additional representations and warranties on the part of the Project Company and Public Authority, such as, for the Public Authority, having sufficient budget funds and having made the necessary budget allocations to make payments under the Project Agreement;

3.2.4 language confining the Public Authority's rights under contractor direct agreements in order to ensure additional control over contract within the Project perimeter;

3.2.5 provisions going beyond those set out in the Project Agreement, for example, on the termination compensation, in instances where Lenders were unable to push through the required language into the Project Agreement;

3.2.6 an obligation of the Public Authority to pay the termination compensation in the currency in which the relevant amounts are expressed (that is, protection against the foreign-exchange risk), including, for example, the amounts of senior debt, import contracts or employment agreements;

3.2.7 indemnities to cover Lenders in certain circumstances, such as against invalidity of the Project Agreement or certain types of breach of contract by the Public Authority.

4. Consent to security and security enforcement

4.1 It is essential that a Direct Agreement has a provision whereby the Public Authority acknowledges, and consents to, the Lenders' security interests over the Project Company's rights under the Project Agreement (and the other Project Documents, such as the energy performance certificate and operations and maintenance agreements and a land lease) and other assets under the Security Documents. If the Project Agreement requires the consent of the Public Authority to a Security enforcement, it is important that such consent is granted in advance in the DA. There may also be certain legal doubts about the ability of Lenders to enforce security against assets and rights which relate to the public infrastructure and public services typically involved in a public-private partnership (PPP), which such consent can help remove. Such consent would serve as a protection measure enabling the Lenders to exercise their rights under the Security Documents confidently if needed.

4.1.1 The Public Authority should also confirm in the DA that it has not received notice of any other security interest granted over any of the Project Company's rights or assets under the Project Agreement and other project contracts.

4.1.2 The DA may also set out provisions with regard to the enforcement of the Security, which will be subject to the terms of the relevant Security Documents and may include, in particular, (i) ensuring that the relevant share and/or asset transfer is made to a person satisfying the definition of a Suitable Substitute Contractor; and (ii) the consequences of the enforcement of such Security (such as the exercise of the step-in rights under the DA being triggered).

5. Public authority notice and lender notice

5.1 One of the cornerstone provisions of a DA is the undertaking by the Public Authority not to exercise its rights of termination or suspension under the Project Agreement without giving the Lenders a prior written notice. The standstill period which starts after the Public Authority Notice allows the Lenders to exercise (or direct the exercise of) the Project Company's rights in an attempt to cure the existing default.

5.2 The length of the standstill period is potentially a negotiation point as the Public Authority will typically not be eager to grant longer periods of time given that the Project Agreement usually already contains a cure period for the Project Company to rectify a default.

5.3 The DA may also include an obligation of the Lenders to notify the Public Authority in writing of the occurrence of a Project Company Default or other Loan Default under the financing documents (the "Lender Notice"). This is primarily about transparency and the flow of important information which could impact the Project. These undertakings are more commonplace in DAs entered into in relation to projects where termination payments often cover not only 100 per cent of "gross" senior debt but may also include equity. In these scenarios, contracting authorities may feel the need for a greater level of control over the Project Company performance.

6. Step-in

6.1 Step-in is a contractual mechanism allowing the Lenders (or another person designated for this purpose to act on their behalf, since Lenders may not want or even be technically able to do so themselves), for a limited period of time, to perform the Project Company's rights under the Project Agreement. Normally, step-in is a temporary contractual arrangement, allowing a third party to exercise the rights and perform the obligations of the Project Company under the Project Agreement on its behalf, while the Project Company remains formally in place and liable for any breaches or losses it has caused under the Project Agreement.

6.2 A step-in is procured in favour of an Appointed Representative. An Appointed Representative can usually be nominated and take up the role on the issue of a Lender's notice to that effect and without needing a consent from a Public Authority as the necessary consent will have been given under the terms of the DA. No special requirements are usually imposed with respect to the standing or nature of an Appointed Representative.

6.3 During the step-in period

6.3.1 the Public Authority as a rule will be required not to terminate the Project Agreement unless Lenders decide not to step in or the Project Company commits a repeated breach. It is advisable that breaches which are an inevitable consequence of an original default(s) are excluded and so not lead to termination during the step-in period;

6.3.2 the Lenders are incentivised to ensure that a remedial programme is implemented in relation to antecedent breaches and that no new breaches occur. If antecedent breaches are not remedied then a right to termination can arise again.

Novation

6.4 The Direct Agreement also provides that the effects of the step-in can come to an end if the Lenders step out or a Novation occurs. If the Project Agreement continues by way of a Novation, this does not mean the parties will not amend the Project Agreement in certain respects. For example, the parties may agree that the performance and payment mechanisms are not incentivising the parties correctly and so require it to be amended.

6.5 A Novation is procured in favour of a Suitable Substitute Contractor. In contrast to an Appointed Representative, a Suitable Substitute Contractor must be a person or entity approved by the Contracting Authority and meeting a set of criteria specified in the DA, including appropriate qualifications and experience, as it will be permanently replacing the Project Company under the terms of the Project Agreement (and other project contracts) and must have the right capabilities to act in that capacity for the rest of its (and their) term. Those criteria are likely to have to be compatible with the criteria that were used in the selection of the original Project Company. But others may also be specified, such as a prohibition against using US- and/or EU-sanctioned entities. The Public Authority cannot withhold its consent to the appointment of a Suitable Substitute Contractor meeting the grounds and procedure for its appointment laid out in the Direct Agreement.

6.6 It is noteworthy that in some civil law countries as a matter of applicable law a contractual step-in mechanism may not operate in the same way as in common law jurisdictions. In these countries, especially with nascent PPP legislation or limited pipeline of projects, the question whether step-in can afford robust legal protection to Lenders and, when applied, not lead to invalidity of the relevant provisions of the Direct Agreement is moot. Oftentimes Lenders prefer to set aside step-in in favour of novation (or transfer of rights and obligations) which may or may not include "step-out", that is, provisions facilitating transitioning of the Project back to the original sponsors. One essential difference between step-in and novation is that in the former, the Project Company's obligations under the Project Agreement rest with the Project Company, which insulates the Lenders' nominee from Project-related liability and consequently improves the chances of finding a suitable substitute. In our view, there is no harm with laying the legal foundation of both step-in and novation in a Direct Agreement. This will provide extended flexibility to Lenders and ultimately benefit the Project as the Lenders will have more legal mechanics in place to rescue an ailing Project.

6.7 Where the Project Agreement is terminated following a period of an attempted rectification, including with the help of step-in or novation, the Project Company may be entitled to a termination payment. In developing economies, we have seen instances of such termination payments including both senior debt and equity, with the latter part payable to unsecured sponsor-controlled accounts. This is grounded on the premise that as a result of novation, the Project company sponsors will be stripped of a right to receive a termination compensation. To ring-fence their investments, they sometimes push hard to include provisions enabling them to be repaid regardless of the novation.

7. Rectification period and performance points

7.1 One key point is the extent to which any penalties for underperformance by the Private Partner can continue to accrue when the Lenders have stepped in. These may take the form of Performance Points linked to a government revenue stream where an availability payment structure is used (on a "non-concession" PPP) or specific penalties or liabilities on a user-pay structure (that is, a concession, unless the project is a purely "self-policing" one, where revenues from third parties fall as a result of poor performance).

7.2 To the extent the Performance Points accrual rate reflects the detriment to the Public Authority, then by Performance Points being incurred, the Public Authority is protected. Its main concern in such circumstances is to ensure that it is not paying for the Service if it is not being provided, or (more commonly) overpaying for a sub-standard service.

7.3 To the extent this is the case, then it may be advisable to postpone a termination for an extended period to allow rectification to occur. Sufficient flexibility should be included in the step-in period so default is not easily triggered (for example, if one more Performance Point during the step-in period can trigger a termination, the Lenders will be reluctant to step in) and time is given to rectify.

7.4 Performance Points should continue to accrue during the step-in period but during such period any previously accrued Performance Points will not count towards the termination threshold. The rationale is that the Public Authority should not be able to terminate the Project Agreement if the Lenders are using reasonable endeavours to rectify any breach that arose prior to the step-in date but which is continuing. If the Lenders subsequently step out, such suspension of the Performance Points should be lifted. If the Public Authority does not have this protection and the Lenders step out because they no longer wish to rescue the Project, the Public Authority will need to count those Performance Points that accrued prior to the step-in date towards the termination threshold. If the step-in period ends because of a transfer of the Project Agreement to a Suitable Substitute Contractor, any accrued Performance Points will be cancelled for the purposes of triggering a termination (but still payable in accordance with the Project Agreement or the Rectification Plan).

7.5 To the extent that a rectification programme is being implemented (and so termination right is suspended) a refinancing may be required to incorporate, for example, new working capital.

8. Other provisions

8.1 Unrestricted assets

8.1.1 On termination of the Project Agreement, the Lenders are normally asked to agree to release any security over the unrestricted assets (that is, the assets which are necessary for the delivery of the project after termination of the Project Agreement and are typically transferred to the Public Authority or its nominee), other than charges over bank accounts, and third-party claims (including claims against the Public Authority under the Project Agreement and the Sub-Contractors under the Sub-Contracts) as well as share pledges, rights under other assigned contracts, charges over assets of the Project Company which do not need to be transferred and so on. This is because a Public Authority will want to ensure that the operational assets which the Public Authority needs to complete or operate the Project pass across from the Project Company to the Public Authority on a termination so as to ensure continuity of service, and the Lenders' security arrangements should not prevent that. In practice, Lenders are often unwilling to release security over Project property before being granted documentary evidence to the effect that the Termination sum is or will imminently be discharged to them in due course (for instance, a cashier's order or an irrevocable payment instruction for the transfer). When the Project Agreement is terminated as a result of a Project Company default and where the Lenders do not have the protection (directly or indirectly) of a clear undertaking from the Public Authority that the totality of their outstanding senior debt will be paid, Lenders may ask instead to be allowed to seek the highest cash sum that can be achieved in the open market for the Project in default. It is then in the interests of the Lenders that the Project remains operational and can be sold in the market for its maximum value. As mentioned in paragraph 2 above, their real security is in the cash flow (or termination sum) rather than in assets. When termination occurs, leading to the public side's obligation to pay off the senior debt, Lenders are typically looking to retain security until the making of such payment.

8.2 No liquid market

8.2.1 The Project Agreement will usually set out the mechanism for calculation and payment of the compensation upon termination of the Project Agreement. The open market value of the Project may be one of the components of the calculation. If this is the case, the Direct Agreement should contain a "no Liquid Market" provision, which allows the Lenders to issue a written notice to the Public Authority that in their opinion no Liquid Market exists.

8.2.2 If the parties agree that no Liquid Market exists, there shall be deemed to be no Liquid Market for the purpose of the Project Agreement and the parties will need to determine the estimated market value of the Project Agreement, including on the basis of pre-agreed mechanics which factor in the termination scenario to arrive to the quantum of compensation payment. One way to do that is for the parties to agree in the Project Agreement a list of components of the termination compensation payable depending on the ground for termination.

8.2.3 If there is no agreement between the parties as to whether or not a Liquid Market exists, either party may refer the dispute to be determined in accordance with the dispute resolution procedure.

8.3 Representations and warranties

8.3.1 As a relatively recent development, a section on representations and warranties began to appear in Direct Agreements. Lenders often used this approach in high-risk jurisdictions to ring-fence against many commercial and legal risks by including extended representations and warranties on the Public Authority's end. Nonetheless, in our view, standard representations and warranties (such as addressing the right of the parties to enter into the Direct Agreement, due execution, the DA being binding and enforceable, any authorisations being in place), can still be considered as a matter of good contractual practice.

8.4 No set-off

8.4.1 As a matter of bankability requirement, DAs must include language preventing set-off of amounts payable to Lenders. This includes both senior debt and any liability under the Direct Agreement (for example, for breaching a warranty). However, if the agreement provides for any payments in consideration of junior or mezzanine debt (as is the case in some direct agreements concluded in the Commonwealth of Independent States), these, as a rule, would not be protected against set-off or other deductions.

8.5 Arbitration and governing law

8.5.1 Lenders expect that the Direct Agreement reflects bankable arbitration clauses. These would normally be rather boilerplate and concise with some commercial tension regarding the arbitration institution. However, as long as this is selected from a ratchet of the top reputable centres (ICC, SIAC, LCIA, ICC, CIETAC and HKIAC), there should not be an unresolvable disagreement between the parties on the matter. Note, however, that Public Authorities may oppose international arbitration and may insist

on disputes being resolved in state courts, which would usually not sit well with Lenders as a matter of bankability.

8.5.2 In countries with limited PPP experience Lenders frequently request that English law govern the Direct Agreement. However, in practice where local law is prescriptive on the matter of the governing law pertaining to the Direct Agreement or where Lenders can be convinced to get comfortable with the law of the country of the Project origin (including by virtue of a positive legal opinion from a reputable legal adviser), or where Lenders are largely (or exclusively) local entities they often consent to the applicable national law. The Public Authority may also not be allowed to enter into agreements governed by foreign law – even when there is no direct prohibition, in many countries public authorities will resist a foreign law governed DA. Where possible, it is advisable that the governing law and arbitration clauses of a Direct Agreement are aligned with those of the underlying Project Agreement.

8.6 Other

8.6.1 As a matter of bankability, the provisions of a DA should prevail over the provisions of the Project Agreement and any other agreements entered into in connection with the Project.

8.6.2 Most capitalised terms in a DA would usually be defined through reference to the relevant definitions given in the Project Agreement and Facilities Agreement.

EBRD PPP regulatory guidelines collection

Chapter 13.
Introduction to model heads of terms

1. Introduction

The two heads of terms (HoT) included in this chapter are each designed as a simple introduction to a typical PPP agreement. We have included two different versions of this document, designed for two different PPP structures and two different sectors. One is a concession-based build-operate-transfer (BOT) port project and the other is a public revenue-based PPP project in the health sector. The two differ from each other in several respects, though we have tried to conform their provisions as much as possible.

As seen from the following two chapters, there is still strikingly little standardisation of provisions.[1] PPP agreements tend to be very much "bespoke" documents, carefully structured and often heavily negotiated, with many provisions that are and need to be project-specific. As a result, their clauses tend to differ widely, from sector to sector, project structure to project structure and from deal to deal.

1.1 The first HoT is designed for a concession-based PPP project in the port sector. It assumes that a BOT PPP structure is used for the project, as this is arguably the most common structure selected by governments for projects of this kind, and the one with the oldest historical pedigree. In other words, it is perhaps the most familiar form around the world and, in some ways, the simplest to understand and apply. The concessionaire is given the full right and obligation to finance, design, build, operate, maintain and commercially exploit the project throughout the term of the agreement, essentially at its own cost and risk, and then transfer it back to the contracting authority at the end of the term as a complete, functioning facility in good condition.

The document assumes that the concessionaire has a relatively high degree of autonomy over its activities and that its revenues will be derived from direct charges to users of the port, rather than from a government payment stream. It also assumes that the whole port will be included in the concession and that the project will involve a "greenfield" development, or at least a significant portion of design and construction of permanent new structures. Some port concessions are more limited than this, with the conceding of only certain aspects of the port's infrastructure within an existing facility, and perhaps the installation of temporary structures and equipment which may have to be removed at the end of the concession term. Some provisions of the agreement would have to be modified to allow for the latter, although many other clauses would still apply in much the same form.

1.2 The second HoT is designed for a PPP project in the health sector, where various activities related to the development and running of a medical facilities building or structure, ranging from design and/or build, to maintenance, operation and management, can be delegated to the private partner under the terms of the agreement. The document assumes less autonomy on the part of the private partner, and a greater degree of control over those activities by the public partner, than in the case of a fully fledged "concession". The private partner's revenues are derived mainly from periodic payments made by the government contracting authority and/or the government-controlled medical operator of the facilities, as the case may be, under the terms of the contract.

Depending on a particular jurisdiction and a particular project, different sets of laws and regulations will apply, especially those relating to healthcare. In some countries, there are mandatory healthcare insurance schemes that will inevitably influence the structure of PPP projects. However, we have tried to provide for key options in the document, which will most likely be relevant irrespective of local set-up: (i) the project may involve a "brownfield" or "greenfield" development; (ii) the ownership title to the healthcare facility may belong to the private or public partner; (iii) the private partner's obligations may include design or not, in which case the private partner will receive the design documentation and be responsible for construction or reconstruction based on that documentation; (iv) the private partner may or may not provide medical services, in the latter case carrying out only the maintenance of the facility after it has been constructed or reconstructed and in the former acting under a certain healthcare plan/mandatory healthcare scheme and sometimes also providing fully commercial medical services to clients; (v) last, but not least, the public partner may finance the project in various forms in full or in part where the private partner may inject some equity and raise debt financing (project financing). The document envisages how these alternatives may find their ways into agreement and what one should take into account considering the key associated terms.

The two HoT are intended to give readers a clear idea of the typical practical and commercial contents of agreements of this type, with provisions simplified and summarised and much of the difficult legal terminology removed. They are designed to be used with relative ease by lawyers and non-lawyers alike, to focus discussion on the project's structural elements and risk allocation, and the respective responsibilities of the parties. We hope this will help readers become more familiar with agreements of this type and the project structures they represent – and that this, in turn, will play a part in facilitating appropriate decision-making among those involved with them. The detailed agreements developed from these HoT would, of course, need to be drawn up with the help of expert counsel and technical/commercial advisers (local and perhaps international), with suitable levels of experience of the sectors and projects concerned.

[1] Although various institutions, including the EBRD and the World Bank, have been trying to encourage greater standardisation for some years.

Chapter 14.
Model heads of terms for seaport concession PPP agreement

1. Introduction

These Heads of Terms ("HoT") are designed as a simple introduction to a typical Concession/PPP Agreement for a concession-based PPP port project. They assume that a "BOT" (build-operate-transfer) PPP structure is used for the project, as this is arguably the most common structure selected by governments for projects of this kind, and the one with the oldest historical pedigree. It is the most familiar, in other words. The Concessionaire is given full rights and obligations to finance, design, build, operate, maintain and commercially exploit the Project throughout the term of the agreement, essentially at its own cost and risk, and then transfer it back to the Contracting Authority, at the end of the Term, as a complete, functioning facility in good condition.

This package of rights and obligations is sometimes referred to as the "Concession" and reflects the basic "trade-off" between public and private sectors in a PPP structure of this type; the former gets a fully functioning port facility, built and operated to the requisite standards, from which the country benefits, without having to fund it; the latter gets its commercial and employment opportunities and investment returns under a long-term contract. And the public gets new, improved infrastructure as a result.

The HoT assume that the Concessionaire has a relatively high degree of autonomy over its activities, and that its revenues will be derived from direct charges to users of the port, rather than from a government payment stream. (This is effectively the definition of a "Concession" in many jurisdictions). They assume that the whole port will be comprised within the "Concession" and that the project will involve a "greenfield" development, or at least a significant portion of design and construction of permanent new structures. Some port concessions are more limited than this, with the conceding of only certain aspects of the port's infrastructure within an existing facility, and perhaps the installation of temporary structures and equipment which may have to be removed at the end of the concession term. A number of provisions of the agreement would have to be modified to allow for the latter, although many other clauses would still apply in much the same form.

The HoT are intended to give readers a clear idea of the typical practical and commercial contents of a Concession Agreement of this type, with much of the difficult legal terminology removed. It is designed to be used with relative ease by lawyers and non-lawyers alike, to focus discussion on the project's structural elements and risk allocation, and the respective responsibilities of the parties. Set out below is a short clause-by-clause introduction to its provisions, together with a summary of some of the issues they typically give rise to.

(A) Parties

The agreement would normally have just two parties, the public and private partners respectively, here called the "Contracting Authority" and the "Concessionaire" – the one awarding and supervising the PPP, and the other implementing and managing it. Occasionally, other parties may also need to be bound in to the agreement, such as another public authority with important powers or responsibilities in relation to the project (e.g., a port regulator, perhaps, or a national government where an element of government guarantee is required) or a parent company of the SPV (special purpose vehicle) for the purposes of certain provisions, such as development phase responsibilities. This is unusual, however. The usual arrangement is to conclude the agreement simply between the two principal parties.

(B) Recitals

The common law practice is to set out a short summary of the background to the agreement in a number of "recitals", bringing out some of its more important aspects, such as the Contracting Authority's overall objectives in awarding it, the use of a competitive tendering process, the nature and outline scope of the PPP (e.g., a BOT structure), critical governing pieces of legislation (such as a PPP Law or Ports Act) and perhaps certain central commercial features. Many civil law jurisdictions, however, do not bother with recitals, and simply plunge straight into the agreement's clauses.

(C) Terms and conditions

1. Definitions and interpretation

Essentially all the agreement's defined terms will be set out here. The HoT only summarises some of the principal ones, which are used elsewhere in the document. The full-length agreement will often run to three or four times their number (because of all the subsidiary definitions needed to support the main ones). Perhaps the only terms that need to be mentioned at this stage are:

(i) The "Contracted Assets". These are in essence all the assets comprised in the Port which the Concessionaire is contractually obliged to finance, design, construct, operate, maintain and then hand back to the Contracting Authority at the end of the Term. They are likely to be listed in an appendix to the agreement. This is necessary to give legal and

practical precision to the meaning of the term the "Port", which is itself only loosely defined as the port the subject matter of the Concession.

Note that many civil law countries sub-divide the Concession assets as a matter of law into three distinct categories; namely, those which are necessary for its performance and become the immediate property of the Contracting Authority; those which may be useful to it, and can eventually be purchased by the Contracting Authority; and those which remain the Concessionaire's property and must be removed at the end of the Term. (If the Concession is a purely "temporary" – see above – all the Concessionaire's assets may fall into this last category). Common law agreements sometimes reach much the same result, but by means of lists in the agreement's appendices. The Contracted Assets cover the first category.

(ii) The "Project" in simple terms means everything the Concessionaire is obliged to do under the Agreement.

(iii) The "Detailed Project Report" or DPR. This is the critical "control document" which will set out the design, construction, maintenance and operational standards with which the Concessionaire has to comply throughout the Term. They will include the "Key Performance Indicators". It may also list the Contracted Assets and set out certain other key commercial parameters. In familiar PPP language, it will be the "Output Specification" defining what the Concessionaire will have to do and to what standards in technical terms. Ideally, it will be complete by the time the agreement is signed. Sometimes, however, it can only be finalised during the Development Period, once a certain amount of basic design work has been done and other critical aspects of the project have been established. It would then be initialed by the parties and inserted into the Concession Agreement. These "deferred provisions" are not ideal from a contractual perspective, but a DPR mechanism can offer a helpful "fallback" device for including them post-signature.

2. Term and effectiveness

The agreement takes effect on signature, although most of its clauses will remain "suspended" and conditional until satisfaction of the conditions precedent ("CPs". see Clause 4). This is because both parties will usually have certain responsibilities to perform relating to the CPs and their satisfaction, a process which may take some months and may involve significant work and expense. They may both want the right to bring proceedings where one party fails to do what is expected of it and so effectively thwarts the implementation of the Concession.

The Clause also provides for the term of the Concession ("Term") to be specified-usually whatever period is necessary for the Concessionaire to repay its lenders and achieve an appropriate return for itself and its investors. Certain other factors, such as the useful life of the underlying assets, the time period for their depreciation and the need to avoid tying up valuable infrastructure in private-sector monopolies or quasi-monopolies, will also weigh heavily in this determination. These will not be brought out in the agreement itself, though, which will usually simply specify the period that results. That period will then often be extendable in certain circumstances, such as to allow for the compensation mechanism where unforeseen events occur, or by agreement between the parties. (The assumption is that the Contracting Authority would usually be reluctant to agree to an extension except for very good reasons). There may also be statutory restrictions on such an extension in the governing PPP law, to safeguard against abuse.

3. Grant of concession

This Clause (in sub-clause 1) formally "grants" the Concession to the Concessionaire, and defines its scope in legal terms. This is often done in more detailed terms than those set out in the HoT. Traditionally, the provision states that the Concessionaire must perform its responsibilities, "and do all things necessary in connection therewith", at its own cost and risk, save where the agreement specifically provides otherwise. This amounts to a clear, fundamental imposition of risk on the Concessionaire. It is therefore basically up to him to ensure it succeeds. The starting point with a PPP is often a wholesale transfer of risk to the private partner, with the Contracting Authority retaining only those specific risks and responsibilities which it is best able to bear to make the PPP work optimally.

Sub-clause 2 mentions the Concessionaire's obligation to transfer the assets comprised in the Concession back to the Contracting Authority, at the end of the agreement's term, in a fit state for their further use for a given period of years. How long that period lasts will be a matter of commercial negotiation for the parties. Sub-clause 3 confirms the exclusive nature of the Concessionaire's rights in relation to the Port. The Contracting Authority cannot award competing rights to develop it to another private sector entity. (That should usually amount to a contractual "statement of the obvious". The more difficult question is what restrictions, if any, are to be placed on the development of competing facilities further afield. See further below.)

4. Conditions precedent

This sets out the conditions precedent which have to be satisfied before most of the Concessionaire's practical obligations under the agreement can take effect, in particular to design, build and operate the Contracted Assets, and the numerous responsibilities connected with them. Most of them should be self-explanatory. They include such matters as the acquisition of the Site by the Contracting Authority, its clearance of obstacles and unnecessary structures and hand-over to the Concessionaire with "Vacant Possession" (i.e., free of any third-party claims), the obtaining of all permits and consents needed at this stage to proceed, and perhaps the granting of a formal lease of the Site to the Concessionaire coterminous with the Concession Agreement (which may or may not be a legal requirement in the jurisdiction in question).

The draft also allows for some more unusual CPs in square brackets, on the assumption that the Agreement may have been signed at a very early stage of the development process, such as the addition of a suitable port operator as JV partner, the carrying out of further feasibility and even due diligence studies, finalisation of the DPR (see above), any formal ratifications or government approvals needed for enforceability purposes, and even the raising of additional development funding. A performance bond may have to be provided by the Concessionaire (or perhaps the main contractor's bond transferred) to the Contracting Authority. All the main Project Contracts will then need to have been signed, and Financial Close under the Financing Documents achieved. The remaining clauses of the agreement can then become effective.

The Clause then provides that both parties must endeavour/use reasonable endeavours to satisfy the CPs within the scope of their respective responsibilities. (These may have to be spelled out in an appendix to avoid doubt or argument). In practice, of course, most of the "heavy lifting" tasks in this context will be down to the Concessionaire. It also allows for a "long stop" (or "drop dead") date (say 6, 12 or 18 months after signature), after which the Agreement can be terminated by either party if the CPs have still not been satisfied in full. The Concessionaire may in those circumstances seek to recover some or all of its development costs (as defined) where it is not itself at fault; the draft provides for this, although in square brackets, as it is relatively unusual. Any such right is likely to be heavily negotiated.

5. Covenants – general and preliminary

This Clause sets out some of the more general/ preliminary responsibilities of the parties. Since the Concessionaire's obligations are detailed throughout the rest of the agreement, the Contracting Authority's feature more prominently here. They include helping to obtain any necessary formal approvals, acquiring and clearing the Site and handing it over to the Concessionaire with Vacant Possession, acquiring-in time-any additional land identified in the DPR needed for subsequent phases of the Project (if any), prohibitions against granting security interests in the Site or Contracted Assets (which it is likely to own from the outset under a BOT arrangement) to third parties and against any nationalisation of the Project assets or take-over or abrogation of the Concessionaire's rights (except with full compensation). The Contracting Authority will sometimes also be responsible for carrying out a full dredging of the sailing channel into the port, and subsequently maintaining it.

The Clause also includes providing reasonable assistance with the implementation of the Project (e.g., by supplying relevant information or dealing with other relevant authorities) and not interfering with the Concessionaire's activities, except where specifically permitted to do so by the agreement's terms. Note, though, that in most civil law jurisdictions, the Contracting Authority has a general legal power to vary or modify the Concession, where necessary to safeguard the public assets and/or public services involved. Where this power is exercised, the Concessionaire also has a legal right to be properly compensated. It usually makes sense to include express clauses in the agreement which reflect and give effect to these rights and powers, rather than simply leaving them to the general law. This is addressed in sub-clause 5.1(i). A "non-interference" provision would have to be read as being subject to them.

The Clause then summarises the Concessionaire's main obligations under the agreement, allowing at the same time for the possibility of implementing subsequent Phases (if there are any) of the Project, as they may come to be detailed in the DPR. If a firm phasing arrangement has been agreed upon from the outset, it would be appropriate to spell this out in appropriate detail in the agreement when it is first signed.

6. Statutory obligations and entitlements of the parties

This deals with some general legal matters. Both parties are obliged to act at all times in accordance with all Applicable Laws (i.e. domestic laws). The completed Port must also comply with them. The Concessionaire has to discharge its practical responsibilities in accordance with "Good Industry Practice", meaning that level of skill, care, diligence and foresight reasonably to be expected of a skilled and experienced international company performing the same responsibilities, to the standards specified in the agreement. In simple terms, this means in accordance with "best international practice" – a standard contracting authorities are typically keen to apply.

Allowance is made for the possibility of certain tax and duty exemptions, or a Duty Free Zone, from which the Project may benefit. These may need to be detailed in the agreement if they represent firm commitments. The Clause then gives the Concessionaire full control over its financing arrangements. Contracting Authorities may (sometimes unhelpfully) try to impose approval rights over them, but in the end finance is primarily the Concessionaire's responsibility under this structure. The draft also allows it to create whatever security interests over its rights and assets that local law permits; the scope and effectiveness of this power can prove awkward in some jurisdictions and would need to be carefully examined with local counsel.

7. Regulatory framework

Specific provisions may need to be included in the agreement for the host country's port regulatory regime – e.g., in relation to certain operational matters or charges, or where revisions to that regime are known to be imminent. A placeholder is included here to allow for them.

8. Development period

This Clause specifies more of the Parties' respective obligations during the Development Period (that is, between signature and Financial Close). The Contracting Authority has to provide copies of all records and studies in its possession relating to the Project and assist the Concessionaire to obtain relevant permits and consents. (These may include certain identified permits for which the former is specifically responsible). The Concessionaire is, of course, in turn responsible for all detailed designs and specifications, the production of which is likely to start during the Development Period (to finalise the DPR). The Concessionaire must appoint the EPC Contractor, and perhaps a separate Design Engineer (unless the former is a "turnkey" contractor). Copies of all designs have to be supplied to the Contracting Authority, who can question and comment on them, but is not necessarily given a formal rights of approval.

The Clause also spells out some of the agreement's land-related provisions. Title to all the land comprised in the Site remains with the Contracting Authority (as it is a "BOT" arrangement). This extends to any "Reclaimed Land" acquired during the Project (that is, extensions of the shoreline created as the port structures are built). The Concessionaire has full control over (and if necessary a lease of) the Site during the Term, and can sub-lease and sub-license any parts of its occupation and use for the purposes of the Project to third parties, to which the Contracting Authority can raise reasonable objections. No part of it can be leased by the Contracting Authority to anyone else. The Contracting Authority may also have on obligation to acquire any further areas of land identified in the DPR that may be needed for subsequent Phases of the Project.

The Contracting Authority is also responsible for arranging and providing the Transport Infrastructure and Utility Linkages to the Site. These are the road and perhaps rail and/or canal linkages with the hinterland necessary for transport of materials, goods and people to and from the Port, and the utility connections (e.g., power, gas, water) necessary for it to function. The assumption is that these will be substantially in place by the time construction gets underway on Site. If not, the draft entitles the Concessionaire to an extension of time for completion.

9. Concessionaire corporate structure

This can be a sensitive area, as the Concessionaire will usually want to maximise its autonomous control over its shareholders, while the Contracting Authority has a legitimate interest in at least knowing who they are and ensuring that the company it has selected for the role remains fully committed to it. The draft assumes that the Concessionaire will be a locally incorporated SPV (as it usually is). It allows the Concessionaire to change its shareholdings or their structure, but must notify the Contracting Authority accordingly; the latter only has the rights of approval (if any) it is specifically given by the agreement. These are likely to have to be negotiated. The Concessionaire undertakes, for example, that no shares will be sold to a third party to which the latter has a reasonable objection on grounds of national security. A mechanism is also included to prevent the disposal of a "key shareholder" (as identified) without the Contracting Authority's consent, at least for a specified period of years. As the Concessionaire is an SPV, it cannot engage in any activities unrelated to the Project.

10. Design and construction

The draft allows a construction period to be inserted (36 months is assumed, as so often!), subject to any extensions granted in accordance with the agreement. The Concessionaire is responsible for all the Project's works of design and construction, which must be carried out in the time and manner required by the agreement. The completed works must be fully in accordance with the DPR, the Contract Documents and standards and the final detailed design. The Concessionaire must submit a detailed programme to the Contracting Authority, showing how the completion date will be met, but this is usually not made contractually binding on him. A clear completion date should be sufficient as a binding deadline, given his incentives to complete and the need to manage his risks.

The Concessionaire is deemed to have made all necessary investigations into the nature and quantities of the works before starting, including site investigations, subject to an exception for difficulties not reasonably foreseeable at the Effective Date, including site contamination and archaeological and historical finds. (Both these risks usually absorb much attention before the project is "let"). It is entitled to extensions of the time for completion for events beyond its reasonable control (force majeure) and Change of Law, but if it fails to complete the works by the due date (as extended) it may be liable for liquidated damages, at a rate to be specified, and a call may be made on any performance bond it has provided. Ultimately, the agreement may also be terminated in these circumstances. Note that concession agreements may or may not provide for liquidated damages or, as explained, a performance bond; arguably, the Contracting Authority will not actually suffer any loss from late completion, while the Concessionaire ultimately stands to lose everything if it fails to complete a functioning project. Its incentive to complete on time is strong anyway, in other words, and will be reinforced by the terms of its loan agreements in a project-finance structure.

The draft provides for inspections and monitoring of the works by the Contracting Authority, subject to reasonableness tests and limitations, and a site office which it can use. The Concessionaire has to provide regular reports and data on progress to it. The Concessionaire can subcontract all its design and construction responsibilities in the usual way, keeping the Contracting Authority informed of the identity and credentials of any material subcontractors (as defined – e.g., costing at least US$ 0.5m pa). Contracting Authorities often seek rights of control and approval over subcontractors, but in general terms this is not appropriate, as it would interfere with the Concessionaire's need to manage the works for which it is responsible as it thinks best. A compromise mechanism suggested by the draft might be to allow the former to raise reasonable objections to material subcontractors – e.g., on grounds of national security.

All design and construction works must be carried out in accordance with Good Industry Practice. This standard will effectively apply to everything the Concessionaire does and all its methods of working. But the draft also allows for a number of specific matters of detail to be set out if required, such as conditions on Site, the use of local labour and materials, compliance with employment laws, health and safety, environmental standards and so on.

When the construction works are sufficiently complete for the Port to become operational, a compliance inspection takes place, allowing the Contracting Authority to attend the completion procedures and tests, and review the relevant reports and certificates, etc. (on which it must rely except in the case of manifest error; there is no point in inviting it to re-open the completion procedures under the EPC Contract). At the earliest practicable date thereafter, the Operational Port Declaration – that is, the formal document allowing the facility to be opened as a functioning port – is issued. This may be before the whole of the works are substantially complete; the latter is governed by a separate Completion Certificate. The issue of an effective OPD following completion is the Contracting Authority's responsibility.

11. Ownership of contracted assets

The party owning the Contracted Assets during the Term is specified in the agreement for the avoidance of doubt. This may not be necessary where the applicable legal regime leaves no room for doubt on this point, as in many civil law jurisdictions. In common law jurisdictions, ownership of the assets would usually follow ownership of the land to which they are permanently affixed. This may or may not be the case in civil law ones. Whoever owns them, the Concessionaire must clearly have full right to operate, maintain, repair and replace them throughout the Term. The Concessionaire's right to grant security over the Contracted Assets and all its other rights and interests under the agreement is confirmed by the next sub-clause. This may raise technical legal issues which should be discussed with local counsel, but it is obviously a critical matter for the bankability of the Project.

12. Operations

This Clause sets out a number of general and specific provisions which apply to the Concessionaire's operation of the Port. from the Date of Commencement of Operations. It is entitled and obliged to manage, operate, maintain and commercially exploit the Contracted Assets and the Port and provide the Services (which will be itemised in an annex) in accordance with the agreement's requirements throughout the Operational Period. It has a high degree of autonomy as to how exactly it plans and organises its activities and carries them into effect, over its "operational regime", in other words. The Clause allows any specific activities which the parties feel should be spelled out to be itemised here. A number of the Concessionaire's obligations in this context are listed.

The Operating Procedures governing the operation of the Port and provision of the Services have to be notified and published, and are subject to the Contracting Authority's reasonable comments. Long-term commercial contracts, leases and licenses with third-party users of the Contracted Assets or the Port can be entered into, provided they are consistent with the agreement's terms. All the Services can be subcontracted by the Concessionaire (who remains fully liable for the performance of its subcontractors in the usual way).

The possibility of Priority Services by the Concessionaire being mandated by the government is allowed for. These are specific port services which have to take priority in a national emergency or catastrophe, on the basis of an indemnity against any Concessionaire losses. The Concessionaire has full control over its appointment of staff at the Site, although a "local content" provision is also included (up to a stated percentage of total staff), as contracting authorities often require one. Site security and maintenance standards are addressed, as are communications, formal "interfacing", reporting and information provision between the parties. The Contracting Authority undertakes to provide the Concessionaire with reasonable assistance when required in relation to its activities. As mentioned above, it may also be responsible for dredging and maintaining berth depths and waterway access to them.

Contracting Authority "step-in rights" are also provided for. These effectively allow it or the government to take over the operation of the Port (in whole or part) for reasons of national security or a national emergency which the Concessionaire is unable to deal with. The difference with Priority Services is that the Concessionaire has to provide the latter, while step-in rights involve bringing in a third-party entity to operate the Port. The Contracting Authority must account to the Concessionaire for any revenues received during the step-in period, which must come to an end as soon as practicable after the events giving rise to it have ceased to apply. The Concessionaire can treat the step-in as an event of political force majeure if it is not itself at fault, and terminate the agreement after a given period if not reinstated as operator.

13. Commercial matters

This Clause provides for the commercial aspects of the Port's operation by the Concessionaire. Regular usage/traffic reports have to be provided to the Contracting Authority. The Concessionaire has the right and obligation to charge and collect all tariffs and other charges in accordance with local law and the provisions of the agreement. Its freedom to set tariffs at a level it chooses will be a matter of both the applicable regulatory regime and negotiation with the Contracting Authority. (The word "set" is therefore in square brackets). In civil law countries, the tariffs usually have to be closely regulated – usually on a cost-plus-reasonable-remuneration basis – as a public service is involved. Even where this is not the case, the Contracting Authority may wish to impose constraints and controls in the contract. Conversely, somewhat unusually, it may be content simply to let market principles apply and allow the Concessionaire to determine them.

Whichever approach is adopted, the tariffs have to be non-discriminatory and published. The draft distinguishes between tariffs for port services and other types of commercial charge (e.g., warehouse rents) which are likely to fall outside any regulatory constraints. The Clause also allows for the possibility of a concession fee and/or "sovereign tariffs" (public sector dues) which are payable to the Contracting Authority, providing it with a certain revenue stream from the Concession. These may or not apply. They would need to be feasible and reasonable in the context of the Concessionaire's wider commercial and financial structure.

The draft allows for the possible inclusion of an element of government guarantee in order to make Project bankable, if this is necessary. A full guarantee of all the financing is unlikely to be either necessary or appropriate on a typical PPP structure. Partial revenue guarantees, on the other hand, are far from unknown in challenging emerging markets, especially where the creation of the port is a government initiative and there are uncertainties about its full commercial potential. The draft contains a "placeholder" for provisions of this kind.

The draft also allows for the future upgrading of the Port by adding further Contracted Assets, which require the Contracting Authority's approval above a certain value. The possible future expansion of the Port is also addressed, either to implement further Phases as envisaged in the DPR, or – perhaps more contentiously – where the Concessionaire deems it feasible. Any conditions and tests or other constraints applicable to such expansion will be a matter for negotiation.

Another possible provision envisaged by the draft which is likely to be highly contentious is the limit on the development by the Contracting Authority (or government) of competing ports, at least within a certain geographical range of the Concession Port. Many government bodies would consider this an unacceptable restraint on their statutory powers and duties; but something like it may be considered essential by investors and lenders.

Finally, the possibility of a performance bond or bonds to cover the Concessionaire's construction and operational obligations and performance standards is allowed for, but in square brackets, as it is arguably commercially pointless and a superfluous project cost. A bond is often required, nevertheless. During the design and construction phase, the obligation may be discharged by assigning the EPC Contractor's bond to the Contracting Authority.

14. Change in law

This Clause sets out the protections – critical in most concession agreements – against changes in law adversely impacting the Concessionaire. It does not of course offer relief for any changes in law of any kind; only for "qualifying" ones, as defined. The exact components of the definition will require careful thought and negotiation. The practice now is to make such protections very limited in OECD countries. But they can still be broad in emerging market ones, where there may be much greater uncertainty about future legal and political changes. The draft suggests some typical language, allowing inter alia for the possibility of a financial threshold.

Where the applicable tests are met, the procedure in sub-clause 2 for invoking the provision is then applied. Two possible consequences can follow: either compensation under Clause 15, or outright termination of the agreement by the Concessionaire if it is left unable to enjoy/perform its material rights/obligations by the Qualifying Change in Law and is deprived of at least a substantial part of the benefit of the Concession as a result.

15. Force majeure and compensation

Protections for unforeseeable events beyond a party's reasonable control are also generally regarded as crucial elements of concession agreements. Thy are sometimes called "exceptional" or "special" events, and sometimes simply force majeure. Their substance is much the same. Their definition – which can be heavily negotiated – will consist primarily of a list of specific events which can trigger the provision. The draft sets out a typical one. These may also be backed by a generalised "catch all", as in the draft, especially in markets where "country risk" is thought to be very high, and future events very hard to predict. The specific list is divided into "political" events, such as war or armed conflict or political interference with the Project, and "natural/other" events, such as storm and tempest, archaeological finds on Site or pandemic. This is partly a matter of convenient organisation of the text, and partly because the agreement will usually provide somewhat differently for some of their respective consequences.

The procedures applicable to a force majeure provision are important to avoid misunderstandings and abuse. They are summarised in the next sub-clause. The affected party must use reasonable endeavours to overcome the event but is relieved from liability for its inability to perform any obligations affected by it (which are deemed "suspended"). Either party is entitled to terminate the agreement for a prolonged event of force majeure (six months or more is suggested).

Clause 15.5 deals with the difficult subject of adjustments and compensation for events of force majeure and Qualifying Change in Law (lumping the two together as a matter of convenience, as the mechanism works in the same way for both). If the Concessionaire has incurred costs or losses, or its "financial equilibrium" (very much a civil law concept) has been adversely affected, as a result, it can require that adjustments are made to the agreement, if possible, to enable it to continue performing its obligations and compensate it for those costs and losses, such that it is left in the same net financial position as before. Many agreements link this mechanism to the assumed internal rate of return (IRR) reflected in a financial model attached to the agreement, as the draft indicates. The extent to which this mechanism applies to "natural/other" events of force majeure, as well as political ones, is usually a matter of negotiation, even though most of the remedies involved do not actually represent a "loss" for the Contracting Authority in any event. For this reason, the word "political" has been included as a qualification, but in square brackets.

The next sub-clause sets out what these adjustments and related steps may consist of – e.g., technical variations to the design or scope of services, extensions of time, an extension of the Term, tariff adjustments, etc. Cash compensation from the Contracting Authority is a last resort, which may be very contentious in negotiating the agreement's terms. The draft envisages that the provision will be applied by agreement between the parties, but with a right to go to the Dispute Resolution Mechanism if they fail to agree.

16. Default and termination

Clause 16 sets out the grounds and procedure for termination of the agreement for "default". This is defined in largely standard terms, to cover (for example) material unremedied breach of contract, repudiation of the agreement, insolvency events or adverse dissolution or reconstruction of the Contracting Authority, etc. It is sometimes also necessary to include the exercise of certain statutory powers by the latter which may be essentially incompatible with the Concession. This is allowed for in sub-clause 16.2(f), but in square brackets, as it is unusual.

The termination procedure that comes into play following an Event of Default is designed to give maximum scope to rectify the Event and avoid a "hair trigger" termination, which may be in no one's interests. A Remedy Period of 180 days ensues following a Notice of Intent to Terminate, during which the Defaulting Party must make efforts to cure the Default. If those efforts fail, a further notice period of 180 days follows, at the end of which the agreement stands terminated, unless the Lenders have by then successfully exercised their step-in rights. The aim of this further period is to leave scope for those step-in rights and give time to prepare for a full hand-over of the Port to the Contracting Authority. The former are expressed in the usual terms in the draft, with the Lenders having the right to bring in a substitute entity to replace the Concessionaire altogether and novate the agreement and other project contracts to it. For the purposes of the latter, an Appraising Team is appointed by the parties to carry out a condition survey and valuation of the Contracted Assets.

17. Transfer obligations and compensation payments

On termination or expiry of the agreement, the Concessionaire has to transfer to the Contracting Authority all the Contracted Assets, the Site and all rights and documents necessary to continue operating and maintaining the Port. These are listed. (Please also see the comments under Clause 1 above about the typical civil law classifications of assets. Some of their legal implications are filled out for the avoidance of doubt. Physical assets have to be in good condition (subject to normal wear and tear). Legal rights must be free of any encumbrances. Assets not subject to transfer must be removed within three months.

The next sub-clauses summarise the calculation of any compensation payments on an early termination of the agreement. Note that these provisions tend to take on a "life of their own" in concession agreements, reflecting the preferences of the parties and their advisers, the idiosyncrasies of the project and the dynamics of negotiation. There are often wide differences between one agreement and another. The draft suggests one set of possible approaches, taking account of both "bankability" and fairness between the parties. Many others are possible.

The Clause distinguishes between three different phases of the project and the reasons for termination in providing for compensation. (i) If during the Development Period, the Concessionaire may be entitled to all or a portion of its Development Costs – that is, sums actually spent on developing the Project to date – depending on the exact grounds of termination. Concessionaire receives nothing if its own default has led to the termination. (ii) If termination occurs during the Construction Period, the Concessionaire is fully reimbursed for all sums spent on the Project where "Contracting Authority risk" events are responsible (i.e., Contracting Authority breach of contract, Qualifying Change in Law or political force majeure), plus a premium representing lost profit. Where the Concessionaire is itself at fault, it still receives the sums actually spent on the Project, but without any premium and less any losses the Contracting Authority may suffer from the breach. Similarly, there is no premium where "other" (non-political) force majeure or prolonged force majeure are involved, but at least a proportion of the equity invested and the outstanding debt are covered. (iii) Termination during the Operation Period is handled in a similar way to (ii), but uses the concept of equity market value plus outstanding debt, rather than sums spent on the Project.

These approaches reflect both the expectations of project-finance lenders, who would usually insist on being kept whole (or largely whole; the draft allows for at least a percentage of them) whatever the reason for termination, and the value of the assets transferred to the Contracting Authority on a termination. The Concessionaire is compensated for its lost profits and sums invested where it is not at fault, while the Contracting Authority can deduct its own costs and losses where it is itself blameless. Any insurance proceeds payable on a termination are also factored

in. The calculations are made by the Appraising Team, but could be challenged by either party through the Dispute Resolution Procedure.

18. Transfer procedures on termination

This describes exactly what has to happen on termination or expiry of the agreement, as the Contracted Assets and the Port are handed over to the Contracting Authority. The Clause itemises the assets and rights to be transferred (unless the Concessionaire simply has to remove them. See comments above about limited brownfield concessions). The remaining useful life of the Assets, to the extent it is a "contracted" figure, would need careful thought and negotiation. There may be an additional short "maintenance period" for them following transfer, during which the Concessionaire must return and repair defects. The training of key Contracting Authority staff before hand-over is also dealt with. The Appraising Team has to report on the condition of the Contracted Assets immediately before hand-over.

19-24. Remaining provisions

These should be largely self-explanatory. The agreement is subject to local law but international arbitration at a recognised international venue. Allowance is made for a dispute-resolution panel (essentially, a sophisticated form of expert adjudicator), if the parties wish to include one; its procedures would be set out in an annex. A wide-ranging waiver of sovereign immunity is usually included in concession agreements, to ensure that proceedings under their terms can be brought and enforced.

Model heads of terms for seaport concession PPP agreement

(A) PARTIES

(1) [Public Partner] [Insert details] ("Contracting Authority")

(2) [Private Partner Project Company (usually special purpose vehicle)] [Insert details] ("Concessionaire")

(3) [[ ] [Insert details of any additional party (if any) e.g., government guarantor] ("Government")]

(each a "Party" and together the "Parties")

(B) RECITALS

WHEREAS:

(1) The Contracting Authority was constituted by the Government of [host country] under the provisions of [Law/Decree [ ]] (the "Ports Law") and has been vested with the power to develop, manage, manage, operate and control container, trans-shipment and other types of port in [host country].

(2) [The Government of [host country] has enacted a legislative act relating to [Concessions and other forms of] Public-Private Partnership[s] ("PPPs") in [host country], which came into effect on [ ] (the "PPP Law");]

(3) The Contracting Authority has decided to establish, equip and operate a multi-purpose [container terminal] port (the "Project", as more fully defined below) in the [Region/ Municipality of], in accordance with Decree No. [specify any relevant law], to develop and strengthen the capacity of port-related services in the [specify region] of [host country];

(4) The Contracting Authority organised and held a competitive tender for the award of the right and obligation to implement the Project in [ ] in accordance with Applicable Law and its Decision no. [ ] of that year, pursuant to which the [private partner's entity/consortium ("Sponsor")] was selected as the winning bidder, based on its proposal to implement the Project on a [Concession/BOT][SPECIFY] basis in accordance with applicable [international] standards;

(5) The Contracting Authority has now agreed, in accordance with the [specify any relevant Memorandum of Understanding/Heads of Terms] and pursuant to the Ports Law [and specify any other relevant laws], the laws of [host country] and Decision No. [ ] of [ ][SPECIFY FORMAL ADMIN. DECISION], to grant a concession to the Concessionaire for the development, financing, design, construction,

operation, maintenance and commercial exploitation of the Port and the Contracted Assets (the "Concession"), for the Term (as defined below), and their subsequent transfer to the Contracting Authority at the end of the Term, on the terms and conditions set out in this Agreement;

(6) The Parties have agreed to render all necessary cooperation and assistance and take appropriate action for giving effect to the terms of this Concession Agreement and all other agreements referred to herein in accordance with (and subject to) their terms, both during the remainder of the Development Period and the rest of the Term.

(7) **[INSERT ANY OTHER RELEVANT RECITALS]**

NOW THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Parties hereto hereby agree as follows:

(C) TERMS AND CONDITIONS

1. Definitions and interpretation

1.1 **Definitions.** Definitions of all key terms, including:[1]

• Agreement – this agreement (including the Detailed Project Report or DPR and other Annexures) as amended from time to time

• Ancillary Facilities – structures, buildings, commercial developments, etc., ancillary to the Project and outside the Contracted Assets

• Applicable Law – all binding laws of [host country]

• Change in Law (CIL) – as defined in Clause [ ]

• Concession – as defined in Clause 3

• Contract Documents – the various documents comprised in the Agreement or deemed to form part of it

• Contracted Assets – identified assets intrinsic to the Project which are subject to the design, construction, maintenance, operation and transfer obligations in the Agreement

• Construction Period – the period between Financial Close and the Operational Period

• Design and Construction Commencement Date – as defined in Clause 4.2

• Detailed Project Report (DPR) – the critical "control document" for the Project, containing technical specifications and key applicable standards

• Development Period – the period from signature up to Financial Close

• [Development Costs – the costs [reasonably and] actually incurred by the Concessionaire/Sponsor in developing the Project before the date of Financial Close]

• Effective Date – as defined in Clause 2

• Financial Close – the date on which all Financing Documents have been signed and funds thereunder have become available, all conditions precedent having been satisfied

• Financing Documents – all documents relating to the debt financing of the Project, including security documents and any Direct Agreement

• Financing Obligations – all amounts required to repay any principal and interest outstanding and due under the Financing Documents, plus associated costs and expenses

• Force Majeure – as defined in Clause 15

• Good Industry Practice – that degree of skill, care, diligence, prudence and foresight reasonably to be expected of an experienced international developer/operator performing similar responsibilities to the Concessionaire's to the specified standards

• [Lease – any separate formal lease of the Site entered into by the Parties]

• Lenders – the lenders under the Financing Documents

• Long Stop Date – as defined in Clause 4.3

• Operating Procedure – as defined in Clause 12.5

• Operational Period – the period between the start of operations and the expiry or termination of the Agreement

• Operational Port Declaration – as defined in Clause 10.8

• [Phase – define if the Project has different identified phases, some of which may be contingent]

• Port – the [type e.g., container terminal] port the subject matter of the Agreement

• Project – the development, financing, design, construction, completion, operation and maintenance

[1] NB Not a complete list and contains only summary, indicative definitions of main terms. The final list of definitions is likely to be at least three or four times as long. We also have not included here all the defined terms used in the HoT, where these are only used in isolated provisions.

of the Contracted Assets and the provision of Services to users of the Port

• Relevant Authority – any government or quasi-governmental body with jurisdiction over any aspect of the Project

• Services – the services to be provided by the Concessionaire to users of the Port, including those listed in the DPR

• Shareholder – any shareholder or owner of the Concessionaire

• Site – the site of the Port and the Project, as identified in Annexure [ ], being the land plot with cadastral number [ ]

• Term – as defined in Clause 2

• Transport Infrastructure and Utility Linkages – all transport linkages and utility supplies necessary for the Project (e.g., road, rail, power, water, heating/cooling)

• Vacant Possession – full right to enter, occupy and use property free of any claims by third parties

1.2 **Interpretation.** Standard interpretation clause, including document prioritisation clause. Consents and approvals not to be unreasonably withheld or delayed unless specifically provided otherwise.

2. Term and effectiveness

2.1 Except as otherwise provided herein, this Agreement shall take effect on signature ("Effective Date") and remain in force until the date falling [20] years from the date of [Commencement of Operations] (the "Term"), unless earlier terminated in accordance with its terms.

2.2 The Term may be extended from time to time as provided herein, but subject always to Applicable Law.

3. Grant of concession

3.1 The Contracting Authority hereby grants to the Concessionaire full right and authority during the Term of this Agreement to develop, finance, design, construct, lease, operate, maintain and commercially exploit the Contracted Assets and the Port, to do or procure all things necessary in connection therewith, including [ELABORATE AS APPROPRIATE ON MAIN RIGHTS AND OBLIGATIONS COMPRISED IN "CONCESSION"] (the "Concession").

3.2 At the end of the Term, the Concessionaire shall be obliged to transfer the Contracted Assets and the operating Port comprising them to the Contracting Authority, in a fit state for their use, operation, management and continued performance for a further notional period of [5/10] years from the date of completion of the transfer process, as more fully provided in Clause [16].

3.3 The rights granted to the Concessionaire hereunder in relation to the Port and the Project are and shall remain exclusive to it during the Term. The Contracting Authority shall not grant any such rights to any other person at the Site, allow any other person to attempt to develop and implement the Project at the Site or grant or negotiate any concession or similar contract with any other person for such purpose during such time.

3.4 The Concessionaire accepts the Concession granted to it by the Contracting Authority under sub-clause 3.2. above and agrees to exercise its rights and perform its obligations in relation thereto in accordance with (and subject to) the terms and conditions of this Agreement.

4. Conditions precedent

4.1 **Conditions.** Except for the provisions of Clauses [ ] and the related Annexures, if any, each of which shall take effect on the Effective Date (signature), all other rights and obligations of the Parties under this Agreement shall only come into full force and effect upon satisfaction (or waiver) of the following conditions ("Conditions Precedent" or CPs):

[SPECIFY e.g.:

• [Sufficient additional development capital raised to enable Development Period obligations to be successfully completed;]

• Any formal authorisations or steps taken (for example, ratification) which are necessary under Applicable Law to make the Agreement binding and enforceable;

• [The Concessionaire will have appointed a world-class port operations company, reasonably acceptable to the Contracting Authority, to act as port operator [and Shareholder];]

• All necessary due diligence on the Project and the Site carried out to the Concessionaire's satisfaction;

• [For a brownfield project – transfer of assets and personnel comprised in the Concession to the Concessionaire, drawing up of full inventory, waiver of rights by original operator, etc.]

• Any remaining technical and commercial studies

and documentation necessary to implement the Project finalised and agreed by the Parties [including a full Feasibility Study;]

• [Base Case Financial Model prepared by the Concessionaire;]

• [All [remaining] Annexures, including the DPR, finalised, agreed and attached to the Agreement;]

• All the main Project Contracts necessary to proceed with design and construction, as listed in Annexure [ ], signed and effective;

• [The Lease signed and effective;]

• The whole of the Site acquired by the Contracting Authority and made available to the Concessionaire, with Vacant Possession[, in accordance with the Lease];

• The Site cleared by the [Contracting Authority] of any identified obstacles to construction and in a fit state to enable Concessionaire to proceed with design and construction without delay;

• [Full management and operational control over all assets, equipment, infrastructure and staff comprising the Existing Port [as defined] has been handed over to the Concessionaire, as provided in the DPR][NB brownfield projects only]

• All Transport Infrastructure and Utility Linkages necessary for the Project [or to proceed with design and construction] obtained and in place;

• All permits, licences and consents necessary under Applicable Law to proceed with development, design and construction [(for instance, formal port declaration/consent to construct/ Services authorisation)] in place;

• [Any specific legal acts necessary to implement the Project in place and effective. Formal confirmation received that no others are necessary];

• Legal opinions issued on behalf of each of the Parties confirming capacity, due execution of Agreement and obligations valid, binding and enforceable;

• [OTHER AS APPROPRIATE]

• [the payment of an up-front concession fee/ provision of performance bond];

• Formal notice given on behalf of the Lenders that Financial Close achieved.

4.2 **Satisfaction of CPs.** The Contracting Authority and the Concessionaire shall each [endeavour/ use reasonable endeavours to satisfy the CPs (within the scope of their respective powers and responsibilities) as soon as practicable after the Effective Date and in any event no later than the date referred to in Clause 4.3 below. Each shall use reasonable endeavours to complete the specific steps respectively assigned to them in Annex [ ] by the dates referred to therein. The "Design and Construction Commencement Date" shall mean the date on which all CPs have been satisfied or waived by the Parties.

4.3 **Long Stop Date.** [It is the intention of the Parties that] the Design and Construction Commencement Date shall be achieved no later than [6/12/18] months from the Effective Date, or such later date as may be agreed by them or determined pursuant to the Agreement (the "Long Stop Date"). If the Design and Construction Commencement Date is not achieved by such date, either Party shall be entitled to terminate the Agreement on written notice to the other. [In that event, the Concessionaire shall be entitled to recover such portion of its reasonable and audited Development Costs as may be provided under [Clause/ Annex [ ]], provided that such termination has not arisen as a result of the Concessionaire's breach of contract].

4.4 [**Audit, etc.** Procedure for audit and payment of Development Costs and delivery of copies of all documents, designs, studies, etc., to Contracting Authority against payment].

5. Covenants – general and preliminary

5.1 **Contracting Authority.** The Contracting Authority shall:

(a) take all steps within its power to apply for and obtain all necessary formal approvals of the Port as a port under Applicable Law and issue/publish any associated declarations/ notifications;

(b) acquire or procure the acquisition of the whole of the Site (and any necessary Reclaimed Land) as identified/ delineated in Annex [ ], with full and unencumbered title, as soon as practicable after the Effective Date, and transfer or procure the transfer of leasehold interest and Vacant Possession of the same to the Concessionaire for the purposes of the Project in accordance with this Agreement [and the Lease]. [When transferred [and leased] to the Concessionaire, the Site shall be free and clear of any obstacles to construction and in a fit state to enable the Concessionaire to proceed with design and construction without delay];

(c) [enter into the Lease with the Concessionaire as soon as practicable after the Effective Date;]

(d) [acquire or procure the acquisition of any additional land needed for any subsequent Phases of the Project at the times and in the manner set out in the DPR, and transfer [leasehold interest] and Vacant Possession of the same to the Concessionaire as required thereby;

(e) not grant or create any security interests of any kind in the assets comprised in the Site, the Port or the Project in favour of any person other than the Concessionaire at any time;

(f) [carry out a full dredging of the sailing channel into the Port as more fully particularised in the DPR];

(g) undertakes and confirms (without prejudice to the termination provisions) that none of the Contracted Assets, the Port, the Site or any part of them shall be nationalised, expropriated, seized, taken over or the equivalent by or on behalf of the Government of [host country] or the Concessionaire's rights and powers hereunder cancelled or abrogated before the end of the Term other than in full accordance with Applicable Law and the express provisions hereof and without full compensation being paid to the Concessionaire for all resulting loss and damage;

(h) provide reasonable support and assistance at all times to the Concessionaire in connection with the implementation of the Project, including by way of providing available information, interfacing with Relevant Authorities, helping to obtain permits and consents or the enactment of any new legislation or regulations needed for the Project, [identifying appropriate local staff and employees,] helping to resolve specific issues and difficulties, etc.

(i) not interfere with, obstruct, or hinder the rights granted to the Concessionaire hereunder to design, develop, finance, construct, operate, maintain and commercially exploit the Contracted Assets and the Port, save only as otherwise specifically provided herein (including under sub-clause (j) below) and in accordance with Applicable Law;

(j) [modify or vary the Services at any time, on reasonable written notice to the Concessionaire, as the Contracting Authority reasonably considers necessary in accordance with its powers under duties under Applicable Law to protect the continuity of their provision and the public interest, provided that any additional costs, expenses of losses of the Concessionaire resulting therefrom are fully and effectually reimbursed or indemnified. The Concessionaire may treat any such modification or variation as an event of political force majeure].

5.2 Concessionaire. The Concessionaire shall:

(a) be responsible for carrying out and/or procuring the design, development, financing, construction, operation, maintenance and commercial exploitation of the Contracted Assets comprised within [Phase 1 of] the Project, the provision of all Services to users of the Port, the [setting and] levying of all tariffs and Commercial Charges, the development and use of any Ancillary Facilities at the Port and the Site, and all other matters comprised within the Concession, in accordance with the terms and requirements of this Agreement, Applicable Law [and the EBRD/ IFC Performance Requirements/ Standards and EHS Guidelines];

(b) [in respect of any subsequent Phases of development of the Port described in the DPR or otherwise agreed with the Contracting Authority, shall carry out and/or procure and implement the same in accordance with the DPR or such agreement.][MORE SPECIFIC AS NEC.]

6. Statutory obligations and entitlements of the parties

6.1 **Applicable Law and Good Industry Practice.** The Parties shall perform their obligations, exercise their rights and discharge their responsibilities under the Agreement in accordance with Applicable Law and (in the case of the Concessionaire) Good Industry Practice.

6.2 **Project Compliance with Applicable Law.** The Contracted Assets and the Port as designed, constructed, managed and operated by the Concessionaire shall comply fully with Applicable Law.

6.3 **General.** Concessionaire in particular to comply with and give effect to Applicable Law at the Site in relation to the environment, health and safety, terms of employment, conditions of work, wages and salaries, non-discrimination, etc. [OTHER AS APPROPRIATE.]

6.4 [**Tax Exemptions.** The Project and the Services shall benefit from the tax and duty exemptions and concessions specified in the DPR [OR SPECIFY].]

6.5 [**Duty-Free Zone.** INCLUDE ANY RELEVANT PROVISIONS RELATING TO A DUTY-FREE ZONE AT OR CONNECTED TO THE PORT].

6.6 **Government Powers not Restricted.** For avoidance of doubt, Government's statutory powers not restricted or qualified by the Agreement, but without prejudice to any rights or remedies of the Concessionaire hereunder.

6.7 **Finance and Security.** Concessionaire shall have full control over sourcing, terms and negotiation of all

financing and security arrangements and documents required for the Project, and shall be entitled to create such security interests over all its rights and assets as may be permitted under Applicable Law and necessary for this purpose. [Contracting Authority entitled to review and comment on financing and security documents.]

7. Regulatory framework

[Insert any specific provisions needed in relation to host country's port regulatory regime and any anticipated changes to it.]

8. Development period

8.1 **Technical Records and Studies.** Contracting Authority to make available to Concessionaire all records, documents, studies and data relating to the Port, the Project and the Site as soon as possible after Effective Date, subject to any reasonable confidentiality restrictions.

8.2 **Clearances (Licences and Permits).** Contracting Authority to use [best/reasonable] efforts throughout the Term to assist Concessionaire to obtain any clearances required for the purposes of the Project or Concessionaire's rights and obligations. [In particular, Contracting Authority shall obtain those specific clearances on behalf of the Project/ Concessionaire listed in Annex [ ].]

8.3 **Design Engineer and EPC Contractor. Detailed Engineering Drawings.**

(a) Concessionaire fully responsible for production of all detailed designs and specifications for the Project, which shall be in accordance with the requirements of the DPR and the Contract Documents.

(b) Concessionaire shall appoint the [Design Engineer and] Engineering, Procurement and Construction (EPC) Contractor on or before Design and Construction Commencement Date, [each] of international standing and repute and appropriate qualifications and experience. Names and credentials to be provided to Contracting Authority at the time of their appointment.

(c) Copies of such of detailed design and engineering documents identified for this purpose in the DPR to be submitted to Contracting Authority for its [information and review] within a reasonable time after preparation. Concessionaire to respond promptly in writing to any reasonable questions or concerns about them raised by the Contracting Authority. Copies of all final designs for the Contracted Assets to be provided to the Contracting Authority.

8.4 **Land.**

(a) Ownership of all land comprised within the Site (including Reclaimed Land) [and leased] [to the Concessionaire under the Lease] shall remain with the Contracting Authority.

(b) All such land (and its use and occupation) shall revert to the Contracting Authority on termination of the Agreement and the Lease.

(c) Concessionaire shall not dispose of its legal interest in such land to any third party (but without prejudice to its right to sublease, subcontract and grant security interests).

(d) [The term of the Lease shall run concurrently with this Agreement and terminate at the same time. The Lease shall not be terminated otherwise.]

(e) Contracting Authority to provide Concessionaire with any easements (or equivalent rights) relating to the Site and necessary for the purposes of the Project, including any identified in the DPR.

(f) Title to any Reclaimed Land acquired for the Project shall vest in the Contracting Authority. Such land shall be deemed to form part of the Site and shall revert to the Contracting Authority with the Site on termination. [(The Lease shall be amended as necessary to allow for its inclusion)]. Acknowledged that Reclaimed Land shall form an integral part of the associated asset infrastructure for the Contracted Assets.

(g) Concessionaire may sublease or sublicence any part of the Site for the purposes of the Project and the exercise of its rights and performance of its obligations. [Concessionaire shall notify Contracting Authority in advance of the identity, experience and capabilities of any material [DEFINE] sublessee or sublicensee, to which it may raise reasonable objections based on a reasonable belief that it may not be able to discharge its responsibilities or be harmful to national security].

(h) [Contracting Authority to acquire or procure the acquisition of any additional areas of land outside the Site boundaries (if any) needed for the expansion of the Port in subsequent Phases in accordance with the DPR and identified therein. Such areas to form part of the Site on acquisition. [Lease to be amended accordingly]].

(i) [Any lease rentals for the Site to be set out in the Lease and subject to periodic revisions pursuant to its terms.]

8.5 **Progress Monitoring and Status Reports.** Contracting Authority and Concessionaire shall provide each other with regular status reports relating to the

performance of their respective obligations during the Development Period at the times and in the manner required by Annex [ ].

8.6 **Provision of Transport Infrastructure and Utility Linkages.** Contracting Authority responsible for providing or arranging the provision of all Transport Infrastructure and Utility Linkages needed for the Project. If a material delay in providing any such Linkages delays the progress or completion of the construction works or the Commencement of Operations, Concessionaire shall be entitled to an extension of the Scheduled Construction Period on a day-by-day basis until they have been provided in full.

9. Corporate structure

9.1 **Incorporation.** Acknowledged that Concessionaire is a [limited liability company] incorporated in [host country]. Confirmed that Concessionaire's corporate documents are in accordance with the requirements of this Clause and have been submitted to Contracting Authority, together with information in reasonable detail about Concessionaire's corporate structure and shareholdings. Concessionaire shall inform Contracting Authority of any material change to its corporate structure, shareholdings, ownership interests or corporate documents, but any such changes shall only require Contracting Authority's approval where this Agreement specifically so provides.

9.2 **Requirements.** Concessionaire may not engage in any business activities outside the scope of the Project without Contracting Authority's consent. Concessionaire shall prepare and maintain all records, documents and accounts required under the laws of its place of incorporation. [Concessionaire may incorporate one or more subsidiary or affiliated companies in [host country] to assist it to perform its obligations and exercise of its rights hereunder as effectively as possible].

9.3 **Composition of/Changes to Shareholdings.** Acknowledgement of shareholdings in Concessionaire as at Effective Date. [SPECIFY ANY RESTRICTIONS ON FUTURE CHANGES TO SHAREHOLDINGS, e.g.] Concessionaire undertakes that no acquisition of its shares will be made by any person which, in Contracting Authority's reasonable opinion, would be contrary to applicable law or the national interest or otherwise materially detrimental to the implementation, operation or reputation of the Project.

9.4 **[No disposal of critical interest without consent.** Concessionaire not to agree to any disposal of its Shareholding by [ ][IDENTIFY ANY CRITICAL SHAREHOLDERS] for a period of [ ] years after the Effective Date without the consent of Contracting Authority.]

10. Design and construction

10.1 **Length of Design and Construction Period.** The period for completion of construction of the whole of the Contracted Assets ("Scheduled Construction Period") for Phase 1 shall be [36] months, starting on the Design and Construction Commencement Date, as the same may be extended in accordance with the terms hereof. [For any subsequent Phases of the Project, the Scheduled Construction Period shall be as specified in the DPR or otherwise agreed by the Parties].

10.2 **Obligations to Design and Construct.**

(a) Concessionaire shall carry out (or cause to be carried out) all works of design, construction, building, supply and equipping of the Contracted Assets in the time and manner required by this Agreement. All such work shall be in accordance with the DPR, the Contract Documents, the standards laid down therein and the final designs and drawings.

(b) Concessionaire to provide Contracting Authority, for its information, within [15] days after Design and Construction Commencement Date, a programme of the timetabling of the design and construction works, showing how completion will be achieved within the Scheduled Construction Period.

(c) Concessionaire confirms that it is familiar with the Contract Documents and understands all their requirements. Deemed to have investigated the nature of the work, verified all measurements and quantities, and carried out all necessary tests and examinations. Subject to variations for material difficulties not reasonably foreseeable at Effective Date, including in particular the risk of contamination or discovery of items of historical/ archaeological importance or interest on Site.

(d) In the event Concessionaire is or is likely to be delayed in performance of its design and construction obligations by a Change in Law or force majeure event, it shall be entitled to a reasonable extension of the Scheduled Construction Period (and any other relevant deadlines) in accordance with Clause [ ] (but without prejudice to any other rights or remedies).

(e) [If the Concessionaire fails to complete the construction works by the end of the Scheduled Construction Period, as extended from time to time under paragraph (d) above, it shall pay liquidated

damages of [...] per day of delay up to a maximum amount of [ ], at which point this Agreement may be terminated by the Contracting Authority for a Concessionaire's Event of Default].

10.3 **Construction Monitoring and Inspection.**

(a) Contracting Authority entitled to carry out such monitoring, inspection, testing and measuring of the construction activities on Site as may be reasonable in all circumstances to satisfy itself that they are all in conformity with the DPR and the Agreement's requirements. [INSERT ANY LIMITS – e.g., one per calendar quarter.]

(b) Concessionaire to provide regular status reports on design and construction as required by Annex [ ] and such data, documents and reports in its possession as may be reasonably requested from time to time.

(c) Concessionaire to provide unhindered access and reasonable cooperation to Contracting Authority for monitoring and inspections, which shall be carried out at reasonable times and on reasonable notice so as not to delay or disrupt progress.

(d) [Contracting Authority may set up and maintain a site office for monitoring purposes. Concessionaire bears reasonable running costs.]

10.4 **Transport Infrastructure and Utility Linkages.** Contracting Authority to ensure that all transport and similar infrastructure linkages to the Site and all utilities (incl. water, power, gas, waste [OTHER]), necessary for the Project or identified in the DPR are provided and made available for the benefit of the Concessionaire as soon as practicable after the Effective Date, and thereafter properly and efficiently maintained throughout the Term. Concessionaire to be kept informed about progress of their supply and installation and to provide Contracting Authority with reasonable assistance as required.

10.5 **Subcontracts**

(a) Concessionaire may subcontract any of its design, construction, operation and maintenance responsibilities to third parties with suitable experience, skills and resources. Contract terms must be consistent with this Agreement. Concessionaire to keep Contracting Authority regularly and properly informed about subcontracting activities and notify it in advance of the identity and credentials of any material subcontract. [DEFINE MATERIALITY – for example, annual expenditure of at least US$ 500,000]. [Contracting Authority can raise reasonable objections to any material subcontractor which it reasonably believes [will not be able to perform or] would be harmful to national interest.]

(b) No subcontracting shall relieve Concessionaire of any of its obligations hereunder. Concessionaire to ensure that all subcontractors perform to the requisite standards and shall be fully liable for any failures or breaches of contract on their part. Copies of material subcontracts to be provided to Contracting Authority.

10.6 **Design and Construction – General.**

(a) Concessionaire to perform all its design, construction, operation and maintenance responsibilities in accordance with Good Industry Practice and to the standards specified in the DPR. It shall have full control over all aspects of the organisation, management, planning, ordering and logistics of the design and construction works, but subject to the following requirements;

[SPECIFY e.g.

- Records and documents to be maintained/ made available to Contracting Authority
- Make use of local products and equipment where reasonably practicable
- Make use of local labour/ manpower where reasonably practicable
- Responsible for all working methods, etc.
- Appoint and maintain at Site a suitable qualified representative and staff to interface with Contracting Authority
- Responsible for any necessary housing of staff and workers at Site
- Ensure that staff and employees on Site are subject to regulations and restrictions under local law. Comply with employment laws under applicable law
- Maintain order and security at the Site
- Carry out all necessary testing and sampling, etc.
- Responsible for health and safety, take reasonable care to avoid death or injury, etc.
- Responsible for prompt reporting/ notification of any findings of antiquities or objects of significant historical, cultural or archaeological value on Site. Entitled to suspend progress of construction works if necessary while finds protected and removed, and to treat discovery as event of force majeure.

10.7 **Detailed Project Report (DPR).** All design and construction of the Contracted Assets to be in accordance with the DPR. Prior written approval of Contracting Authority needed for any material variation of the DPR, which shall not be unreasonably withheld if [proposed change would not materially prejudice the overall functioning, capacity, operation

or standards of the Port, or] is otherwise reasonably justified for performance of Concessionaire's obligations or necessitated by Change in Law. Scheduled Construction Period to be adjusted as necessary as a result. Contracting Authority to respond promptly and in any event within [one month] to any proposed variation. Changes can also be made by simple agreement between the Parties.

10.8 **Operational Port Declaration.** Concessionaire may notify Contracting Authority during Construction Period of substantial completion of the whole or such part of the Contracted Assets as makes possible their use as a functioning port, and are accordingly ready for formal declaration as a public port (the "Operational Port Declaration"). Contracting Authority entitled to verify this by inspections, attending final tests and receiving copies of relevant certificates and other documents under EPC Contract, etc. Contracting Authority agrees to rely on certificates, test results, etc., unless subject to manifest error. At the earliest practicable date after such verification, Contracting Authority shall issue (or procure issue) of Operational Port Declaration, and take all necessary steps to give legal effect to it (including publication). Concessionaire entitled to start operating and using the relevant facilities as a port as from such issue.

10.9 **Date of Commencement of Operations.** This shall mean the date on which the Operational Port Declaration becomes effective (and any remaining Conditions Precedent have been satisfied or waived). If issue or effectiveness of Declaration is delayed without fault on Concessionaire's part, Concessionaire entitled to a day-for-day extension to the Scheduled Construction Period. Contracting Authority shall use reasonable endeavours to expedite its coming into effect.

10.10 **Completion of Whole of Construction.** Contracting Authority shall carry out inspection of all Contracted Assets promptly following notice from Concessionaire that their construction has been substantially completed. If reasonably satisfied as to substantial completion in accordance with the Agreement, it shall issue a Certificate of Completion of Construction.

11. Ownership of contracted assets

11.1 [**Ownership of Assets.** Acknowledged that legal title, right and interest in and to the Contracted Assets during the Term vested in [Concessionaire] to extent permitted by applicable law, until transferred to Contracting Authority. Concessionaire entitled to maintain, repair, replace and improve any of them at discretion, provided they remain at all times in conformity with the DPR, the detailed design and this Agreement.]

11.2 **Security.** Concessionaire entitled to grant security interests in accordance with Applicable Law in all its rights and interests in this Agreement, the Lease, the Project Contracts, the Contracted Assets, the Port and the Project for the purposes of financing the implementation of the same, including by way of [mortgage/charge/assignment/[OTHER], etc].

12. Operations

From the Date of Commencement of Operations, the following provisions shall be applicable:

12.1 **General.** Concessionaire entitled and obliged to manage, operate, maintain and commercially exploit the Contracted Assets and the Port and provide the Services throughout the Operational Period, regularly and without unreasonable interruption, in full accordance with the requirements of this Agreement, Good Industry Practice and the standards specified herein, at its own cost and expense (save as otherwise provided), and to collect and retain the revenues and profits therefrom (other than the Sovereign Tariffs).

12.2 **Autonomy.** Concessionaire entitled to plan, organise, manage (etc.) all its activities, the operational regime and the management of its business as it judges best at its discretion to exercise its rights and meet its obligations, including (for the avoidance of doubt and subject to Applicable Law)) the following specific activities:

(a) hire and fire staff;

(b) enter into commercial contracts, subcontracts, subleases, etc.

(c) issue all rules and regulations for organisation of work/ working practices on Site;

(d) open and maintain bank accounts in local and foreign currency both inside and outside [host country];

(e) borrow from local and international banks;

(f) use, apply, retain, distribute, etc., any capital invested in the Project;

(g) retain or distribute net profits from the Project and transfer the same within or outside [host country];

(h) make use of foreign labour where local labour impractical or insufficiently qualified;

(i) [specific staff retention/ entry and exit rights?];

(j) enjoy full benefit or rights under this agreement or Applicable Law to use and develop the Site and any related real estate for purposes of or connected

with the Project, including developing any Ancillary Facilities;

(k) receive, retain, use and apply all revenues resulting from the commercial exploitation of the Contracted Assets and Project (other than Sovereign Tariffs);

(l) [enjoy any privileges or exemptions available under applicable investment promotion laws, for example, tax or duty exemptions;]

(m) [rights of foreign workers to transfer salaries or wages abroad, etc.]

(n) [OTHER AS APPROPRIATE.]

12.3 **Pilotage, Guidance, etc.** Concessionaire to ensure that any pilots it engages at the Port are properly licensed by Relevant Authorities. Concessionaire to take reasonable steps to familiarise pilots with local waters of Port and any applicable official guidelines. All guidance and towing activities to comply with Good Industry Practice.

12.4 **Operations and Services.** Concessionaire shall, in accordance with this Agreement and Good Industry Practice:

(a) efficiently and regularly operate, maintain, manage and make available the Contracted Assets;

(b) provide all resources necessary for the operation and maintenance of the Contracted Assets and the Port;

(c) provide the Services to the users of the Port to the standards specified in the Contract Documents, without any unreasonable interruption, [failure of which the liquidated damages provided for in the same Contract Documents may be applied by the Contracting Authority];

(d) provide access to the Port to users and shipping lines on a non-discriminatory basis (as defined under Applicable Law).

12.5 **Operating Procedure.** Concessionaire responsible for preparing, notifying and (as required) publishing the written statement of detailed procedures for the operation of the Port and provision of the Services ("Operating Procedure") in accordance with Applicable Law and the DPR. To incorporate any reasonable suggestions or comments of Contracting Authority, which shall provide reasonable assistance with its preparation. Contracting Authority to be supplied with an up-to-date copy at all times.

12.6 **Commercial Contracts.** Concessionaire and its subcontractors entitled to enter into (long-term) commercial contracts with third-party users of the Port and its facilities, governing terms of access and use (incl. any permissible priority or exclusivity). Any such contracts must not be inconsistent with this Agreement and terminate on its termination or expiry.

12.7 **Priority Services.** Acknowledged that the Government or other relevant Authority may, pursuant to Applicable Law, direct the Concessionaire to provide Priority Services at the Port (i.e., port-related services or facilities which can be mandated to deal with events of national importance, national emergency, environmental catastrophe, etc.). Concessionaire to comply with any such lawful directions to extent practicable and commensurate with available resources. Contracting Authority to indemnify Concessionaire against all resulting costs and losses (including lost profits) and assist it to obtain any available statutory compensation. Concessionaire only liable for Concession Fee payments at such time to extent available revenues permit it to pay them on substantially the same commercial basis as normal. Priority Services deemed to be a force majeure event.

12.8 **Subcontracting.** Concessionaire may engage subcontractors for provision of the Services. Must ensure they comply with terms hereof and fully liable for performance of their acts, omissions or faults. Contracting Authority has no liability for any sums owed to them on or following expiry of Agreement.

12.9 **Leases and Licences.** Concessionaire may lease or licence the use of the Contracted Assets or the Site to third parties, keeping the Contracting Authority properly and regularly informed. Leases and licences not to be inconsistent with this Agreement and terminate on its termination or expiry.

12.10 **Personnel.** Concessionaire and its subcontractors/sublessees, etc., entitled to hire and employ such personnel on such terms as they deem appropriate, provided they do so in accordance with Applicable Law. [Concessionaire shall award at least [ ] per cent of its employment positions during Operational Period to nationals of [host country] provided they have the necessary skills and experience to perform their respective responsibilities]. Concessionaire to train local employees using up-to-date methods and practices consistent with Good Industry Practice, with a view to ensuring they are properly qualified to manage and operate Port on transfer.

12.11 **Security.** Concessionaire responsible for physical security of Project and staff within boundaries of the Site and the provision of properly trained and resourced security personnel as reasonably necessary to guard against potential threats and as required by Applicable Law/ Good Industry Practice. Contracting Authority responsible for such security outside Site boundaries. [REFINE AS NEC.] Responsibilities to apply for duration of Agreement from handover of Site.

12.12 **Maintenance Standards.** Concessionaire to maintain, repair and replace the Contracted Assets as necessary in accordance with Good Industry Practice and any specific schedule/ plan in the DPR.

12.13 **Interaction of the Parties.**

(a) Each Party to appoint a formal Representative to act on its behalf in relation to the Project, receive communications, notices, etc. Contracting Authority shall also constitute a Committee including its Representative and appropriate technical/ commercial experts to monitor and report on progress of operations at the Port, address specific issues, etc. Concessionaire entitled to rely on its conclusions and decisions as being those of CA.

(b) Concessionaire to submit to the Contracting Authority the following as from Date of Commencement of Operations:

a. annual reports covering operation and maintenance of Port and all relevant material technical/ commercial/ financial/ training matters; [REFINE AS NEC.]

b. traffic/ throughput reports;

c. updates to the list of material third-party contractors.

(c) Concessionaire to provide such further information throughout Term as Contracting Authority may reasonably request to verify that the former is in compliance with terms of the Agreement. Also to provide unhindered access and necessary cooperation for purposes of monitoring and inspecting Project and Port operations, at reasonable times on reasonable notice. [Contracting Authority entitled to on-site office at Concessionaire's cost.]

(d) Contracting Authority shall throughout Operating Period:

a. provide Concessionaire with all reasonable assistance in relation to any procedures or applications required under Applicable Law or by any relevant Authority;

b. [be responsible for berth depths support in accordance with passport depths, and for timely performance of the operational dredging of the operational waters of the berths, water accesses to them, etc., all as specified in the DPR.]

12.14 **Contracting Authority Step-In Rights.**

(a) Contracting Authority or Government ("Step-In Entity") entitled to take over operation of the Port (in whole or part) for purposes of ensuring its continuity and the effective provision of the Services where necessary (and required by statute) for it to do so to:

a. prevent, mitigate or eliminate an emergency [DEFINE] where the Concessionaire, in breach of contract, is unable to do so itself; or

b. on reasonable and proper grounds of national security.

(b) Step-in rights exercised by giving Concessionaire as much notice as practicable. If in accordance with this Clause, Concessionaire to allow Step-In Entity to take over operation of Port (in whole or part) for such period of time as necessary to deal with emergency or matter of national security. Concessionaire to provide reasonable assistance. During such time, Step-In Entity fully responsible for managing, operating and maintaining facilities taken over, for collecting all revenues therefrom and for all costs and liabilities of Concessionaire relating thereto (other than resulting from any breach of contract). [Revenues held on trust (or equivalent[2])/for the account of Concessionaire.]

(c) Operation and control of Port to be returned to Concessionaire in full as soon as possible after ground to step in have ceased to apply, and in any event within [six] months. If not at fault, Concessionaire entitled (unless already fully compensated) (a) to extension of Term equivalent to duration of exercise of step-in rights, which are deemed to constitute political force majeure event; and (b) to terminate Agreement for prolonged political force majeure where operation and control not returned to it within [six] months.

13. Commercial matters

13.1 **Traffic Reports.** Concessionaire to submit annual traffic and cargo throughput reports to Contracting Authority, showing any variances against projections.

13.2 **Tariffs.** Concessionaire entitled to [set,] revise, levy and collect all tariffs and fees for its services, in accordance with Applicable Law and Annex [ ] of this Agreement. To include both permitted tariffs for port usage and other commercial charges. [Allow for "Sovereign Tariffs" collected on behalf of Government?] Can structure them [at its discretion] subject to any applicable regulations.

13.3 **Public Notification.** Tariffs to be non-discriminatory in accordance with Applicable Law; although Concessionaire may customise packages of services and charges for individual users. Comprehensive tariff schedules setting out rates and

[2] A "trust" is a common law concept. The civil law equivalent is a simple notion of "on behalf of" or "for the account of" someone else.

timing shall be published and notified to port users by Concessionaire. Concessionaire can arrange for tariffs and charges to be collected by third-party agency.

13.4 **Concession Fee and Non-Discrimination.** Any Concession Fee (if any) payable in respect of operation of the Port (including any relevant exemptions) to be determined and paid in accordance with detailed provisions set out in the DPR (for example, flat rate/ throughout-based/ profit-share). Contracting Authority warrants and undertakes that it shall not levy charges, royalties or fees (including Concession Fees) at any other comparable ports in [host country] on terms materially more favourable than those that apply at the Port, and that all Sovereign Tariffs are charged on a consistent and non-discriminatory basis.

13.5 [**Guarantee/ Revenue Support.** ALLOW AS APPROPRIATE FOR ANY SPECIFIC GOVERNMENT REVENUE SUPPORT OR WIDER GUARANTEE.]

13.6 **Additional Contracted Assets.** Concessionaire may from time to time ask the Contracting Authority to approve additional assets to be constructed or installed at Port as Contracted Assets, including as part of implementation of further Phases, provided their value exceeds the threshold amount specified in the DPR. The procedures and criteria in Clause 10 shall apply to such requests. Approval deemed to be given if no response from Contracting Authority within [60] days. Relevant designs and studies for such assets also subject to approval on the same basis, and shall become part of the DPR.

13.7 **Expansion.** Concessionaire entitled to develop and expand the Port and the Contracted Assets during the Term, either by implementing subsequent Phases or as seems reasonably constructive and appropriate to Concessionaire for the purposes of the Project, provided the Project [and host country] economics, cargo and traffic throughout, the state of the relevant financial markets [and host country political situation] are deemed [by Concessionaire] to justify it. Formal variations to DPR to be made as necessary. Subject to the approval of Contracting Authority.

13.8 [**Competition.** Contracting Authority undertakes that neither it nor the Government shall develop or permit to be developed any materially competing ports or similar facilities in [host county] [within a distance of [ ]km from Port/ between specified longitudinal/ latitudinal points] during the Term. [DEFINE "competing" – for example, could reasonably be expected to have material adverse effect on commercial standing and revenues of the Port or specify criteria in DPR]. A breach of this undertaking deemed to be a political force majeure event.]

13.9 [**Performance Bonds:** Concessionaire shall issue (or procure the issue) in the form of a first demand bank guarantee (i) a "completion bond" of an amount of [...] on which the Contracting Authority may draw if the Concessionaire fails to comply with any of its material design and construction obligations; and (ii) a "performance bond" of an amount of [...] on which the Contracting Authority may draw if the Concessionaire materially fails to meet the level of services provided for in the Contract Documents.]

14. Change in law

14.1 **Definitions.**

(a) "Change in Law" (or "CIL") [DEFINE] to include enactment of new laws, modification or repeal of existing laws, commencement of a law not yet in effect at Effective Date, change of interpretation or application of law, a Regulatory Change in Law [define] or a Loss of Permit [define to include amendments].

(b) "Qualifying Change in Law" is one which results in significant capital or operational expense for Concessionaire, or materially hinders or adversely affects it in the performance of its obligations or exercise of it rights under this Agreement, the Financing Documents of Project Contracts, reduces its revenues [or profitability] from the Project or necessitates a material changes to the Contracted Assets, the DPR, the design documents or this Agreement. Provided not attributable to a breach or fault of Concessionaire and not foreseeable at Effective Date. [REFINE AS APPROPRIATE, including any agreed thresholds (e.g., minimum cost of US$ 50,000) or other relevant concepts (e.g., "specific" CIL).]

14.2 **Consequences.**

(a) Concessionaire to give notice of Qualifying CIL to Contracting Authority as soon as practicable, with reasonable detail as to its impact.

(b) If Qualifying CIL does not lead to service of Termination Notice below, the compensation provisions of Clause 15 apply.

(c) If Qualifying CIL renders Concessionaire unable to perform or exercise any of its material rights or obligations under this Agreement, the Financing Documents or Project Contracts, or renders them illegal or unenforceable, such that Concessionaire is deprived of the whole or a substantial part of the benefit thereof, Concessionaire may serve a Termination Notice. Parties then consult for a period of [90] days in attempt to agree changes to the Agreement which will mitigate the CIL to the Concessionaire's reasonable satisfaction. If they fail to do so, the Concessionaire can proceed with termination.

(d) Acknowledged that these provisions do not extend to a Change in Law of general application in [host country] which do not amount to a Qualifying CIL. Each Party to bear the economic consequences thereof itself.

15. Force majeure

15.1 **Definition.** Any event or circumstance after the Effective Date which adversely affects or impedes a Party in the performance of its obligations or exercise of its rights hereunder and which is beyond the affected Party's reasonable control, was not reasonably foreseeable, and could not have been avoided or overcome with reasonable care/Good Industry Practice. Includes the events listed below (but only the Concessionaire can claim political force majeure) and those affecting the Concessionaire's subcontractors. [Identify specific exceptions, including late or defective performance by subcontractors, late delivery of plant equipment and insufficiency of funds, etc.]

15.2 **Specific.** Force majeure includes the following specific events meeting the above tests:

(a) Political force majeure. Events of the following kind provided not a reasonable response to the breach or omission of the affected Party:

- acts of war, insurrection, revolution, etc.
- blockade, riot, bombs, civil commotion, etc.
- political strikes/ industrial action, etc.
- decision or order of a court or Relevant Authority impeding performance
- failure or delay in granting a necessary licence, permit or consent
- cancellation, suspension, etc., of any necessary licence, permit or consent
- Qualifying Change in Law
- acts or omissions of the Contracting Authority (incl. breach of contract) or Government having a material adverse effect on the Project [or the Concessionaire's financial equilibrium]
- nationalisation, confiscation, requisition of the Port, Project, Contracted Assets, etc.
- Priority Services or Contracting Authority step-in rights
- [serious disruption or deterioration in [host country] political or economic situation adversely affecting Project or the availability of funds to finance it].

(b) Natural/ other force majeure ("OFM") includes the following:

- explosion, accident, breakage, etc.
- tidal variations, storms, etc.
- lightening, tempest, storm, etc.
- epidemic/pandemic or plague
- discovery on Site of archaeological finds, etc. [or adverse subsurface/ subaqueous conditions]
- third-party claims relating to acquisition, use or occupation of Site.

15.3 **Procedure for Calling Force Majeure.** Affected Party to send notice(s) to other Party as soon as practicable after occurrence of force majeure event, specifying nature of event, impact, steps taken to mitigate, estimate of duration, etc. Regular updates to be provided during continuance of event, at least monthly, together with facilities for site inspection, access to further information, etc.

15.4 **Consequences.** Force majeure period deemed to last from its occurrence (as notified) until its impact is no longer adverse. Further notice to be given on expiry. Parties to consult in good faith during continuance. Affected Party to use all reasonable endeavours in accordance with Good Industry Practice to overcome and mitigate adverse impact of event and resume performance of affected obligations as soon as practicable, and to use available insurance proceeds for this purpose. Obligations adversely affected by force majeure event are deemed to be suspended for its duration. Affected Party entitled to reasonable extension of time to any time-related obligations and (subject to Applicable Law) a reasonable extension of the Term to allow for impact.

15.5 **Adjustments and Compensation for Force Majeure/Change in Law.**

(a) If a Qualifying Change of Law or event of [political] force majeure occurs which causes Concessionaire to incur material cost, loss or expense, or otherwise has a material adverse effect on its commercial or economic standing or financial equilibrium (including anticipated Internal Rate of Return [DEFINE]) then Concessionaire entitled to give notice to Contracting Authority requiring that such changes or adjustments are made to the Agreement and/or its charges of tariffs, or such other steps are taken

- as may be necessary to enable it to continue performing its obligations and exercise its rights and
- to provide it with reasonable compensation for its costs, losses, expenses or other adverse effect

[such that it is left in the same net financial position as before and enjoys the same IRR][REFINE KEY TESTS AS APPROPRIATE]. No account taken of costs and losses covered by insurance.

(b) Changes, adjustments or other steps may include any of the following:

- extensions of time for performing obligations
- extension of the Term (subject to Applicable Law)
- changes to Concessionaire's tariffs or charges (subject to Applicable Law)
- changes to the nature or scope of the Services
- changes to the DPR or Project design
- [if above do not adequately compensate Concessionaire, [in the case of events of political force majeure], cash compensation payments by the Contracting Authority.]

(c) Parties' Representatives to meet following service of notice, to discuss and attempt to agree appropriate remedies. In assessing impact, due account to be taken of financial assumptions, cash-flow forecasts and IRR set out in financial plan attached to [DPR]. Financial Model it contains to be re-run to assist assessment. If Contracting Authority and Concessionaire cannot agree on necessary changes, adjustments or other steps within [SPECIFY PERIOD(S)], either Party can refer the matter for determination to Dispute Resolution Procedure (DSP) under Clause [ ]. If determined under DSP that changes, adjustments or other steps cannot be made or taken to compensate Concessionaire adequately, [either Party/ Concessionaire] is entitled to terminate the Agreement.

15.6 **Termination for Prolonged Force Majeure.** If force majeure event continues such that affected Party is unable to perform its material obligations or exercise its material rights for a continuous period of at least [six] months, either Party is entitled to terminate the Agreement.

16. Default and termination

16.1 **Concessionaire Defaults.** The following constitute Concessionaire Events of Default entitling Contracting Authority to terminate the Agreement;

(a) material breach of the Agreement by Concessionaire which remains unremedied for [180] days after notification from CA;

(b) repudiation (etc.) of Agreement by Concessionaire;

(c) appointment of provisional liquidator or equivalent to wind up Concessionaire, unless notice set aside within 45 days;

(d) order or voluntary petition for winding up Concessionaire, except for purposes of amalgamation, reorganisation, reconstruction, etc. (subject to usual qualifications);

(e) Concessionaire abandons construction or operation of the whole or substantial part of the Port for a continuous period of [90] days;

(f) failure to pay Concession Fee due for at least [one year]

16.2 **Contracting Authority Defaults.** The following constitute Contracting Authority Events of Default entitling Concessionaire to terminate the Agreement;

(a) material breach of the Agreement by Contracting Authority [or Government] which remains unremedied for [180] days after notification from Concessionaire;

(b) dissolution, reconstruction or reorganisation of Contracting Authority in whole or part, on terms not reasonably satisfactory to Concessionaire and its lenders, which has a material adverse effect on its obligations or the rights of the Concessionaire hereunder or the enforceability of the Agreement's provisions;

(c) repudiation (etc.) of the Agreement by Contracting Authority;

(d) [failure to issue or procure the Operational Port Declaration within [three months] of construction completion];

(e) [termination of the Lease by the Contracting Authority;]

(f) Performance of acts or occurrences listed in Annex [ ]];

16.3 **Consequences of Default.** In an Event of Default occurs, the following termination procedures shall apply:

(a) Non-defaulting Party may initiate termination by delivering notice of intent to terminate to defaulting Party, specifying grounds relied on and any default, copied to the Lenders.

(b) Defaulting Party then has a Remedy Period of [180] days from date of notice to rectify Event of Default, to the reasonable satisfaction of the non-defaulting Party. Can continue to make efforts to rectify during Remedy Period; non-defaulting Party must not interfere or obstruct. Parties to continue performing all other obligations.

(c) Lenders also entitled to procure or assist with rectification of Concessionaire Event of Default during Remedy Period, and to pay any amounts outstanding to Contracting Authority (with interest at default rate), in accordance with the terms of their Direct Agreement.

(d) If Event of Default (or other ground of termination) is rectified or ceases to apply, or non-defaulting Party is satisfied with rectification steps being taken, during Remedy Period, the notice of intent to terminate shall be withdrawn.

(e) If not, the non-defaulting Party may terminate the agreement by giving defaulting Party a further Termination Notice of [180] days, copied to the Lenders. At the end of such period, unless the Lenders have exercised their substitution rights under the Direct Agreement, this Agreement shall stand terminated.

(f) In connection with any termination or expiry of the Agreement, Contracting Authority is entitled to serve a Transfer Information Notice, requiring Concessionaire to provide all relevant information, data and records relating to the Port, the Contracted Assets, its business, etc., to the Appraising Team under sub-clause (g) to enable the condition survey to be carried out.

(g) Following service of a Termination Notice, Lenders entitled to take steps to bring in a substitute entity ("NC") to take over the rights and obligations of Concessionaire in its place, in accordance with the detailed procedures specified herein and in the Direct Agreement, including consultation and provision of all relevant information. [SPECIFY] Lenders entitled to effect substitution if NC has the necessary management capabilities, competence and resources for the role, subject to Contracting Authority's reasonable approval. Contracting Authority to provide all reasonable assistance throughout this process. If approved, this Agreement, the Lease and all the Project Contracts and documents shall be novated to NC. If the Lenders fail to effect and complete such substitution by the expiry of the Termination Notice period, termination goes ahead.

(h) Parties to appoint an Appraising Team in the event of any termination or expiry of the Agreement, to carry out a condition survey of the Contracted Assets and the Port and determination of any Final Compensation payable, consisting of a port and harbour engineering expert, a transport economist and a financial expert. [SPECIFY PROCEDURE with fallback mechanism for appointment by independent firm of international repute failing agreement of the Parties.]

17. Transfer obligations and compensation payments on termination

The following provisions apply on any termination or expiry of the Agreement:

17.1 **Scope of Transfer.** Concessionaire to hand over use, control and occupation of the Site, the Contracted Assets and the permanent facilities comprised therein, and transfer the following assets necessary to operate and maintain the Port to Contracting Authority:

(a) all land and buildings

(b) plant and machinery

(c) spare parts

(d) deeds and documents necessary to transfer legal interests

(e) benefit of any unexpired insurance, guarantees, warranties, etc.

(f) all designs, maps, plans, technical documents, manuals, etc.

(g) any port User Agreement and other agreements which the parties have agreed should survive termination

(h) all rights to operate, maintain and use the Port and provide the Services

To include tangible and intangible assets but exclude Concessionaire's own existing business assets such as cash, investments, loans, book debts, tax refunds, receivables, etc. (unless paid for by CA). All property comprised within the Site [and the Lease] shall revert to Contracting Authority free of any encumbrances. No Ancillary Facilities to be removed that represent integral part of Project. Concessionaire required to remove all staff, personal property, movable assets, etc., not required to be transferred within three months. Assets to be transferred by Concessionaire at its own cost and in good working condition (subject to normal wear and tear), free of any security interests or outstanding liabilities. Contracting Authority responsible for all costs of management, operation and maintenance of Port following transfer.

17.2 [**Amounts Payable on Termination.** The following principles shall apply to calculation of any asset valuations and amounts payable on termination of the Agreement (as the same may be refined or developed in the DPR/ Annex [ ]):

[NB there are many different ways of approaching this subject. the following summary represents one possible approach]

(a) Expiry of Term. No amounts payable (except as agreed otherwise);

(b) Termination before Expiry of Term. Amounts payable by Contracting Authority to Concessionaire determined on following basis:

a. During **Development Period.**

i. Termination resulting from Qualifying CIL, political force majeure or Contracting Authority Default: recover full audited Development Costs [as defined];

ii. Termination resulting from Concessionaire Default: no recovery;

iii. Termination resulting from OFM/ prolonged force majeure (including failure to achieve Financial Close by Long Stop Date: recover 50 per cent audited Development Costs up to maximum of [US$].

b. During **Construction Period.**

i. Termination resulting from Qualifying CIL, political force majeure or Contracting Authority Default: recover all sums actually spent on developing and implementing Project up to that date (including Development Costs, design and construction costs, financing costs, advisory fees, etc.), plus a premium of [15 per cent] to compensate for the Concessionaire's loss of profit;

ii. Termination resulting from Concessionaire Default: all sums actually spent on developing and implementing the Project (as in i above) but without premium and LESS any amounts Contracting Authority is entitled to deduct or offset as provided below (e.g., to rectify Concessionaire breach or redo defective work) but PROVIDED that deductions do not reduce compensation below the [amount/[ ] per cent] of outstanding Financing Obligations;

iii. Termination resulting from OFM/ prolonged force majeure: [all][/[ ] per cent of] sums actually spent on developing and implementing Project (as in i above) but without any premium, and NOT LESS than [[ ] per cent] Equity Invested (define) plus Financial Obligations.

c. During **Operational Period.**

i. Termination resulting from Qualifying CIL, political force majeure or Contracting Authority Default: the fair market value of the Equity Invested (calculated in accordance with Annex [ ]) plus the Financial Obligations (if any) together with a premium of [15 per cent] of all future anticipated revenues for the remainder of the Term as indicated in the Financial Plan;

ii. Termination resulting from Concessionaire Default: as in i above, but without any premium and LESS any amounts Contracting Authority is entitled to deduct or offset as provided below PROVIDED that deductions do not reduce compensation below the [amount/[ ] per cent] of outstanding Financial Obligations;

iii. Termination resulting from OFM/ prolonged force majeure: [[ ] per cent of] the fair market value of the Equity Invested (calculated in accordance with Annex [ ]) plus the Financial Obligations (if any) and without any premium.

(c) Procedure and Final Amount. Sums notionally payable calculated in [ ] currency as provided above [and in Annex [ ]]. Contracting Authority then entitled to deduct any outstanding penalties or damages due or losses suffered as a result of from Concessionaire breach (but not below amount of Financial Obligations) and any insurance proceeds payable to Concessionaire in respect of termination, to reach Final Compensation Payable. Calculations to be made by Appraising Team. Final Compensation Payable by Contracting Authority in accordance with Clause 18. Express termination provisions hereunder are exhaustive (but without prejudice to any accrued rights and liabilities of the Parties at such time).

18. Transfer procedures on termination

The following procedures and provisions apply on any termination of the Agreement

18.1 **Procedure and Condition of Assets.** Concessionaire obliged to hand over the Contracted Assets and control and occupation of the Site and the Port to the Contracting Authority, in a fit state and condition for it to continue operating them for a notional period of at least [5/10] years (or as specified in DPR). Concessionaire obliged, during a [two-] year warranty period, to return to Site and rectify defects in assets which do not meet the specified standard. Contracting Authority must also operate and maintain assets to the contracted standards. Scope of assets to be transferred and any payments to be determined as provided above.

18.2 **Condition Survey and Calculations.** Transfer Information Notice to be issued at least [six] months before due date of expiry or termination. Concessionaire to procure condition survey of the Contracted Assets and the Site by the Appraising Team, to ascertain condition of the facilities, etc., and whether they meet the hand-over requirements of the Agreement, and to calculate compensation payments due (acting as expert not arbitrator). Parties to provide reasonable assistance to/cooperation with Appraising Team, including access to relevant records and documents. Costs borne equally by them.

Appraising Team to issue report within three months of appointment. Conclusions subject to challenge through dispute resolution procedure.

18.3 **Final Compensation Payable.** To be paid within 60 days of Appraising Team report or resolution of any dispute (unless longer period agreed by Parties), failing which Concessionaire can continue operating Port and receiving revenues for up to a further [two years] (but without prejudice to its rights to Final Compensation Payable with interest at default rate). Contracted Assets and Port to be transferred by termination or expiry date (save as aforesaid). Parties can agree on deferred/stage payment arrangements if they choose.

18.4 **Training.** Designated key personnel of Contracting Authority to be trained by Concessionaire's personnel for six months prior to termination/ hand-over date to facilitate smooth transfer.

18.5 **Final Certificate.** Parties to confirm completion of transfer and hand-over procedures and payments by signing certificate to that effect.

19. Insurance

19.1 **Insurance Required.** Concessionaire obliged to insure the Contracted Assets and its activities as from Construction Commencement Date with reputable national/international insurers in accordance with Good Industry Practice, including the policy categories specified in the DPR, on such detailed terms as Concessionaire reasonably considers necessary/ appropriate and consistent with the Financing Documents (subject to market availability on reasonable commercial terms). Contracting Authority to be kept properly informed, receive copies of policies and notified of any cancellation or lapse. Concessionaire must also submit annual insurance report.

19.2 **Application.** Subject to the Lenders' requirements, insurance proceeds in respect of physical damage and interruption of operations to be applied for reconstruction making good lost revenues.

20. Law and disputes

20.1 **Arbitration.** Except where (if at all) the Agreement provides for final determination by an Expert, all disputes, claims or difference between the Parties arising out of or in connection with this Agreement, including with respect to its existence, performance, breach, termination, validity or interpretation (each a "Dispute") shall be referred to and resolved by the Dispute Resolution Procedures herein. Disputes shall be referred initially to Parties' representatives, who shall meet and discuss them within [30] days of notice at [location] in attempt to resolve them. Failing agreement within [90] days, either Party may refer any dispute for final determination to [arbitration] under [SPECIFY SYSTEM (e.g., ICC/LCIA/ ICSID)][the courts of host country]. The place of arbitration shall be [ ] and the language [ ]. [SPECIFY NO. OF ARBITRATORS AND ANY OTHER PROCEDURAL SPECIFICS]

20.3 **Governing Law.** The Agreement shall be governed and construed in accordance with laws of [host country].

21. Assignment

Neither Party may assign or transfer its obligations or liabilities under the Agreement without the consent of the other [not to be unreasonably withheld]. However, Concessionaire may freely assign the benefit of its rights by way of security to its lenders for the purposes of raising funding for the Project (subject to Applicable Law). All without prejudice to the Lenders' step-in and substitution rights set out in Clause [ ].

22. Representations, warranties and sovereign immunity

22.1 **Reps and Warranties.** [INSERT AS APPROPRIATE FOR EACH PARTY. To include capacity and standing, power and authority, due execution and authorisation, valid, binding and enforceable obligations, no immunity from legal process, no conflict with other documents, no existing claims or proceedings which could materially prejudice Project, etc.]

22.2 **Waiver of Sovereign Immunity.** [STANDARD WAIVER] Contracting Authority [and Government] unconditionally and irrevocably waive[s] any sovereign or governmental immunity from suit or legal process to the maximum extent permitted under Applicable Law, such that the Agreement's provisions can be treated as private commercial acts fully enforceable in accordance with their terms, etc. Consents generally to the bringing and enforcement of proceedings, judgments or awards against it and relief and remedies granted, etc.

23. Indemnities

[INSERT AS APPROPRIATE for example, against third-party claims resulting from breach of contract]

24. Miscellaneous

[STANDARD LEGAL BOILERPLATE incl. entire agreement/ amendments/ no waiver/ severance of terms/ language/ notices/ confidentiality/ Interest on late payments/ further assurance, etc.]

[EXECUTION CLAUSES]

Appendices

An indicative list of Appendices and their contents might include:

1. The detailed project report ("DPR")

[Containing key technical specifications ("output spec."), design and construction parameters, maintenance standards and replacement schedules, operational procedures, KPIs (Key Performance Indicators), international "best practice" standards and relevant EBRD/IFI requirements in this context. May also include certain central commercial requirements that could not be finalised at the time of signature of the agreement – e.g., phasing, tax/duty exemptions/competition restrictions, etc.]

2. Contracted assets

[List of assets to be provided/ installed/ deployed by Concessionaire, indicating ownership, temporary or permanent nature and whether to be included in Transfer procedures (hand-over). (The latter may become a distinct category of "Core Assets"). NB may be combined with DPR.]

3. The site

[Exact description with maps/diagrams of land constituting the Site, indicating layout of Port, means of access and egress, location of utilities and transport infrastructure linkages, etc. May distinguish between initial land required as CP to Construction Commencement and after-acquired land to be added in subsequent Phases. The hand-over of the Site to the Concessionaire may also be phased if Site acquisition is a complex process.]

4. [The lease]

[Pro-forma lease of Site to be included if needed]

5. Financial model

[Concessionaire's Financial Model may be attached to Agreement, especially if it needs to be re-run to help indicate impact of certain events with consequences under the Agreement – for example, "financial balance" provisions where force majeure/CIL clauses come into play].

6. Permits and consents

[List of identified permits and consents known to be needed for the Project, showing the stage at which they must be obtained and the parties' respective responsibilities for obtaining them (primarily the Concessionaire, but in some cases perhaps also the Contracting Authority – for example, in the case of any ratification of the Agreement or the Operational Port declaration)].

7. Expert committee

[Often a formal monitoring and "interface" body representing both parties, to discuss questions and issues, ensure communications are properly addressed and received, etc.]

8. Monitoring of design, construction and operations stage

[Supervisory procedures. Contracting Authority's rights to supervise, inspect and monitor the design and construction works, and subsequently the maintenance and operations activities. May set out any and all specific rights of approval. Documents to be provided/ timing/ level of detail, etc. Access to be granted. Description of any Site office for CA representatives. Pro-forma monitoring and information chart.]

9. Services

[List of Services to be provided by the Concessionaire during the Operational Period. There may be some negotiation about their level of detail in this Annex. The Concessionaire will want a degree of flexibility to re-plan, reorganise, modify or even cancel them. But the CA will have a statutory duty to ensure that any "services of general interest" to the public are being provided, and to appropriate standards. A comprise might be to distinguish between "essential" and "other" services. A separate list of applicable "cargo restrictions" may also be included here.]

10. Tariffs

[Include any specific provisions relating to the tariffs to be charged to (public) users of the Port – for example, amounts/ calculation/ revisions – and the rights of approval of the CA to any changes to them. See Commentary on this subject. Law in effect may require the CA to approve all of them, especially in civil law

jurisdictions. In some countries, though, there may be no such automatic power and the CA may be content to let market forces apply, in which case the Annex may be omitted altogether.]

11. Ancillary facilities

[List (non-exhaustive) of facilities which may be developed, installed and used by or on behalf of the Concessionaire during the Term in addition and adjacent to the Contracted Assets – for example, certain warehousing/ factories/ storage, restaurants/ shops/ fuelling stations, etc.]

12. List of insurance

[Categories of insurance required to be obtained by Concessionaire and any minimum amounts. Some will be essential from the CA's point of view – e.g., physical damage and third-party liability; others may be optional and not even require listing – e.g., business interruption/ political risk/ directors' liability].

13. List of material third-party contracts

[List certain third-party contracts over which CA may have certain rights of review or approval, or which the Concessionaire may not amend without its consent. Likely to include EPC Contract, perhaps any separate agreement with Design Consultant and any principal O&M Contract (periodically updated).]

14. [Termination events]

[List of specific occurrences or statutory powers which may trigger termination of Agreement. See Clause 16.2(f). Designed to capture very specific areas which Concessionaire may be concerned about, but which cannot be precluded by contract. Usually, the general provisions of the termination clause will be sufficient, however].

15. Termination compensation

[Include any more detailed methodology supporting calculation of termination payments, such as calculation of future revenues where early termination occurs during Operational Period, or methodology for calculating market value of equity or assets.
NB Another accepted approach to termination compensation is to take Book Cost/ Depreciated Historical Cost/ Depreciated Base Cost as the basis of calculation, in which case it would be helpful to insert agreed guidelines here.]

16. [Dispute resolution]

[Include any specific provisions or procedures that may need to be set out in the Agreement – for example, a mediation mechanism, specific details (if any) relating to the arbitration procedure and the procedures applicable to any expert determination of disputes, such as those including an Expert Panel.]

EBRD PPP regulatory guidelines collection

Chapter 15. Model heads of terms for healthcare non-concession PPP agreement

These Heads of Terms (HoT) are designed as a simple introduction to a typical non-concession PPP agreement for a healthcare PPP project. Clearly, significant specifics are attributable to non-concession PPPs in education, sports, tourism, cultural heritage and other social sectors. Even within the healthcare sector, there are different facilities/assets such as neo-natal centres, dialysis centres, laboratories, cancer treatment centres and hospitals, which obviously require different approaches and a number of specific provisions in the Agreement. It is not the purpose of the HoT to cover all these particularities.

The HoT assume that a (build-operate-transfer (BOT) PPP structure is used for the project just like the Heads of Terms for a concession-based seaport project where the BOT model is discussed in more detail.

That said, either the Public Partner or the Private Partner may own the Contracted Assets during the term of the Agreement. At the end the Public Partner usually owns the Contracted Assets. Rarely the title to the Contracted Assets is vested into the Private Partner upon the termination of the Agreement (so-called BOO model).

However, unlike the concession-based seaport project, these HoT assume that the Private Partner's revenues will be derived not from direct charges to users, but rather from a government payment stream. Specific parameters and conditions for the payment of the Operation Fee depend on the project's financial model and the country's healthcare system and are to be developed by financial experts (in the relevant appendices to the Agreement).

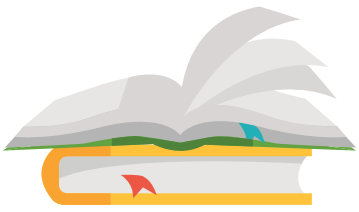
Based on the international experience in implementing PPP projects in healthcare sector, it should be noted that common forms of payments from the government are 1) availability payment, such as a payment for the facility maintenance that depends on key performance indicators (if not achieved, the payment is reduced) and 2) services charge pro rata to the ancillary services provided (volume-based fees), such as catering and parking. There are projects where the private investor operates and maintains the facility and in particular provides medical services, whereas the government pays to it a fixed annual fee (subject to indexation), with the private investor also earning additional income through commercial medical services (for example, the Queen Mamohato Memorial Hospital PPP, Maseru, Lesotho). There are also schemes, in which the government pays to a private investor for the delivery of each individual medical service, while services remain free to the population (for example, B. Braun Dialysis Centers, Andhra Pradesh, India).

The wording of the subject matter and some other key provisions of the Agreement depends on the following parameters of the relevant project: 1) which Party will take the ownership of the Contracted Assets; 2) whether the Private Partner will be responsible for the Design or the Private Partner will be provided with the Design Documentation and the Private Partner will then only be responsible for building/renovating the Contracted Assets; 3) which Party will be responsible for the delivery of medical services: the Private Partner may both operate the Contracted Assets for intended purpose (delivery of clinical services) and maintain it, or the Private Partner may only be responsible for the facility maintenance; and 4) whether the Public Partner will participate in the financing of the project from the outset.

Early termination provisions and payments are absolutely key for project bankability and should take into account the local market consensus for compensating financiers upon early termination. The termination amount payable by the Public Partner will vary depending on the grounds for early termination.

Specific provisions may need to be included in the Agreement for the host country's healthcare-regulatory regime, for example, in relation to certain operational matters or permits, or where revisions to that regime are known to be imminent.

The HoT are intended to give readers a clear idea of the typical practical and commercial contents of a non-concession agreement of this type, with much of the difficult legal terminology removed. It is designed to be used with relative ease by lawyers and non-lawyers alike, to focus discussion on the project's structural elements and risk allocation, as well as the respective responsibilities of the parties.



[1] https://www.unece.org/fileadmin/DAM/ceci/images/IcoE/PPPHealthcareSector_DiscPaper.pdf

Model heads of terms

(A) PARTIES

(1) [Public Partner] [Insert details] ("Public Party")

(2) [Private Partner, a Project Company (usually SPV)] [Insert details] ("Private Party")

(3) [[ ] [Insert details of any additional party (if any) e.g., government guarantor] ("Government")]

(each a "Party" and together the "Parties")

(B) RECITALS

WHEREAS:

(1) [the Agreement is entered into pursuant to the [decision on the conclusion of the Agreement [decision details, date]], adopted by [authority description] based on the results of [the consideration of the Private Partner's proposal on entering into the Agreement dated [●].

OR

(2) the tender for the right to conclude the Agreement (minutes approving the tender results dated [●]), in accordance with which the Private Partner was named a winning bidder].

(3) **[INSERT ANY OTHER RELEVANT RECITALS]**

NOW THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Parties hereto hereby agree as follows:

(C) TERMS AND CONDITIONS

1. Definitions and interpretation.

1.1 **Definitions.** Unless the context requires otherwise, the words and expressions used in this Agreement shall have the meanings assigned to them in Appendix 1.

Affected Party has the meaning assigned to it in Clause 9.4(a)

Agreement means this Public-Private Partnership Agreement, including all Appendices

Arbitration means [●]

Building means the (re)construction of the Contracted Assets, the completion of all preparation, construction, installation, commissioning and other works, and also of all business management, administrative and other activities as required for obtaining the relevant Contracted Assets commissioning Permits

Building Commencement Conditions Precedent has the meaning assigned to it in Clause 5.3(a)

Construction Period means the period from the Building Commencement Date through the Contracted Assets Acceptance Date

Building Commencement Notice has the meaning assigned to it in Clause 5.3(b)

Business Day means a business day in [□] in accordance with the work calendar based on 5-day working week for the relevant year

[Capital Grant] [means sums of money to be paid by the Public Partner to the Private Partner for the purposes of financing a portion of (re)construction costs in the manner provided for in the Agreement]

Contractor means an entity/entities, with whom the Private Partner has entered into the Contractor Agreement(s)

Contractor Agreement means an agreement to be entered into between the Private Partner and the Contractor for the purposes of completing the Contracted Assets

Court means [□]

Debt Financing means any borrowed funds that may be raised by the Private Partner under agreement(s) with the Lenders for the purposes of the performance of the obligations assumed by it to partially finance the [Design and] Building activities, which include the Principal Debt

[Design] [means the Private Partner's activities, carried out in accordance with the requirements of the Law and the Agreement, to develop the Design Documentation]

Design Documentation means the documentation, defining architectural, functional, structural, engineering and other Design needed to proceed to Building, that is developed by the Private Partner in accordance with the Law the requirements of the Agreement in respect of Contracted Assets

OR

means the documentation, defining architectural, functional, structural, engineering and other Design solutions needed to proceed to Building, developed by the Private Partner in accordance with the Law and in respect of which the relevant Permits have been obtained, to be delivered by the Public Partner to the Private Partner on the Execution Date

[Design Stage] [means the period from the Financial Close Date through the Building Commencement Date]

Direct Agreement means an agreement entered into between the Public Partner, Private Partner and Lenders in accordance with the heads of terms, agreed in Appendix 11 (Heads of Terms in Relation to Direct Agreement)

Dispute has the meaning assigned to it in Clause 11.1(a)

Dispute Resolution means Dispute Resolution under the Agreement, as set forth in Appendix 23 (Dispute Resolution)

Encumbrance means third-party rights in respect of the Site, including lease (sublease) rights to the Site, pledge (mortgage) or attachment, as well as rights of owners of and other legal holders of rights in respect of the immovable property located on the Site

Equipment means [□][2]

Equity Financing [the Private Partner's own funds, provided by its investors as shareholder loans, subordinated notes, subordinated financing, mezzanine debt financing or other quasi-equity financing, as contributions into the Private Partner's share capital, by way of contribution of assets to a simple partnership, as well as in other forms in accordance with the Law for the purposes of the performance of its obligations assumed under the Agreement][3]

Execution Date means the date of the execution of the Agreement by the authorised signatories of the Parties

Expiry Date has the meaning assigned to it in Clause 2.3(b)

Extra Costs means any extra costs, expenses or actual damages, incurred by the Private Partner as a result of the occurrence of the special events, including financing costs, and further including any additional payments towards taxes and other mandatory levies payable to the budget, as well as the Private Partner's extra costs under any agreements with third parties and/or in connection with the third-party claims, to the extent such costs and indemnities are not provided for under the terms of the Agreement

Contracted Assets means collectively all movable and immovable assets to be developed in accordance with the Agreement as described in Appendix 2 (Contracted Assets Description and its Technical and Economic Performance)

Contracted Assets Acceptance Date means the date of the execution by the Public Partner of the Investment Stage Completion Certificate, showing that the relevant commissioning Permits have been obtained in respect of Contracted Assets in the manner prescribed by the Agreement

Contracted Assets Transfer Certificate has the meaning assigned to it in Appendix 20 (Contracted Assets Transfer)

Financial Close means the date on which all Financing Documents have been signed and funds thereunder have become available, all conditions precedent having been satisfied

Financial Close Certificate has the meaning assigned to it in Clause 3.2(a)

Financial Close Stage means the period from the Execution Date to the Financial Close Date

Financing Documents means all documents relating to the Debt Financing of the Project, including security documents and any Direct Agreement

Force Majeure Events has the meaning assigned to it in Clause 9.4(a)

Good Industry Practice means that degree of skill, care, diligence, prudence and foresight reasonably to be expected of an experienced international developer/operator performing similar responsibilities to the Private Partner's to the specified standards

Government Authorities means any legislative, executive or judicial authority in [specify country]

Investment Stage means the period comprising the Financial Close Stage [, Design Stage] and Construction Period

Investment Stage Completion Certificate has the meaning assigned to it in Clause 5.6(a)

Investment Stage Schedule means the schedule of [Design and] Build activities, attached as Appendix 3 (Investment Stage Schedule)

Site means any of the land plots listed in Appendix 8 (Allocation of Land Plots)

Law means any laws, subordinate legislation and any other regulations of [specify country] that have come into and remain in force

Lenders means the lenders under the Financing Documents

Maintenance means the Private Partner's operations relating to the Contracted Assets maintenance, carried out in accordance with the terms of the Agreement either itself or by contracting third parties,

[2] Equipment descriptions to be prepared based on specific features of each particular project.

[3] The definition may be revised in accordance with applicable law.

and including activities intended to maintain the Contracted Assets in safe operational conditions fit for the Operation

Maintenance Services Provider means an entity/entities, contracted by the Private Partner in accordance with Clause 7(b) of the Agreement for the performance of the Maintenance obligations

Monitoring means the Public Partner's monitoring of the performance by the Private Partner of the requirements under the Agreement, to be carried out in the manner provided for in Clause 10.1 and Appendix 6 (Reporting and Monitoring)

Operation means the use of the Contracted Assets for the delivery of clinical services, listed in Appendix 5 (Operation and Maintenance Requirements), to users

Operation Commencement Date means the date, on which all required commissioning Permits in respect of Contracted Assets will have been obtained in the manner, provided for by the Agreement

Operation Fee a sum to be paid by the Public Partner to the Private Partner during the Operation Period for the Private Partner to recover certain costs, subject to the terms and conditions set forth in the Agreement

Operation Period means the period from the Operation Commencement Date through the Termination Date

Operation Period Schedule means the Schedule of Maintenance and Operation activities, attached as Appendix 4 (Operation Period Schedule)

Operator means an entity/entities, engaged by the Public Partner for the performance of the Operation obligations as set forth in Appendix 16 (List of Bodies and Entities Acting on Behalf of the Public Partner, Scope and Composition of Certain Public Partner's Obligations to Be Performed by Them)

OR[4]

means an entity/entities, engaged by the Private Partner for the performance of the Operation obligations in accordance with the provisions of this Agreement

Party means the Public Partner or Private Partner

Permits means permits, approvals, certificates, clearances, licences and other permitting documents (including permits, approvals and licences of the Contractor and other Private Partner Persons), required in accordance with the Law in order to [Design,] Build [, Operate] and Maintain the Contracted Assets, to employ foreign workers (if any) and to perform any other obligations under the Agreement, including, but not limited to: [□][5]

Principal Debt means the total outstanding debt of the Private Partner (current balance under loans), obtained pursuant to Financing Agreement(s) with the Lenders to finance the costs associated with the performance of the obligations under the Agreement

Private Partner has the meaning assigned to it in the Preamble

Private Partner Persons means the Contractor, Maintenance Services Provider, [Operator] and any other persons, with whom the Private Partner, Contractor or Maintenance Services Provider enter into an agreement for the performance of obligations of the Contractor or the Maintenance Services Provider, as well as the employees of the said persons, including the employees and representatives of the Private Partner

Project means the Development, Financing, [Design], Construction, Completion, [Operation] and Maintenance of the Contracted Assets and the provision of medical services.

Public Partner has the meaning assigned to it in Preamble

Public Partner Persons means entities and bodies, that exercise, pursuant to the Agreement or the Law, the authority directly related to the Project implementation, the list of which is attached as Appendix 16 (List of Bodies and Entities Acting on Behalf of the Public Partner, Scope and Composition of Certain Public Partner's Obligations to Be Performed by Them), as well as representatives (individuals) and employees of the Public Partner, exercising, pursuant to the Agreement or the Law, the authority directly related to the Project implementation

Refinancing means the amendment of the financing terms entered into in the Financing Agreement

Reports means any report, which is to be prepared and submitted by the Private Partner in accordance with Appendix 6 (Reporting and Monitoring)

Required Insurance Coverage means all insurance contracts, which shall be concluded by the Private Partner in accordance with the requirements of Appendix 9 (Required Insurance Coverage)

Review and Approval Procedure means the procedure for review and approval as between the Parties of certificates, schedules and other documents

[4] Depending on which Party is responsible for the Operation

[5] The definition may be revised in accordance with applicable law.

that need to be approved in accordance with the Agreement, as set forth in Appendix 19 (Review and Approval);

Site Preparation means site preparation activities for Building roll-out, as contemplated in the Design Documentation;

Special Events has the meaning assigned to it in Clause 9.1;

Terminating Party has the meaning assigned to it in Clause 14.12(a);

Termination Date means any of the following dates:

(i) Expiry Date or

(ii) a date of the execution by the Parties of an agreement to terminate this Agreement prematurely, except where a different date is specified in such agreement or

(iii) a date, set forth in a judicial ruling to terminate the Agreement or

(iv) other date of termination of this Agreement, as determined in accordance with the Law

Termination Fee means the sum to be paid by the Public Partner to the Private Partner in the event of the premature termination of the Agreement, which may consist of different amounts depending on the reason for the termination of Agreement, in accordance with Clauses 14.1–14.12

Term of Agreement has the meaning assigned to it in Clause 2.3(b)

1.2 **Interpretation:** Standard interpretation clause, including document prioritisation clause. Consents and approvals not to be unreasonably withheld or delayed unless specifically provided otherwise.

2. General provisions

2.1 Subject of the agreement

[The wording of the subject matter depends on the following parameters of the relevant project: 1) which Party will take the ownership of the Contracted Assets; 2) whether the Private Partner will be responsible for the Design; 3) which Party will be responsible for the Operation (delivery of medical services) and 4) whether the Public Partner will participate in the financing of the project. Typical examples of the language for the subject matter are provided below.]

(a) In accordance with this Agreement the Private Partner undertakes, using its own and/or borrowed funds, to Finance, [Design,] Build [, Operate] and Maintain the Contracted Assets, the ownership of which will be taken by the Public Partner, whereas the Public Partner undertakes to transfer the Contracted Assets into the Private Partner's possession and use within the period of time, stipulated in the Agreement, for carrying out the activity specified in the Agreement, [to take care of the Operation], and to pay to the Private Partner [the Capital Grant and] the [Operation and] Maintenance Fee.

OR[8]

In accordance with this Agreement the Private Partner undertakes, using its own and/or borrowed funds, to Finance, [Design,] Build and also to [Operate and] Maintain the Contracted Assets, whereas the Public Partner undertakes to [take care of the Operation of the Contracted Assets,] to pay to the Private Partner [the Capital Grant] and the Operation Fee, and also to take the Contracted Assets into ownership in the manner and subject to the conditions provided for in the Agreement.

(b) [The Public Partner shall hand over to the Private Partner by way of a delivery and acceptance certificate the Contracted Assets intended for [re]construction in the following manner: [to be specified: timing of hand-over to the Private Partner of the property to be reconstructed, the list of assets and hand-over

[6] The following option is contemplated hereinafter in the model Agreement: either the Private Partner will complete the Design or the Private Partner will be provided with the Design Documentation and the Private Partner will then only be responsible for building/renovating the Contracted Assets.

[7] The following option is contemplated hereinafter in the model Agreement: the Private Partner will both Operate the Contracted Assets for intended purpose (delivery of clinical services) and Maintain it, or the Private Partner will only be responsible for the Facility Maintenance.

[8] Option 1 – Public Partner owns the Contracted Assets. Option 2 – Private Partner owns the Contracted Assets.

procedure, any encumbrances. If as at the Execution Date the Parties lack the understanding in respect of all specified aspects, it may be possible to refer to the Review and Approval Procedure].][9]

(c) The Parties undertake further to perform other obligations provided for under the Agreement.

[If the Private Partner is entitled to carry out commercial activity for the purposes of earning additional income through the use of the Contracted Assets, then this Clause should address the conditions, on which the Private Partner would be authorised to do so, including, but not limited to, the need to have an authorisation from the Public Partner and the distribution of income from such activity of the Private Partner.]

(d) [The immovable assets built by the Private Partner with the consent of the Public Partner while carrying out the activity, provided for under the Agreement, that are unrelated to the Contracted Assets shall be owned by the Private Partner, whereas the immovable assets built by the Private Partner without the consent of the Public Partner while carrying out the activity, provided for under the Agreement, that are unrelated to the Contracted Assets shall be owned by the Public Partner and the value of such assets shall not be recoverable.

(e) The movable assets built or purchased by the Private Partner with the consent of the Public Partner while carrying out the activity, provided for under the Agreement, that are not part of the Contracted Assets shall be owned by the Private Partner and shall not be transferred to the Public Partner after the Expiry Date, unless the Parties agree otherwise.[10]]

2.2 Contracted assets

(a) The Contracted Assets comprise movable and immovable assets to be developed in accordance with the Agreement, intended for [●], the description of which, including technical and economic features and requirements, is set out in Appendix 2 (Contracted Assets Description and Technical and Economic Performance) to this Agreement.

(b) The risk of incidental destruction of or damage to (loss of) the Contracted Assets shall be borne by the Private Partner throughout the entire Term of Agreement.

2.3 Term of agreement

(a) The Agreement shall come into effect as of the Execution Date.

(b) Unless the Agreement is terminated prematurely, the term of this Agreement shall be equal to the period commencing on the Execution Date and ending [□] years/months after the Execution Date (hereinafter – "Expiry Date" and "Term of Agreement", respectively).

2.4 Security for performance of the private partner's obligations under the agreement

(a) The Private Partner shall provide security for performance of its obligations under this Agreement in accordance with the provisions of Appendix 7 (Security).

2.5 Required insurance coverage

(a) The Private Partner shall procure that the Required Insurance Coverage is maintained continuously in such amounts and on such terms, as defined in Appendix 9 (Required Insurance Coverage).

2.6 Allocation of the site

(a) For the purposes of the [Design], Building and Operation/Maintenance, the Public Partner shall provide to the Private Partner the Site owned by the Public Partner free of Encumbrances, as listed in Appendix 8 (Allocation of the Site), necessary for the conduct of activities provided for under the Agreement in accordance with the process and terms set forth in Appendix 8 (Allocation of the Site).

(b) The Site shall be provided to the Private Partner within/by [specify period/date].

[9] The Clause will apply, if the project involves reconstruction rather than greenfield construction.

[10] Clauses 2.1(d) and 2.1(e) are optional, depending on the project structure and law of the project jurisdiction.

3. Financial close

3.1 Conditions precedent to financial close

(a) The Financial Close shall be achieved upon the satisfaction of the following conditions:

[Conditions for the Project's financial close consistent with its financial model need to be specified. Such conditions may include the execution by the Private Partner of financing agreements with banks for amounts, defined in the Agreement/Project financial model (in terms of debt financing), the amount of own funds to be invested (in terms of equity financing].

(b) For the avoidance of doubt, the Private Partner shall not be held liable for failure to meet the Financial Close deadlines, if such failure results from the Public Partner's failure to comply with obligation in relation to transfer to the Private Partner of the Site in accordance with the requirements of Clause 2.6.

3.2 Financial close certificate

(a) Upon the satisfaction of conditions listed in Clause 3.1(a), but in any event no later than [□] days after the Execution Date the Parties shall sign a certificate of the Financial Close (hereinafter – "Financial Close Certificate") in accordance with Appendix 13 (Principal Forms of Certificates under Agreement).

(b) The approval and signing of the Financial Close Certificate shall comply with the Review and Approval Procedure.

4. Design

4.1 Term of the design stage

(a) The term of the Design Stage and the key interim milestones of the Design Stage shall be as set out in Appendix 3 (Investment Stage Schedule).

4.2 [Design documentation]

(a) The Private Partner shall develop the Design Documentation within the period contemplated by the Investment Stage Schedule and shall submit such documentation to the Public Partner for approval. The Public Partner shall be required to either approve the submitted Design Documentation, or respond with reasoned objections in accordance with the Review and Approval Procedure. For the avoidance of doubt, the Public Partner may decline approving the Design Documentation solely with reference to one or more of the following reasons:

i. the Design Documentation does not comply with Appendix 2 (Contracted Assets Description and Technical and Economic Performance)

ii. the Design Documentation does not comply with the Law

iii. the Design Documentation does not comply with the provisions of Appendix 21 (Arrangements for Cooperation between Parties at Investment Stage)

OR[11]

(b) On the Execution Date the Public Partner shall deliver to the Private Partner the Design Documentation, (i) sufficient and suitable in all respects for the performance all of the Private Partner's Building obligations, (ii) in respect of which all Permits required in accordance with the Law have been obtained. The Private Partner shall perform its Building obligations in accordance with the Design Documentation provided by the Public Partner.]

4.3 Other engineering documentation

(a) The Private Partner shall develop and approve, in the manner provided for by Appendix 21 (Arrangements for Cooperation between Parties at Investment Stage), the following engineering documentation: [documentation needs to be specified that is to be developed in accordance with the law of the project jurisdiction for the (re)construction].

5. Construction

5.1 Term of the construction period

(a) The term of the Construction Period and the key interim milestones of the Construction Period shall be as set out in Appendix 3 (Investment Stage Schedule).

5.2 Site preparation

(a) The Parties shall carry out the Site Preparation activities in accordance with the Design Documentation, the Law and the requirements of Appendix 21 (Arrangements for Cooperation between Parties at Investment Stage).

[The Site Preparation comprises the activities relating to the preparation of site (Site) for the Building activities. The Site Preparation activities may be

[11] Depending on whether the Private Partner is responsible for developing the Design Documentation.

assigned either to the Private Partner, or to the Public Partner, or allocated between the Parties depending on which Party is better prepared to take the relevant risk.]

5.3 Building commencement conditions precedent

(a) Except where the Parties agree otherwise, the Private Partner may not proceed to the performance of its Building obligations until the following conditions precedent to the Building have been satisfied (hereinafter – "Building Commencement Conditions Precedent"): [conditions to the commencement of (re) construction need be specified, such as the permits required in accordance with applicable law, security for the performance of the Private Partner during the Construction Period, the Required Insurance Coverage in respect of construction risks.].

(b) Within [□] Business Days following the date of satisfaction of the last of the Building Commencement Conditions Precedent the Private Partner shall give to the Public Partner a notice of the Building commencement, prepared according to the form in Appendix 13 (Principal Forms of Certificates under Agreement) (hereinafter – "Building Commencement Notice").

5.4 General building requirements

(a) During the Construction Period, the Private Partner shall have an obligation to Build the Contracted Assets and to arrange for the Equipment to be installed within the period of time provided for in Appendix 3 (Investment Stage Schedule) and in accordance with the technical and economic performance requirements set out in Appendix 2 (Contracted Assets Description and Technical and Economic Performance) and the Contracted Assets requirements in accordance with the Agreement, the Design Documentation and the Law.

(b) While building, the Private Partner shall have an obligation to ensure that the Contracted Assets is in compliance with:

i. the Agreement, including Appendix 2 (Contracted Assets Description and Technical and Economic Performance)

ii. the Design Documentation

iii. the Law

(c) While building, the Private Partner shall have an obligation to: [the main Private Partner's obligations at the Building Stage in accordance with the project's technical parameters need to be described].

5.5 Facility equipment

(a) The medical Equipment to be procured by the Private Partner and the medical technologies employed should be allowed for the application (should have state registration and/or certification, where necessary) in the territory of [specify country] in the manner prescribed by the Law with appropriate Permits obtained.

(b) The requirements to the quality of the Equipment shall be set forth in Appendix 2 (Contracted Assets Description and Technical and Economic Performance)[12] / Appendix 21 (Arrangements for Cooperation between Parties at Investment Stage).

5.6 Contracted assets acceptance

(a) Within [□] [per the Investment Stage Schedule] the Private Partner shall submit to the Public Partner a draft of the investment stage completion certificate, prepared according to the form of Appendix 13 (Principal Forms of Certificates under Agreement) (hereinafter – the "Investment Stage Completion Certificate"), evidencing the satisfaction of the following conditions: [conditions to the Contracted Assets acceptance need be specified, depending on the technical parameters of the relevant project and the law of the project jurisdiction, such as conditions regarding absence/correction of any defects, all Permits required under the Law for the purposes of the Contracted Assets' commissioning into operation].

(b) For the avoidance of doubt, the Investment Stage Completion Certificate shall evidence the proper performance by the Private Partner of its Building obligations in full. The Investment Stage Completion Certificate shall be approved in accordance with the Review and Approval Procedure.

5.7 Ownership right to the contracted assets

(a) The ownership right to the completed Contracted Assets shall arise in accordance with Appendix 24 (Contracted Assets Ownership).

[In the event that the Contracted Assets is built to be owned by the Private Partner: prohibition to dispose of

[12] Requirements to the Equipment that will be part of the Contracted Assets are to be set forth in Appendix 2. If the Private Partner's obligations include only the supply of Equipment that will not be part of the Facility, then requirements to such Equipment are to be set forth in Appendix 21.

the Contracted Assets, indication if encumbrances on the Contracted Assets are allowed.

In the event that the Contracted Assets are built to be owned by the Public Partner, the procedure for transfer of lease rights to Contracted Assets to the Private Partner for the latter to carry out the Maintenance/Operation will need to be included].

6. Operation

6.1 Term of the operation period

(a) The term of the Operation Period and the key interim milestones of the Operation Period shall be as set out in Appendix 4 (Operation Period Schedule).

6.2 Maintenance

(a) The Private Partner shall maintain, repair and replace the Contracted Assets as necessary in accordance with Good Industry Practice and any specific schedule.

7. Subcontracting

(a) The Private Partner may subcontract any of its Design, Construction, Operation and Maintenance responsibilities to third parties with suitable experience, skills and resources. Contract terms must be consistent with this Agreement. The Private Partner shall keep the Public Partner regularly and properly informed about subcontracting activities and notify it in advance of the identity and credentials of any material subcontract. [DEFINE MATERIALITY – e.g., annual expenditure of at least US$ 500,000]. [The Public Partner can raise reasonable objections to any material subcontractor which it reasonably believes [will not be able to perform or] would be harmful to national interest.]

(b) No subcontracting shall relieve the Private Partner of any of its obligations hereunder. The Public Partner shall ensure that all subcontractors perform to the requisite standards and shall be fully liable for any failures or breaches of contract on their part. Copies of material subcontracts to be provided to Public Partner.

8. Financial obligations

8.1 General

(a) The Private Partner shall provide [partial/full] financing of the [Design,] Building [and Maintaining/Operating] of the Contracted Assets, including the Equity Financing and/or the Debt Financing in the amounts set out in Appendix 25 (Private Partner Financing).

(b) [Appendix should contain provisions in respect of amounts of and timing for providing the Private Partner's financing depending on the project financial model.]

8.2 [Capital grant[13]]

(a) [The Public Partner shall make the Capital Grant disbursements to the Private Partner in such a manner, within such time and on such terms, as provided for in Appendix 14 (Capital Grant Procedure and Disbursement Schedule).

(b) The Parties hereby agree that a Dispute shall not relieve the Public Partner from the obligation to pay the Capital Grant to the extent not disputed.]

8.3 [Operation fee[14]]

(a) [The Public Partner shall have an obligation, beginning with the Operation Commencement Date, to pay to the Private Partner the Operation Fee in the manner and on the terms provided for by the Law and the Agreement.

[13] The Clause is optional. It will be applicable to projects, in which the Public Partner will be partially financing the Design/(re) construction of the Facility.

[14] Specific parameters and conditions for the payment of the Operation Fee depend on the project's financial model and the country's healthcare system and are to be developed by financial experts (in the relevant appendices to the Agreement). Based on the international experience in implementing PPP projects in healthcare sector, it should be noted that common forms of payments from the government are: 1) availability payment, i.e., a payment for the facility maintenance that depends on key performance indicators (if not achieved, the payment is reduced); 2) services charge pro rata to the ancillary services provided (volume-based fees), such as catering, parking. There are projects where the private investor operates and maintains the facility and in particular provides medical services, whereas the government pays to it a fixed annual fee (subject to indexation), with the private investor also earning additional income through commercial medical services (example: the Queen Mamohato Memorial Hospital PPP, Maseru, Lesotho). There are also schemes, in which the government pays to a private investor for the delivery of each individual medical service, while services remain free to the population (example: B. Braun Dialysis Centers, Andhra Pradesh, India). Reference source: https://www.unece.org/fileadmin/DAM/ceci/images/ICoE/PPPHealthcareSector_DiscPaper.pdf

[15] This Clause will be relevant if the Private Partner raises debt financing.

(b) The payments of the Operation Fee shall be made in the manner, within the periods of time and on the terms, provided for in Appendix 15 (Operation Fee).

(c) The Parties hereby agree that a Dispute shall not relieve the Public Partner from the obligation to pay the Operation Fee to the extent not disputed.]

8.4 [Direct agreement[15]]

(a) [If the Private Partner raises the Debt Financing, the Private Partner, the Public Partner and the Lender shall enter into the Direct Agreement by [□] in accordance with heads of terms set out in Appendix 11 (Heads of Terms in Relation to Direct Agreement).]

8.5 [Refinancing]

(a) [Any refinancing shall be arranged in accordance with Appendix 26 (Refinancing), unless provided otherwise in the Direct Agreement.]

9. Special events, force majeure events

9.1 Definition of special event

(a) The special events shall be deemed to include any of the events listed in Clause 9.1(b), which become known after the execution of the Agreement, except for cases, when actions or omissions of the Private Partner (or any Private Partner Person) have caused such event, and if at least one of the following conditions is met for the special event:

i. the occurrence of this event prevents the performance by the Private Partner of the obligations under the Agreement, including in respect of the Financial Close, and results in the inability of the Private Partner to perform in a timely manner its obligations with respect to the Financing [, Design], Building [, Operation] and/or Maintenance or a significant delay in the performance of such obligations (for longer than [□] days, unless a different period is provided for the relevant special event); and/or

ii. the occurrence of this event has entailed or will entail Extra Costs in amount exceeding [□] during the Investment Stage, or [□] during the Operation Period.

(b) The special events are listed in Appendix 27 (Special Events and Force Majeure Events). [The events to be treated as special events are those that significantly impede the performance by the Private Partner of its obligations under the Agreement with such events being at the same time a consequence of actions of the Public Partner, government authorities and other factors beyond the control of the Private Partner, such as discovery on the Site of archeological sites, the Public Partner's failure to allocate the Site in due time, Pre-Existing Environmental Conditions, Material Adverse Government Actions, Qualifying Change in Law, etc. The list of special events depends on a particular project.]

9.2 Consequences of special event

(a) Upon a special event, the Public Partner shall in the manner and on the terms provided for in the Agreement:

i. provide to the Private Partner additional time, as may be necessary for the performance of its obligations under the Agreement; and/or

ii. reimburse to the Private Partner the Extra Costs incurred by it; and/or

iii. carry out other obligations, provided for by the Agreement.

(b) For the avoidance of doubt, if as a result of a special event the Agreement needs to be amended, the Parties undertake to approve such amendments to the extent permitted under the Agreement and the Law.

9.3 Actions of the parties upon special event

(a) The procedures for actions by the Parties upon the special events are set out in Appendix 27 (Special Events and Force Majeure Events).

9.4 Definition of force majeure event

(a) A force majeure Event means any extraordinary and unavoidable event under the existing circumstances that is beyond reasonable control or influence of the affected party, which results in a delay or the impossibility of the performance or improper performance by a Party (hereinafter – the "Affected Party") of its obligations. The force majeure events are listed in Appendix 27 (Special Events and Force Majeure Events). [Force majeure events include those force majeure conditions that neither party is able to control, such as wars, strikes, acts of terrorism.]

(b) Any event that can be considered a force majeure event in accordance with Clause 9.4(a) shall not be deemed as such for the relevant Affected Party, if:

i. the occurrence of such event could have been prevented by the Affected Party by use of reasonable good faith effort for the purposes of the performance of its obligations in accordance with the Agreement; or

ii. the occurrence of such event has been caused in full or in part by a breach by the Affected Party of any of its obligations under the Agreement or any action of or omission by the Affected Party.

9.5 Consequences of the occurrence of a force majeure event

(a) A force majeure event shall release the Affected Party from liability for the non-performance or improper performance of its obligations under the Agreement, but only to the extent that such non-performance or improper performance have been caused by the force majeure event.

9.6 Actions of the parties upon a force majeure event

(a) The procedures for actions by the Parties upon a force majeure event are set out in Appendix 27 (Special Events and Force Majeure Events).

9.7 Correlation between force majeure events and special events

(a) To the extent that any force majeure event is also a special event, such force majeure event and also its consequences shall be deemed as a special event. If, however, any event can be divided into several events, some of which constitute special events, while others constitute force majeure events, the Private Partner should have the right to be released from obligations, depending on and to the extent that each such isolated event constitutes a special event or a force majeure event.

10. Reporting and monitoring

10.1 General

(a) The Public Partner shall monitor the compliance of the Private Partner with the terms of this Agreement, including the obligation to carry out the [Design], Building, [Operation] and Maintenance in accordance with the purposes set out in the Agreement, the compliance with timing requirements for the performance of the above obligations in the manner provided for in Appendix 6 (Reporting and Monitoring).

(b) The Private Partner shall provide for the representatives of the Public Partner's relevant bodies carrying out the monitoring of the Private Partner's compliance with the terms of this Agreement an unobstructed access to the Contracted Assets and also to the documentation relating to the Financing [, Design], Building [, Operation] and Maintenance activities, in the manner provided for in Appendix 6 (Reporting and Monitoring).

(c) The Public Partner shall have the right to request information from the Private Partner on the performance by the Private Partner of the obligations under this Agreement. The procedure for the submission by the Private Partner and review by the Public Partner of the said information is set forth in Appendix 6 (Reporting and Monitoring).

(d) The Private Partner shall provide the Reports to the Public Partner in the manner and within such time periods as set forth in the Agreement and Appendix 6 (Reporting and Monitoring).

(e) The Public Partner may not interfere with the performance of the business activities by the Private Partner.

11. Dispute resolution

11.1 Dispute resolution

(a) Except where (if at all) the Agreement provides for final determination by an Expert, all disputes, controversies or claims, arising out of or in connection with this Agreement, including with respect to its existence, performance, breach, termination, invalidity or interpretation (each hereinafter – the "Dispute"), shall be resolved in accordance with the Dispute Resolution Procedure whereby Disputes shall be referred initially to Parties' representatives, who shall meet and discuss them within [30] days of notice at [location] in attempt to resolve them. Failing agreement within [90] days, either Party may refer any Dispute for final determination to arbitration under [specify system (e.g., ICC/LCIA/ ICSID)].

(b) The place of arbitration shall be [ ] and the language [ ].

[The Dispute Resolution clause should address the pre-judicial dispute resolution process (through negotiations), the procedure for the Parties to refer a dispute to Court/Arbitration (as applicable) for the resolution, as well as the role of the Technical Expert (if applicable) in the dispute resolution.]

12. Liability

[INSERT AS APPROPRIATE e.g., against third-party claims resulting from breach of contract; liquidated damages in the event the Private Partner fails to meet the contractual commissioning date or the levels of services to be provided for in the Agreement; Warranty Obligations with respect to the Facility Equipment as well as liability exclusions]

13. Amendment of the agreement

13.1 Amendment

(a) All modifications of and amendments to the Agreement shall be valid if made in writing and signed by the recognised representatives of the Parties.

(b) The Parties acknowledge that any condition of this Agreement, including its essential conditions, may be amended by an agreement of the Parties in accordance with Clause 13.1(a), unless provided otherwise by the Law.

13.2 Amendment procedure

[This Clause is to describe the procedure for the amendment of the Agreement in accordance with law of the project jurisdiction.]

14. Agreement termination

14.1 Grounds for termination of the agreement

(a) This Agreement shall terminate:

i. On the Expiry Date;

ii. prematurely prior to the Expiry Date:

- pursuant to an agreement of the Parties;
- by the Public Partner on any ground contemplated in Clauses 14.2, 14.4 or 14.5;
- by the Private Partner on any ground contemplated in Clauses14.3, 14.4 or 14.5.

14.2 Termination for reasons attributable to the private partner

(a) This Agreement may be terminated, if so requested by the Public Partner in case of the occurrence of the following events, except when such events arise as a consequence of the special events and/or force majeure events and/or as a consequence of a breach by the Public Partner of its obligations under the Agreement: [specify breaches of obligations under the Agreement by the Private Partner that entail the termination of the Agreement].

14.3 Termination for reasons attributable to the public partner

(a) This Agreement may be terminated, if so requested by the Private Partner in case of the occurrence of the following events, except when such events arise as a consequence of the special events and/or force majeure events and/or as a consequence of a breach by the Private Partner of its obligations under the Agreement: [specify breaches of obligations under the Agreement by the Public Partner that entail the termination of the Agreement].

14.4 Termination of the agreement due to special event

(a) This Agreement may be terminated, if so requested by any of the Parties upon a special event, if the special event:

i. clearly cannot be remedied or prevents the proper performance of the Agreement by the Private Partner for longer than [□] days;

ii. results in the payments of the Public Partner to the Private Partner in relation to the relevant special event exceeding [□].

iii. entitles the Parties to extend the period for the performance of the obligations under the Agreement and/or to receive reimbursements of certain expenses, but such entitlement cannot be exercised by them within [□] days from the date it came to the existence for the reason of a failure to obtain the required approval of the relevant government authority in the manner provided for under the Law;

iv. [other grounds may be included in respect of a particular project].

14.5 Termination of the agreement related to force majeure events

(a) This Agreement may be terminated, if so requested by any of the Parties, if:

i. a force majeure event or its consequences prevent the performance by either Party of its obligations under the Agreement for longer than [□] days and/or several force majeure events prevent the performance of the Agreement for longer than [□] days in total during [□] year;

ii. [other grounds may be included in respect of a particular project].

14.6 Termination by agreement of the parties

(a) This Agreement may be terminated prior to the Expiry Date pursuant to an agreement of the Parties executed in writing. Such agreement between the Parties terminating this Agreement should set forth either the amount, or the procedure for determining the amount of the Termination Fee and the procedure for its payment, agreed by the Parties, but the amount of the Termination Fee, however, cannot in any event be less than the amount determined in accordance with Clause 14.8(a).

14.7 General provisions on the termination fee

(a) The payment of the Termination Fee in the event of the termination of this Agreement in accordance with Clauses 14.2 to 14.6 shall be effected by the Public Partner no later than within [□] days after the Expiry Date.

(b) The procedures of and timing for the recognition and/or conservation of the Contracted Assets upon the Agreement being terminated prematurely shall be set forth by the Parties in the Approval Procedure.

14.8 Termination fee related to reasons attributable to the private partner

(a) If the Agreement is terminated for any reason listed in Clause 14.2, the Public Partner shall then pay the Termination Fee, consisting of: [the composition of the fee payable to the Private Partner needs to be described, which may include 100 per cent of the outstanding amounts under the Debt Financing as well as other expenses relating to obtaining the Debt Financing, etc., LESS any amounts the Public Party is entitled to deduct or offset to rectify the Private Party's breach or redo defective work but PROVIDED THAT deductions do not reduce compensation below the amount under the Debt Financing – depending on the project's financial model and arrangements between the Parties.]

14.9 Termination fee related to reasons attributable to the public partner

(a) If the Agreement is terminated for any reason listed in Clause 14.3, the Public Partner shall then pay the Termination Fee, consisting of: [composition of the fee payable to the Private Partner needs to be described, which should include 100 per cent of the outstanding amounts under the Debt Financing and a portion of the outstanding amounts under the Equity Financing as well as other expenses relating to raising the Debt Financing, Equity Financing, the costs of Building, recognizing and conserving the Contracted Assets, etc. – depending on the project's financial model and arrangements between the Parties. The items included in the fee in connection with the termination on this basis cannot be less in scope than the items included in the fee in connection with the termination for reasons attributable to the Private Partner].

14.10 Termination fee related to special events

(a) If the Agreement is terminated for any reason listed in Clause 14.4, the Public Partner shall then pay the Termination Fee, consisting of: [composition of the fee payable to the Private Partner needs to be described, which should include 100 per cent of the outstanding amounts under the Debt Financing and a portion of the outstanding amounts under the Equity Financing as well as other expenses relating to raising the Debt Financing, Equity Financing, the costs of Building, recognizing and conserving the Contracted Assets, etc. – depending on the project's financial model and arrangements between the Parties. The items included in the fee in connection with the termination on this basis cannot be less in scope than the items included in the fee in connection with the termination for reasons attributable to the Private Partner].

14.11 Termination fee related to force majeure events

(a) If the Agreement is terminated for any reason listed in Clause 14.5, the Public Partner shall then pay the Termination Fee, consisting of: [composition of the fee payable to the Private Partner needs to be described, which may include 100 per cent of the outstanding amounts under the Debt Financing as well as other expenses relating to raising the Debt Financing, Equity Financing, the costs of Building, recognizing and conserving the Contracted Assets, etc. – depending on the project's financial model and arrangements between the Parties. The items included in the fee in connection with the termination on this basis cannot be less in scope than the items included in the fee in connection with the termination for reasons attributable to the Private Partner].

14.12 Procedure for premature termination of the agreement

(a) The procedure for terminating the Agreement prematurely shall be set forth in Appendix 20 (Premature Termination and Contracted Assets Transfer Procedure).

14.13 Transfer of rights to the contracted assets

Transfer of Ownership Right to the Contracted Assets

(a) The Contracted Assets shall be transferred pursuant to the procedure set forth in Appendix 20 (Premature Termination and Contracted Assets Transfer Procedure). If in accordance with the Law the Contracted Assets transfer into the Public Partner's ownership requires the execution of a supplementary agreement, the Parties shall execute such agreement within a reasonable period of time.

(b) If the Agreement terminates on the Expiry Date, the Private Partner shall transfer the right of ownership to the Contracted Assets to the Public Partner no later than [□] days prior to the Expiry Date.

(c) If the Agreement is terminated prematurely, the Private Partner shall transfer the right of ownership to the Contracted Assets to the Public Partner no later than [□] Business Days following the date of the Termination Fee payment in full in accordance with the requirements Clauses 14.6, 14.8, 14.9, 14.10 or 14.11 (as applicable).

(d) For the avoidance of doubt, the responsibility for the maintenance of the Contracted Assets shall pass to the Public Partner as of the date of the execution of the Contracted Assets Hand-Over Certificate.

OR[16]

Hand-Over of the Contracted Assets to the Public Partner

(e) The hand-over of the Contracted Assets to the Public Partner shall be performed pursuant to the procedure set forth in Appendix 20 (Premature Termination and Contracted Assets Transfer Procedure).

15. Miscellaneous provisions

[STANDARD LEGAL BOILERPLATE incl. entire agreement/ amendments/ no waiver/ severance of terms/ language/ notices/ confidentiality/ Interest on late payments/ further assurance etc.] Representations, Warranties and Sovereign Immunity].

15.1 Reps and warranties

[INSERT AS APPROPRIATE FOR EACH PARTY. To include capacity and standing, power and authority, due execution and recognition, valid, binding and enforceable obligations, no immunity from legal process, no conflict with other documents, no existing claims or proceedings which could materially prejudice Project, etc.]

15.2 Waiver of sovereign immunity

[STANDARD WAIVER] The Public Partner [and Government] unconditionally and irrevocably waive[s] any sovereign or governmental immunity from suit or legal process, to the maximum extent permitted under Applicable Law, such that Agreement's provisions can be treated as private commercial acts fully enforceable in accordance with their terms, etc. Consents generally to the bringing and enforcement of proceedings, judgments or awards against it and relief and remedies granted, etc.

15.3 Assignment and enforcement

(a) No transfer of the Private Partner's rights and obligations under the Agreement shall be permitted, except in cases provided for under the Law and the Direct Agreement.

[The provisions of this Clause may be supplemented in accordance with the law of the project jurisdiction and the project financial arrangements: the replacement of the Private Partner in case of restructuring, consent to replace the Private Partner on request of the Lenders.]

15.4 Governing law

(a) This Agreement, including the rights and obligations of the Parties, its validity and the consequences of its invalidity, shall be governed by and construed in accordance with the law of [specify the project jurisdiction].

[EXECUTION CLAUSES]

[16] The provisions of Clause 14.13(e) shall apply if the Facility was built into the Public Partner's ownership.

Appendices

The following Appendices shall form the integral part of the Agreement:

i. Appendix 1 (Terms and Definitions)

[Containing definitions of all key terms, including Affected Party, Agreement, Arbitration, Building, Building Commencement Conditions Precedent, Building Commencement Notice, Business Day, [Capital Grant], Construction Period, Contractor, Contractor Agreement, Court, Debt Financing, [Design], Design Documentation, [Design Stage], Direct Agreement, Dispute, Dispute Resolution, Encumbrance, Equipment, Equity Financing, Execution Date, Expiry Date, Extra Costs, Contracted Assets, Contracted Assets Acceptance Date, Contracted Assets Transfer Certificate, Financial Close, Financial Close Certificate, Financial Close Stage, Financing Documents, Force Majeure Events, Good Industry Practice, Government Authorities, Investment Stage, Investment Stage Completion Certificate, Investment Stage Schedule, Site, Law, Lenders, Maintenance, Maintenance Services Provider, Monitoring, Operation, Operation Commencement Date, Operation Fee, Operation Period, Operation Period Schedule, Operator, Party, Permits, Principal Debt, Private Partner, Private Partner Persons, Project, Public Partner, Public Partner Persons, Refinancing, Reports, Required Insurance Coverage, Review and Approval Procedure, Site Preparation, Special Events, Terminating Party, Termination Date, Termination Fee, Term of Agreement.]

ii. Appendix 2 (Contracted Assets Description and Technical and Economic Performance)

[List of all movable and immovable assets to be developed in accordance with the Agreement along with their sufficient description and output specifications.]

iii. Appendix 3 (Investment Stage Schedule)

[The schedule of [Design and] Build activities.]

iv. Appendix 4 (Operation Period Schedule)

[The Schedule of Maintenance and Operation activities.]

v. Appendix 5 (Operation and Maintenance Requirements)

[The list of medical services, which the Private Partner shall itself or by contracting the Operator carry out for the duration of the Operation Stage, as well as other requirements to maintenance of the Contracted Assets.]

vi. Appendix 6 (Reporting and Monitoring)

[Procedure for the Public Partner's monitoring of the performance by the Private Partner of the requirements under the Agreement and forms of reports by the Private Partner.]

vii. Appendix 7 (Security)

[Describes requirements with regard to security for performance of the Private Partner's obligations. In particular, it will be necessary to specify: the term for which security is to be provided, its amount, the requirements to entities providing security (such as banks in case of bank guarantees), etc. As a matter of practice, the Private Partner is typically expected to provide separate security for each type of the Private Partner's obligations under the Agreement – [Design], Build, Maintenance [, Operation].]

viii. Appendix 8 (Allocation of the Site)

[Sets forth the procedures for and conditions of the allocation to the Private Partner of the Site required for the performance by the Private Partner of its obligations under the Agreement, including: how the Site will be provided to the Private Partner (lease is most frequent); the condition, in which the Site are to be handed over; the period of lease (depending on the law of the project jurisdiction, if it is impossible to transfer lease rights to the Site for the entire term of the Agreement, then the Public Partner's obligation to renew/extend agreements/contracts, on the basis of which the Site are provided to the Private Partner, is to be included so that the period of validity of the Private Partner's rights to the Site is the same as the term of the Agreement); payment amount/procedure for determining the payment for possession and use of the Site; procedure for granting access to the Site to the Private Partner's contractors.]

ix. Appendix 9 (Required Insurance Coverage)

[The Required Insurance Coverage refers to contracts of insurance that the Private Partner is required to enter into for the purposes of covering certain Project-related risks. In particular, as a matter of practice insurance is to be obtained for construction risks (Construction All Risks) and third-party liability risks (health, life and property), arising out of the activities, provided for under the Agreement. Appendix 9 should include the requirements as to insurers, types of insurance, insurance amounts, beneficiaries and other terms of insurance.]

x. Appendix 10 (Liability)

[A Party shall be entitled to the compensation of losses that have been incurred as a result of the non-performance or improper performance by the other

Party of the obligations under the Agreement, and also to the payment of penalties, in the manner and on the grounds, set forth in Appendix 10.]

xi. Appendix 11 (Heads of Terms in Relation to Direct Agreement)

[Contains the heads of terms of an agreement to be entered into between the Public Partner, Private Partner and Lenders. It is better to set out the key heads of terms as different banks may have different forms of direct agreement whereas the key terms ensuring the bankability of the project should largely remain the same.]

xii. Appendix 12 (Heads of Terms in Relation to Contracted Assets Lease Agreement)

[Contains all key terms and conditions of the Contracted Assets Lease Agreement, pursuant to which the Private Partner shall transfer the rights of possession and use in respect of the Contracted Assets to the Operator.]

xiii. Appendix 13 (Principal Forms of Certificates under Agreement)

[Contains the forms of Financial Close Certificate, Building Commencement Notice, Investment Stage Completion Certificate, etc.]

xiv. Appendix 14 (Capital Grant Procedure and Disbursement Schedule)

[Describes the manner, time and terms for the Public Partner to make the Capital Grant disbursements to the Private Partner.]

xv. Appendix 15 (Operation Fee)

[Describes the manner, time and terms for the payments of the Operation Fee to be made.]

xvi. Appendix 16 (List of Bodies and Entities Acting on Behalf of the Public Partner, Scope and Composition of Certain Public Partner's Obligations to Be Performed by Them)

[Lists the entities and bodies that exercise, pursuant to the Agreement or the Law, the authority directly related to the Project implementation.]

xvii. [Appendix 17 (List of Expert Entities)]

[Lists recognised expert entities from among which the Technical Expert may be selected by the Private Partner.]

xviii. [Appendix 18 (Heads of Terms in Relation to Technical Expert Agreement)]

[Contains all key terms and conditions of the Technical Expert Agreement, pursuant to which the Technical Expert is appointed by the Private Partner.]

xix. Appendix 19 (Review and Approval)

[The procedure for review and approval as between the Parties of certificates, schedules and other documents that need to be approved in accordance with the Agreement.]

xx. Appendix 20 (Premature Termination and Contracted Assets Transfer Procedure)

[Sets forth: (i) information to be provided in the termination notice to defaulting Party, (ii) the duration of the cure period at the expiry of which the Agreement may be terminated, (iii) the condition of the exercise of the Lenders' and Public Party's step-in right, (iv) technical requirements and condition, in which the Contracted Assets should be handed over to the Public Partner and the procedure for inspection of the Contracted Assets to check whether it conforms to those requirements.]

xxi. Appendix 21 (Arrangements for Cooperation between Parties at Investment Stage)

[Contains (i) additional requirements to the Design Documentation and specific arrangements with regard to its approval and obtaining Permits in respect of the Design Documentation – in accordance with technical parameters of the relevant project and provisions of the law of the project jurisdiction, and (ii) the requirements to the engineering documentation to be developed by the Private Partner, in accordance with the law of the project jurisdiction and the technical features of the relevant project and the procedure for its approval].

xxii. Appendix 22 (Arrangements for Cooperation between Parties at Operation Period)

[Procedure for cooperation between the Parties at the Operation Stage, including for the purposes of ensuring the proper Operation and Maintenance, in particular for approval of the Operator / the Maintenance Services Provider.]

xxiii. Appendix 23 (Dispute Resolution)

[Includes any specific provisions or procedures that may need to be set out in the Agreement, e.g., depending on a jurisdiction and applicable laws / market practice a mediation mechanism, specific details (if any) relating to the arbitration procedure, and the procedures applicable to any expert determination of disputes, such as those including the Technical Expert / an "Expert Panel".]

xxiv. Appendix 24 (Contracted Assets Ownership)

[Addresses the following: which Party will have the ownership of the Contracted Assets, the procedure for the registration of the ownership right to the Contracted Assets, other provisions on dealings between the Parties in connection with the ownership of the Contracted Assets.]

xxv. Appendix 25 (Private Partner Financing)

[Specifies the amounts of Equity Financing and/ or the Debt Financing of the [Design,] Building [and Maintaining/Operating] of the Contracted Assets to be provided / arranged by the Private Partner.]

xxvi. Appendix 26 (Refinancing)

[Provides which Party, under which circumstances and within what time will be entitled to initiate the Refinancing, and also what is the procedure for the approval of the Refinancing by the other Party, including the grounds for refusing to approve the Refinancing.]

xxvii. Appendix 27 (Special Circumstances and Force Majeure Circumstances)

[Contains (i) the lists of special events and force majeure events, (ii) procedures for giving a notice of a special event, for the identification of costs to be reimbursed, and also of measures to be undertaken for the purposes of mitigating the consequences of a special event and procedures for actions by the Parties if a special event is a continuing event, and (iii) procedures for giving a notice of a force majeure event and procedures for actions by the Parties, if force majeure event is a continuing event.]

xxviii. [More appendices can be added as an Agreement is drafted for a specific Project.]

EBRD PPP regulatory guidelines collection

Chapter 16.
Model public-private partnership policy

Outline of example document for CIS member countries[1]

[1] Note: This document is a direct, non-professional translation from Russian into English.

1. Introduction

General part

1.1 [The Government / Cabinet / Council / other name of the highest executive authority] of [name of the country] (the "Government") intends to develop and maintain the uniform approach to prepare and implement public-private partnership projects[2] ("PPP") [as well as PPP assessment] in [name of the country].

1.2 The objective of the Government regarding PPP is to provide the private sector with opportunities to participate in the economic and social development of the state, attract investments in the creation of new infrastructure and the reconstruction of existing public infrastructure facilities, as well as other goals specified in section 2 below.

1.3 PPP is just one of the arrangements or approaches which may be used to develop and implement public infrastructure, provide socially significant public services or attract private investment to the infrastructure sector. This Policy does not automatically prioritise PPP over any other such arrangements and approaches which may be available within the territory of [name of the country].

1.4 The Government intends to develop and maintain PPP arrangements in those spheres, where they can most benefit the economy and the public compared with traditional state or municipal procurements.

1.5 This Policy shall apply to all the models and forms of PPP, including [concessional and non-concessional PPPs and any other available structures (the terminology may be modified to reflect the name of the relevant forms of PPP in the relevant country)].

Policy objectives

1.6 This document specifies the policy framework of [name of the country] in the sphere of PPP. The Government intends to comply with all the requirements of international best practice and generally accepted standards in this sphere, taking into consideration the regulatory framework of [name of the country], and its economic and social priorities.

1.7 The Government agrees that, to accomplish the task set before it in this Policy, it is required to create the conditions for attracting private investments from legal entities registered in the territory of [name of the country] and resident individuals of [name of the country], as well as from foreign legal entities and persons, together with associations of the same (consortia).

1.8 This Policy may also be deemed a signal of official support for PPP projects in [name of the country] at the country level for the benefit of potential investors and financing institutions.

1.9 Developing PPPs is one of the priority tasks for [name of the country]. The Government acknowledges that, in connection with PPP project implementation, private sector participants may be primarily interested in protecting their investments and commercial and ownership interests and providing adequate legal assurances for that purpose. This Policy therefore determines the political and institutional basis for PPP project implementation and the protection of the interests of the state and the public in the course of such implementation. For this purpose, the Government shall implement transparent procedures for developing, implementing, monitoring and managing PPP projects.

1.10 This Policy is also designed to provide a framework for implementing certain PPP pilot projects, subject to international best practice, which it is hoped shall become templates for the further development of PPP in [name of the country] in future years.

2. PPP objectives

2.1 The primary objectives of PPP development and implementation shall include the following:

(a) Creating new, and modernising existing, infrastructure;

(b) Attracting additional infrastructure investments;

(c) Reducing the cost and improving the quality of infrastructure construction and operation;

(d) Improving the efficiency of infrastructure management and technical maintenance within its whole life cycle;

(e) Facilitating the public's access to public (socially significant) services;

(f) Improving the quality of public services;

(g) Harnessing the experience, skills, technologies and know-how of private sector companies.

2.2 Other supporting objectives to be achieved with PPP development and implementation include the following:

(a) Increasing the predictability and transparency of

[2] The term "PPP" used in this policy document for [name of the country] in the field of PPP (the "policy") has the same meaning as in the Model Law of the CIS Member States "On Public-Private Partnership".

the budgetary expenses and liabilities of [name of the country], of the [constituent entities of [name of the country]] and of the municipal authorities

(b) Establishing of a more client-oriented culture in the provision of public services

(c) Stimulating innovation

(d) Fostering conditions for the accelerated development of business activities

(e) Giving the state greater flexibility in the disposal of budget funds

(f) Increasing the transparency and reliability of the public sector in the course of procurement works and services provided by private individuals

3. PPP definition and characteristics

PPP criteria

3.1 No single definition of PPP is universally accepted. In some states, the term "PPP" has a narrow definition in the legislation, and it is used only with respect to strictly determined projects. In other jurisdictions, PPP is the general term used with respect to any and all kinds of cooperation between the public and private sector on a contractual and institutional basis. [Name of the country] adheres to the compromise approach: the PPP definition is not unduly narrow, however, a project may be deemed a PPP project only subject to compliance with certain criteria.

3.2 PPP criteria shall include:

(a) provision by a private partner of the public infrastructure and/or public services, that is, the infrastructure or services traditionally created and provided by public authorities

(b) Long-term nature of the partnership (that is, term of the PPP agreement – from [three/five] years [and up to [***] years])[3]

(c) Fulfilment by the private partner of its obligations to [create/reconstruct and operate, and/or technically maintain[4]/operate, and/or technically maintain[5]] PPP project

(d) Allocation of risks between public and private partners

(e) [Full or partial financing by a private partner (equity and/or debt) for the implementation of the project][6]

3.3 [In most PPP projects, a private partner provides the major part of the financing for the project. However, provision of financing by a private partner shall not be deemed a necessary criterion of PPP.][7]

3.4 The PPP agreement shall be fee-based. The private partner shall earn revenues and a return on its investments from payments made by the final consumers of the public services/users of the public infrastructure (either directly or indirectly), or from payments made [by the public partner] from the budget, [and/or funding received from non-budgetary funds] or cumulatively from several sources.

3.5 As a rule, a public partner in PPP projects consists of government authorities/ministries or local government agencies. [State and municipal enterprises, state-owned companies and municipal agencies, state-owned companies and corporations, as well as other legal entities, mainly controlled by the state or municipal entity][8] may also act in the name, and on behalf, of a public partner.

3.6 Private partners may [only be legal entities (corporations or partnerships) registered in accordance with the laws of [name of the country]. This restriction shall apply only at the moment of conclusion of the PPP agreement, that is, foreign legal entities or consortia may also participate in the tender and, in case of award of the contract, shall establish a project company under the legislation of [name of the country], which shall act as the private partner.][9]/ [either legal entities registered under the laws of [name of the country] or foreign legal entities.][10]

[3] Optional limitation shall apply at the discretion of the authorised body of the member country.

[4] The first variant (more severe restriction) shall apply at the discretion of the authorised body.

[5] The second variant (less severe restriction) shall apply at the discretion of the authorised body.

[6] Optional limitation shall apply at the discretion of the authorised body of the member country.

[7] At the discretion of the authorised body of the member country.

[8] The list shall be subject to adjustment/specification in accordance with the provisions of the legislation of the member state.

[9] The first variant (more severe restriction) shall apply at the discretion of the authorised body.

[10] The second variant (less severe restriction) shall apply at the discretion of the authorised body.

3.7 [State and municipal enterprises, state-owned companies and corporations, as well as other legal entities [controlled by the state or municipal entity[11] may not own more than [49 per cent] of shares/ interests in a private partner.][12]

PPP term of validity

3.8 Each PPP agreement shall specify the PPP term of validity [(up to [***] years)][13] based on the following criteria:

(a) The life cycle of the infrastructure created, reconstructed, operated and/or serviced by a private partner

(b) The period required for the anticipated return on the investments made by a private partner (including the cost of funds raised or borrowed)

(c) The period required for the [public][?] partner to achieve the applicable performance levels determined in the PPP agreement, the achievement of which is the objective of the project (for example, certain levels or volume of public services)

(d) The [characteristics] of the industry or sub-industry, in which the PPP project is implemented

Spheres of PPP application

3.9 The spheres of PPP application in [name of the country] shall include:

(a) Transport
(b) Housing maintenance and utilities
(c) Energy industry
(d) State and municipal management
(e) Provision of defensive capacity, safety and security
(f) Communications and data transmission
(g) Scientific activities, education, upbringing and culture
(h) Social services
(i) Public health services, physical training and sports
(j) Tourism
(k) Agriculture
(l) Other spheres, [but only subject to receipt of a preliminary consent of a competent state or municipal authority,][14] unless the laws stipulate any restrictions in respect thereof.

4. Organisational structure

Authority responsible in the sphere of PPP

4.1 In accordance with [***], [***] is the authority [with overall administrative responsibility] in the sphere of PPP (the "PPP authority"). The main functions of the PPP Authority are provided for hereinafter in Clauses 4.2–4.12.

4.2 Further development and improvement of the policy in the sphere of PPP.

4.3 Provision of mandatory requirements for the procedures and methodological recommendations in the sphere of PPP.

4.4 Assessment of individual PPP project proposals and making decisions on the basis of implementation thereof.

4.5 Provision of general recommendations [and guidance?] to public authorities and other interested parties with respect to application of the laws in the sphere of PPP and development of PPP projects.

4.6 Collection and analysis of information on PPP projects and the results of their implementation. Provision of relevant reports thereon.

4.7 Development and distribution of the manuals recommended for application in the sphere of PPP.

4.8 Fostering conditions for the successful implementation of PPP projects, including qualified personnel training.

4.9 Coordination of and support for PPP projects (in different forms).

4.10 Refinement of PPP project financing and funding techniques.

4.11 Maintenance of the PPP projects register (database).

4.12 Provision of interdepartmental coordination of the activities of higher-level executive authorities relevant to the implementation of a PPP project.

[11] The list shall be subject to adjustment/specification in accordance with the provisions of the legislation of the member state.

[12] Optional limitation shall apply at the discretion of the authorised body of the member country.

[13] Subject to the decision made by the duly authorised body of the member country, in accordance with Clause 3.2 (b) above.

[14] Optional limitation shall apply at the discretion of the authorised body of the member country.

Obligations of the authority carrying out the functions of a public partner

4.13 Authorities carrying out the functions of a public partner (the "authorised bodies") include the agencies authorised by the state to fulfill the obligations of a public partner in a PPP project. Such authorities shall be liable for the services and infrastructure provided within the scope of PPP projects for which they are responsible. In some cases, authorised bodies may delegate their authorities to others, such as state-owned or municipal enterprises.

4.14 The PPP Authority shall support the authorised bodies in the course of the initial [qualification] [preparation?] of PPP projects, as well as in the course of [the examination and discussion of promising project decisions and ideas], and the selection of consultants and the conclusion of contracts with them.

4.15 Consultants may play a significant role (inter alia) in developing feasibility studies for a PPP project.

4.16 The PPP Authority shall, if necessary, offer recommendations to the authorised bodies on the selection and coordination of the consultants.

5. PPP project development stages

5.1 The [Government] shall monitor the implementation of the PPP project through the following main stages:

(a) Identification of the project (including development of the project source idea and its preliminary feasibility study, if necessary). This stage is required to understand the applicability of PPP to the project, which helps to avoid any unnecessary use of resources (including financial resources) to develop the project which may in the end not be implemented as a PPP.

(b) Development of the source concept and technical feasibility studies for the PPP project

(c) PPP project assessment. Among other things, a decision shall be made at this stage about the form of PPP project implementation (in the form of concession or any other PPP model).

(d) The stage of award to a private partner, which shall be completed in the form of commercial close

(e) Financial close

(f) Monitoring of implementation of the PPP project

(g) Further PPP project assessment

6. PPP project assessment

6.1 All PPP projects in [name of the country] shall undergo the assessment procedure prior to the first stage of award to a private partner.

6.2 Assessment of a PPP project includes a complex analysis of all aspects of the project [carried out by the team of specialists not directly involved in development of the project].

6.3 The PPP project assessment at [federal/national] level shall be carried out by the sectoral ministry and then by the PPP Authority. For PPP projects at a municipal level, the assessment shall be carried out similarly to federal projects, save that it shall initially be carried out not by the ministry, but by the municipal executive authority. If a PPP project includes some measures of state support, the PPP authority shall carry out its final assessment.

6.4 The main criteria that the Government shall use to assess PPP projects are:

(a) Compliance with the national development plan, as well as the development plans and strategies of certain industries or sectors of the economy

(b) Economic [and technical] feasibility of the project

(c) Feasibility of implementing the project as a PPP (compared with traditional government procurement)

(d) Allocation of the duties and risks of the project parties

(e) Acceptability of rights and benefits provided to a private partner

(f) Investment potential of the project for financing institutions

(g) Sufficiency of the funds of the state or municipal budget (if applicable)

(h) The basis and amount of the private partner's fees for the project and their affordability for end-users of the infrastructure (if applicable)

(i) Acceptability of the ecological and social consequences of the project

(j) Acceptability of the tax consequences of the project

(k) Acceptability of the private partner award procedure

6.5 Evaluation of PPP projects will be made on the basis of the Methodology for evaluating the effectiveness of PPP projects in Commonwealth of Independent States (CIS) member countries.

6.6 The PPP authority or the government shall determine additional criteria of assessment for different projects in different economic sectors.

7. Selection of a private partner

Procedure to select a private partner for PPP projects

7.1 Clauses 7.2–7.7 specify the most important aspects of a private partner selection procedure in PPP projects in [name of the country].

7.2 **Notification on tender.** Publication of a notification of the tendering procedure shall imply the beginning of the official procedure to select a private partner. At this stage, interested parties may obtain any additional documentation required for the following stages of qualification. The notification shall be published on the official website for publishing information on tendering procedures ([***]) and in the official print media for the same [***].

7.3 **Prequalification.** The objective of prequalification shall include assessment of the participants' compliance with certain criteria, which confirms that such participants are able to implement the PPP project. Invitations to prequalify shall include the criteria and methodology for assessing the prequalification requirements of the participants.

7.4 **Invitation to Tender.** Documentation included in an invitation to tender (the "Tender Documentation") shall contain all information tender participants require to prepare their tender proposals for the project. The invitation to tender shall also contain [a draft of the general terms and conditions of a PPP agreement/draft PPP agreement].[15] The invitation to tender shall specify clear criteria used to assess the proposals submitted by the tender participants, as well as the respective importance and weighting of each criterion.

7.5 **Tender Stage.** In the course of the procurement process, the public partner shall provide clarifications to the participants in the tender with respect to the terms and conditions of the Tender Documentation. Nevertheless, the PPP project may require more active dialogue with the tender participants in the course of the tender.

7.6 **Assessment of Tender Proposals and the Winner Qualification.** At this stage, the tender commission shall keep a detailed report of its assessment of the tender proposals, including a description of all its stages. This report shall describe the decision-making methodology used by the commission members, as well as the justification for all their decisions.

7.7 **Final Negotiation.** Typically, any PPP project requires additional negotiation with the winner of the tender with a view to agreeing on the final draft of the PPP agreement.

Non-competitive (direct) negotiations

7.8 Non-competitive (direct) negotiations held for the purposes of selecting a private partner may be permitted only in certain circumstances, in circumstances where only one potential private partner can meet the requirements of the public partner.

Publication of information about the results of the tender

7.9 Information on the results of the tender to select a private partner shall be published, with the exception of information constituting a state secret or other secret protected by law. Information is published on the official website for publishing information about tendering procedures ([***]) and in the official print media for the same [***].

Private initiative/unsolicited proposals

7.10 Private investors may also initiate PPP projects through a so-called private initiative. A private investor may submit a private initiative at its own discretion and not in accordance with any request from the authorised body. Such private initiative arrangements can help the state benefit from the private sector's ideas, know-how and experience. However, using such arrangements requires special procedures and rules designed to maintain a balance between stimulating the implementation of PPP projects by private investors and maintaining sufficient transparency. [Competitive pressures should therefore be brought to bear wherever possible under these procedures.]

7.11 The investor's proposal to initiate the PPP project shall be published on the official website of the public partner. If no third party submits a competing tender proposal for the project within [45 days/another term], the public partner shall be entitled to conclude a PPP agreement for the project with its private initiator without any tender procedure. Should any other interested parties put forward competing proposals for the project, the public partner shall conduct the tender procedures as described above and [reimburse the private initiator of the project for all reasonable expenses incurred when preparing the project in case of its failure to win the tender/provide the project initiator with other privileges and benefits in the course of the tendering procedure].[16]

[15] At the discretion of the authorised body.

[16] At the discretion of the authorised bodies.

8. Financing PPP projects

State financing and support

8.1 The public partner may participate in the financing of the project by providing loans and/or grants or participating in the share capital of a private partner as well as through other methods specified in this section below.

8.2 State financing and support will be used [(among others)] in cases where projects are economically viable but have insufficient financial viability or strength, or are subject to risks beyond the sufficient control of a private partner, which (in each case) significantly diminishes the prospects of using private finance to fund them.

8.3 The Government will use the following types of state support if certain conditions are met in the circumstances established by the Government and/or the PPP Authority:

(a) The public partner may provide the private partner with additional infrastructure assets.

(b) The public partner may provide the private partner with a capital grant.

(c) The public partner may provide the private partner with tax and customs privileges (or guarantee that the tax scheme will not be changed within a certain period of time).

(d) In certain circumstances, the public partner may provide the private partner with periodic grants and subsidies to ensure the affordability of user fees.

(e) The public partner may undertake obligations under the PPP agreement for making payments in favour of a private partner in certain circumstances as part of the risk allocation pattern, such as provision of a minimum revenue or return guarantee for the project.

(f) The public partner may provide guarantees for the fulfilment of certain payment obligations, such as obligations connected with an early termination of the PPP agreement.

(g) As a general rule (and subject to the preceding paragraph), the public partner does not provide any guarantees with respect to [any/material part of] debts of a private partner to its creditors. Should the public partner provide a guarantee with respect to the entire debts of the private partner to its creditors under the project, it would affect their incentive to help control the successful implementation of the PPP project.

Rights and interests of creditors

8.4 With regard to PPP projects, the Government will ensure compliance with all procedures required by law to obtain the consent of the public partner to the granting of suitable security and similar interests in (or in relation to) all the assets of the project in favour of the lenders (including all contracts under the project), such that the senior creditors may (among others) take over the project if a private partner fails to implement it as required, and perform the responsibilities of the private partner prior to its proper replacement by another entity.

8.5 The Government will ensure, if this is necessary to attract debt financing for the PPP project, that a direct agreement is signed among the senior creditors, the public partner and the private partner which will include the terms and conditions governing the takeover by a creditor of the project and the replacement of the private partner, as well as other terms and conditions associated therewith. Direct agreements, depending on the requirements of the creditors, will include provisions governing the waiver of any outstanding breaches of contract by the private partner, the takeover of the project, relevant notifications and procedures, assignment or transfer of the parties' rights and obligations – in other words, all those terms and conditions which will provide senior creditors with the right to cancel or vitiate the consequences of any material breaches by the private partner, and assuring the further implementation of the PPP project.

9. Control of the agreement performance, reporting and further assessment

Control and supervision

9.1 The authorised body shall remain liable to the public for the provision of services, even after conclusion of a PPP agreement, and will supervise the implementation of the PPP project. The Government will ensure that the authorised body the appropriate resources to do this.

9.2 PPP agreements will establish a systematic monitoring mechanism for the purposes of determining the level of performance by a private partner of its obligations under the PPP agreement. Such monitoring shall be of a systematic nature.

9.3 The government and/or the PPP authority will establish requirements for exercising control and supervision in the field of the PPP in accordance with the brief recommendations on monitoring the quality of services provided and the results of PPP projects in the CIS member countries.

Transparency

9.4 All executed PPP agreements shall be available to the public, apart from where other or qualified arrangements are required to protect national security or maintain commercial confidentiality, including certain individual terms and conditions of such agreements which contain commercially classified information.

9.5 By providing requirements for the publication of PPP agreements, the Government demonstrates to the private partner its intent to conduct transparent and fair tendering procedures [and promotes a wider understanding of the workings of its PPP system and market on a transparent basis].

Information relating to PPPs

9.6 The PPP Authority shall maintain a systematic and well-organised database with respect to all PPP projects. Maintenance of such database shall contribute to the transparency of tendering procedures [and data flow] and enable the state to trace its own obligations.

9.7 The Government and/or PPP Authority shall establish standard requirements for reporting with respect to the results of activities under all PPP projects (different types of key indicators) on the basis of the Methodology for introducing key performance indicators in PPP projects for CIS member countries. Such requirements shall describe the indicators to be measured, the service provision standards, measurement systems and the consequences of non-fulfillment by a private partner of its relevant obligations. The Government will also publish periodic reports in accordance with the standard forms to be registered and analysed in the course of implementation of any PPP project.

Ex-post PPP projects assessment

9.8 A team of specialists independent of the PPP authority shall carry out ex-post assessment of each project after its completion, because the PPP Authority took part in the process of assessment and agreement of the project.

Chapter 17.
Core principles of modern PPP law

A modern PPP law should:

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

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

3. provide clarity and certainty of rules and procedures

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

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

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

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

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

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

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

11. permit suitable flexibility and negotiability of PPP contracts

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

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

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

Explanatory memo

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

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

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

Principle 1.

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

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

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

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

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

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

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

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

Principle 2.

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

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

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

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

[4] See Principle 1 above.

Principle 3.

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

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

Principle 4.

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

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

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

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

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

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

Principle 5.

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

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

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

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

Principle 6.

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

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

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

Principle 7.

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

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

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

Principle 8.

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

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

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

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

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

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

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

Principle 9.

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

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

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

Principle 10.

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

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

Principle 11.

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

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

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

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

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

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

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

Principle 12.

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

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

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

Principle 13.

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

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

Principle 14.

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

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