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Chapter 2.
The legislative and regulatory framework for PPPs

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(A) Introduction

This chapter provides summary guidance, primarily to policymakers and legislators, but also to private-sector participants, on the nature and contents of the wider legal framework for PPPs. This may help the former create or refine that framework, especially when they are moving from the use of PPPs as occasional, impromptu arrangements to a more systematic application of them for infrastructure development. It may give the latter a deeper understanding of that framework and help them to evaluate the efficacy of a country's legal system from the PPP perspective, when they are considering or structuring a project investment.

Many areas of a country's laws and legal system can be relevant to privately financed infrastructure projects and PPPs, and their structuring, award and implementation. These range from laws relating to companies and property, procurement, the environment, contract and tort (or equivalent), construction, dispute resolution, banking, finance and security, and tax and investment protection to sector-specific laws, constitutional and administrative laws, laws governing the exercise of ministerial powers and duties and the provision of public services, and – ever more prominently – laws governing international, public law obligations and human rights (to name just the more obvious ones). Above all, the host country's legal system may already have a fully fledged PPP law in place or a collection of laws and rules directed specifically at the private sector's involvement or participation in infrastructure development. Or it may not, potentially leaving a yawning gap that might need to be filled if a new PPP system is to work satisfactorily.

It follows that perhaps no discussion or analysis of all these areas of law can really be complete or comprehensive. There certainly is not scope in this short study to do more than touch on some of them. For a fuller understanding, readers should also look at other leading publications on this subject.[1] We therefore concentrate in this chapter on aspects of the subject where we feel the most helpful guidance can be offered, clearly and simply, in the context of the wider objectives of the EBRD publication of which it forms part. We hope this will help policymakers and legislators understand the salient features of a clear, robust legislative/regulatory framework for PPPs, and the changes to their legal systems that might be necessary to create one. It may also help sponsors, investors, lenders and contractors to learn more about the thinking behind such changes. Above all, we discuss in this chapter the challenge of structuring and drafting a modern, comprehensive PPP law, which countries considering launching wide-ranging PPP programmes for the first time may find necessary or appropriate to put in place.

The reader should keep in mind one important caveat when reviewing these pages, however. The Covid-19 pandemic and the economic crisis that has resulted from it have had a devastating impact on many PPPs around the world, while at the same time accelerating others as part of the emergency response. This has had – and will continue to have – major consequences for the frameworks (legal and non-legal) in place for PPPs in many countries in the short, medium and long term. It may change those frameworks in ways that are partly predictable and partly unforeseeable at this point. Chapter 5 considers this subject in greater detail (taking account of some of the voluminous materials already published about it).

This chapter is divided into five main sections: (B) a discussion of some of the general legal issues raised by the wider legal framework; (C) a review of some of the principal sources of published guidance and precedent in this area, and the sources of law that drafters may need to consider; (D) this section – the centrepiece of the chapter – contains detailed guidance on how to structure and draft a new PPP law; (E) some views on how supporting regulations and guidelines might be used in this context; and (F) a conclusion summarising our main points and recommendations.

(B) Assessing the wider legal framework

1. The need for a PPP framework

What do we mean by a PPP framework? PPPs can be undertaken as isolated, ad hoc projects, without any clear, pre-existing "scaffolding". Indeed, countries often use them for the first time on that basis, perhaps to experiment with the structure, deal with an emergency or urgent need, or establish the viability of this form of infrastructure procurement. Most countries, however, quickly find that if they are looking for something more systematic and seeking to implement a long-term, wide-ranging PPP programme successfully, a well-defined PPP framework will be necessary. A great deal of precedent and guidance is

[1] Such as the United Nation Committee on International Trade Law's (UNCITRAL) Legislative PPP Guide and its accompanying Model Legislative Provisions (referred to in this chapter as the UNCITRAL Guides or just UNCITRAL), which perhaps comes closest to a comprehensive examination of it, or the materials listed in the EBRD, the World Bank's Public-Private Infrastructure Advisory Facility and the European Expertise Centre (EPEC) databases. See Section (C) below.

available about how to achieve this (see below).[2] Each country will need to develop its own framework, adapted to its particular needs, norms and traditions, and this framework will inevitably need to be modified and refined over time, as its PPP system evolves.

The phrase PPP framework covers a range of matters affecting the implementation of PPPs, some of which are beyond the scope of this chapter and Guide. It encompasses the policies underlying them, the institutions that give effect to them, the laws and regulations that bind them, and the values, tests, rules and procedures that apply to them. The framework covers every stage of the process, from initial project conception and selection, to design, assessment, structuring, approval, award and final implementation. A well-designed framework will facilitate the efficiency and sustainability of the PPP system. It will promote effective project design and selection, fair and competitive procurement, the better realisation of the system's aims and objectives, and overall transparency and accountability. It will also help generate private-sector interest in the opportunities on offer, as well as its acceptance by the general public. Conversely, a poorly designed PPP framework is likely to encounter systemic difficulties or blockages at many levels, which can all too easily turn into fatal flaws.

In other words, it is all about the good governance of a PPP system. A range of publications have captured the key principles over the past few years. The United Nations Economic Commission to Europe's (UNECE) Guidebook on Promoting Good Governance in PPPs (2008), for example, identifies six core principles: efficiency, accountability, transparency, decency, fairness and participation. More recently, it published its 10 Guiding Principles for PPPs for the SDGs (Sustainable Development Goals). The Organisation for Economic Co-operation and Development (OECD) has also published a set of Recommendations on Public Governance of PPPs (OECD 2012). These fall into three main groupings: (1) the need for clear and transparent institutional arrangements and well-trained and resourced authorities; (2) putting value for money at the heart of the selection process and (3) ensuring that the selection of PPPs is properly integrated with the wider budget process to minimise fiscal risks.

To work well, the PPP framework must be designed in a holistic manner, so its component parts are all consistent with each other and fit seamlessly into the country's wider strategy for economic and infrastructure development. It should form an integral part of the broader picture, fully integrated with planning, procurement, investment promotion and fiscal management processes.[3] PPPs should not be used as a furtive method of avoiding regulatory or fiscal constraints. The framework also needs to be well understood; governments typically find that they need to publish guidance materials about the workings of their PPP systems at an early stage to help civil servants, developers, investors and even the general public understand and work with them. These can take the form of policy statements, manuals, guidelines and other tools, clarifying rules and procedures and codifying best practice.

A PPP framework's main elements are likely to include the following:

- **Policy framework** – a policy paper or statement explaining the government's thinking in making use of PPPs to develop its infrastructure, its objectives and priorities in doing so, and their scope and core principles.

- **Legal framework** – the laws and regulations that govern PPPs and their selection, structuring, award and implementation, as well as other aspects of the PPP programme. These will include relevant aspects of the country's wider legal regime, any PPP-specific legislation and applicable sector-specific rules and regulations.

- **Processes and procedures** – the various stages in the selection, design, review, approval, award and management of PPPs, and the responsibilities of the different public authorities and bodies involved in each.

- **Values, tests and criteria** – the critical values and tests to be applied at each stage of the process by the responsible bodies involved, including the principles and objectives contained in the policy framework, the main design, approval and tendering criteria, key performance indicators (KPIs), the principles and provisions reflected in the PPP contracts, and key considerations governing the implementation and monitoring of PPPs. Value for money, social benefit, affordability and ESG (environmental, social and governance) values are likely to feature prominently.

[2] The World Bank's PPP Reference Guide is particularly helpful on this subject. In 2022, it published a new study entitled Guidance on PPP Legal Frameworks.

[3] Unfortunately, this is still all too often not the case, especially in emerging market and developing economies (EMDEs). This simply reflects the sophistication needed at a governance level to make these systems work, and the capacity building still needed in many EMDEs before they can achieve it, which is a well-recognised problem. Many countries still have much to learn, and to teach their civil servants, about them.

• **Integration with wider development strategy** – the integration of the PPP programme with the country's wider policies and plans for infrastructure and economic development and investment. How well do they all mesh? Are their different elements truly consistent and symbiotic?

• **Budgetary and fiscal management** – the process by which the government's actual and contingent liabilities under its PPP projects are managed, reported, limited and budgeted for, to ensure that PPPs are being appropriately evaluated, their fiscal risks limited and accounted for, and that no undue burden is placed on future generations.

• **Transparency, accountability and engagement** – the steps taken to ensure that all these elements are sufficiently clear, transparent and well-understood, that stakeholders are properly engaged and that government (or quasi-governmental) bodies taking decisions at each stage are held responsible for their decisions and actions. This extends to publicity requirements, reporting, monitoring, record-keeping and public consultation.

All these elements need to form integral parts of a coherent whole. In practice, they all overlap. There is an arbitrary element to their categorisation, which could be organised rather differently if one chose. Each could also be the subject of a detailed discussion, and a different chapter of this Guide, although many raise issues that are not primarily legal at all, but economic, financial, practical and ethical. Nevertheless, most of them have a legal dimension of some kind, as the following pages will show – especially those dealing with a PPP law, which will typically touch on many of them. The legal framework will determine the legally binding aspects of each.

The subject of the policy framework is discussed further in Chapter 17 (Vol I) and PPP contracts in Chapter 3 (Vol III). The remainder of this chapter examines the legal framework – that is, the laws and regulations governing PPPs.

2. Some relevant areas of law (general)

Does a country need a PPP law? It may not. Some countries do not have a recognised legal concept of PPP or "concession"[4] at all. Many common law countries do not, but treat them as just another form of commercial contract – notably the United Kingdom, which for a time developed and managed the largest PPP system in the world.[5] Where this is the case, and the country's legal system already contains adequate provision for all aspects of commercial contracts of that kind, it may be unnecessary to introduce further legislation to give effect to them.[6]

Other countries, particularly civil law ones, with their comparatively greater reliance on statute, tend to give PPPs clear statutory recognition. France is a leading example. In many ways, France pioneered their use in the modern world generations ago[7] and has a well-developed administrative law concept of "concession", with an accompanying body of case law, principles and rules that prescribe their application in practice. Countries that are constrained by their jurisprudence or legal philosophies to take the same approach as France (and many other civil law jurisdictions) may already have similar principles enshrined in their administrative laws, or may need to give full legal effect to their PPP systems in their legislation. This is the norm, in fact, among civil law countries,[8] where the operations of government are often codified in their systems of administrative law. Many of the rights, obligations and procedures that apply to PPPs will be set out in administrative laws, rather than simply in contracts, as they tend to be in common law jurisdictions. Those laws can even modify the provisions of PPP contracts, primarily to ensure continuity of provision of the public services involved and maintain a project's financial equilibrium.

Some civil law countries (including France)[9] also make a formal, legal distinction between concession and non-concession PPPs, categorising the former as projects where the private partner is extensively exposed to demand (and perhaps supply) risk, typically where it relies on direct user charges for its revenue stream, while the latter involves a government revenue stream and little or no demand or market risk. If a formal, legal distinction between the two of this kind is made,[10] it may be reflected in somewhat differing rules and procedures, or occasionally even different laws, applicable to each (at least at the procurement level). Countries that do not need to make such a distinction tend to prefer to avoid it altogether in their legal frameworks, in the interests of simplicity and flexibility. For many such countries, PPPs are all essentially members of the same "species" and can be made subject to the same legal regime and rules.[11]

There can, however, be a clear case for drawing up a PPP law even where it may not be strictly necessary in a technical sense to do so. Some countries take the view that their legal systems already permit PPPs to be used (especially if there have been isolated examples of PPP projects in the past), but that having a new law in place will generate a helpful degree of clarity and certainty, which makes it worth doing.[12] There could otherwise be many questions about authority, scope, content and procedure, which the country's lawyers may not be able to answer clearly and precisely in the absence of a new law. This is, in

fact, a very cogent reason to have one. Introducing piecemeal, scattered rules and decrees over time, to address specific aspects of PPPs as need arises – as numerous countries have done in the past[13] – can be messy and confusing. Instead, it is likely to be more helpful and efficient from everyone's perspective to draw up a comprehensive new statute covering the ground in clear, coherent terms that ideally reflect international best practice. This is the position in many civil law countries, but also in some common law ones as well.

To do that, however, and design a suitable legislative and regulatory framework for PPPs, host countries need to think carefully about the wider aspects of their existing legal system. As already mentioned, there are potentially many areas of law that must be considered. These may impinge on PPPs in one way or another, and may need to be taken into account or modified as the new framework is designed. These will typically include laws on commercial contracts, companies and partnerships, taxation, procurement, competition, finance and security, insolvency, specific sectors, property, compulsory purchase, the environment, investment protection and intellectual property, and – depending on their scope and purpose – a range of others. All these laws will need to be compatible with the new PPP structures as the host country is proposing to award and implement them. At the same time, they will need to represent a sufficiently stable, robust and commercial legal environment to attract private-sector participants and investors to the new system. Serious deficiencies in any of them could potentially represent serious obstacles to its implementation. Some of their provisions may have to be amended or repealed in consequence.

It would go beyond the scope of this paper to discuss all the aspects in which these diverse areas of law might prove deficient, or what might have to be done to modify them to make them more conducive to implementing PPPs.[14] Nevertheless, there are some central features to many of these areas of law, which are of more self-evident relevance to governments seeking to inaugurate PPP programmes or others considering investing in them. Some of these are discussed below. One fundamental area, for example, concerns the rule of law and the reliability and impartiality of the country's courts and judicial system (even where international arbitration is specified in the PPP contract). An adequate legal framework is of little use if no proper mechanism exists to implement and enforce the country's laws, or if there is insufficient judicial reliability to enforce legal proceedings and contracts, pursue remedies and recognise and execute court and arbitration decisions. Some of these issues touch on fundamental country risk issues of this kind, which any investor considering a large capital outlay in a challenging country may have to consider.

[9] However, France has always treated concessions as being governed by administrative law, while other forms of PPP are categorised as regulated civil-code contracts. These distinctions involve some difficult areas of legal theory. Where a country is not clearly obliged to make them, it is hard to see any benefit in doing so. The distinction is also reflected in European Union (EU) law.

[10] As it is now under EU law.

[11] Or essentially the same; certain differences of approach to different types of PPP can, of course, be allowed within the same legislation if necessary.

[12] This was the case with Georgia's recent new PPP law, for example.

[13] See, for example, the way the law in this area has evolved in Türkiye.

[14] As we have said, the UNCITRAL guides and the World Bank sources are particularly informative on this subject.

Appendix 1 of this Chapter contains a pro forma questionnaire that is designed to help legislators and investors to make judgements about some of the main areas of law relevant to PPPs. It is broken down into around 100 specific questions, categorised under the following headings

General legislative/ institutional framework	Scope of authority to award PPPs	Administrative coordination	Regulatory authority
Government support	Selection of private partner	Project agreement	Project site/assets/rights
Finance and security	Construction works	Operation of the facility	Ancillary contractual arrangements
Risk allocation	Duration and termination of PPP and project agreement	Settlement of disputes	Miscellaneous

3. Some relevant areas of law (specific)

The issues raised by the questionnaire in Appendix 1 are reviewed in more detail in Section D, dealing with the content of PPP laws. A brief discussion of some of the main background areas of law relevant to PPPs follows below. These will all need to be considered as the legal framework for PPPs is designed, and in many cases as individual projects under it are structured or reviewed.

(i) Commercial contract/civil code
(ii) Company and tax
(iii) Procurement
(iv) Property
(v) Environment and ESG
(vi) Public international law and investment protection
(vii) Intellectual property
(viii) Anti-corruption
(ix) Banking and finance
(x) Security
(xi) Insolvency
(xii) Dispute resolution
(xiii) Institutional processes and procedures
(xiv) Public financial management
(xv) Transparency, accountability and engagement

(i) Commercial contract law/civil code

The host country's commercial contract laws must be sufficiently robust, flexible and reliable to cater for the full range of commercial contract requirements of the various parties involved in a PPP, including the project company, its contractors, subcontractors, suppliers, lenders and investors (whether domestic or international). Any PPP (like any project financing) will be structured, defined and implemented through a complex matrix of contracts. A reliable and sophisticated system of contract law to allow for all their terms is therefore essential for a successful PPP programme. The domestic law of the host country will often govern the terms. If there is any material doubt about its efficacy, the project may not succeed. In practice, this is not an issue in most jurisdictions; it is rare for contract law (the civil or commercial code) to have to be amended to allow for PPPs. But careful thought should still be given to what it permits and whether this is sufficient for the purposes of the PPP contract and other local law agreements.

(ii) Company and tax law

In PPP projects involving the development of new infrastructure, project promoters will usually establish the project company as a separate legal entity in the host country.[15] The detailed structure, powers and obligations of project companies may vary considerably from jurisdiction to jurisdiction. The company (and partnership) laws in the host country must contain clear, reliable and practical provisions governing essential corporate matters such as establishment procedures, corporate governance, issuance of shares (or ownership interests) and their sale or transfer, the ability to borrow and grant security, accounting and financial statements, protection of minority shareholders and so on. These may also contain certain licensing requirements which need to be considered, including specific ones

[15] Occasionally, it will be incorporated in another jurisdiction, perhaps for tax reasons. Even then, it will usually be helpful and perhaps necessary to incorporate a domestic subsidiary in the host country.

for foreign investors. Perhaps the most fundamental requirement for private-sector participants, however, will be an available corporate investment vehicle with independent legal capacity, the liabilities of which are limited to its own assets and property, where its owners or shareholders are generally shielded from those liabilities,[16] and which will enable them to realise their equity returns from the project efficiently over time. They will want the standard benefits offered by limited liability companies (or occasionally partnerships), in other words.

Tax law also tends to feature prominently in the wider assessment of a country's corporate laws. The private sector will usually assess the transparency of the domestic taxation system at an early stage, including the nature and extent of any discretions exercisable by the taxation authorities, the clarity of guidelines and instructions issued to taxpayers, and the objectivity of criteria used to calculate tax liabilities. There will have to be sufficient confidence in the transparency and stability of the system, and the investors' scope to manage their fiscal liabilities at the applicable taxation levels. Appropriate tax incentives and relief may also be important to the financial viability of individual projects. These may include such matters as the right to deduct certain construction and maintenance expenses, adequate double taxation treaties with investor countries, the absence of withholding tax on interest or dividend payments, corporation tax exemptions for a given period, reductions in real estate tax, exemption from import duties on equipment and raw materials, and tax concessions on royalties. If so, their availability under the host country's taxation system will need to be examined.

(iii) Procurement law

A country's procurement laws will always constitute an essential part of the legal and regulatory framework for PPPs. A PPP is first and foremost a procurement tool. One of the first questions to address in designing that framework will therefore be the adequacy of those laws for PPP purposes. PPPs are typically large, complex, innovative projects that are best awarded on the basis of competitive tenders. The tenders concerned often call for bespoke planning and structuring, to allow for the unusual and sophisticated appraisal, evaluation and approval mechanisms involved (including the criteria applied and the interaction with bidders typically required).

A county's procurement regime may be perfectly adequate for that purpose, at least at a fundamental level, even if some minor, focused amendments must be made to it to allow for these matters. (This has generally been the position across the European Union, for example, at least for countries already subject to the EU acquis.) On the other hand, it may not. Not infrequently, especially in jurisdictions that have no or only limited experience with PPPs, countries find that their existing procurement regimes simply cannot cater to the demands of the PPP award process. They then choose to disapply that regime altogether in this area and to set out a complete and exclusive procurement regime for PPPs in a new law instead.

The critical questions are therefore:
(a) how applicable is the host country's procurement laws to PPPs?
(b) does it need to be amended to allow for them?
(c) should a comprehensive new procurement regime for them be set out in a separate PPP law?

These questions are discussed further in the next two sections.

(iii) Property law

Security of property rights is obviously essential to foster private investment in any country. Ideally, there should be no restrictions on foreign or private ownership of domestic assets of a kind which could be prejudicial to private-sector or cross-border investment. Property laws should contain adequate provision and clarity relating to the ownership and/or use or possession of land and buildings, their leasing and/or licensing, access rights (easements, and so on), chattels and movable and intangible property. These should ensure the private partner's ability to use, occupy, develop and modify the site and other assets in the PPP in full accordance with the requirements of the PPP contract, to sublease or sublet them to third parties (especially its subcontractors) and to exercise such rights as it may be given to purchase, sell and/or transfer such property.[17]

Both the private partner and its lenders will need a high degree of confidence that title to the land and the assets (whether based on ownership, lease or licence) will not be subject to dispute or challenge by third parties. There should be effective mechanisms to enforce property rights granted to the private partner against violations by third

[16] This is now common all over the world, but there are exceptions (for instance, Saudi Arabia). Even common law permits the "piercing of the corporate veil" in exceptional circumstances.

[17] Ownership of the site itself is usually not a critical factor. Many jurisdictions impose restrictions on ownership of government property and some on the foreign ownership of land. The critical thing is for the private partner to have sufficient control and flexibility over the occupation and use of the site, which in many ways is the equivalent of ownership, and can usually be granted by a full lease or licence.

parties. Sufficient confidence will also need to be placed in the planning and permitting process to the extent it will affect the private partner's design and construction works. Excessive restrictions or complex procedures governing such matters as the rights of adjoining property owners, archaeological finds, site contamination or local authority consents could also be problematic.

In addition, it may be necessary to review the host country's legislation governing compulsory acquisition of land, with a view to ascertaining its compatibility with the needs of large infrastructure projects. All countries reserve the right to expropriate property for public purposes, and sponsors and investors may need to understand the conditions applicable to expropriation – for instance, how any compensation payable is determined (to the extent it may be passed through to the project), whether expropriation powers are limited in scope or subject to judicial review, their timing, efficacy and so on. Conversely, many sponsors and lenders these days will also want to verify that the exercise of such powers will be compatible with the international human rights obligations of the host country.

(iv) Environmental laws and ESG values

Environmental laws are often relevant to PPPs. They may play a part in shaping the design of the whole facility[18] and will almost certainly impinge on any construction works. Obligations arising from the host country's environmental laws must be sufficiently clear and precise for their impact on PPP investors and lenders to be properly assessed, including the conditions under which licences are to be issued and the circumstances justifying their refusal or withdrawal.

A country's environmental laws should suit its wider infrastructure development plans. Effective procedural coordination at an administrative level is important from this perspective. This is particularly true for some types of infrastructure, such as roads, power-generation projects, water-treatment plants, and railways, where the environmental authorities' authorisation may be required for a project to go ahead in the first place.[19] The legislation should also be clear on the penalties (if any) that may be imposed on parties that may be held responsible for any damage. Investors will need to know if the law requires detailed environmental impact studies to be carried out (as it usually will these days). Any potential liabilities for past and future environmental damage also need to be clearly defined and understood. Strict liability often plays a part in environmental law, potentially giving rise to severe consequences, which must be adequately gauged by PPP stakeholders as part of the wider risk analysis.

Another challenge here is the speed at which environmental obligations are changing, as regulatory systems all over the world are modified to allow for the urgent transition to a decarbonised economy and far stricter protections for the global ecosystem. (Among other things, this reinforces the importance of having reliable change-in-law provisions in PPP contracts, and PPP laws that permit them.) It may also be necessary in this context to consider the host country's international obligations under treaties and multilateral agreements.[20] This area is now moving to the top of the priority list for many developers and investors, as climate change and other ESG considerations and values acquire ever greater importance in financial markets and shareholder expectations.

The speed at which the ESG agenda has taken centre stage has been striking. The acronym only surfaced in recent years, but now plays a critical part in the thinking, policymaking and deal-making activities of governments, corporates, lenders, contractors and advisers at every level. It is informing regulatory changes, affecting investment decisions and portfolio composition, reshaping priorities and driving new developments. Some of it will already be enshrined in a host country's laws and regulations, especially those dealing with the environment, health and safety and planning; more will follow in future, as laws and policies change. But the concept goes beyond legally binding provisions, to embrace notions of ethics, responsibility and principle that can determine policies and priorities just as powerfully as laws. It extends to resilience and sustainability, climate change, human rights, poverty alleviation, equality and other forms of environmental and social impact.[21]

These principles and values can impinge on PPPs at many levels. PPPs often involve those very areas of activity with which ESG values are most concerned – the environment, economic growth, public services, social impact and development, inclusivity, knowledge

[18] Especially in the areas of transport, water and power.

[19] UNCITRAL Legislative Guide to Privately Financed Infrastructure Projects.

[20] For example, the Paris Agreement on Climate Change or the UN Charter and the various conventions it has drawn up on the environment and biodiversity in recent years.

[21] See also Section D of Chapter 3 on PPP contracts on this subject.

transfer and so on. PPPs can therefore play a positive part in advancing these principles and values in constructive and innovative ways. Their size and long-term nature also mean they can represent considerable sustainability challenges, which need to be suitably addressed. In any event, ESG values can now influence every stage of a PPP's life: the wider procurement strategy and project pipeline; the choice of structure for the PPP; the output expectations and technical specifications set out in tender documents and the criteria used to evaluate them; the performance standards and risk allocation set out in the PPP contracts; the manner of the PPP's implementation; and the management, monitoring and information supply arrangements which apply throughout. As such, they are potentially relevant to every aspect of the legal framework for PPPs.

A key touchstone of compliance in this field is the United Nations (UN) body of principles in this area: the Sustainable Development Goals (SDGs). These enshrine a set of 17 specific targets that seek to give greater scope for those values in virtually all important areas of economic activity and social and political arrangement. The SDGs constitute a universal call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity by 2030. They include explicit support for PPPs in Goal 17, which seeks to "encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships". All members of the United Nations – which today includes nearly all the world's nations – are now formally committed to the SDGs by virtue of their membership. Many PPP developers and investors[22] are beginning consciously to evaluate their projects against the SDGs, to verify their compliance with them. Other examples of influential documents issued by governments and multilateral organisations which embody ESG values and principles are the G20 Principles for Quality Infrastructure Investment (attached as Appendix 5), the Equator Principles and the EBRD's operating guidelines and Environmental and Social Policy.

The UNECE[23] Working Party on PPPs, the UN body dedicated to promoting PPPs around the world and helping emerging market governments understand and apply them, has promulgated the new concept of "PPPs for the SDGs" – encouraging countries to ensure their PPPs are as compliant as possible with the SDGs and so represent greater value for people and the planet. It has done this by issuing 10 core principles governing their different aspects.[24] This United Nations group has now formally and very visibly adopted this concept of PPPs for the SDGs which is likely to have growing influence on UN member states.[25] The group has also developed and published a detailed and wide-ranging evaluation methodology – the PPP and Infrastructure Evaluation and Rating System – to measure and score projects, qualitatively and quantitatively, in terms of their compliance with the SDGs and the extent to which they give effect to them. This system is a digital tool, available online. It focuses on the five core outcomes set out in the Guiding Principles, namely (1) access and equity; (2) economic effectiveness and fiscal sustainability; (3) environmental protection and resilience; (4) replicability and (5) stakeholder engagement. It then subdivides these into a group of key criteria and relevant indicators and provides a methodology to apply and score them.

A further important international initiative, directed at urgently closing the annual US$ 3 trillion sustainable infrastructure investment gap, was launched early in 2020 by a group of institutions led by Climate Policy Initiative, HSBC Holdings, the International Finance Corporation (IFC), the OECD and the Global Infrastructure Facility, under the auspices of French President Emmanuel Macron's One Planet Lab. Dubbed the finance to accelerate the sustainable transition (FAST) infrastructure initiative, its method is to transform sustainable infrastructure into a mainstream, liquid asset class.[26] More than 50 global entities representing governments at all levels, the financial sector, investors, development finance institutions, insurers, rating agencies and non-governmental organisations now actively participate in developing the FAST-Infra initiative, which has the EBRD's strong support.

The initiative's premise is that to meet decarbonisation targets, it is essential to develop a new generation of sustainable (as opposed to carbon-intensive) infrastructure, to satisfy the world's demand

[22] For example, Meridiam Infrastructure, which now does so annually.

[23] UNECE, based in Geneva, Switzerland (one of the authors of this paper is a vice-chairman of UNECE).

[24] Attached in summary form in Appendix 5 Part B. See the UNECE website and the various papers published there on PPPs for the SDGs.

[25] See, for example, the references to it in the joint EBRD/United Nations Model PPP Law, discussed in Chapter 2 (Vol I of the PPP Regulatory Guidelines Collection).

[26] See the Climate Policy Initiative website for a fuller description.

for energy, transport, water, sanitation, schools and hospitals, especially in emerging economies. Progress is being steadily made with green (that is, sustainable) infrastructure, but it is far too slow. To accelerate the process and close the funding gap, especially from private sources and the private sector, investors must be able to verify quickly which assets are truly sustainable.

The FAST-Infra solution is to establish a "consistent, globally applicable labelling system for sustainable infrastructure assets"[27] while developing financial mechanisms to mobilise private investment at scale to fund the labelled projects. It is hoped that this will allow the market to signal the sustainability of assets quickly and efficiently, allowing investors to feel confident that their money is going to projects that meet environmental, social, resilience and governance needs and contribute to the SDGs, giving rise to a more liquid asset class. A sustainable infrastructure label will "ensure that governments and project developers embed high environmental, social, governance and resilience standards into new infrastructure at the design and pre-construction phases, on the grounds that only assets incorporating such standards will obtain the label".[28] The system will thus help to attract private finance both during and after construction.

(v) Public international law and investment treaty protection

At first sight, a host country's obligations under public international law may not seem of great relevance to its PPPs. This area of law is primarily concerned with relations between states, and between states and certain international or multinational organisations – such as the UN, the World Trade Organization (WTO), the World Health Organization and the EU – the treaties between them and the principles of (largely customary) international law that can bind them. However, it can also regulate certain aspects of the relationship between individuals or corporates and the state, such as in the area of human or economic rights, and above all international investment protection. And as we have seen, many PPPs have a cross-border dimension, either because they involve foreign investors or because the project itself crosses national boundaries (such as a pipeline, energy transmission or international transport or transit project). Where this is the case, a project-specific treaty may also have been put in place to underpin it.[29]

In addition, when structuring (or restructuring) an investment – especially a high-value one – in a foreign country, it is important to consider whether and to what extent it may be covered by the protections offered by bilateral investment treaties (BITs) or multilateral investment treaties (MITs) such as the Energy Charter Treaty. When properly planned and executed, these can be highly effective in safeguarding investments, including in the case of a PPP that involves foreign direct investment, as so many will. As the safeguards in question will in effect represent supplementary public law defences largely outside the terms of the various project contracts, they will offer an additional tier of protection for sponsors and investors, which can strengthen a project's appeal and bankability. A review of a country's laws from a PPP perspective should therefore also take account of this dimension. Equally, a host country defining its legal framework for PPPs must do the same, as the framework will need to be compatible with it. Some countries are signatories to a range of BITs and MITs, others to very few.

A BIT is essentially an agreement between two states providing a range of substantive rights for the investors of each country when investing in the economy of the other that they can enforce themselves, if necessary through international arbitration. Its priority is to eliminate the political risk of interference by government in businesses or of discriminatory behaviour which unfairly favours local competitors. BITs have increased in number strikingly in recent years. While their provisions vary somewhat, they all tend to cover much the same ground: promotion of investment; fair and equitable treatment; rights to repatriate investments and returns; protection against physical violence; protection against expropriation without compensation and certain political force majeure events; respect for contractual undertakings; assurances against unfair competition; and dispute resolution procedures. These disputes procedures often extend to the use of arbitration under the International Centre for the Settlement of Investment Disputes (ICSID), managed by the World Bank. MITs perform a similar function, but on a somewhat more complex basis, as they involve multi-partite treaties. The Energy Charter Treaty has 53 signatories, of which 48 have ratified it. It may come to have particular importance in the PPP context, as renewable energy projects continue to grow exponentially and to be treated as PPPs by host countries as part of the drive to tackle climate change.

[27] B. Buchner et al. (2021). FAST-Infra. Available at: https://www.climatepolicyinitiative.org/fast-infra/.

[28] ibid

[29] See in particular the discussion of this subject in the textbook Project Finance (4th edition) by Graham Vinter et al.

The principal steps for parties to a PPP involved in structuring a project for treaty protection of this kind are to (1) consider carefully the project's central investment objectives that may benefit from treaty protection, (2) research any available BITs and MITs into which the host country may have entered that may offer such protection, (3) take account of any other legal advantages (for instance, tax) which may flow from holding the proposed investment through an entity in another jurisdiction where the host country has entered into such a BIT or MIT, (4) analyse any other international law protections that may be relevant (for example, ratification of the ICSID Convention)[30] and (5) review any international case law that may be relevant (such as prior international investment treaty arbitration awards) and bear on how the investment is structured.[31] Being able to carry out these steps successfully in relation to a given jurisdiction plays an increasingly important part in the thinking of sponsor organisations and financial institutions involved in PPPs.

(vi) Intellectual property law

PPP projects frequently involve the use of new or advanced technology, as well as sophisticated and complex designs, processes and patented inventions. Private investors will need to be reassured that the intellectual property laws of the host country contain adequate provisions to protect and enforce the intellectual property interests in the assets involved. In addition, the wider legal framework should ideally contain suitable provisions addressing possible concerns in the areas of privacy, security of information, confidentiality, data protection, piracy, industrial espionage and (conversely) freedom of information, all of which can otherwise represent potential obstacles to economic and technological advancement. At least to some extent, the host country may be able to provide the necessary legal framework for the protection of such rights by adherence to international agreements and treaties.[32]

(vii) Anti-corruption

Corruption hampers and pollutes the business climate and distorts fair competition, which as a result can deter private-sector involvement and investment or seriously compromise the quality of implemented projects, to the detriment of the public they are meant to serve. A project that turns out to be tainted with illegality is also at risk of suspension or cancellation and, of course, immense reputational damage. The host country should have a viable anti-corruption strategy in place and take effective and concrete action to combat illicit practices. A good step for countries in transition is to incorporate international agreements and standards on integrity in the conduct of public business, of which there are many.[33] In the fight against corruption, the host country's legal framework should (among other things) provide for the criminal and civil liability of those guilty of corrupt acts, allow the freezing, seizure and confiscation of assets, protect witnesses, experts and victims, tackle the consequences of acts of corruption, ensure that entities or people who have suffered damage as a result of an act of corruption have an enforceable right to compensation, and establish a body or bodies or persons specialised in combating corruption through law enforcement.[34]

[30] The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[31] States faced with international investment treaty arbitration claims have not infrequently tried to argue that the BIT jurisdiction being invoked under the claim has been artificially "manufactured". While these arguments have largely been unsuccessful, it is important to bear them in mind when structuring the investment and documenting the reasons why the investment located in the host state can be held indirectly through particular entities with which the host state has a BIT or MIT.

[32] The relevant international agreements to consider include: the Agreement on Trade Related Aspects of Intellectual Property Rights (1994), the Paris Convention for the Protection of Industrial Property (1883) as revised and amended, the UNCITRAL Convention on Assignment of Receivables in International Trade (2001), the International Institute for the Unification of Private Law Convention on International Interests in Mobile Equipment (2001), the Patent Cooperation Treaty (1970), the Madrid Agreement Concerning the International Registration of Marks (1891) as revised, the Protocol Relating to the Madrid Agreement of 1989 and the Common Regulations under the Madrid Agreement and the Protocol Relating thereto (1998), the Trademark Law Treaty (1994) and the Hague Agreement Concerning the International Deposit of Industrial Designs (1925).

[33] International agreements and conventions on anti-corruption include: Convention on the Protection of the European Communities' Financial Interests of 1995, Resolutions of the United Nations General Assembly: resolution 51/59 of 12 December 1996, by which the Assembly adopted the International Code of Conduct for Public Officials, Resolution 51/191 of 16 December 1996, by which the Assembly adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, Convention Against Corruption Involving Officials of the European Communities 1997, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, the Criminal Law Convention on Corruption of the Council of Europe 1999, Additional Protocol to the Criminal Law Convention on Corruption of the Council of Europe 2003, the Civil Law Convention on Corruption of the Council of Europe 1999, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – On a comprehensive EU policy against corruption (COM(2003) 317), Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention against Corruption (COM(2006) 82). UNECE has also drawn up a standard on this subject for use in the PPP context, called zero tolerance of corruption.

[34] See www.europa.eu.

It is also worth bearing in mind that many OECD countries impose much more stringent anti-corruption standards than in the past on the activities of their nationals abroad. It is becoming increasingly easy to infringe those standards inadvertently or ignorantly. The US Foreign Corrupt Practices Act and the UK Bribery Act are two of the best-known examples, potentially imposing liabilities for infringement which can inflict major financial and reputational damage on the companies and directors found liable (consciously or otherwise), as well as triggering defaults under commercial and financing agreements which could ultimately lead to the unravelling of an entire project. Many other countries have adopted similar provisions in recent years.

(viii) Banking and finance

A country's financial laws will have to be compatible with the use of private finance to fund PPPs, including from the international banking markets and on a project-finance basis. Most are privately financed. The first question that development banks and commercial lenders based in the world's financial centres will ask themselves when considering a lending proposition for a PPP project is whether a country is "open" to the international financial markets. If it is not – and there are always certain "fragile" countries devastated by war, political upheaval or economic collapse which are not – then the use of international project finance will be out of the question. PPPs are usually also project-financed, in view of their size and long-term nature, meaning that lenders provide most (often the great majority) of the funding required and rely primarily on the future cash flows it is expected to generate for repayment of their loans. If a country is already using project finance and the international capital markets, it is likely to be a safe assumption that its financial laws will be generally compatible with PPPs. Nevertheless, there may still be some questions about (for example) currency exchange controls, the availability of hard currency, the right to repatriate profits and various other matters, all of which need careful examination. The country's legal framework for PPPs will need to be fundamentally bankable, which means that it must be regarded by lenders as a viable basis for their loans and investments.[35]

(ix) Security: Pledges, assignments and collateral

The wider legal framework should allow and encourage structures that provide for adequate protection of the rights of lenders under the project's security documents, especially in the event of a default or a threatened termination of a PPP. The fundamental question is whether the lenders will be able to take sufficiently broad and effective security over the assets of the private partner to meet their usual expectations and lending assumptions. Such security usually extends to real property, buildings, equipment, insurance proceeds, bank accounts, receivables and an assignment of the benefit of the project contracts. Lenders also require security that is readily realisable and expect local security laws to provide for its effective enforcement. Security over PPP property that remains public property – sometimes referred to as conceded assets – may not in fact be permissible at all, however (see below).

In addition, lenders' "step-in rights" usually must be feasible under the host country's laws. When PPPs involve project finance, the lenders will take the most wide-ranging package of security measures available over the project assets. This may be virtually worthless to them, however, if the PPP contract is no longer in place. If the agreement is terminated, the ability and right of the sponsors and the private partner to generate the cash flow on which the lenders will depend for repayment will be lost; the collapse of the other project contracts is likely to be triggered as well. This is why the lenders will regard it as essential to keep the PPP alive, as it were, and give the project company (or a substitute entity) an opportunity to cure the default.

Step-in rights are designed to achieve this. Although they often prove highly controversial in countries which have had little experience of them, their feasibility in the host country will usually be fundamental to the success of PPPs. In some jurisdictions, they may not be permissible at all, at least in relation to certain types of project. Although, technically speaking, step-in rights are not actually security documents, they are typically regarded as an essential part of the lenders' wider security package. (They are discussed in more detail in Chapter 3 on PPP contracts). If they are not viable under a host country's PPP legal framework, financing the project with project financing is likely to be far more difficult than it otherwise would be.

More specifically, for project finance lenders, a host country's wider legal framework should, ideally, allow for the following security interests (or their equivalent under local law):

- Assignment of benefit of project contracts: The lenders will expect to have assignments of the benefit of all the project company's (material) project contracts, giving them control and priority rights over these agreements, the right to bring proceedings under them and allowing them to be transferred to a new project vehicle if necessary.

[35] See the discussion of bankability in Chapter 3 on PPP contracts.

• Assignment of receivables: The lenders normally take security over all receivables arising from agreements into which the project company enters with strategic business partners, such as suppliers, contractors, transporters, off-takers, and so on. This gives them priority rights to the benefit of those receivables.

• Accounts pledge: The lenders will expect to take pledges over the borrower's bank accounts and will need to ensure that the banks in the host countries acknowledge such pledges. These should allow them to take full control of the operation of those accounts, including sums paid into and out of them.

• Mortgages and charges: The lenders should be in a position to obtain a mortgage over land, buildings and other fixed assets, together with floating charges (or equivalent, if available) over movable assets, including project inventory and receivables, production/work in progress, intangibles and other personal property and interests. This can include what is called in some jurisdictions an enterprise mortgage – in effect, a mortgage or charge over a borrower's entire business, including its fixed, current and liquid assets, but which does not interfere with their use and replacement in the course of business.

• Share pledge and assignment: The lenders will require pledges on shareholders' equity participation in the borrower, giving them effective (temporary) ownership of those shares.

Not all of these may be available. But the more, the better. As already mentioned, security over property which remains public property (for instance, conceded assets) may not be permissible in some countries. Under the Russian PPP law, for example, a concessionaire's public assets and associated rights cannot be pledged as security. In addition, its rights cannot be transferred to another entity before the assets are put into operation and, even then, approval of the grantor would be required.[36] This is not necessarily problematic. No one else will be able to take security over that property either, which means it is shielded by law from competing claims. The critical thing is for lenders to have security over all assets that are the property of the borrower, coupled with lender step-in rights, so they have full control. In that case, the questions that always arise are: Does any limitation in this area represent an insuperable obstacle to funding, or can an acceptable compromise be found? Does the law need to be changed as a result, either by amendment or through the terms of the PPP law?

(x) Insolvency law

A host country's insolvency laws may need to be considered or examined from the perspective of the lenders' usual security package and expectations. Issues such as the ability of secured creditors to foreclose on security despite the opening of bankruptcy proceedings, whether secured creditors are given priority for payments made from the proceeds of the security and how claims of secured creditors are ranked may all need to be considered. In practice, this may not amount to more than a relatively straightforward checking exercise, to make sure that local law does not contain insolvency rules or procedures which are inconsistent with lenders' expectations. After all, if a project company is allowed to slide into insolvency at all, it may be too late for the project participants to salvage much from the project.

(xi) Dispute resolution

The dispute resolution laws and procedures of the host country always need careful analysis. Sponsors, investors and lenders must get a clear understanding of the mechanisms that will (or may not) be available to them for protection and enforcement of their rights in the event of a dispute. They are usually not comfortable with being obliged to submit disputes under the PPP agreement exclusively to the courts of the host country, given their typical complexity and the risks of political bias. In most cases, they require that such disputes are resolved in accordance with a reputable international arbitration system, established in a neutral jurisdiction.

Local law will usually be chosen as the governing law of the PPP/concession agreement, and logically so (see Section D). The more contentious question tends to be what dispute resolution forum should be adopted to hear proceedings. Even where international arbitration is permitted, however, there will still need to be sufficient confidence in the ability of the successful party to enforce a favourable award against the host country. If it cannot be reliably enforced, it will have little value. The lenders' security interests may also need to be enforced through the courts. This may all necessitate due diligence on the local courts (and perhaps arbitral) system, and the host country's position under relevant investment and arbitration[37] treaties, such as ICSID and the New York Convention on the Recognition of Foreign Arbitral Awards. To attract cross-border investment on a large scale, the country will have to be perceived as an "investible proposition" from the dispute-resolution as well as economic and financial perspective.

[36] However, the law does enable the private partner, such as a special-purpose vehicle, to be a foreign legal entity, which allows the major part of the transaction to be structured in an offshore environment.

[37] See further above.

(xii) Institutional processes and procedures

Many governments describe in their PPP laws at least some of the institutional processes and procedures governing the design and implementation of PPPs. This refers to the various stages involved and the authorities or bodies responsible for them. To do so can help advance the system's efficiency and smooth functioning. To some extent, a country's existing laws may already cover these processes and responsibilities – particularly its procurement laws, constitutional and administrative laws, and rules dealing with financial management (Germany, for example, relies heavily on its budget law for this purpose). They will be addressed to some extent in bureaucratic structures and procedures, rather than laws. The more clarity and certainty there is in this area, the more successful the PPP system is likely to be. This means those designing or reviewing a PPP framework need to consider carefully whether gaps need to be plugged in this area or existing laws modified. Some PPP laws address this subject specifically – as we shall in Section D.

The relevant processes will include project selection, preliminary design, appraisal, procurement, implementation and monitoring. Depending on the experience of the government in using PPPs, certain reviews, formalities and approvals may be required at each stage (sometimes called gateways) to ensure that system requirements and the applicable criteria are being met. The powers and responsibilities of contracting authorities will need to be clear at each stage, as will those of any other agencies involved (such as PPP units or authorities with high-level approval powers, like a cabinet commission or public oversight body). These tend to vary widely from country to country. For instance, some countries require final approval of high-value PPPs by the cabinet, president and/or legislature, for reasons of both legality and fiscal prudence. In the end, though, these steps have much the same underlying purpose, as every government wants to be as confident as it can that each PPP represents a good investment decision and that the system is functioning as intended.

(xiii) Public financial management laws

The laws and regulations that govern the host country's management of its finances and fiscal responsibilities will need careful review as PPP frameworks are developed and individual projects designed. These may include approvals, fiscal limits, budgeting processes and reporting requirements. They will control the country's public investment planning and selection processes, under which a PPP is just one form of procurement project. Again, some of them may be more a matter of codified practice than binding laws, but these will still operate within a set of legal norms. Every PPP will have to be compatible with them, as they will (in part) determine what commitments can be taken on by contracting authorities (or the wider state) under PPP contracts-whether in the form of asset contributions, payments obligations, contingent liabilities, guarantees or other forms of government support – and how their actual and potential liabilities are to be accounted for. The PPP will often need to fit into a medium-term expenditure framework and/or a medium-term fiscal framework, or equivalent. Suitable approvals will therefore be required from the government agency or agencies responsible for public financial management and planning – often the ministry of finance and/or ministry of economy. Some governments split these functions. Others also use independent audit bodies. Ultimately, in this context, there will be two critical questions: will the project be affordable, and will it represent value for money?[38]

This subject has come to represent a significant issue in recent years, as attention has focused on the accounting treatment of PPPs, which are usually project-financed and so may be "off balance-sheet" for the governments using them. In the past, this has sometimes allowed them to bypass government spending limits. It can be perfectly legitimate to take this approach, but it should depend on the contractual structure involved and should not be used to push governments into using PPPs for accounting reasons when other criteria, such as affordability and value for money, do not justify it. Payment obligations under PPPs are long term, while some of the contingent liabilities involved depend on risk (for example, termination payments), which can be hard to judge up front. Public financial management tools, by contrast, are generally based on annual spending appropriations. The contingent liabilities may be very large, and will also tend to accumulate over time as the system develops and expands. From both a budgetary limit and balance-sheet perspective, then, PPPs represent a challenge for public financial management. If not rigorously managed and monitored, their potential exposures can threaten fiscal sustainability.[39] PPP-specific accounting and budgeting methodologies have developed in consequence, which can be built into the PPP system.[40] It can be good practice, for example, to maintain a central, up-to-date register of PPP

[38] See the detailed discussion of this subject in the World Bank's PPP Reference Guide.

[39] This eventually became a major political issue in the United Kingdom, for example, and played a leading part in the decision by the UK government in 2018 to put an end to PFI.

commitments, perhaps at the ministry of finance. This aspect of a country's legal framework always needs careful consideration.

(xiv) Transparency, accountability and engagement

Finally, there will also be a legal dimension to the processes by which the workings of the PPP system are made transparent and well-understood, stakeholders engaged and the various government agencies involved made accountable for their decisions and actions. This is all about transparency, clarity and the interface between the PPP system and third parties – those seeking to understand it, work within it and give effect to it, as well as those who stand to be affected by it. It is therefore very much about good governance and the ESG values mentioned above. This is likely to touch on a number of the host country's laws.

Governments are usually well advised to aim for a high degree of information disclosure about their PPP system. Disclosure should usually be proactive rather than reactive disclosure (that is, telling people in advance, rather than waiting to be asked). This will enhance its effective functioning and efficiency. Information about the workings should be rigorously collated and recorded, kept up-to-date and comprehensively disclosed wherever possible. Many governments publish guidance notes, manuals, handbooks and model clauses to promote a full understanding of PPPs and different aspects of their systems. There should be a general presumption of publicity of system data. A central register or database of relevant information often makes sense, together with a precedent library, covering all PPPs that are implemented. Contracting authorities and other government bodies should have clear duties to maintain and update records of their PPP-related activities, including tendering procedures, tender results and contract terms, as well as subsequent monitoring activities and conclusions reached at different stages of evaluation and consultation. In principle, these should all be copied to the central database and made generally available publicly (subject only to any carefully defined confidentiality restrictions).

Accurate records and transparency of decision-making will also be key to the accountability of the different public bodies involved in making PPP decisions. It should always be clear why and on what basis those decisions have been made. This will usually improve the quality of decision-making and so strengthen the system's functioning, but also allow appropriate action to be taken where responsibilities have been neglected or breached. That accountability should be protected by law and subject to challenge through appropriate grievance procedures and judicial review (or equivalent). It may also be reinforced, in certain areas, by high-level audit bodies and procedures, applicable to both specific projects (for example, very high-value ones) or the PPP system as a whole.

Similarly, broad stakeholder engagement and communication are likely to produce the best results. This applies at all stages of project implementation, from initial design to feasibility studies and environmental impact assessments, market soundings, construction and the operational phase. In the words of the PPP Reference Guide: "Stakeholder engagement is an inexpensive and efficient way of creating a better operational environment for a project." Stakeholders refers to anyone likely to be materially involved with or affected by a project, from other government bodies to contractors and suppliers, landowners, local communities, users of the infrastructure or public service in question, and the general public. Appropriate consultations with them at each relevant stage, to elicit their views and reactions and so help shape constructive decisions and pre-empt disagreements, are usually advisable. They reduce risk and improve the prospects of success. For that reason, stakeholder engagement is one of the 10 Equator Principles.[41] It also features prominently in the People-First PPP Principles drawn up by the United Nations.

[40] For example, the 2016 Eurostat Guide to the Statistical Treatment of PPPs (EPEC), International Public Sector Accounting Standards 32 (2011) and the International Monetary Fund's (IMF) Government Finance Statistics Manual and Fiscal Transparency Code (2014c).

[41] See https://equator-principles.com/about-the-equator-principles/.

(C) Guidance, published materials and precedents

Aside from PPP laws themselves, of which there exist an increasing number around the world,[42] there are many helpful precedents and sources of guidance to which governments can turn to help them review and develop their PPP legal frameworks. These include the materials listed in Appendix 2 of this Chapter. Some of the principal sources are discussed below.

1. Institutional databases and sources of material. Many international organisations and institutions maintain and publish articles, studies and guidance materials on the subject of PPPs, including their statutory and legal frameworks. Some of the best-known include:

• The **EBRD**. The EBRD, which has structured and funded hundreds of PPPs in its economies over more than three decades, maintains an extensive library of materials and precedents of various kinds on the subject. Some of them are available on its website, in the section marked 'Public-private partnerships'.[43]

• The **World Bank (International Bank for Reconstruction and Development, or IBRD)**. The World Bank Group (including IFC) has created a range of different resources in this area, including its PPP infrastructure resource centre, a knowledge lab, a legal resource centre, a PPP library, a PPP reference guide and the public-private infrastructure advisory facility. It also co-manages a training programme with other development banks called the APMG PPP Certification Program Guide.

• The **United Nations**. The United Nations has long been a source of guidance and expertise in the PPP area. **UNECE** includes a PPP working group, led and run in Geneva, which helps emerging-market governments understand and implement PPPs. **UNCITRAL** has published several leading texts in this field.[44] The **United Nations Development Programme** has also carried out and published extensive work in the PPP area, in particular reviews of national policy for the establishment of municipal PPPs for public service delivery and local development in Europe and the Commonwealth of Independent States (CIS) region (especially the accession countries then joining the EU).

• The **European Union**. The European Union has a disparate body of law, regulations, published guidance and precedent which either must (in the case of accession countries) or helpfully can (in the case of others) be taken into account by governments forming their PPP legislative structures (see below). Its statistical centre of expertise, EUROSTAT, focuses on the statistical and fiscal aspects of PPPs.

• The **EIB/EPEC**. The European Investment Bank (EIB) has established a European expertise centre (EPEC) and library.

• The **Global Infrastructure Facility**, also chaired by the World Bank, is a joint venture among a group of leading development banks, governments and the private sector.

• The **Global Infrastructure Hub**. This is a (relatively new) knowledge and expertise centre based in Australia, which is steadily expanding its database of instructive materials.

• The **Asian Development Bank** (ADB) has also published an extensive body of articles and studies in this field.

• **Government resources**. Some of the countries with the most advanced and wide-ranging PPP programmes have drawn up and published extensive guidance on the operation of their systems which can be invaluable both to domestic users and (by analogy) in other jurisdictions. They include Australia, Canada, France, the Netherlands, South Africa and the United Kingdom.[45] Many other countries have now embarked on similar exercises.[46]

Some of these sources and guidance are discussed below.

2. The EBRD tools for assessing and promoting sound legal frameworks for PPPs.

An invaluable source of guidance and assistance in this area is the EBRD's Legal Transition Programme, which helps countries in transition to create transparent and predictable legal environments, and has collated many of the most relevant precedents, guidelines and standards recently developed by international organisations (cited in Appendix 2 and stored in a more detailed form at the Bank). In

[42] A list of the principal sources we have considered in preparing this chapter is set out in Appendix 3.

[43] https://www.ebrd.com/infrastructure/infrastructure-ppp.html

[44] See paragraph 3(a) below.

[45] Although the UK system of PPPs, the PFI and subsequently the PF2, have now been wound up.

[46] To take just one example, see for instance the Ukraine PPP Manual, drawn up with the help of the World Bank and its team of consultants, published in 2021. It is an admirably detailed guide to selecting, structuring, awarding and implementing PPPs.

the infrastructure area, the programme focuses on PPP arrangements and does not generally address privatisation or procurement contracts. It looks at further standard-setting, reviews of existing laws and practices and the need for technical assistance. In the words of one EBRD report: "Enabling fair and transparent concession [PPP] legislation is vital to the development of a market economy and as such this sector is recognised by the EBRD as a 'core area' of its Legal Transition Programme." For the past 20 years, under the leadership of Alexei Zverev,[47] the Bank has pioneered the work of helping governments in EBRD economies to put modern and effective legal frameworks in place for PPPs.

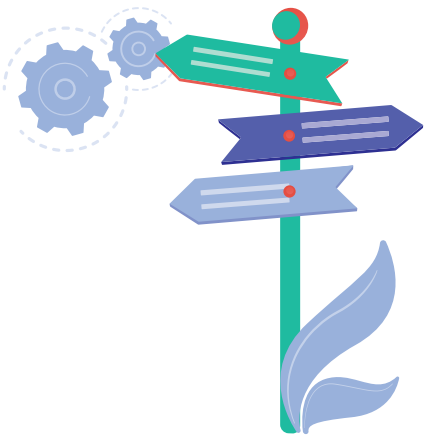
The Bank has carried out periodic reviews and assessments of those PPP legal frameworks (every 3-7 years). It has used a number of different tools for this purpose over the years, including the following:

(i) LIS. The annual Legal Indicator Survey (LIS) formerly[48] allowed the EBRD to give existing PPP laws a range of classifications in the context of a wider analysis of the legal systems of the countries concerned. This survey was carried out roughly every five years, making possible a long-term understanding of how laws in this area were evolving and improving. It focused on the effectiveness of the PPP laws examined (that is, their theoretical adequacy). For example, the EBRD's 2006 LIS measured effectiveness on a comparative basis, as shown in the table below. While a few countries fell into the "highly effective" category, including Bulgaria, the Czech Republic, Lithuania, Romania and Slovenia, others received a "very low" effectiveness rating. The remaining transition countries fell into a middle category. The LIS review concluded that the PPP legal environment in many transition countries had much scope for improvement.

(ii) PPP Law Assessment. The PPP Law Assessment and checklist originally gauged the extensiveness of a country's PPP law, but has since been broadened to include its effectiveness as well (that is, how well it works in practice), thus replacing the LIS. Specific country assessments were carried out in 2004-05, 2007-08, 2011-12 and 2017-18. The questionnaire used for the exercise is divided into several different chapters: policy framework, general PPP legal framework, definitions and scope of the PPP law, selection of the concessionaire, the project agreement, availability of security instruments and state support, and settlement of disputes and applicable law. While it takes into account the laws already on the statute books of the country in question, the results of the assessment are designed to assist potential investors who already have substantial knowledge about the laws of that country to make their PPP-related investment decisions.

Since 2005, when the first assessment results were published, there have been many important developments in the region relating to both PPP policy and legislative initiatives that have changed the overall picture dramatically. The 2007-08 assessment found that the average compliance for all relevant countries still fell within the medium compliance category, although many had improved their legal frameworks very significantly. A comprehensive PPP Law Assessment carried out in 2011-12 showed very different results, as did the following one in 2017-18 (see tables below). Progress was perhaps attributable above all to the need of EU accession countries to comply with the relevant EU requirements in this area,[49] but there can be no doubt that the efforts in this field made by the EBRD and other international financial institutions (IFIs) across the region also greatly facilitated it.

By 2018, the number of countries with higher levels of compliance had increased significantly and included Albania, Egypt, Latvia, Mongolia, North Macedonia and Slovenia among the leading jurisdictions. The tone of these two later assessments was different to that of their predecessors. The Bank referred to the "tremendous level" of legislative activity that had taken place during the intervening years, pointing out that, in just 3 years, no fewer than 17 of the EBRD's economies had introduced new or modified PPP laws. This signals impressive progress and indicates how eager these countries are to adopt effective PPP systems.



[47] Senior Counsel, Legal Transition team.

[48] The LIS ended in 2006.

[49] See below for more information on EU procurement and PPP laws.

2011-12 PPP law assessment

Very high compliance	High compliance	Medium compliance	Low compliance	Very low compliance
Mongolia	Albania	Bosnia and Herzegovina	Armenia	
	Bulgaria	Czech Republic	Azerbaijan	
	Croatia	Jordan	Belarus	
	Egypt	Morocco	Georgia	
	Estonia	Kazakhstan	Tajikistan	
	Hungary	Kyrgyz Republic	Turkmenistan	
	Lithuania	Poland	Uzbekistan	
	Latvia	Romania		
	Moldova	Türkiye		
	Montenegro			
	North Macedonia			
	Russia			
	Serbia			
	Slovak Republic			
	Slovenia			
	Tunisia			
	Ukraine			

This is also illustrated by the following compliance charts from the 2017-18 assessment. As the report points out, the average compliance status for all relevant countries falls between high compliance and medium compliance, with the larger category now being high compliance (11 countries). However, four countries are still classified as having low or very low compliance, which suggests that they were still thought to have considerable room for improvement when the survey was carried out. The EBRD has since been assisting three of them to put new PPP laws in place. Among the high-compliance countries, most have adopted a new PPP law in recent years (many of them sponsored by the EBRD).

2017-18 PPP law assessment

Very high compliance	High compliance	Medium compliance		Low compliance	Very low compliance
	Croatia	Albania	Kazakhstan	Georgia	Turkmenistan
	Greece	Armenia	Kyrgyz Republic	Ukraine	
	Kosovo	Azerbaijan	Latvia	Uzbekistan	
	Lithuania	Belarus	Lebanon		
	Mongolia	Bosnia and Herzegovina	Moldova		
	Montenegro		Morocco		
	North Macedonia	Bulgaria	Romania		
	Poland	Cyprus	Russia		
	Serbia	Egypt	Slovak Republic		
	Slovenia	Estonia	Tajikistan		
	Türkiye	Hungary	Tunisia		
		Jordan			

(iii) Best practice. In addition to the assessments and surveys mentioned above, in November 2005 the EBRD published a document called Update on Best International Practices in Public Private Partnerships with Regards to Regional Policy Issues. This document summarised global best practice common to countries with successfully implemented PPP transactions, with a primary focus on fiscal policies and the sharing of responsibilities between central and local governments. It also provided recommendations as to the consequences of application of those policies. It has now been partly superseded by a paper describing the fundamentals and challenges of drawing up a policy paper on PPPs, which is discussed in Volume II of this collection.

(iv) Core principles for a modern concessions law. Lastly, in August 2006 the EBRD published Core Principles for a Modern Concessions Law ("the Core Principles"). Their purpose was, in the EBRD's words, to identify and promote sound modern principles of concessions laws in the Bank's economies. They have now been revised to take account of the many changes in this field since they were first published, including the use of the term PPP rather than concessions. A copy of the Core Principles is attached as Appendix 4, Part A.

3. Model PPP laws and clauses

(i) UNCITRAL. One of the most authoritative sources of guidance in this area for the past 20 years has been UNCITRAL. Its legislative guide and legislative provisions for privately financed infrastructure, originally published in 2000 and 2003, respectively, were revised and updated in 2019 and are now called the Legislative Guide and Model Legislative Provisions on Public-Private Partnerships. They remain an invaluable resource for governments and practitioners in this area.

(ii) CIS Model PPP Law. In 2014, the EBRD started providing technical assistance to the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS IPA)[50] with the development of a model law on PPPs for CIS member countries (the CIS model PPP law) and some supporting legislative materials, including a sample policy paper, memoranda summarising state support measures for PPPs and practical lessons in the sector from some CIS countries, together with a formal commentary on the CIS model PPP law. The project aimed to create legislative instruments that would help CIS states modernise the legislative frameworks in their PPP sectors in accordance with the latest standards and practices, while learning lessons from the implementation of PPP projects in past years. It is now substantially complete. The CIS model PPP law takes on board a range of progressive concepts from today's PPP market, designed to ensure the effectiveness of PPP frameworks and achieve an appropriate balance of risk among private and public partners. The CIS IPA has recommended that member states adopt the law into national legislation.

(iii) EBRD/UNECE Model Law for Public-Private Partnerships/Concessions in support of the SDGs, and accompanying commentary. In 2017, the United Nations UNECE PPP Working Group and the EBRD launched a joint project to draft a new model PPP/concessions[51] law as one of their available guidance documents for governments and practitioners, with the help of a global legal team of experts.[52] It has benefited from the full support and involvement of the EBRD[53] throughout. It aimed to produce a complete model PPP law – a comprehensive precedent for a legal framework for PPPs – which reflects international best practice and the latest thinking in this field, taking account of some of the leading legislative acts of this kind in force around the world, together with a detailed explanatory commentary. It also incorporates and gives effect to the Guiding Principles for PPPs for the SDGs, adopted by the United Nations in 2019[54] (as the People-first Principles) and further modified in 2021. The project was substantially completed in 2021 and formally adopted by the United Nations and the EBRD in 2022. The document is available on the websites of both institutions.

[50] The CIS IPA, created on 27 March 1992, is an interstate body of the Commonwealth of Independent States consisting of national parliamentary delegations of the member states. The CIS IPA is vested by its mandate with the task of harmonising commercial legislation in its member states and has been carrying out this task by drafting and enacting model legislative acts and other instruments, including in various commercial law sectors, taking into account national and international experience, and recommending their implementation in the national legislation of member states.

[51] These PPP regulatory guidelines do not make a firm or jurisprudential distinction between PPPs and concessions. Some do, however. This became a major issue as the Model Law was being developed. For that reason, both terms are used in the title.

[52] Consisting of some 60 members from different jurisdictions and a subgroup of 15 leading practitioners, led by Christopher Clement-Davies.

[53] In particular, Alexei Zverev and colleagues.

[54] See section (B)3(iv) above and Appendix 5 (Part B).

4. Procurement: laws, rules and guidance

Readers should also be aware of some of the other main internationally recognised sources of procurement law, because, as we have seen, procurement is a central element of most PPP laws and international standards and practices in this area, as well as the host country's existing procedures, often need to be taken into account in framing them. A formal basis for awarding PPPs will always be necessary, and competitive tendering is now widely considered the most advisable general approach, as it promotes transparency, fairness, market activity and efficient pricing, and reduces the risk of corruption. It is also often a requirement of the funding sources likely to be deployed to finance PPPs; development banks such as the EBRD will typically insist on it.

PPP laws, then, need to be consistent with a country's existing procurement rules, or perhaps go beyond them. If the former already represent an adequate framework for awarding PPPs, they can simply be used for that purpose – as in many common law and EU countries. If they do not, they may need to be amended or – more often – a complete, self-standing procurement regime must be built into the PPP law. Knowing which route to take can be challenging. Confusion can result from overlapping or conflicting provisions between the two systems. Not infrequently, a decision is made to make the procurement provisions in the PPP law comprehensive and self-standing and not to apply the wider procurement laws at all.

The two best-known and far-reaching sources of prescriptive provision in this area are the WTO and the EU. Perhaps the most important international agreement of its kind in operation is the plurilateral Government Procurement Agreement (GPA) drawn up by the WTO, while the most wide-ranging set of supranational laws are the body of rules contained in EU's Procurement Directives. The host country is also likely to have in place domestic laws governing the award of contracts for works, supplies or services by government bodies, state agencies, state-owned enterprises and, in some cases, the private sector. Domestic legislation may also give effect to the requirements of the GPA or, in the case of an EU member state, the EU's directives.

(i) The World Trade Organization

WTO members have for many years been seeking ways to address the issue of government procurement in multilateral trading systems. This has resulted in three main areas of work, shown in the table below.

The three main areas of work on government procurement in the WTO

	Plurilateral Agreement on Government Procurement	General Agreement on Trade in Services	Working Group on Transparency in Government Procurement
Type of work	Administration of WTO agreement	Negotiations based on Article XIII:2 of GATS	Study and elaboration of elements for inclusion in an appropriate agreement
Main principles	Transparency and non-discrimination	Transparency and possibly non-discrimination	Only transparency (preferences not affected)
Scope of work	Goods and services, including construction services	Only services	Government procurement practices
Participation	Plurilateral (not all WTO members are parties)	Multilateral (all WTO members involved)	Multilateral (all WTO members involved)

Source: World Trade Organization.

The GPA is the only legally binding agreement in the WTO focusing on government procurement. It is a plurilateral treaty, administered by a Committee on Government Procurement, which includes the WTO members that are party to the GPA and thus have rights and obligations under the agreement. Not all the members are party to the agreement, and those that are can have differing rights and obligations in certain areas. Originally introduced in 1981, and subsequently renegotiated and redrafted in 1994 and 2012, the current version was adopted in 2012 and came into force in 2014. It replaced the 1994 version on 1 January 2021.

The rationale for the GPA is simple. In most economies, the government and its agencies are the largest buyers of goods of all kinds. The temptation to favour domestic suppliers can be very strong. The GPA seeks to open up as much of this business as possible to international competition. It is designed to make government procurement laws, regulations, procedures and practices more transparent and ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. The agreement covers 48 WTO members,[55] of which some are in the process of acceding to the GPA (including Albania, Brazil, China, Georgia, North Macedonia and Russia). It has two elements: general rules and obligations, and schedules of national entities in each member economy whose procurement is subject to the agreement. A large part of the general rules and obligations concern tendering procedures. The GPA's provisions may be relevant to any public law analysis that needs to be carried for PPP purposes, by the host economy or investors, as described in section (B)3(vi) above.

(ii) EU legislative framework

Introduction

The EU legislative framework contains numerous regulations and directives specifically concerning PPPs. Until 2014, it included some procurement directives with which those PPPs that qualify as "public contracts" had to comply. On the other hand, PPPs qualifying as "works concessions" were covered only by a few provisions of secondary legislation, while no EU directives covered those qualifying as "service concessions".[56] However, concession contracts were also subject to the general principles of the European Union, according to which any act whereby a public entity transfers the provision of economic activity to a private party must also be examined against the rules and principles of the EC Treaty and the Treaty on the Functioning of the European Union 2010 (TFEU). In the field of public procurement and concessions, TFEU Articles 49 (on freedom of establishment) and 56 (on freedom to provide services) are especially important. In addition, the principles of equal treatment – such as prohibition against discrimination on grounds of nationality, transparency, mutual recognition and proportionality – must be considered.

EU public procurement legislative framework

After a lengthy legislative process, the Council of the European Union adopted three new procurement directives in February 2014. They were published on 28 March 2014 in the Official Journal of the European Union and came into force in April. They consist of the Concession Contracts Directive 2014/23/EU, the Public Contracts Directive 2014/24/EU and the Utility Contracts Directive 2014/25/EU (together, the Procurement Directives). They replaced the earlier 2004 Public Contracts and Utility Contracts Directives. Consideration must also be given to Directive 2007/66/EC (the Remedies Directive) and the new thresholds under Commission Regulation (EU) No 2017/2365 of 18 December 2017.

The Procurement Directives represent the most significant reform of procurement law in the EU since 2004. They aim to modify the existing regime, rather than transform it, by introducing changes to meet criticisms of and perceived weaknesses in the law. In particular, they aim to ameliorate the position of small and medium-sized enterprises, which had often complained about the difficulty of meeting the onerous requirements of public tendering procedures, and to introduce greater flexibility in those procedures, widening the scope for negotiation, and allowing the use of tailor-made processes and the procurement of creative solutions. Of most significance to PPPs, there is now a new directive in place that deals specifically with the award of concession agreements, removing much of the uncertainty that surrounded the pre-amendment legislation.

[55] WTO members covered by the agreement: Armenia, Australia, Canada, the European Union (which covers its 27 member states), Hong Kong China, China, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Taipei China, Ukraine, the United Kingdom and the United States of America.

[56] Public contract: Contract for pecuniary interest concluded in writing between a contracting body and an economic operator, which has as its object the execution of works, the supply of products or the provision of services.
(Works or service) concession: A contract which differs from a public contract in that the source of revenue for the economic operator consists either solely in the right of exploitation or in this right together with payment. Source: www.europa.eu.

EU PPPs and concessions

In line with Directive 2004/18, under current Directive 2014/23, concession contracts are less tightly regulated than public works contracts, but bound by rules on valuation, advertising, time limits for application, additional works to concessionaires, subcontracting and rules for when the concessionaire lets contracts to third parties. Service concessions are excluded from the scope of Directive 2004/18 (Article 17) but fall with the remit of the Procurement Directives nevertheless, and are dealt with directly in Directive 2014/23. At the same time, of course, all transactions subject to EU law are bound to respect general treaty principles (for example, freedom to provide services, free movement of goods, freedom of establishment, mutual recognition, proportionality, non-discrimination and equal treatment).

The Procurement Directives have maintained considerable flexibility relating to the procedure to be used for the award of PPPs. There is a free choice between the open or restricted procedure, the negotiated procedure with prior publication of a notice, or the competitive dialogue procedure. An obligation is obviously imposed to specify the award criteria that will be used; these may focus on price and technical specifications, but may also include environmental, social or innovation-related criteria.

EU institutional framework – conclusion

The goals of the EU public procurement framework have evolved considerably in the last 20 years, reflecting the challenges of their times and the maturity of the member states in their use of public procurement instruments. The main objectives of the 2004 Procurement Directives were to promote and develop a transparent, non-discriminatory and integrated procurement market across the EU, while ensuring European citizens a fair return on their taxes. The declared aim of the 2014 Procurement Directives, on the other hand, is to use public procurement as a strategic tool to implement public policies, in particular with respect to fighting corruption, but also with a view to promoting innovation and tackling global challenges such as climate change or the scarcity of natural resources and public money.[57] In that vein, the European Parliament published a note in April 2020 on the contribution of EU public procurement to the achievement of the objectives of the Paris Agreement and the circular economy strategy, urging the European Commission to create "off the shelf" tools available to member states to promote strategic public procurement and, in particular, green public procurement requiring low carbon, life-cycle and circular approaches in public purchases.[58]

(iii) Procurement model laws and IFI standards

A leading source of guidance on procurement standards and requirements is, again, UNCITRAL. The UNCITRAL Model Law on Procurement of Goods, Construction and Services, adopted by the UN on 16 July 1993, and the UNCITRAL Model Law on Public Procurement, adopted on 28 June 2012, are designed to help states reform and modernise their laws on procurement procedures. These model laws contain procedures designed to achieve competition, transparency, fairness and objectivity in their procurement processes, thereby increasing economy and efficiency in procurement. The former model law is available for use by states that wish to enact procurement legislation with a scope limited to procurement of goods and construction. The latter has a rather wider ambit.

In addition, as already mentioned, countries that seek financing from multilateral lending agencies[59] should be aware of their standard procurement policies.[60] Complying with those policies may be necessary to access this type of funding and perhaps to attract private-sector funding from commercial or investment banks that may need to collaborate with them in difficult markets, especially where a full co-financing structure is involved. Failure to do so may mean that funding from these sources is unavailable. They should therefore be taken carefully into account when revising the host country's procurement laws and the procurement aspects of a PPP law.

[57] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making Public Procurement work in and for Europe, Com (2017)-572, October 2017.

[58] European Parliament, briefing requested by the Committee on the Internal Market and Consumer Protection (IMCO), The EU's Public Procurement Framework, How is the EU's Public Procurement Framework contributing to the achievement of the objectives of the Paris Agreement and the Circular Economy Strategy?, April 2020.

[59] That is, multilateral development banks such as the EBRD, the IBRD, IFC, the EIB and the ADB, and similar public sector-controlled financial institutions (such as the World Bank's Multilateral Investment and Guarantee Agency and export credit agencies).

[60] EBRD Procurement Policies and Rules, accessible at https://www.ebrd.com/work-with-us/procurement/policies-and-rules.html

World Bank policies in this area can be found on its website and are detailed in Guidelines: Procurement under IBRD Loans and IDA Credits and the Guidelines: Selection and Employment of Consultants by World Bank Borrowers. In addition, the World Bank provides a diagnostic tool called the Country Procurement Assessment Report that can assist with an assessment of a country's procurement system and plans to improve it. The World Bank is also updating its public procurement guidelines. The EBRD has published its Procurement Policies and Rules on its website, along with a paper[61] on the EBRD Financing of Private Parties to Concessions, which discusses the Bank's approach to PPP financing. The European Investment Bank also publishes its policies, which are detailed in its Guide for Procurement of Services, Supplies and Works by the EIB for its Own Account and the Guide to Procurement. Finally, the relevant agencies in developing countries can consult the Joint Venture for Procurement, an international forum for procurement specialists representing multilateral lending agencies and developing countries engaged in procurement reform.

(iv) Procurement impact of the Covid-19 pandemic and economic crisis

Many countries modified or qualified their normal procurement arrangements for PPPs to deal with the impact of the Covid-19 pandemic and the devastating economic crisis it triggered. Sometimes, they bypassed those arrangements altogether. As already noted, there will be short-, medium- and long-term consequences for PPPs and the frameworks for them, including at a procurement level, as a result. This subject is discussed in more detail in Chapter 5.

(D) Content of PPP laws

Preamble. The next section summarises the provisions often found in PPP laws and discusses some of the issues typically encountered as they are drawn up. This is done in some detail, as the legal framework for a PPP regime will be primarily set out in such a law where the country concerned requires or decides to use one (see section B above).

Purpose and objectives. PPP laws may start with a preamble or preface of some kind, designed as a simple introduction to the law. This 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. Some countries feel it is 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.[62] Other countries prefer to work these statements into a "scope" provision in the main text, or simply not to include them.

Policy paper. It is common these days for governments to put a detailed policy statement in place before (or at the same time as) the PPP law is enacted.[63] 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.

Distinguish PPPs and other government contracts. A preamble may be a useful place to make it clear 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 (this is another aspect for the law's clarificatory function). There may be many of these other arrangements in the relevant jurisdiction which should not be subject to the PPP law; these may include 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 to the extent they are carved out of the PPP regime (see below).

[61] Now somewhat dated.

[62] 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.

[63] See Chapter 17 (Vol I of the PPP Regulatory Guidelines Collection) for an example of how this is done.

Chapter I. General provisions

The initial chapter of the law typically deals with the more general aspects of PPPs and the new PPP system that 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 basic elements of a PPP contract (such as its parties and term).

1. Scope

General scope. A general scope provision is sometimes included, summarising the range of activities the law is intended to cover[64] and the general principles which may apply to those activities. These general principles are becoming increasingly familiar and standardised at the level of international law (although the exact meaning and application of some of them can be debated) and may include any or all of the following:[65] transparency, fairness, stability, proper management, integrity, completion, economy and long-term sustainability.

Range of PPP structures. One way or another, the law and any scope provision must clarify the range of PPP structures to which it applies. As explained in section B, some countries distinguish formally and as a matter of jurisprudence/legal theory between different types of PPPs, 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 exposure to demand risk.[66] This can sometimes lead to the adoption of two different laws or areas of law dealing, respectively, with each (as in China and Serbia, for example, and of course France, which first made this distinction). EU law also makes a formal distinction along these lines, where the critical criterion is whether the nature of the payments to the private partner (from whatever source) involves a transfer to it of non-negligible operating risk, in which case the PPP is categorised as a concession.[67]

One law for all? Many 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 principles. To do so offers the advantages of simplicity, consistency and comprehensiveness. It will usually be more straightforward, both conceptually and practically, to treat all types of PPP as essentially the same, as points on a spectrum, as it were, unless there is a clear and compelling reason to make formal legal distinctions between different varieties. Allowance can still be made for specific variations in treatment between the different forms, if that is thought helpful, while avoiding a categorical distinction between the two different basic types (government-pay and concessions). A county which sees a need to draw up different rules or procedures for different types of PPP structure, however, should make that very clear in the scope provision and the relevant clauses of the PPP law (or laws).

Government levels. The scope provision should also address the question of the governmental level at which the law applies – that is, national, federal, regional and/or municipal, or all of them. It will usually make sense for a country to have a single legislative act governing all its PPPs, no matter which level of government or administrative structure is involved. This will help to achieve coherence, clarity and consistency, and avoid the pitfalls and surprises that can result from having to deal with several different laws. There may be exceptions, however. In a truly federal structure, it may be necessary for each member state to enact its own law on this subject; the most obvious instance of this is the United States of America.

2. Key terms and definitions

It is generally desirable to try not to use too many defined terms, so each provision can be readily understood on its own terms. Most of the defined terms should be straightforward and self-explanatory. One or two may be more problematic, including:

- **Government.** This term is often used loosely and widely in PPP laws, as referring to any part of the legislative, administrative or executive branches of government legally entitled to exercise powers or perform functions under them. Careful thought needs to be given to the inter-relationship between these categories, however, and any possible conflict between them. It may not be appropriate for the

[64] If not covered solely in a preamble or foreword.

[65] See for example the UNCITRAL model provisions.

[66] 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 pre-dated it).

[67] See further in section B.

executive branch to exercise some powers. Greater precision may therefore be needed in the use of the term. Indeed, some statutes allow for this, using the word "government" to refer to the executive only (and even specifically the cabinet or council of ministers). The problem is sometimes finessed by simply using the generic expression "competent body". But if clarity is needed in terms of which branch of government is being referred to in a PPP law, then precision is needed in the terminology used.

There can also be uncertainties about the extent to which local or regional bodies are being empowered under the PPP 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.

• **Institutional private partner/institutional PPP.** A PPP law may or may not include provisions dealing with institutional private partners and institutional PPPs, as a distinct, defined concept.[68] EU law makes allowance for the concept, for example (although somewhat inconclusively), as do the laws of some other countries around the world. Many others do not. Host countries may or may not wish to do so. If they do, it should be well thought-through and well-defined.

In essence, the term usually refers to PPPs where the contracting authority (or perhaps another public body, such as its affiliate or a state-owned enterprise) and the private partner form a joint entity (institutional private partner) to perform some or all of the tasks under the PPP contract. Although the private-sector participant would usually retain a majority and controlling interest, even that is not always clear. For the project to be a PPP in any meaningful sense, the private sector should still logically assume the main responsibility for implementing it. It should be borne in mind, however, that is far from uncommon for contracting authorities to take minority shareholdings in PPP companies in any event. In many jurisdictions, that will make these defined terms pointless. A separate formal category of institutional PPP may be unnecessary.

• **PPP guidelines/PPP regulations.** The host country should decide whether it wishes to allow for both of these concepts in its PPP law. Sometimes 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 (such as a PPP enabling framework).

• **Public infrastructure.** The host country 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. For example, does it wish to include 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)? This is likely to make sense. It is usually helpful to define the term broadly, to avoid any potentially awkward or unintentional restrictions on its scope and build in the flexibility to allow for future developments.

• **PPP.** The term is not always as straightforward to define as one might expect. 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, clear definition that captures the essentials and is reasonably robust and workable at a practical level, and above all is fully consistent with any other critical elements of PPPs set out in the law, rather than one that is conceptually flawless. An example[69] would be "an undertaking meeting the criteria and requirements set out in [the PPP law], involving a long-term, cooperative relationship between a public and private partner, on the basis of a PPP contract, with shared risks and responsibilities throughout its term, for the design, development, construction, reconstruction, rehabilitation, operation and/or maintenance of public infrastructure (whether new or existing) and/or the provision of public services or services of general interest".

• **Value for money/value for people.** The term "value for money" also needs careful consideration. The PPP world has been subject to years of difficult debate about how it should be defined and interpreted. This is intensifying, as ever greater attention is given to ESG values and criteria. A convincing modern definition would stress 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. A new term, value for people (meaning people and the planet), is now surfacing to express this. This may be treated as an

[68] The terminology, which derives from EU provisions, is somewhat unfortunate. There is nothing particularly or clearly "institutional" about these arrangements.

[69] Taken from the Model Law.

essential aspect of value for money or distinct from it. In any event, host countries should reflect carefully on the meaning they wish to give the words, in terms of the key tests to be taken into account when they are applied. They may even wish to provide for a detailed methodology for such tests to be set out in their PPP regulations or guidelines. A narrow definition (for instance, lowest price) is not likely to be appropriate.

3. PPP regulations and guidelines

Either or both. 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 its PPP law. The former will often be necessary to complete the PPP legal regime, and so their compilation – and revision (updating) over time – made an obligatory aspect of the law. The latter may or may not be, at least at a formal level, and so may be referred to in more permissive language.

Lead authority. Many governments around the world prefer to put a single policymaking body in place for PPPs – often the ministry of finance or economy – with authority to make and revise PPP policy and take charge of the implementation of the system. Any such body is likely to have ultimate responsibility for the regulations and guidelines issued. If so, this may also need to be addressed in the chapter dealing with generalities.

4. PPP criteria and fundamental requirements

Criteria. Many PPP laws seek to lay down the essential features and characteristics (criteria) of PPPs, reinforcing the basic definition. This clarifies which types of project are to be treated as PPPs, and so must comply with and be undertaken in accordance with all the law's requirements, which in turn helps to create coherence and certainty under the law. The criteria may include some or all of the following:

- **Long-term contract.** PPPs need to be long-term in nature (perhaps subject to a minimum term established in accordance with the law (see below) and implemented on the basis of a PPP contract that accords with the requirements of the PPP law.

- **Minimum value.** A minimum or threshold (estimated) value may be required for any PPP. In essence, this is because of the complex nature of PPPs and the time and resources necessary to make them work. It can be difficult to establish what exactly any minimum value should be as a matter of law, however, especially in the case of projects with little or no capital expenditure (capex) involved, and how it should be calculated. Some countries may therefore treat the requirement as a matter of detail to be dealt with in the regulations (that is, state in the law that a monetary threshold must be exceeded, but leaving its value and the method of calculation to the regulations), or simply not include any such requirement at all.

- **Range of activities.** It can be helpful to restate the full range of activities which a PPP can cover (such as design, construction, management, rehabilitation, maintenance and/or operation of public infrastructure). A PPP is not the same as a construction contract or simple contract for services. It needs to contain an appropriate element of long-term responsibility for the public infrastructure and/or public services;

- **Risk allocation.** There should be a clear element of risk-sharing between the parties throughout the life of any PPP.

- **Private finance.** A PPP usually includes the use of private finance, but – at least in theory – may not do. 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 occasionally the public sector may choose to provide the funding itself. A PPP law may or may not include it as a requirement.

Link to policy objectives? Some laws will also include a link back to the public interest goals and objectives summarised in the preamble. (If these have been carried over into the law itself, the cross-reference should be to the relevant article.) Some may also provide for an order of priority between the different criteria.

Special provision for small projects. Some host countries may decide to create some flexibility in the treatment of smaller projects by their legal and regulatory PPP framework, including those falling below any threshold value specified in the law (see above). They may make special provision for them in the regulations, perhaps by way of abbreviated and simplified procedures (for example, providing for simplified studies and evaluations, making them subject to direct negotiation, rather than full public tendering, or allowing for the bundling together of smaller projects and their implementation in a group as a full-blown PPP subject to the law's requirements).

Institutional PPPs. If the PPP law allows formally for institutional PPPs, it will need to complete the picture by making it clear whether and to what extent its provisions apply to them. Typically, all or nearly all of them should apply. Any specific exceptions should be carefully thought through and closely identified.

5. Authority to award and enter into PPPs

A necessary provision. There is sometimes considerable uncertainty 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 nothing may need to be said about it in the PPP law. Many PPP laws do not provide for it. But where doubt or uncertainty exists, it will be helpful for the PPP law to address the subject head on, ideally in simple, clear terms.

Options. One approach is for the law to say 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 a specific law provides otherwise). Alternatively, it may simply list those public authorities that are allowed to award and implement PPPs.[70] The two approaches can always be combined.

Fallback mechanism. It may also be helpful to include a fallback mechanism, giving the government the specific power (in paragraph 2) to vest the necessary authority in individual bodies where necessary or appropriate (and subsequently revoke it). Some governments may also find it necessary to include a specific prohibition against regulatory bodies acting as contracting authorities, in view of the conflicts involved. That would be unusual, however. Occasionally, public authorities with regulatory powers do indeed have to act as PPP contracting authorities, pending the creation of an independent national regulator.

6. Applicable sectors and activities for PPPs

Inclusions. PPP laws typically prescribe the range of sectors and economic/commercial activity to which PPPs can apply. It is usually desirable to make any such provision broad and flexible, and any list it contains inexhaustive, since formal legal restrictions or exclusions are often, in the end, simply unnecessary. (Governments can always then make impromptu decisions about whether to use of a PPP in a particular area). For example, it may say that PPPs can be used in any sector or area of activity not specifically excluded by this or any other law, perhaps setting out an illustrative list of the most obvious ones, which can be expanded or reduced as appropriate. Alternatively, the host country may prefer the list to be specific and exhaustive.

Exclusions. It may then be appropriate for certain sectors or areas to be specifically excluded from the application of PPPs, if that is considered necessary. Some countries prefer to exclude certain areas of defence activity and contracting, for example, or prisons. Another example might be certain types of agricultural activity which are controversial at an environmental or health-protection level.

Natural resources. The natural resource/extractive industries sector sometimes proves problematic in this context. This sector is often distinguished and excluded from the scope of PPPs and a 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). 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. On the other hand, other forms of energy such as the power sector, which embraces essential public services and public infrastructure, are usually included in the list of eligible sectors.

7. Parties to a PPP contract

Main parties and flexibility. There will often be only two parties to a typical PPP contract – the contracting authority and the private partner (as we call them here, for the sake of consistency. The terms “conceding authority” and “concessionaire” are often also used, at least in concessions laws). It is worth noting, though, that, on the one hand, there may occasionally be more than one public authority participating as contracting authority,[71] such as where several municipalities are involved, for example, or a state-owned enterprise teams up with a line ministry, while, on the other, the private partner will often consist of a consortium of companies that become shareholders in the special-purpose vehicle company incorporated to fulfil this role under the

[70] UNCITRAL takes this approach.

[71] 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.

contract. The two principal parties may also agree to bring in additional third parties to the PPP contract (such as a guarantor), where the project's particular circumstances or needs call for it. The law may need to make provision for this.

8. PPP term

Minimum term. A PPP law will sometimes prescribe a statutory minimum term for all PPPs. A host country tempted to do so should think carefully about what this might be and how it should be calculated. A specific minimum period might be inserted, for example. A term of at least five years is likely to make sense, given that PPPs are inherently complex, long-term structures, with sophisticated risk-sharing elements between the parties and subject to important review and approval requirements (which simply would not be practical in the case of simpler, short-term contracts). Because there is no commonly recognised methodology for establishing a minimum term, however, any detailed basis for doing so can always be set out and refined in an ancillary document, such as the guideline regulations (if this is thought to be necessary at all). Any minimum term should of course be consistent with any minimum value prescribed by the law.

Maximum term. It is more common for the PPP law to lay down a maximum term for PPP projects and contracts, or a set of principles for determining the term of each (which is much the same thing). This is because it is important not to allow such contracts to lock up assets and activities for too long, potentially creating long-term, anti-competitive monopolies, but also to mitigate the risk of corrupt practices. Many commentators argue that the temptations to do very long-term deals can simply be too strong for government departments to resist, and that a clear limit in the PPP law can therefore be helpful. 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, or the useful life of the asset involved, as this should always be sufficient to make a project financeable and investible. Others believe that much longer periods (50 or even 75 years) can make sense; there are indeed many examples of them in practice.

Applicable principles. This is why it can be difficult for the law to provide for a specific maximum period, even though quite a few do. Instead, it may be sufficient to set out the basic principles to be taken into account in framing any maximum term, leaving the term itself to be specified in the PPP contract (which will always have a term clause anyway).[72] These principles may say, for example, that the term of the project must be no longer than that period of time necessary:

- to achieve the project's approved public-service objectives and meet the contracting authority's requirements
- to allow any debt to be repaid and investors to achieve a suitable return
- to allow the physical assets involved to be properly depreciated/amortised
- to make proper allowance for any relevant market and sector policy requirements.

Precise, flexible wording. Any such principles will need to be very carefully worded in the PPP law. As each factor amounts to a complex variable, it may make sense to leave their detailed definition and wording to the regulations or guidelines, where they can be refined with relative ease over time. (What, for example, is a suitable return on investment and how long should it take to achieve it?) In practice, it should be possible in many cases to leave the precise application of these principles to the contracting authorities deciding on each project's duration. Nevertheless, the principles applicable need to be worded in the law with sufficient care and flexibility to enable that to happen, while detailed guidance about their use can be set out in the regulations and/or guidelines.

Allow for extensions of term. It must be remembered that PPP contracts often – even typically – contain mechanisms that allow their term to be extended in exceptional circumstances described in their provisions.[73] This may occur, for example, where force majeure or other exceptional events seriously delay progress or interrupt operations, or a change in law necessitates major changes to aspects of the design and construction works.[74] Any maximum term laid down by the law should allow for this, while if necessary making it subject at the same time to any limits or conditions considered appropriate (and perhaps set out in the regulations) to prevent the extension mechanism being abused.

[72] UNCITRAL takes this approach.

[73] 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.

[74] Note that this can effectively benefit both parties. For the contracting authority, extending 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.

Chapter II. Institutional arrangements and roles

General. It may be necessary in a PPP law to include provisions dealing with the inter-relationship 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. The decision-making processes behind the different stages of a PPP's preparation, approval, award and implementation certainly need to be properly accountable. It can also be helpful, in the interests of clarity, for the various stages – from initial inception to final monitoring and termination – to be identified and described, with the responsibilities of different government bodies for each spelled out. Those procedures and processes will, of course, be addressed in any case in many of the law's provisions. However, some aspects may need further precision or amplification in certain specific areas. This chapter is designed to allow for them. The wider aim here is to achieve the necessary administrative clarity in relation to all aspects of the implementation of PPPs.

No standard requirements. It is difficult, though, to generalise about what exactly such provisions should say. This will depend very much on the particular administrative structures and procedures in operation in each country, and the challenges and problems (if any) to which the relevant "interfaces" may give rise, and the extent to which other laws and codes already address them. There are few examples of such provisions in PPP laws actually in force which amount to helpful precedents.

Possible areas affected. In theory, there are many possibilities. Cross-referring to the wider public investment process is one, integration with long-term infrastructure development planning another (including any 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 a PPP commission, the role of the ministry of finance or economy and its risk management unit,[75] a revolving fund to aid the use of PPPs by local authorities, contingency funds to support some or all contracting authorities and their potential liabilities, and additional tiers of approval or control where the exceptions to normal procedures come into play under the PPP law (as in the case of unsolicited proposals or direct negotiations).

The long-term fiscal impact of PPPs may need to be specifically addressed. Flow charts drawing together the relevant strands of decision-making may be helpful (although one would not expect these to be reflected in the law itself). One needs to tread carefully, however. Some of the processes and constraints relevant to these areas may already be in place in the existing administrative and constitutional structures and rules (as already noted). To that extent, it may be unnecessary or inappropriate to reproduce them in a PPP law. Where they are not, it may make sense to address them.

9. PPP unit and administrative coordination

Purpose. One such provision which is commonly included, is that dealing with the establishment of a PPP unit. Many governments create PPP units as part of their new PPP systems. These are essentially administrative support functions, designed to help implement and refine the new system and to disseminate a proper understanding of it, in both the public and private sectors. However, the structure, responsibilities and powers of PPP units 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.

Structure and organisation. Each host country should think carefully about how it wants to structure, organise, staff and empower its PPP unit, and provide for this adequately in its PPP law.[76] The articles may, for instance, address how the unit is to be staffed, identifying a suitable spread of skills and backgrounds; whether a controlling ministry and director should be identified (for instance, the ministry/minister of finance or economy); and how its governing procedures and record-keeping are to be provided for. Many countries put in place a single, centralised body to provide technical assistance and capacity building to all contracting authorities in PPP-related matters. Individual contracting authorities may then wish to create their own specialist PPP office or department within their organisation, to spearhead PPP activities going forward.

[75] Unsurprisingly, the finance ministry frequently has a leading part to play in the decision-making behind a country's PPP system, as the ways PPP projects may impinge (or not) on a government's finances are usually a prime consideration in their application.

[76] There may also be certain concerns about potential corruption here, which should be kept in mind as the PPP unit is being structured (see the UNECE ZTC Standard on this subject).

List of functions and responsibilities. The PPP law will often include a list of the PPP unit's functions and responsibilities.[77] Functions should be chosen and allocated in ways that avoid potential conflicts of interest with respective ministerial duties or conflicts between different responsibilities in the PPP unit.

Administrative coordination. "One-stop shop". It may be appropriate add in this chapter a mechanism designed to coordinate the issue of relevant licences and permits for PPPs between the different ministries and public authorities 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. The idea is that the processes involved would be streamlined and made faster and more efficient, to the benefit of the whole system. Actual examples of such mechanisms in practice are hard to find, however. Licences and permits are the responsibility of individual authorities and ministries, and their issue is a function of the statutory duties and prerogatives they have. These cannot easily be transferred to a different centralised body. The concept may be something of an elusive ideal.[78]

10. Information about PPPs

Need for data and transparency. The transparency of a PPP system is critical to its success (as the SDGs recognise). The more fully both public and private sectors understand all its technical, procedural, commercial and operational aspects, the better. PPPs are complex, sophisticated vehicles that 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. A well-drafted PPP law should thus impose wide-ranging duties on government – that is, on the various government bodies involved with PPPs – to prepare, collate, develop, maintain and publish the relevant information about them and the operation of its PPP system, so that contracting authorities, participants, stakeholders and the general public can all benefit.

Wide disclosure. Such information should ideally be subject to a presumption of transparency and disclosure. It may include information about PPP policy papers, regulations and guidelines, appraisal and evaluation criteria, procedures in use under the PPP law, the progress of individual projects and those being planned, tender results and material terms,[79] recommended or standard contractual terms, the "pipeline" of future projects, studies and reports, and perhaps even information showing how PPPs fit into the context of the government's broader plans for infrastructure procurement and economic development. To satisfy ESG requirements, it should include information that local communities may need to exercise the rights of protection they may enjoy under applicable law.

Tenders and related matters. The need to publish relevant information about competitive PPP tenders and their results, on websites and/or official publications, should also be addressed. So should the need to maintain access to it for a sufficient period of time. Host countries should consider any other specific requirements of this kind which they would like to see included in their PPP laws, such as mechanisms for independent audits of aspects of the published information, and procedures for public reviews or hearings where appropriate.[80] Private partners should also have a general duty to maintain and provide information about their projects, which can be elaborated in the PPP contracts.

Chapter III. Initiation and preparation of PPPs

The central chapters of a PPP law will usually deal with the all-important subject of the selection, preparation and award of individual PPP projects. They should aim 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 the tender documents themselves. Chapter III of this outline deals with the early stages of a project's initiation, preparation and approval, Chapter IV with its award and implementation.

11. Initiating and preparing PPPs

Need for clarity. Ideally, the law should summarise the steps and procedures that must be followed as a PPP is defined, initiated, appraised and approved. It is all too easy for a project to be mishandled in the initial stage, with flaws in its structure or critical steps missed in its approval by the relevant oversight

[77] The Model Law contains a very comprehensive "wish-list" of them.

[78] Note that the EU is currently devising some helpful provisions long these lines, at least for cross-border projects.

[79] Subject to any carefully circumscribed confidentiality restrictions.

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

bodies. This can be fatal, either at this stage or later as it is fully implemented.[81] A well-drafted law will help to avoid this by defining the preliminary steps and requirements in sufficient detail.

Initiation and preparation. It should be possible for PPPs to be formally initiated (set in motion) by either the relevant contracting authority or a private initiator in the case of unsolicited proposals (if they are permitted – see below). In both cases, however, the contracting authority will usually carry out, or at least manage, the detailed work of preparing the PPP, as this will allow it to retain a suitable degree of control over its contents (subject always to appropriate exceptions, such as for jurisdictions with very limited relevant experience of PPPs or relatively constrained government resources, where it may be necessary to delegate more of this work to the private sector).[82] Moreover, many unsolicited proposals will end up in competitive tenders in any case, which reinforces the need for the public sector to lead the preparation process.

Meaning of preparation. Preparation in this context refers to the detailed early-stage work of defining, describing and specifying the PPP, setting out its main scope and features, so the requisite internal approvals can be obtained and it can be made the subject of an effective tender process or other award to the private sector.[83] It does not, of course, extend to any of the more detailed design and engineering work that may be left to the private sector once the project has been awarded.

Scope. The preparation work should ideally include a comprehensive feasibility study[84] and cost-benefit analysis, showing how the applicable appraisal criteria will be met, together with (or covering) a strategic impact and value for people/ESG assessment (reviewing its social and environmental impact and sustainability), together with reports on any other fundamental matters that should be examined and confirmed before the PPP can go ahead. These studies may be carried out in stages. They may include an initial risk allocation pattern, fiscal sustainability test, an assessment of the contracting authority's capacity to launch and carry through a PPP, an assessment of relevant private-sector strengths and appetite, an indication of likely government support and proposals for the best basis for awarding the project. KPIs, and at least indicative payment terms, should also, if practicable, be identified at this stage. All these reports should then be reviewed and approved (perhaps certified) as compliant with the requisite standards and procedures, by whichever competent body is empowered to do this (such as the PPP unit or perhaps a PPP commission). The private partner (or tenderers) may then need to do further commercial and technical feasibility studies of their own, to validate individual proposals, but this is consistent with the contracting authority's own preliminary one, the purpose of which is to establish the project's basic viability as a PPP and some of its key features.

Detail in regulations. Host countries will probably want eventually 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. Ideally. the preparation work should allow at a suitable point any public and stakeholder consultations and hearings, structured to allow issues to be properly aired and ideas for improvements to be put forward. The processes involved should be transparent and participatory.[85] It must also be possible to change any PPP proposals during their preparation to ensure they are fully complaint with all the law's requirements. The structure should not be "set in stone" at too early a stage.

Cost considerations. The cost of all this preparation work can prove challenging, especially for governments in lower-income countries. This is something governments should consider in advance as they structure and define their PPP systems. A mechanism to pass some of these costs on the private sector as part of the award of the PPP contract may also make sense.

[81] The EBRD has done a great deal of helpful work in recent years in this area, developing special procedures (project preparation framework contracts) designed to assist governments with the definition of their early-stage PPPs, with the help of teams of pre-qualified specialists.

[82] When this happens, the contracting authority must 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 on. It may need to hire independent expert advisers for this purpose.

[83] A great deal of helpful information is also available from published sources about the process of preparing and structuring PPPs, including the UNECE Standards and, of course, UNCITRAL. Contracting authorities can consult it whenever they need to.

[84] Sometimes called a pre-feasibility study.

[85] And ideally be in accord with the Aarhus Convention on the subject. The Aarhus Convention is created to empower the role of citizens and civil society organisations in environmental matters and is founded on the principles of participative democracy. This may (or may not) have been incorporated into the host country's legal system.

12. Appraisal and approval procedures

Purpose. Once a PPP project has been prepared, it should be appraised and formally approved before it can be implemented, and the private partner for it chosen, in accordance with any procedures laid down for this purpose in the law (and/or the regulations). This is essentially a checking exercise, a failsafe mechanism, to ensure that each project is meeting all the law's applicable requirements and that the relevant contracting authority has the capacity to award and implement it successfully.

Scope and powers. The contracting authority should submit the PPP preparation work it has carried out (or managed) to the competent body tasked with reviewing it. The scope and nature of that review, and the powers and responsibilities of the competent body, should be clearly and precisely defined in the PPP law. Enacting states should decide how rigorous a supervisory role they actually want to put in place over the preparatory work of contracting authorities, and whether these should include formal powers of approval (as opposed to simple review). The better-established the PPP system, and the more experienced and sophisticated the contracting authorities involved, arguably the less the need for detailed and rigorous reviews. The inter-relationship between national and subnational government bodies may also complicate this process, requiring different bodies to give different approvals of various kinds, depending on the nature of the project and its fiscal implications (for instance, local or national). The problem of potential conflicts of interest should also be considered and addressed in the way approvals are structured.[86]

Both review and approval? 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 a PPP commission). Some may want it to extend to approval of PPP tender documents; others may regard this as unnecessary. Allowance may also need to be made for the fact that, over time, these functions may have to be loosened somewhat as the PPP system becomes larger and more evolved. Eventually, many contracting authorities may be capable of at least an element of self-regulation in this context (although they may choose to allocate different teams to different tasks, to preserve impartiality).

Applicable criteria. The applicable appraisal criteria should then be identified clearly and comprehensively. They should include compliance with the fundamental requirements for PPPs set out in the law (discussed under paragraph 4 above). Affordability, commercial and financial viability, long-term sustainability and the project's potential to enhance public services and achieve socio-economic benefits/value for people (including inclusivity and accessibility) will also be critical. Host countries should consider which others to include in any definitive list(s) of their own. These may include market demand for the service, technical strengths, alignment with the host country's wider strategic plans, the need for and amount of any public sector payments or other forms of public-sector support, cost-efficiency, value-for-money criteria, and the appropriateness of the project risk profile.

Priorities and flexibility. While many of these criteria 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, although certain matters – such as affordability and public service efficiency – will always count as key criteria. Lawmakers should therefore give careful thought to the question of which criteria should always be applicable (mandatory) and which will only sometimes come into play. PPP laws should contain an element of flexibility about them, as they are likely to differ depending on the type of project being considered.[87] Some governments may wish to specify the relative priority or weighting of different criteria in the law or regulations. The law should also build in flexibility to refine the criteria over time and include new ones in future.

Risk allocation. Finally, in this context, it should be emphasised that a PPP law should not attempt to allocate PPP risk with any specificity, or indeed at all, except in very general terms. Some of its articles will be based on assumptions about how certain risks are to be borne, and may even address them as a matter of principle. The important word here, however, is specificity. The subject of risk allocation is, of course, critical to successful PPP structuring, but is not really susceptible to legal prescription, as it always comes down to matters of detail and judgement, and the exact details will vary considerably from project to project. It is therefore a matter for the contracts (and

[86] Some commentators become concerned about a potential conflict of interest or bias here, where a PPP unit may have already been involved in helping with the preparation work and is then responsible for formal review. Others – including the authors – take the view that, as the unit's objectives will be consistent throughout, there is no real conflict at work. A concern about bias can always be addressed by splitting the review and approval functions between different bodies.

[87] 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, however, may still justify approaching a project as a PPP rather than a conventional procurement, as other long-term benefits can accrue that 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.

related documents), not the legislation. PPPs are all about long-term risk sharing and allocation, and the famous mantra is that risks should be borne by the parties best placed to manage them. That is simply a truism and a conceptual starting point, however. It would not be appropriate to say it in a law, let alone try to define how exactly it should be applied. Even a legal provision requiring an "suitable" allocation of risks between the parties could be unhelpfully ambivalent and open to abuse.

13. PPP implementation resolutions

Rationale. Once a PPP project has been prepared, appraised and selected, it is helpful to confirm this in a public document with a proper degree of formality, finality and transparency. This often takes the form of a published implementation resolution. Its main purpose, aside from marking an important milestone in the implementation process, is to make relevant date publicly available. A document of this kind can summarise all those critical aspects of the project which need to be described in its contents, to ensure they are visible to the public and the market and readily understood, and demonstrate the project's compliance with the law's essential requirements and 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 any formal tendering process.

14. Unsolicited proposals

Permitted or not? Host countries need to work out how they wish to address the subject of unsolicited proposals in their PPP laws. Unsolicited proposals can be controversial, with many commentators regarding them as unnecessary and open to corruption and 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. Where they are permitted, the provisions and procedures applicable to their use, and the award of the resulting PPPs, should be as clear, transparent, fair and competitive as possible, as well as consistent with those applied to PPPs initiated by contracting authorities.

Initial submission. The law should clarify the initial steps involved in submitting an unsolicited proposal. For example, the private initiator should have to 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 provide for this to reduce the risk of any system abuse). The latter may have discretion, or an obligation, to review it and make a preliminary decision about moving to the next stage. The rationale for making this step discretionary is that the relevant 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 each proposal nevertheless, together with a duty to give reasons for the conclusion reached.

Review and preparation. Only unsolicited proposals unrelated to projects which have already been officially lined up should be considered. The contracting authority can require the private initiator to provide as much 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. The law should respect any exclusive rights of the private initiator in relation to the project (such as intellectual property). If the contracting authority decides formally to review the PPP and move forward, the provisions described above, covering the project's detailed preparation, appraisal and formal approval, would then come into play. If an implementation resolution to proceed with it is then passed, the relevant provisions of the next chapter, dealing with selection of the private partner, would govern the next stage.

Chapter IV. Selection of private partner

15. Procedures to select the private partner

Competitive tendering the norm. The starting point in this chapter of most modern PPP laws is to require competitive tendering to be used to select the private partner, save only where exceptions are expressly permitted, such as in the case of direct negotiations. 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 to mitigate any risk of local corruption. It is also often an explicit requirement of IFIs,[88] such as the EBRD, and a condition of their financing for particular projects (albeit not an invariable one).

Inter-relationship with existing procurement laws? The question always arises with PPP laws as to what extent a country's existing procurement regime should apply to the award of PPP projects? This is something each country needs to consider carefully. Most countries will already have such a regime in place. It may be a sophisticated one which already caters specifically or by implication for PPPs (as in the EU, for example). Where it has been drawn up before the country has started to use PPPs, extensively or at all, however, the regime will often not apply to the very large, complex, high-value structures that PPPs typically represent. Its concepts, procedures and applicable tests may simply not be appropriate to them.

Exclude or amend existing rules? It may be possible to amend or modify the existing procurement regime to accommodate PPPs, or to say that it applies save to the extent expressly excluded or modified by the PPP law (a sort of halfway house; after all, there may be a large body of regulations and/or case law which it would be time-consuming and cumbersome to try to reproduce). On the other hand, this may be difficult to do and may also give rise to considerable confusion about how exactly the revised or reserved provisions will apply to PPPs. 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.[89] This is the approach reflected in many PPP laws (and the one suggested by UNCITRAL and the Model Law). If the host country decides to amend its existing procurement regime, or concludes that it can be used without amendment, the provisions of this chapter of its PPP law may look rather different to those explained below. 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.

Principles and detail. The regulations are likely to set out the more detailed aspects of the applicable tendering procedures – such as time periods, notice requirements, the forms used (paper or electronic), other formalities and the contents of tender documents. The PPP law may specify the general principles by which they must be governed, such as the need to promote fair and effective competition, transparency, equal treatment, non-discrimination and the efficient use of resources (and perhaps proportionality).

Precise criteria. In the case of each tender, the exact criteria and evaluation methodology for choosing successful bidders and any prequalification process will have to be selected by the contracting authority and set out in the tender documents. These will need to be suitable for the relevant PPP and tender structure being used. The PPP law can set out a "shopping list" of potentially available ones, on which each contracting authority can draw,[90] refining, making them more precise and weighting them as necessary. The selected criteria should always be consistent with those used to approve the PPP at preparation stage and the implementation resolution adopted for it.

16. Tender structures and procedures: general

Choice of tender structure. The exact tender structure used for the award of any PPP will be determined by the contracting authority, in accordance with the requirements of the PPP law and regulations. Its detailed aspects will be set out in the tender documents (and summarised in the public announcement). The PPP law can include a range of helpful general provisions relating to all these structures and application, which clarify their main parameters.

[88] Such as development banks and similar international funding organisations, as opposed to private-sector banks and investors. They include the World Bank (IBRD), IFC, the EBRD, the ADB, the African Development Bank, the Asian Infrastructure Investment Bank and others.

[89] If the host country is an EU accession country or even a member state, it would have to ensure that any bespoke procurement procedures for PPPs were fully consistent with EU law on procurement and state aid.

[90] Please see the Model Law for a comprehensive list of options.

Open and closed tenders. As explained above, the law is likely to provide 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 – should only be permitted in very limited circumstances described in the law. Each host country should decide on the scope of these exceptions. They are often limited to defence, national security or other exceptional circumstances of national interest, where a public tender would give rise to serious concerns about government confidentiality and therefore would not be feasible. Specifying the exceptions with precision in the law is recommended and considered common best practice.[92] Where closed tenders are used, the contracting authority should still try to maximise any available element of competition involved, for instance, by inviting offers from as many sources as practicable.

Eligible participants. The law should be clear about eligible participants in a tender. Usually, any person or groups of people with legal capacity (companies, partnerships, natural persons, and so on) can participate in a tender, subject to any applicable legal restrictions, in particular resulting from rules excluding people who may have been convicted of relevant offences, such as corruption, illicit employment practices (such as 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.

Compliant decisions. The law should state that all decisions during the tender process, concerning prequalification, selection (short-listing), 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).

Miscellaneous. This part of the law can provide for other matters, including the need for transparent communication processes and methods with bidders (allowing for suitable bidder input in the tender documents and final project definition), the use of tender security (such as bid bonds), restrictions on multiple or joint bids, and the consequences of receiving only one tender. The scope for a final clarification or negotiation stage may also need to be specifically provided for; this represents a potentially awkward area which should be carefully handled in the regulations and tender documents. The nature and extent of any tender confidentiality restrictions, as between competing bidders, should also be covered, together with the contracting authority's need to keep appropriate records of tender proceedings.

Article 17. Tender documents and criteria

Contents of tender documents. The law can usefully lay down general requirements for any set of tender documents drawn up by contracting authorities. These should ensure that the documents are sufficiently complete and transparent to enable bidders to participate effectively on a level playing field. For example, they should describe the project in sufficient detail, identify the essential elements of the PPP to be addressed in the bid, include the main specifications and KPIs, include the draft PPP contract, describe the tender procedures and clarify the applicable criteria and methodology for selection. The underlying principle is to maintain an adequate and healthy level of competition throughout the process.

Full data. It is helpful to oblige the contracting authority to provide all information it possesses 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.

Amendments. It should be possible to amend tender documents during a tender, before the applicable deadline(s), either on the contracting authority's initiative or in response to bidders' comments (subject, of course, to the usual transparency principles). Deadlines must be extended as necessary to allow for this, and appropriate records kept of the rationale for the changes.

[91] Not to be confused with the EU term "open procedure", which has a more specific meaning, excluding a prequalification stage.

[92] Host countries that 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.

Article 18. Tender committee

The law may provide for a tender committee to manage each PPP tender. The detailed requirements of its structure, composition and operation should be decided by each host country and set out in the regulations. Some structural flexibility is advisable, allowing committees to be formed which are best suited to the needs of individual projects. It would be fitting to require minutes to be kept and reasons given for key decisions, to promote the legitimacy and transparency of the processes involved.

19. Tender stages

Framework. The law should then outline a framework for the principal stages of a PPP tender, from announcement to contract signature, that will vary depending on which structure is used: open or closed or two-stage, with or without prequalification. Certain aspects of each can then be provided for. These may include the essentials of a tender announcement, the possibility of a single-stage tender, the use of closed tenders (in the limited circumstances permitted – see above), the basic requirements of a prequalification process, the main elements of a subsequent request for proposals and, finally, the contracting authority's obligations in comparing and evaluating proposals on a fair, objective basis in accordance with the tender documents.

More detail in regulations. Note, though, that these provisions usually do not amount to a complete picture, a comprehensive set of procedures. It will be for the PPP regulations – or perhaps the country's existing procurement rules, where they apply – to contain the fuller story, including all the necessary details required (such as formalities, timescales and deadlines, applicable criteria and methodologies) for each tender structure. Even then, many precise details will only be set out in the tender documents themselves. The PPP law aims to define the main pillars of the system, its overarching framework. UNCITRAL[93] takes a very similar approach.

Special provision. PPP laws often need to deal expressly with certain specific aspects of the tender process that may be not permitted, adequately or at all, in more general procurement regimes. These can be essential for PPPs, which typically need longer and more tiered procedures than smaller, simpler projects.

Two-stage procedure. One is a so-called two-stage procedure (confusingly, this is not to be confused 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 when 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 (usually excluding financial 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.

Competitive dialogue. The second is more unusual. Known as the competitive dialogue procedure, it originally evolved in the EU procurement context. 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 be deployed in the concluding phase. 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 short-listed 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 is the level of uncertainty about fundamental project features, which can only be defined in dialogue with bidders. The two-stage procedure is more about simply refining, or fine-tuning, certain aspects of a project. In practice, however, 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.[94] 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.

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

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

20. Conclusion of the PPP contract

Final stage of award process. To close the procedural loop, so to speak, the law should also provide for the final stage of the award process. It should state that a PPP contract shall be concluded with the winning bidder, as 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 (if any)[95] to capitalise the special purpose vehicle, and subsequent changes to its corporate structure, may be allowed for here, as may requirements for public statements about the contract award (for instance, to post a formal notice on the contracting authority's website and publish it through the official channels).

Public disclosure. The law may allow for the public disclosure of PPP contracts (subject to applicable confidentiality restrictions) where this is thought appropriate. Note that governments may be hesitant about publishing all their contracts as their new PPP systems are taking shape, but that this may in time come to be perceived as advantageous to all, and so be provided for in the law or PPP regulations.

21. Conclusion of PPP contract for unsolicited proposals

Testing competition. The final stages of the award of a PPP project based on an unsolicited proposal will usually need specific provision. The law should seek to bring competitive pressures to bear in this context, notwithstanding the project's initiation by a single private-sector source who may hope to be awarded it without the need for a tender. Where the PPP is based on certain exclusive rights of the private initiator, such as protected intellectual property, and/or its concepts and technology are truly unique or new, fostering competition may simply not be feasible. Subject to this caveat, however, it is advisable for the law to prescribe a framework for attracting competitors. It might say that, once a final decision to proceed with the unsolicited proposal has been made, the implementation resolution for it should be passed and published on the contracting authority's website 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 final direct negotiations permitted under the law and regulations).

Tenders and compensation. If third-party expressions of interest are received, tender proceedings should be organised in accordance with the law's procedures. PPP laws sometimes provide for incentives or compensation to be offered to the private initiator in these circumstances, in view of the effort and resources already invested by it in the project. Host countries should think carefully about whether they wish to include such a mechanism and how exactly it would work. Cost compensation payments and adjustments to bidding scores are popular examples. 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 far more difficult. Some countries prefer not to provide for this at all; others may already address them in other procurement regulations.

22. Direct negotiations

Exceptions to tendering procedures. The somewhat contentious subject of awarding a PPP project on the basis of direct negotiations, without holding a competitive tender, usually needs to be covered in a PPP law. Host countries should think carefully about the exact circumstances in which they wish to permit this and define them closely. The reason for caution is that these situations are widely recognised as being vulnerable to corruption, as well as creating logjams in a country's pipeline of potential PPP projects. Strong competitive bidding also tends to elicit the best price.

Specific instances. The exceptions might include:
(a) when only a single compliant bidder has surfaced in the context of a tender process (subject to the relevant qualifications);
(b) when the unsolicited proposal provisions allow it;
(c) perhaps, when there is an urgent need to maintain public services and holding a tender would be impractical (although some experts caution against this exception);
(d) in the case of small, short-lived projects that do not meet the usual statutory thresholds;
(e) when the state's vital security interests do not permit tendering and, lastly
(f) when it has been clearly established, based on an independent expert report, that there is only one source actually capable of implementing the project (for example, in the case of unique patented technology or intellectual property).

[95] There is no obvious reason why this subject should need to be treated as a matter of binding legal requirement. Many countries would be content to leave it to the PPP contracts. But countries wishing to make their PPP legal and regulatory frameworks complete may wish to touch on it. Care should be taken, however, not to make any provisions too restrictive.

Caveats. The detailed procedures governing any such direct negotiation can be set out in the regulations. Close monitoring of the PPP implemented as a result of the procedures, including its standards of performance, is encouraged. Even where an exception applies, it may be appropriate to oblige the contracting authority to try to introduce an element of competition into at least aspects of the procedure if it believes it can.

23. Review and challenge procedures

Recognition of principle. It is usually appropriate to permit 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 to bring proceedings through any available legal channels in the host country. It is difficult to generalise about what exactly such channels or proceedings might consist of, as they 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.

Detailed provision in regulations? Any established channels and mechanisms may need to be reinforced or supplemented in the regulations.[96] Careful thought should 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 damaged the project at a later stage; prevention is better than cure. Where the PPP regulations provide for such procedures, the law should require 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, should be allowed for, together with a power to award compensation for losses incurred and even to cancel an entire project in appropriate circumstances. Host countries should take care in framing any such powers, however, as they would be invasive and sweeping, and may overlap with similar powers and mechanisms under other branches of law (such as procurement laws, judicial review or the laws of tort or contract).

Chapter V.
PPP contracts

24. Main terms and conditions of PPP contracts

Contractual framework. Nearly all PPP laws will contain provisions governing the agreements that give effect to the PPPs – the PPP contracts. These are addressed in this chapter, together with other fundamental aspects of those agreements. PPPs are fundamentally creatures of contract, and so, from the regulatory perspective, have to be set in the context of the nature and workings of the host country's wider law of contract. This, in turn, raises the question of how much freedom of contract can and should be permitted in the law for the parties to any PPP contract to agree and shape its contents. Many countries will be content to allow wide latitude. Others may have a more prescriptive approach to it, especially in view of the importance and visible nature of the public services and/or public infrastructure assets involved.

Freedom of contract. The most advisable – and most favoured – approach is to provide in the law that an overriding principle of freedom of contract shall govern the drafting and negotiation of the contents of a PPP contract. The parties can agree essentially whatever provisions they choose, in other words, subject to any requirements or constraints in the wider legal system. 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). In reality, many other laws will also apply to the assets, services and responsibilities involved, putting effective limits on what can be permitted under the contract.

Broad latitude advisable. Within those constraints, however, most PPP laws today envisage that it will be most productive to allow the parties to have wide latitude in settling the terms and contents of the PPP contract, to reduce the risk of clauses which they consider 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. When those advisers are available, it tends to make most sense for the law to trust the parties, so to

[96] 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.

speak, to reach appropriate conclusions about their terms, with the freedom to agree the clauses they consider appropriate. 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.

Alternatives. PPP laws will often then set out a "wish list" of the main provisions typically found in agreements of this kind. This helps focus minds on them and removes possible doubts about their legitimacy, while leaving it to the parties to make the final decisions about which to use and how exactly to word them. The underlying assumption behind this approach is that the host country will welcome and accommodate it. Countries that 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, as we have said, 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 awkward wording may make the provision unworkable or unbankable.

Model clauses. The freedom of contract approach is perfectly 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 resource. 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 an obstruction to the rapid evolution of the system.

Available PPP structures. This can be a logical place in the law to address the subject of the PPP structures available to the parties, as these[97] are all essentially contractual arrangements. The industry has evolved a wide range of possible structures over the past few decades, and an even wider range of familiar (and sometimes confusing) acronyms used to describe them, such as BOT, BOOT, BOO, DBFO and BLT.[98] It is again usually desirable for the law to provide that all of them will be available, in principle, and that the parties will have maximum freedom to use the structure which seems to them most suitable for the project in question. If host countries have any serious reservations about any of them, they should modify the provision accordingly.

25. Conclusion, amendment and termination of PPP contracts

Parties' rights to extend and amend contract. The law will state that the PPP contract is to be entered into by the contracting authority and the private partner selected in accordance with the previous chapter (and any other persons whom they agree should be parties). It will terminate on the expiry of its term, which may be extended in accordance with its provisions. It can be amended or terminated by mutual agreement, but subject to any relevant restrictions in the contract, the regulations or otherwise at law. 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. Obviously, any elements of the PPP contract which require the initial approval of any competent bodies or relevant authorities besides the contracting authority will need further such approval before they can be amended.

Constraints. Some laws therefore impose clear constraints to the parties' freedom to agree on amendments to the PPP contract. The concern here is the risk of contracts being abused and clauses changed in ways which might suit the parties, but may not be appropriate for the project or the country. For example, some laws will require a separate tier of approval of any amendments to the essential or fundamental aspects of a PPP, especially aspects 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 detail.[99]

Some amendments are inevitable. It should be remembered, though, that most PPPs will be subject to a large number of amendments during their life – as will any major project – and putting ponderous obstacles in the way of the parties' freedom to agree 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, thus providing another safeguard against abuse.

[97] Perhaps apart from institutional PPPs. See above.

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

[99] See the alternatives suggested in the Model Law or the provisions of the UNCITRAL model clauses.

Early termination and compensation. 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 the law requires it) the confirmatory decision of a court or tribunal. It may also be appropriate for the law to say something about 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". All the detail will be set out in the PPP contract, distinguishing between debt and equity payments, and between the different grounds of termination. The law can help clarify what is feasible and appropriate, however, at least in general terms.

It may say, for example, 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). This would be separate from the usual compensation payments one would expect to be payable on a contracting authority default. 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. It may therefore be helpful for the law to spell out that this may, indeed, be the case. The basic rationale for it is that the assets transferred to the contracting authority on an early termination will usually have a long-term value that far exceeds the amount of any losses it suffered 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.[100]

Best international practice therefore usually entails the payment of at least some compensation for those assets and costs. This approach is 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 law should not specifically require such compensation to be payable, however. The final decision about that question should, again, be left to the parties negotiating the PPP contract. But it may make sense for the law to oblige them to give due consideration to the principles governing any such compensation when they are concluding it, while itemising some of these factors. The applicable details will still have to be worked out and settled in the contract.

Other termination matters. The law may also refer to 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.

26. Property and related matters

Property required for the project. It may be necessary or helpful for the PPP law to address some of the main property (real estate) issues likely to arise as a PPP is being structured and negotiated. For example, the contracting authority will probably be given general responsibility for ensuring that the physical real estate (typically, the site) and associated rights (such as easements and rights of access) and assets needed for the PPP are provided to the private partner, in accordance with the terms of the PPP contract (where the relevant details will be set out). No additional public tender[101] needs to take place. This can apply both to property in the contracting authority's ownership or control, and that of third parties. In the latter case, the contracting authority may be obliged to acquire it, if necessary using available compulsory purchase powers, together with the necessary legal rights and interests. It will nearly always be more sensible and efficient to leave the management of these property risks and responsibilities to the public partner, rather than trying to transfer them to the private one. Investors and bidders for projects will expect this. Any doubts or uncertainties on this point can be fatal to the success of a PPP.

Contractual rights and interests. The PPP law can then confirm the rights of the parties to the PPP contract to grant each other whatever property-related rights or interests are needed for the purposes of the project, in relation to the property comprised in the PPP, in accordance with the terms of the contract. These may include outright ownership, leases, licences, rights of use and so on. The private partner's rights and interests should be able to be passed on (subject to their terms) to its third-party contractors. Some PPP laws also acknowledge that the parties may decide in the PPP contract to identify and list different classes of asset by reference to their treatment on

[100] This subject is discussed in more detail in the chapter on PPP contracts.

[101] Additional to the PPP tender, that is.

termination (for example, some assets which are to be transferred or sold to the contracting authority). This approach may be customary or obligatory in certain (civil law) jurisdictions

27. Types of payment under PPP contracts

It can be helpful for the law to confirm 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 can be allowed for. The law can set out a broad, illustrative list of the types of payment that may be used, including both direct user charges (typical of a concession structure) and payment streams from the contracting authority (such as shadow tolls and availability payments), making it clear that any available forms of permissible payment not specifically prohibited by local law 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. It is generally advisable for the provision to cast 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.

28. Liability of parties to the PPP contract

Some laws – by no means all – may contain provisions on the liabilities and remedies of the parties if the terms of a PPP contract are breached. The terms of the contract and the rights provided by a country's wider legal system should normally apply anyway, without the need for further legislative detail. Host countries should consider whether the law contains any unusual or problematic restrictions in this context which need to be amended or overridden in the PPP law, or gaps that need to be specifically provided for.

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

Meaning. 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 assume temporary control and operation of a project in defined circumstances, such as when an emergency endangering the public or public services occurs. 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 assume 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.

Summaries in PPP law. It is therefore commonplace for PPP laws to address step-in rights expressly. The provision may allow 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 be agreed and set out in the contracts. (A very "ESG-conscious" law – to coin a phrase – might also require those procedures and conditions to be drawn up and specified in a way that is unlikely to adversely affect the project's provision of public services to end-users).[102] Because the nature and effect of lenders' step-in rights can be startling to contracting authorities negotiating PPPs, it can be helpful for the law to summarise the main powers they typically bestow on those lenders.)

Covid-19 considerations. There is much talk about the ways government powers and commercial contracts may need to be modified to allow more effectively in future for the impact of global pandemics on the scale of Covid-19. Many possibilities are being discussed but details have yet to be worked out.[103] One likely possibility, however, is to strengthen public-sector step-in rights by according greater latitude to take over projects (in whole or part, temporarily or even permanently) to deal with crises of this nature. Host countries may wish to allow for this as appropriate in the provisions of their laws dealing with step-in rights. It should always be borne in mind, though, that, as step-in rights are primarily matters of contract, the key provisions will be found in PPP contracts and direct agreements with lenders, rather than in statutes. There is no simple statutory solution to this problem, and respecting the sanctity of commercial contracts will remain a fundamental principle of free-market economies.

[102] See the article on this subject in the Model Law, for example. This is a very novel requirement, however, reflecting the innovative nature of some of the People-First PPP Principles. It is worded as simply a qualified aspiration, as it were, for the relevant contractual provisions (aim to ensure…), as step-in rights are often considered fundamental components of PPP contracts, by both contracting authorities and project-finance lenders. Both might consider a more restrictive, unqualified obligation along these lines to be unacceptable.

[103] As at the time of writing.

Chapter VI.
Support, protections and guarantees

This chapter seeks to confirm the viability of certain types of clauses in PPP contracts that can be problematic or uncertain when they are being structured or negotiated, and to clarify certain general responsibilities. The less uncertainty there is about the feasibility of such provisions, the less the need for the chapter. Provisions can be scaled back or deleted as appropriate.

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

Exclusivity. It can be helpful to confirm that exclusive rights can be granted in a PPP contract. This could 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.

Licences and permits. PPP laws will usually give the private partner primary responsibility for obtaining the permits and consents needed for the project, while obliging the contracting authority 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 it will be primarily responsible for satisfying conditions attached to permits and consents.

No undue interference. The law can prohibit the contracting authority from taking steps which may unduly interfere with or obstruct 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 (such as certain approval rights) or at law (such as step-in rights). This is designed to overcome the temptation many contracting authorities often feel, at least in the early days, to try to micromanage PPP projects and to help them make the cultural shift from traditional procurement methods to the much more "hands off" approach needed in the case of PPPs. Care should be taken, though, not to impose too sweeping a restriction on the contracting authority's actions. The public sector has a legitimate right to monitor and supervise the project and to assist in addressing major difficulties.

Adequate level of payments to private partner. In many PPPs, provisions of the PPP contract determine the payments to be made to the private partner (regulation by contract). In some cases, however, a regulatory body of some kind sets or adjusts the tariffs charged to users or other payments to be made to the private partner. If the regulatory environment in the country is new and untested, or believed to be unreliable, investors and lenders may be reluctant to subject themselves to decisions made by the regulator. In some circumstances, if permitted under law, it may be appropriate for the parties to agree in the PPP contract the formulas and algorithms for the adjustment of tariffs or other payments, and to specify the procedures by which any such adjustment will take place, as an exception to normal regulatory practice. An important caveat is that this method is not likely to work well if the tariffs in question are for a complex utility system (such as electricity or water distribution), except as a short-term, transitional arrangement.

Exceptional events. It probably makes sense to allow exceptional or special event provisions to be included in a PPP contract, 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, and to insert an illustrative list of the sort of consequences that may be specified in the contract. These may include, for example, relief from liability for breach, amendments to the contract's terms, payment adjustments, cash compensation or early termination. These clauses again tend to feature among the more difficult and challenging ones in negotiation. It can therefore be important to highlight their availability in principle in the law.

Essential shareholders. It may also be helpful to protect the position of the contracting authority – and therefore the public interest – by requiring its consent for any disposal of a controlling or essential interest in the private partner, at least for a certain period of time and subject to appropriate conditions. The public sector sometimes misses this possibility in negotiation, and the private partner is not likely to volunteer it!

31. Forms of public support for PPPs

Another helpful "avoidance of doubt" provision might make it clear 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.[105] If necessary, these can also be provided for or refined specifically and in more detail in the PPP regulations and

[105] For example, EU member states and accession countries will be subject to EU state aid rules. Many other countries will have equivalent restrictions.

explained in the guidelines. Examples – which can be set out in the article – would include payments, grants, asset contributions, property, subsidies, guarantees of different kinds, loans, investments, tax breaks and incentives. The terms and conditions applicable to them would be set out in the PPP contract. Host countries should add references to any other specific forms they think need to be included (if any) or qualify or remove any they regard as inappropriate.

32. Protection of lenders' and investors' rights and interests

General. A further avoidance-of-doubt provision might specifically allow 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 they are necessary to secure the successful financing of the PPP. These can include step-in rights and their associated powers in direct agreements (see above). But it should also be remembered that the credit agreements with lenders will also contain numerous clauses requiring the lenders' approval to exercise specific rights and powers under the PPP contract, and preventing the taking of certain steps without their consent. Lenders' interests are usually well-protected anyway, in other words. There is not usually any pressing need for further statutory protection. In addition, however, this provision can also confirm that the private partner and its investors are able to grant to lenders the full range of financial security interests available at law over the assets and rights comprised in a PPP, giving helpful examples.[106]

Justification. The rationale for such a provision is that doubts and uncertainty 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 and send positive signals to the financial markets. Step-in rights, in particular, can prove problematic. As we have seen, it is usually helpful to spell out their availability.

No replacement of private partner without consent. As a caveat or contrast to the security rights recognised above, however, some PPP laws provide (as does 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 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, of course, allowed.

33. Protecting end-users and the general public

Procedures to safeguard the interests of end-users and the general public. ESG thinking these days might call for a law to include a provision 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 by the parties. (It is a fundamental aspect of the People-First PPP Principles.) A provision of this kind might, for example,[107] oblige governments, in drawing up their detailed procedures for implementing PPPs 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, as well as those of the parties to the PPP contract and its main stakeholders. Alternatively, or in addition, it could be included in the one of the more general provisions of the law, such as the preamble or criteria and general requirements article (see paragraph 4 above).

Grievance and complaints procedure. The obligation referred to in the preceding paragraph might require a 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

[106] For instance, property mortgage, pledge, enterprise mortgage, assignment, fixed and floating charges (or their equivalent), share and account pledges, assignments of receivables.

[107] See the Model Law for an example. There are still few examples in enacted laws of this kind, though.

specifically directed at PPPs, in the procedures. Such mechanisms should never oust or limit other existing rights and remedies, however, including the despite resolution mechanisms of the parties set out in the PPP contract.

Operational-level grievance mechanism. A provision of this kind might allow the contracting authority to require the private partner to put in place an operational-level grievance mechanism, which would be designed to facilitate the efficient handling of complaints and claims by the public. This would need to be provided for specifically in the PPP contract to be enforceable.

Service adjustments. When the PPP involves services to the public, it may make sense to allow certain adjustments to be made to those services over time as circumstances dictate, together with (if necessary) non-discriminatory third-party access to any related infrastructure network or system.[108] How exactly any such adjustments are made, and with what consequences for other provisions of the contract (especially those determining the private partner's remuneration), will need careful consideration. It may be by simple agreement between the parties, in which case-specific provision may not be called for. Or it may be subject to the agreement's |change of circumstances" clauses, and third-party resolution in the event of a dispute. Many civil law countries vest the power to insist on such changes in the contracting authority.

Chapter VII. Governing law and dispute resolution

34. Governing law

Governing law of PPP contract. There is considerable debate about what PPP laws should say about the governing law of PPP contracts. Many will say that local law must apply. It is questionable whether an automatic presumption of this kind is the most constructive provision for a PPP law to contain, however. In the end, a more convincing approach is perhaps to allow the parties to a PPP contract to choose and agree on the system of law which governs it, but subject to a presumption that local law will be applied save in exceptional circumstances.

Departing from local law. Many legal systems apply local law anyway to their government agreements. Occasionally, this can be problematic or even fatal for PPP projects, 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". Very innovative contractual structures sometimes need to be deployed as a result. In addition, where 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 among all the parties, which (by definition) is not that of one or more of the jurisdictions involved.[109] It can therefore be appropriate to allow the parties at least the possibility of choosing a different system of governing law other than that of the host country.

Local law is often the inevitable choice. The choice of a foreign system of governing law is a somewhat theoretical possibility all the same. PPP contracts are almost invariably governed by local law, for a range of cogent reasons (especially at the sub-sovereign level). Most of the underlying assets will be governed by it anyway, especially the real property involved. The public infrastructure and public services involved will also be subject to local law. Moreover, it would often 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 event.

Governing law of other agreements. 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. It is usual to allow the parties to choose the law governing them, subject to any applicable legal restrictions. These are likely to be local law for the 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.

35. Dispute resolution

Freedom of contract. The subject of the dispute resolution mechanisms to be used in the PPP contract is more straightforward. Here, the principle of freedom of contract should apply. The parties should be able to choose the mechanisms they think most appropriate. The law can mention a range of possibilities – such as mediation, binding and non-binding expert adjudication, national or international arbitration (commercial and/or investment) or the

[108] See the UNCITRAL model clauses.

[109] The best-known example is the Channel Tunnel, the concession agreement for which was made subject to (in crude terms) common principles under both British and French law, with specific provision for resolving inconsistencies between them.

local courts where appropriate. At least in the case of larger PPP projects, there is a common perception that international arbitration, under a well-recognised system or set of rules (for example, ICC/UNCITRAL, ICSID or the London Court of International Arbitration), is the only way to be confident of obtaining a fair and unbiased result, and that international lenders will not finance the project without it. It is therefore important for the law to enable its use if possible.

Special provision? Some legal systems will prescribe specific procedures in this context nevertheless (for example, those that treat PPPs as a branch of administrative law and accordingly make them subject to the local constitutional courts). If they do so, in ways which are perceived as problematic, the relevant legislation may have to be amended to permit a different approach in the case of PPPs – assuming this is legally and politically feasible. It may also be helpful for this provision of the PPP law to confirm 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 must be constantly reviewed and assessed by the governments advancing them. A well-drafted PPP law should provide for this.

36. Monitoring and reporting on the implementation of PPPs

Monitoring and supervision. The law should confirm the contracting authority's right, under the PPP contracts, 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 should be allowed. The detailed requirements and procedures will all have to be set out in the PPP contracts themselves, as these powers must be exercised in ways which do not interfere with the efficient implementation and management of the projects. But the law can encourage the parties to make proper provision for them.

Each contracting authority should then be subject to an obligation in the law to provide regular reports about its PPPs to central government, copies of which should 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.

Contracting authorities should also be required to keep accurate and complete records of the decisions made and procedures followed by them in connection with all aspects of PPP implementation under the PPP law. This is considered important from the perspectives of both transparency and accountability.[110]

37. PPP database

The PPP law can also mandate the creation and maintenance of a central database of PPPs in the host country, containing information that is reasonably comprehensive, up-to-date and clear, as well as generally publicly available. This helps 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 final chapter of the PPP law would deal with the formalities of its entry into force, including the cancellation or amendment of relevant existing laws and perhaps a deadline for making other consequential amendments.

[110] Both of which constitute important ESG and People-First PPP Principles.

(E) Supporting regulations – some observations

The question sometimes arises as to whether and to what extent aspects of a PPP law should be contained in separate or supporting regulations, as opposed to being set out in the primary legislation itself. There is no simple or generally applicable answer to this. Much will depend on the legislative practices and traditions of the country concerned, and the content of its other relevant laws.

Ideally, in our view, the primary PPP law should be as comprehensive and self-contained as possible. If everything can be set out clearly and effectively in a single legislative act, so much the better. After all, PPP laws are generally not very lengthy or complex documents. It is also important for legislators to think carefully about which aspects of the new PPP regime genuinely need the force of law and which do not, or which need relative flexibility. Subordinate regulations can sometimes be treated as a form of "half-way house," giving provisions a degree of legal significance (and making them part of the law) while treating them as less strictly prescriptive than primary legislation.

That said, separate regulations can certainly play an important role in creating or developing an effective legal regime for PPPs. They may have to be introduced at a later stage following enactment of the main PPP law, for example, to "plug a gap", fill in details or deal with unforeseen circumstances. Exceptions may have to be made to the general provisions of the law (without, of course, modifying its principles) to allow for sector-specific needs, perhaps, or those of particular geographical areas. Other examples of where they might be used include:

- identifying eligible contracting authorities for certain types of project, where the PPP law may be unclear
- prescribing elements of the critical project selection and preparation phase(the difficulty, complexity, time and resources needed for this phase often mean that civil servants value relatively detailed provisions telling them only what has to be done as a project is identified, selected and prepared, so that the requisite formal approvals can be obtained)
- developing aspects of the tendering procedure that could not be entirely settled at the time the primary legislation was drawn up (for example, tender qualifications or the content of documents or specifications)
- laying down definitive criteria for contracting authorities relating, for example, to the structure or appraisal of PPPs (such as value for money or other fiscal tests) or aspects of the decision-making process
- dealing with detailed regulatory issues (such as pricing structures or service standards)
- providing for aspects of model contractual provisions, such as conditions for termination or amendment (but subject always to the need for flexibility discussed in the previous section).

Perhaps the simplest way to answer this question is to see the PPP law as the overarching structure or skeleton of the legal framework, the provisions, principles and elements of which are regarded as fixed, and the regulations as providing the supporting detail – the bricks-and-mortar, so to speak – which can be modified or replaced without difficulty. Matters of detail that should be subject to change can go in the latter. This is the way much utilities regulation works.

Regulations may have special relevance in countries with a PPP unit involved in vetting and making sure that contracting authorities adhere to required procedures and methods. The PPP unit will soon come to interpret primary legislation in certain ways, to resolve uncertainties and ambiguities, based on its experience of operations in the "real world" and the detailed application of the law's provisions. It may be helpful for the PPP law to bestow a formal function on the PPP unit of this kind – that is, to propose regulations to the entity authorised to issue them.

It is also important to distinguish between elements or aspects of the PPP regime which are intended to have the force of law and those which are not. Guidance, practice notes, templates and so on are usually not.

(F) Conclusions and recommendations

The landscape in the field of the legislative and regulatory framework for PPPs around the world has changed and advanced dramatically in the past 20 years. Many countries have made impressive progress in this area. They have learned from each other, and from the expertise of international bodies able to offer sophisticated guidance on the subject, such as the EBRD, the EU, the United Nations and the World Bank. Some valuable precedents have been created. These were in notably short supply at the start of the 21st century.

As a result, crafting new laws in this area, or otherwise refining their legal frameworks for PPPs, need not hold any particular terrors for host countries. PPP laws can be – indeed, usually are – relatively short and straightforward documents. They should address key definitions, applicable sectors, the power and authority of conceding bodies, if necessary tendering and selection procedures and criteria, and usually the central components of a PPP contract. It may be

helpful to touch on a few other fundamental areas as well, such as finance and security, step-in rights, administrative coordination, the range of available PPP structures and perhaps certain sector-specific features of the law that need to be addressed. They are unlikely to need to go much further than that. Thought also needs to be given to the question of which provisions are appropriate for the statute and which for any supporting regulations. The key to drafting these laws well is often to see them as essentially clarificatory and permissive documents, as enabling legislation which makes certain types of arrangement and agreement feasible and practicable, rather than as restrictive or heavily prescriptive ones that seek to cover every conceivable aspect of a PPP system. Governments seeking to introduce a programme of PPPs – as so many are and have been for the past 20 years – will have their work cut out anyway, as they rise to the many challenges of in-depth understanding and successful implementation. A clear, coherent, well-conceived and flexible legislative framework will simply provide a solid cornerstone for that endeavour.

Drawing together the threads of advice in this chapter, governments thinking about drawing up new PPP laws for the first time to underpin their PPP systems could consider some of the following steps to create a comprehensive legal framework in accordance with international standards and best practices:

- Start with a wide-ranging review and analysis of the country's existing laws that may impinge directly on PPPs, so a list can be prepared of constraints or deficiencies that must be addressed as the PPP law is drawn up.

- Collate the most helpful precedents, guidance and published materials on the subject of PPP laws available at an international level.

- Examine the structure of public procurement rules (at a national and if applicable international level) and determine the extent to which (if at all) they must be modified or supplemented to cover the award of PPPs.

- Define the suitable scope of the new PPP law in light of the above and the government's policy preferences/any policy statement on the subject.

- Include appropriate provisions as required, covering (among other things) the areas discussed in this chapter (and summarised in the preceding paragraph).

- Start preparing and collating a precedent library of model clauses for PPP contracts, but without making these automatically binding as a matter of law.

- Start preparing and issuing regulations and/or guidelines about the workings of the new PPP system and the application of the law. These are likely to need extensive and repeated refinement over time.

How exactly the PPP law then takes shape and evolves will depend on many factors, reflecting the country's wider legal system, the needs of the programme and the policy decisions made by government about its contents. There are no rigid and invariable rules. Where the subject is approached with relevant knowledge, understanding, balance and flexibility, however, it should not prove too great a challenge to draw up an appropriate statute.

Appendix 1

PPP laws and legal assessment: diagnostic questionnaire

1. General legislative and institutional framework

(i) Does the constitutional, legislative and institutional framework for the implementation of privately financed infrastructure projects ensure transparency, fairness, efficiency and the long-term sustainability of projects?

(ii) Are there undesirable restrictions within that framework on private-sector participation in infrastructure development and operation?

(iii) If so, how can they best be eliminated?

2. Scope of authority to award projects

(i) Does the law clearly identify the public authorities of the host country (including, as appropriate, national, provincial and local authorities) that are empowered to award public-private partnership projects ("PPPs") and contracts for their implementation.

(ii) Is there a clear allocation of such powers as between national and local authorities?

(iii) Is it clear that these powers extend both to the construction and operation of new infrastructure facilities and the maintenance, modernisation, expansion and operation of existing facilities?

(iv) Does the law identify with sufficient clarity the sectors or types of infrastructure or public-service activity in respect of which PPPs may be granted?

(v) Does the law address questions of geographical extent and exclusivity relating to the jurisdiction of the relevant authorities with sufficient clarity, and the resolution of overlapping jurisdictions?

3. Administrative coordination

(i) Have adequate institutional mechanisms been established to coordinate the activities of the public authorities responsible for issuing approvals, permits, licences and consents needed to implement the infrastructure project?

4. Regulatory authority

(i) Is there a clear separation of authority between the regulator and the entity providing the infrastructure services?

(ii) Has regulatory competence been entrusted to functionally independent bodies sufficiently autonomous to ensure their decisions are taken without political interference or inappropriate pressures from operators and service providers?

(iii) Are the rules governing regulatory procedures publicly available?

(iv) Is there an obligation to provide reasons for regulatory decisions, with sufficient access for interested parties?

(v) Are there transparent procedures whereby regulatory decisions can be appealed to – and reviewed by – an independent and impartial body, and clear criteria applicable thereto?

(vi) Are special procedures necessary for handling disputes between service providers concerning alleged violations of laws and regulations in their sector, and are they in place?

5. Risk allocation

(i) Are there any unnecessary statutory or regulatory limitations on the ability of the contracting authority and the private partner to agree on an allocation of risks in the project agreement that is best suited to the project?

6. Government support

(i) Does the law make it clear which public authorities may provide financial or economic support to the implementation of the project (where needed) and what types of support they are authorised to provide?

7. Selection of the private partner

(i) General: Are the law's procurement procedures sufficiently comprehensive, transparent and efficient, and well-adapted to the particular needs of PPPs (given their value, complexity, evaluation challenges and lengthy bidding requirements)?

(ii) In particular, are there clear and well-structured procedures relating to:

- pre-selection
- single and two-stage procedures (as appropriate) for requesting proposals from pre-selected bidders?
- allowance for a "negotiated procedure" and "competitive dialogue procedure" (or equivalent) where appropriate?
- the content of final proposals?
- requests for clarification and modification?
- appropriate evaluation criteria?
- accepting and evaluating proposals?
- final negotiation and project award?
- award of the project without using competitive procedures (and the circumstances in which this can be done)?
- the treatment of unsolicited proposals?
- confidentiality of submissions and negotiation?
- publication of final award?
- maintenance of records of selection and award proceedings and scope of public access to them?
- the right to appeal against or seek review of the contracting authority's acts?

8. Project agreement

[NB: The contents of a typical concession or project agreement are addressed in a separate chapter.]

(i) Does the law allow sufficient scope and flexibility for the parties to agree on the contents of the project agreement as best suited to the needs of the project?

(ii) Does it provide any helpful guidance as to the possible contents of the agreement, including provisions which may be unfamiliar or challenging to the contracting authority or of uncertain validity in the host jurisdiction?

(iii) Does it contain any unnecessary constraints in this context, such as mandatory terms which may be over-prescriptive?

9. Project aite, assets and easements

(i) Is the law sufficiently clear and flexible in terms of the controls it permits to be vested in the private partner over the possession, use (and where relevant ownership) of the site and the assets comprised in the

project? For example, can clear distinctions be made (if necessary) between public assets and private property? Can the private partner be obliged to transfer some assets and retain others at the end of the project?

(ii) In particular, does the law allow the private partner to enjoy sufficient access to and occupation and use of the site as necessary for the purposes of the project?

(iii) Does the law make it possible for the private partner to obtain/enjoy ancillary property rights (easements, rights of way etc.) related to the project as necessary to perform its obligations – for example, to enter upon/transit through property of third parties?

(iii) How satisfactorily will any compulsory purchase powers work in connection with the site?

- are they available to the contracting (or other) authority?
- are the relevant powers sufficiently clear and reliable?
- will they operate efficiently enough and in time?
- will the project be adequately insulated from third party claims?
- can acquisition costs be properly allocated (including recovery from the private partner where appropriate)?

10. Tariffs

(i) Does the law enable/allow the private partner where necessary to collect tariffs or user fees for its services directly from customers?

(ii) Conversely, does it allow the contracting authority (or other government body) to pay the private partner for its services where appropriate?

(iii) Where needed, does the law contain adequate regulatory controls over the private partner's charges and tariffs? Are any such controls consistent with the proposed terms of the project agreement?

11. Finance and security

(i) Does the law allow the private partner to raise and structure the finance it needs for the project (with sufficient flexibility in terms of sources, mixture, use and application)?

(ii) Does the law enable the private partner and its investors to grant adequate security over the project assets for the purposes of raising such finance, including:

- mortgage/charge over its property (immoveable and moveable)
- pledges of shares in the project company
- a charge over proceeds and receivables from the PPP
- an assignment of the private partner's contractual rights and claims
- any other suitable security?

(iii) Are there restrictions in the law relating to the grant of security over any public assets comprised in the PPP? How significant are any such restrictions? Are they prejudicial to the private partner's ability to finance the project?

(iv) Does the law allow for the creation of appropriate "step-in rights" in favour of lenders where required, including:

- the right to direct the activities of the project company
- the right to enforce a share pledge and restructure the project company
- the right to use alternative/substitute project companies
- the right to transfer the PPP to a new entity?

(v) Does the law make it possible for a controlling interest in the project company to be transferred to a third party where appropriate? Conversely, what restrictions (if any) does it impose?

12. Construction works

(i) Does the law contain any unnecessary restrictions relating to the parties' ability to agree on suitable provisions for the design and construction of the project works, including (a) the drawing up, review and approval of construction plans and specifications; (b) preparation of the design; (c) the contracting authority's right to monitor construction; (d) the contracting authority's power to order variations where appropriate; (e) procedures for testing, inspection, approval and acceptance of the facility; (f) latent defects and liability?

13. Operation of the facility

(i) Does the law contain any (unnecessary) restrictions or unacceptable constraints relating to operation of the completed facility and the parties' ability to agree on suitable provisions relating thereto, including, for example:

- continuity of service provision
- non-discriminatory access and availability

• provision of information and progress reports

• the contracting authority's right to monitor performance

• the contracting authority's right to exercise appropriate emergency step-in and operational powers

• the making (and publication) of rules governing use and operation?

14. Ancillary contractual arrangements

(i) Does the law contain any (unnecessary) restrictions on the private partner's freedom to agree the terms of the various project and other contracts with third parties necessary to give effect to the project (for example, construction/operation and maintenance/shareholder agreements)? Are there (unnecessary) requirements to obtain government approvals, apply local law, restrictions on "delegation", etc.?

(ii) Does the law contain other (unnecessary) restrictions relating to the parties' freedom to agree on other fundamental provisions of the project agreement such as:

• suitable performance guarantees

• suitable insurance arrangements

• modifications for events of force majeure/changes in law/stabilisation provisions and the payment of compensation where appropriate

• extensions of time for completion/extension of the term of the concession

• remedies for default?

(iii) Does the law contain any unnecessary restrictions on the private partner's freedom to develop commercial operations and services ancillary to the main project, or the parties' ability to agree them in the terms of the project contract?

14. Duration, extension and termination of project agreement

(i) Does the law prescribe a (maximum) duration for the project agreement? If so, is it sufficiently long, taking account of the various relevant criteria?

(ii) Does it allow the contracting authority sufficient flexibility to agree an appropriate term?

(iii) Does it permit the term to be extended in appropriate circumstances (for instance, completion delay due to force majeure/government suspension of the project/compensation for change in law)? What if any constraints does it impose on any such extensions?

15. Termination of project agreement

(i) Does the law contain any (unnecessary or inappropriate) restrictions on the parties' freedom to agree on termination rights and procedures that are best suited to the project. The law will often provide for termination rights, of course. But are these:

• sufficiently flexible to be developed/modified in the agreement as appropriate?

• sufficiently clear and balanced (and fair to the private partner)?

• subject to a "public interest" termination right? If so, will this be acceptable to the private partner and its lenders (this will often come down to the payment of adequate compensation)?

• sufficiently broad to allow for force majeure/change of law/suspension/frustration terminations?

(ii) Does the law allow adequate step-in rights to be granted to lenders (see above)?

(iii) Does the law contain any (unnecessary or inappropriate) constraints on the making of compensation payments to the private partner on termination? In particular:

• will the parties have sufficient flexibility to provide for this in detail in the project agreement?

• is it possible to deal appropriately with the full range of termination events and categories of loss (including the fair value of works performed/lost return to shareholders/payment out of debt)?

• are any restrictions consistent with "international norms" and the expectations of lenders?

(iv) Does the law provide with sufficient clarity for the transfer of identified (public) assets to the government, and the retention of other (private) assets by the concessionaire?

(v) Does the law contain any (unnecessary) restrictions relating to:

• the transfer of technology required for operation of the facility

• the training of the contracting authority's personnel

• the provision of operation and maintenance services and spare parts by the private partner, if required, for a limited period after termination?

16. Settlement of disputes

(i) Does the law allow the parties to the project agreement sufficient freedom/flexibility to agree on dispute-resolution mechanisms which are best suited to the needs of the project (including choice of law/ international arbitration/mediation and "panel" mechanisms, etc.)?

(ii) If not, how prejudicial could any restrictions be modified or overcome?

(iii) Does the law contain any unnecessary restrictions on the private partner's freedom to agree on the most suitable dispute-resolution mechanisms with its third-party contractors (including shareholders, lenders, contractors, operators and suppliers)?

(iv) Are "special dispute resolution" mechanisms needed/allowed in relation to disputes with customers/members of the public in connection with use of the facility?

17. Miscellaneous

(i) Do any sector-specific laws need to be modified to give effect to the PPP law or project? Which ones and how?

Appendix 2

Published materials relevant to the legal framework for PPPs

Section 1. EBRD PPP reference materials

1. EBRD (2017-2018) PPP Laws Assessment

2. EBRD/UNECE (2020) People-First PPP Model Law

3. EBRD (2021) Core Principles for a Modern PPP Law

4. EBRD Guidance on PPP Legislative Provisions and Contractual Provisions (2010 and 2015)

Section 2. Multilateral and supra-national organisations – guidance, model LIgislation / regulations and assessments

5. World Bank (2017) The PPP Reference Guide published by the World Bank (IBRD)

6. World Bank (2017) Guidance on PPP Contractual Provisions

7. World Bank Guidance on PPP Legal Frameworks (2022) OECD (2012) Principles for Public Governance of Public-Private Partnerships

8. OECD (2012) Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships

9. European Commission (2003) Guidelines for Successful Public-Private Partnerships

10. European Commission (2008) Interpretative Communication Brussels, 05.02.2008. on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP)

11. European Commission (2005) Communication on PPPs and EU Law on Public Procurement and Concessions (15.11.2005)

12. The EU Parliament (2006) Resolution on Public Private Partnerships and Community law on Public Procurement and Concessions (2006/20430 (INI)).

13. The EU Parliament / The CEU Council (2014/2020) 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 as amended in 2020

14. The EU Parliament / The CEU Council (2014/2020) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC, OJ L 94, 28.3.2014 as amended in 2020

15. UNCITRAL Model Legislative Provisions on PPP 2019

16. UNCITRAL Legislative PPP Guide 2019

17. UNECE (2018) Draft UNECE Guiding Principles on People-First Public-Private Partnerships (PPPs) for the United Nations Sustainable Development Goals (UN SDGs) 2018

18. UNIDO (1996) Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines)

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

20. The UNCITRAL (2012) Model Law on Public Procurement, adopted on 28 June 2012

21. UNCITRAL (2012) The Guide to enactment of the UNCITRAL Model Law on Public Procurement, adopted on 28 June 2012

CIS (2014) The Model Law On Public Private Partnership of 28 November 2014 by IACIS (Model Law On Public-Private Partnership (Appendix to the Decree No. 41-9 of the Inter-parliamentary Assembly of Member Nations of the Commonwealth of Independent States, dated 28 November 2014)

Section 3. Official publications on PPPs issued by various international bodies

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23. World Bank (2017) Garcia-Kilroy C and Rudolph H P, 'World Bank Group. Private Financing of Public Infrastructure through PPPs in Latin America and the Caribbean'

24. ADB and KDI (2019) Realizing the potential of Public–Private-Partnerships to advance Asia's infrastructure development

25. ADB (2018) Lee and others, Hazard Analysis On Public-Private Partnership Projects In Developing Asia, ADB Economics Working Paper Series No.548

26. ADB (2008) Public-Private Partnership Handbook

27. ADB (2011) Guidelines for Climate Proofing Investment in the Transport Sector: Road Infrastructure Projects. Manila: Asian Development Bank

28. ADB (2013) Guidelines for Climate Proofing Investment in the Energy Sector. Manila: Asian Development Bank

29. IMF (2016) PPP Fiscal Risk Assessment Model (PFRAM)

30. IMF (2006) Public-Private Partnerships, Government Guarantees, and Fiscal Risk

31. IMF (2007) Manual on Fiscal Transparency. Washington, DC: International Monetary Fund

32. UNESCAP (2011) 'Guidebook on PPP in Infrastructure'

33. OECD (2008) Public-Private Partnerships In Pursuit of Risk Sharing and Value for Money: In Pursuit of Risk Sharing and Value for Money

34. APEC/OECD (2019) 'Financing Infrastructures in APEC Economies: APEC/OECD Report on Selected Effective Approaches' (APEC & OECD Report on selected effective approaches, 2019)

35. The EU (2004) Green Paper on PPPs (On Public-Private Partnerships And Community Law On Public Contracts And Concessions) Brussels, 30.4.2004

36. European Court of Auditors (2018) Special Report "Public Private Partnerships in the EU: Widespread shortcomings and limited benefits"

37. European PPP Expertise Center (EPEC) (2011) PPP Guide to Guidance

38. EPEC (2014) Overview of the PPP Legal and Institutional Frameworks In The Western Balkans (EPEC 2014)

39. EPEC (EIB) (2014) Managing PPPs during their contract life: Guidance for sound management

40. EPEC (EIB). 2013. Termination and force majeure provisions in PPP contracts: Review of current European practice and guidance

41. EPEC (2009) The Financial Crisis and the PPP Market: Potential Remedial Actions. Luxembourg: European Investment Bank, European PPP Expertise Centre

42. EPEC (2014) Role and Use of Advisers in Preparing and Implementing PPP Projects. Luxembourg: European Investment Bank, European PPP Expertise Centre

43. EPEC (2010) Eurostat Treatment of Public-Private Partnerships: Purposes, Methodology and Recent Trends. Luxembourg: European Investment Bank, European PPP Expertise Centre

44. EPEC. (2011) The Non-Financial Benefits of PPPs: A Review of Concepts and Methodology. Luxembourg: European Investment Bank, European PPP Expertise Centre

45. International Institute for Sustainable Development (2015) Hovy P, 'Risk Allocation in PPP: Maximizing VFM' (2015) IISD Discussion Paper

46. World Bank (2013) Disclosure of Project and Contract Information in Public-Private Partnerships

47. World Bank (2015) A Framework for Disclosure in PPPs

48. World Bank (2017) Benchmarking PPP Procurement

49. World Bank (1990-2019) Featured Rankings

50. World Bank (2017) Guidelines for the Development of a Policy for Managing Unsolicited Proposals in Infrastructure Projects. Washington, DC: World Bank and Public-Private Infrastructure Advisory Facility

Section 4. Samples from countries that have issued specific regulations/policies governing PPPs

51. Australia (2015) National PPP Policy Framework. Canberra: Commonwealth of Australia

52. United States. State P3 Legislation

53. Ireland (2002) State Authorities (Public Private Partnership Arrangements) Act, 2002

54. South Korea (2014) the Act on Public-Private Partnerships in Infrastructure, Act no. 12248, Jan. 14, 2014

55. France (2019) French Public Procurement Code

56. India (2011) DEA Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects (Department of Economic Affairs' (DEA) PPP Cell)

57. India (2014) Public-Private Partnership Request for Qualification: Model RFQ Document. New Delhi: Government of India, Planning Commission

58. India (2014) Public-Private Partnership Model RFP Document. New Delhi: Government of India, Planning Commission

59. India (2012) Institutional Mechanism for Monitoring of PPP Projects: Guidelines. New Delhi: Government of India, Planning Commission

Section 5. Government and public bodies publications

60. UK (2009) Government Response to Report on Private Finance Projects and Off Balance Sheet Debt. London: House of Lords, Economic Affairs Committee

61. UK (2003) NAO, PFI: Construction Performance. Report by the Comptroller and Auditor General, HC 371. London: National Audit Office.

62. UK (2009) NAO. Performance of PFI Construction. London: National Audit Office.

63. UK (2010) NAO. The Performance and Management of Hospital PFI Contracts. Report by the Comptroller and Auditor General, HC 68. London: National Audit Office.

64. UK (2011) NAO. Lessons from PFI and other projects. Report by the Comptroller and Auditor General, HC 920. London: National Audit Office.

65. UK (2006) NAO. A Framework for Evaluating the Implementation of Private Finance Initiative Projects: Volume 1. London: National Audit Office.

66. UK (2010) Yong, H.K., ed. Public-Private Partnerships Policy and Practice: A Reference Guide. London: Commonwealth Secretariat

67. UK (2015) Valuing Infrastructure Spend: Supplementary Guidance to The Green Book. London: UK Government, HM Treasury

68. Singapore (2012) Public Private Partnership Handbook. Version 2. Singapore: Government of Singapore, Ministry of Finance

69. Egypt (2007) National Program for Public-Private Partnerships. 2nd edition. Cairo: Government of Egypt, Public-Private Partnerships Central Unit

70. South Africa (2004) Public Private Partnership Manual. Pretoria: South African Government, National Treasury

Section 6. Leading textbooks and monographs

71. Graham Vinter, Gareth Price, David Lee (2013) Project Finance 4th edition

72. Delmon, Jeffrey (2015) Private Sector Investment in Infrastructure: Project Finance, PPP Projects and PPP Frameworks. 3rd edition. Alphen aan den Rijn, Netherlands: Wolters Kluwer

73. Dewar, John (2015) International Project Finance: Law and Practice. 2nd edition. Oxford University Press

Section 7. Training materials from accredited training programmes

74. APMG (2016) PPP Certification Program Guide. In eight chapters. APMG-International. Website

Section 8. Publications (research papers, journals, articles and so on)

75. Yescombe E.R. (2007) Public-Private Partnerships: Principles of Policy and Finance. Oxford: Butterworth-Heinemann

76. Groom, Eric, Jonathan Halpern, and David Ehrhardt (2006) Explanatory Notes on Key Topics in the Regulation of Water and Sanitation Services. Water Supply and Sanitation Sector Board Discussion Paper 6. Washington, DC: World Bank

77. Farquharson, Edward, Clemencia Torres de Mästle, E. R. Yescombe, and Javier Encinas (2011) How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets. Washington, DC: World Bank

78. Caribbean (2017) Caribbean PPP Toolkit. Washington, DC: World Bank, Inter-American Development Bank and Caribbean Development Bank

79. Reyes-Tagle, Gerardo, and Karl Garbacik (2016) Policymakers' Decisions on Public-Private Partnership Use: The Role of Institutions and Fiscal Constraints. Washington, DC: Inter-American Development Bank

80. Irwin, Timothy C. (2007) Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects. Directions in Development. Washington, DC: World Bank

81. Farquharson, Edward, and Javier Encinas (2010) The U.K. Treasury Infrastructure Finance

Unit: Supporting PPP financing during the global liquidity crisis. Public-Private Partnerships Solutions. Washington, DC: World Bank

82. Burger, Philippe, Justin Tyson, Izabela Karpowicz, and Maria Delgado Coelho (2009) The Effects of the Financial Crisis on Public-Private Partnerships. IMF Working Paper WP/09/144. Washington, DC: International Monetary Fund

83. Farrugia, Christine, Tim Reynolds, and Ryan J. Orr (2008) Public-Private Partnership Agencies: A global perspective. Working Paper #39. Stanford, California: Collaboratory for Research on Global Projects at Stanford University

84. Irwin, Timothy C., and Tanya Mokdad. (2010) Managing Contingent Liabilities in Public-Private Partnerships: Practice in Australia, Chile, and South Africa. Washington, DC: World Bank

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88. IFC (2007) Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets. Washington, DC: International Finance Corporation

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90. CCPPP (2011) Public-Private Partnerships: A Guide for Municipalities. Toronto: Canadian Council for Public-Private Partnerships

91. EIU (2014) Evaluating the Environment for Public-Private Partnerships in Latin America and the Caribbean: The 2014 Infrascope. London: Economist Intelligence Unit

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93. Grimsey, Darrin, and Mervyn K. Lewis (2004) Discount debates: Rates, risk, uncertainty and value for money in PPPs. Public Infrastructure Bulletin 1(3)

94. Gray, Stephen, Jason Hall, and Grant Pollard (2010) The public private partnership paradox. Brisbane, Australia: University of Queensland

95. Jeff Delmon (2013) International Project Finance and Public-Private Partnerships. A Legal Guide to Key Growth Markets

96. Christopher Clement-Davies (2003); Negotiating Concession Contracts for Emerging Market Projects; Journal of the International Bar Association.

Appendix 3

PPP and concessions laws and regulations reviewed or referred to in this chapter

(a) EBRD economies

Armenia

Azerbaijan

Czech Republic

Egypt

Estonia

Hungary

Georgia

Kazakhstan

Kyrgyz Republic

Lithuania

Mongolia

Poland

Romania

Russia[111]

Serbia

Slovenia

Türkiye

Ukraine

Uzbekistan

(b) Others

China

Egypt

France

[111] The EBRD has made no new investments in Russia since 2014. In April 2022, the EBRD Board of Governors decided to suspend Russia's access to EBRD resources in response to the invasion of Ukraine. The Bank has closed its offices in Moscow. Russia remains a shareholder of the EBRD.

Portugal

India (Gujarat)

Kenya

Namibia

The Netherlands

South Africa

Spain

United Kingdom (hybrid bills)

United States of America (various states)

Appendix 4

Core principles

Part (A) EBRD: Revised core principles for a modern PPP law

A modern PPP law should:

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

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

3. provide clarity and certainty of rules and procedures

4. promote fairness, transparency, efficiency and accessibility in its application

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

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

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

8. reflect appropriate ESG values and the UN's Sustainable Development Goals, 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, undertakings and guarantees, and

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

PART (B) United Nations Guiding Principles in support of People-First PPPs

- Projects and action plans
- Capacity building
- Improving legal frameworks for people-first PPPs
- Transparency and accountability
- Risk and de-risking
- Procurement: Promoting, value for people
- Resilience and climate change
- Innovative financing: Impact investing

PART (C) United Nations Guiding Principles for PPPs for the SDGs

Principle 1: Make sure that people' needs are listened to and their needs are addressed.

Principle 2: Deliver **more, better, simpler projects** by joining up government and allowing cities and other local levels to develop projects themselves.

Principle 3: Increase **skills in delivering projects**, to better empower women in projects, encourage the private sector to contribute to the necessary transfer of skills.

Principle 4: Establish more inclusive **policy and legal frameworks** that allow for active engagement of communities and focus as well on a zero-tolerance approach to corruption.

Principle 5: Disclose **more information** about projects to society especially on the commitments made to various partners in the project.

Principle 6: De-risk projects by providing more **predictability in the enabling environment**.

Principle 7: Set out clearly the projects' **selection criteria to promote "value for people"** so that the best projects can be selected.

Principle 8: Make **environmental sustainability a key**

component of evaluating, awarding and implementing PPP projects.

Principle 9: Ensure that **blended financing** catalyses private partners to invest in projects.

Principle 10: Avoid dept traps by ensuring the **fiscal sustainability** of projects and the transparency of fiscal policies.

Appendix 5

G20 principles for quality infrastructure investment

Preamble

Infrastructure is a driver of economic prosperity and provides a solid basis for strong, sustainable, balanced and inclusive growth and sustainable development, which are the key goals of the G20 and critical for promoting global, national and local development priorities. Nonetheless, the world still faces a massive gap in financing for investment in new and existing infrastructure, which could generate a serious bottleneck to economic growth and development or provision of secure and reliable public services. In this vein, the G20 has stressed the need to scale up infrastructure investment. Efforts have been made to find concrete ways to mobilise more private capital, such as the Roadmap to Infrastructure as an Asset Class ("Roadmap") endorsed by Leaders in 2018.

The G20 has also highlighted the importance of the quality of infrastructure investment, including in the Leaders' Communiqué at the 2016 Hangzhou Summit, and in the Roadmap. In infrastructure, quantity and quality can be complementary. A renewed emphasis on quality infrastructure investment will build on the past G20 presidencies' efforts to mobilise financing from various sources, particularly the private sector and institutional sources including multilateral development banks, thereby contribute to closing the infrastructure gap, develop infrastructure as an asset class, and maximising the positive impacts of infrastructure investment according to country conditions.

Principles for promoting quality infrastructure investment

This document sets out a set of voluntary, non-binding principles that reflect our common strategic direction and aspiration for quality infrastructure investment.

Principle 1: Maximising the positive impact of infrastructure to achieve sustainable growth and development

1.1 The aim of pursuing quality infrastructure investment is to maximise the positive economic, environmental, social, and development impact of infrastructure and create a virtuous circle of economic activities, while ensuring sound public finances.

1.2 This virtuous circle can take various forms. New jobs are created during construction, operation and maintenance of infrastructure, while positive spillover effects of infrastructure stimulate the economy and lead to more demand for jobs. Advanced technology and know-how may be transferred voluntarily and on mutually agreed-upon terms. This can result in better allocation of resources, enhanced capacities, skills upgrade and improvement of productivity for local economies. This impetus would improve the potential for economic growth, leading to widening of the investor base, crowding-in more private investment, and resulting in further improvement in economic fundamentals. This would facilitate trade, investment, and economic development. All these expected outcomes of the investment should be considered in the project design and planning.

1.3 Infrastructure investment should take into account economic, environmental and social, and governance aspects, and be guided by a sense of shared, long-term responsibility for the planet consistent with the 2030 Agenda for Sustainable Development, national and local development strategies, and relevant international commitments, and in the spirit of extensive consultation, joint efforts and shared benefits. 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. A virtuous circle of economic activities would be further secured through enhancing accessibility to, and national, regional, and global connectivity of, infrastructure, based on consensus among countries. Domestic resource mobilisation is critical to addressing the infrastructure financing gap. Assistance for capacity building, including for project preparation, should be provided to developing countries with the participation of international organisations. Quality infrastructure investment also needs to be tailored to individual country conditions and consistent with local laws and regulations.

Principle 2: Raising economic efficiency in view of life-cycle cost

2.1 Quality infrastructure investment should attain value for money and remain affordable with respect to life-cycle costs, by taking into account the total cost over its life-cycle (planning, design, finance, construction, operation and maintenance, and possible disposal), compared to the value of the asset as well as its economic, environmental and social

benefits. Using this approach helps choose between repairing or upgrading an existing infrastructure or launching a new project. Project preparation, as set out in the G20 Principles for the Infrastructure Project Preparation Phase is crucial in this regard.

2.2 The life-cycle costs and benefits of infrastructure investments should be taken into consideration in ensuring efficiency. Construction, operation and maintenance and possible disposal costs should 3 be estimated from the onset of the project preparation stage. The identification of mechanisms to address cost overruns and cover ongoing operation and maintenance costs is critical to ensure financial sustainability at project level. Cost-benefit analysis should be used over the life-cycle of infrastructure projects.

2.3 Infrastructure projects should include strategies to mitigate the risks of delays and cost overrun, and those in post-delivery phases. Necessary elements to achieve this objective can include: (i) broad stakeholder engagement throughout the project; (ii) expertise in planning, operations and risk allocation/mitigation; and (iii) application of appropriate safeguards and instruments. 2.3 Innovative technologies should be leveraged through the life-cycle of infrastructure projects, where appropriate, to raise economic efficiency for existing and new infrastructure. Advanced technologies are an important component for new and existing assets and can help to improve data availability to monitor infrastructure use, performance and safety.

Principle 3: Integrating environmental considerations in infrastructure investments

3.1 Both positive and negative impacts of infrastructure projects on ecosystems, biodiversity, climate, weather and the use of resources should be internalised by incorporating these environmental considerations over the entire process of infrastructure investment, including by improving disclosure of these environment related information, and thereby enabling the use of green finance instruments. Infrastructure projects should align with national strategies and nationally determined contributions for those countries determined to implement them, and with transitioning to long-term low emissions strategies, while being mindful of country circumstances.

3.2 These environmental considerations should be entrenched in the entire life-cycle of infrastructure projects. The impact on the environment of the development, operation and maintenance, and possible disposal of the infrastructure project should be continuously assessed. Ecosystem-based adaptation should be considered.

3.3 The environmental impact of infrastructure investment should be made transparent to all stakeholders. This will enhance the appreciation of sustainable infrastructure projects and increase awareness of related risks.

Principle 4: Building resilience against natural disasters and other risks

4.1 Given the increasing number and heightened magnitude of natural disasters and slow onset of environmental changes, we face the urgent need to ensure long-term adaptability and build resilience of infrastructure against these risks. Infrastructure should also be resilient against human-made risks.

4.2 Sound disaster risk management should be factored in when designing infrastructure. A comprehensive disaster risk management plan should influence the design of infrastructure, the ongoing maintenance and consider the re-establishment of essential services.

4.3 Well-designed disaster risk finance and insurance mechanisms may also help incentivise resilient infrastructure through the financing of preventive measures.

Principle 5: Integrating social considerations in infrastructure investment

5.1 Infrastructure should be inclusive, enabling the economic participation and social inclusion of all. Economic and social impacts should be considered as an important component when assessing the quality of infrastructure investment, and should be managed systematically throughout the project life-cycle.

5.2 Open access to infrastructure services should be secured in a non-discriminatory manner for society. This is best achieved though meaningful consultation and inclusive decision-making with affected communities throughout the project life cycle, with a view to securing non-discriminatory access to users.

5.3 Practices of inclusiveness should be mainstreamed throughout the project life cycle. Design, delivery and management of infrastructure should respect human rights and the needs of all people, especially those who may experience particular vulnerabilities, including women, children, displaced communities or individuals, those with disabilities, indigenous groups and poor and marginalised populations.

5.4 All workers should have equal opportunity to access jobs created by infrastructure investments, develop skills, be able to work in safe and healthy conditions, be compensated and treated fairly, with dignity and without discrimination. Particular

consideration should be given to how infrastructure facilitates women's economic empowerment through equal access to jobs, including well-paying jobs, and opportunities created by infrastructure investments. Women's rights should be respected in labour market participation and workplace requirements, including skills training and occupational safety and health policies.

5.5 Safe and healthy occupational conditions should be put in place, both at the infrastructure site and in the surrounding communities. Maintaining occupational safety and health conditions would also present a huge economic advantage worldwide.

Principle 6: strengthening infrastructure governance

6.1 Sound infrastructure governance over the life cycle of the project is a key factor to ensure long-term cost-effectiveness, accountability, transparency, and integrity of infrastructure investment. Countries should put in place clear rules, robust institutions, and good governance in the public and the private sector, reflecting countries' relevant international commitments, which will mitigate various risks related to investment decision-making, thus encouraging private-sector participation. Coordination across different levels of governments is needed. Capacity building is also key in ensuring informed decision-making and effectiveness of anti-corruption efforts. In addition, improved governance can be supported by good private-sector practices, including responsible business conduct practices.

6.2 Openness and transparency of procurement should be secured to ensure that infrastructure projects are value for money, safe and effective and so that investment is not diverted from its intended use. Transparent, fair, informed and inclusive decision-making, bidding and execution processes are the cornerstone of good infrastructure governance. Greater transparency, including on terms of financing and official support will help ensure equal footing in the procurement process. A wide range of stakeholders such as users, local population, civil society organisations and private sector, should be involved.

6.3 Well-designed and well-functioning governance institutions should be in place to assess financial sustainability of individual projects and prioritise among potential infrastructure projects subject to available overall financing. In addition to project-level financial sustainability, the impact of publicly funded infrastructure projects, and of possible contingent liabilities, on macro-level debt sustainability, needs to be considered and transparent, given that infrastructure investment can have significant impact on public finance. This will contribute to attaining value for money that considers life-cycle cost, promoting fiscal sustainability, saving fiscal space for future potential projects, and crowding in more private investments. A functionally integrated and transparent decision-making framework for infrastructure investments that considers both operation and maintenance and new investments to ensure efficient resource allocation. Contingent liabilities, as defined by the IMF 2019 revised Fiscal Transparency Code, are payment obligations whose timing and amount are contingent on the occurrence of a particular discrete/uncertain future event or series of future events.

6.4 Anti-corruption efforts combined with enhanced transparency should continue to safeguard the integrity of infrastructure investments, which are potentially large-scale, complex, long-term, and with a wide range of stakeholders. Infrastructure projects should have measures in place to mitigate corruption risks at all project stages.

6.5 Access to adequate information and data is an enabling factor to support investment decision-making, project management and evaluation. Access to information and data needs to be available in-country to help undertake cost and benefit analyses, supports government decision-making and policy monitoring, and facilitates project preparation processes and management.