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### Committee on Innovation, Competitiveness and Public-Private Partnerships

#### Working Party on Public-Private Partnerships

##### Third session

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Item 4 of the provisional agenda

**Review of the work since the second session of the Working Party on Public-Private Partnerships on 20-21 November 2018**

### **Draft UNECE/EBRD People-first PPP Model<sup>1</sup> law and commentary**

**Note by the Secretariat<sup>2</sup>**

#### *Background*

At its eighth session in October 2016, the Team of Specialists on PPPs (subsequently replaced by the Working Party on PPPs) agreed to include the drafting of a model PPP/Concession law as one of the standards to be developed by a dedicated Project Team composed of leading international legal experts (ECE/CECI/PPP/2016/2).

In partnership with the European Bank for Reconstruction and Development (EBRD), a Project Team was set up by the Bureau of the then Team of Specialists on PPPs under the leadership of Mr. Christopher Clement-Davies following a call for stakeholder mobilization as envisaged in the process for developing international PPP standards (ECE/CECI/2015/7).<sup>3</sup>

The work on the draft model PPP law started on 14 September 2017 and was concluded on 19 November 2019 when the Project Team leader submitted the draft model PPP law and the commentary to the secretariat for further development. In preparing the texts, the Project

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<sup>1</sup> This is a working title which might be subsequently revised in consultation with key stakeholders.

<sup>2</sup> The draft model PPP law and the commentary are being circulated by the secretariat as received from the Project Team leader with very minor editorial changes.

<sup>3</sup> The process for developing international PPP standards is composed of the following seven stages: 1. Project initiation; 2. Stakeholder mobilisation; 3. Developing the initial draft; 4. Public review; 5. Endorsement (by the Bureau and the Working Party); 6. Approval (by the Committee on Innovation, Competitiveness and PPPs); and 7. Maintenance and Implementation.

Team ensured that the draft model PPP law and the commentaries conform as much as possible to the UNCITRAL model legislative provisions adopted in July 2019.

On 22 November 2019, the draft model PPP law was placed on the UNECE website for a 60-day public review period. The secretariat has sent a notification to the PPP network and other key stakeholders soliciting comments and observations on the draft model PPP law. All comments received by email to [PPP@un.org](mailto:PPP@un.org) during the public review stage will be taken into account in the revised draft that will be submitted to the Bureau of the Working Party in early 2020 for its review and endorsement.

The Working Party is expected to take note of the draft UNECE/EBRD People-first Model PPP law and the commentary and requests the Bureau to submit these documents to the Committee on Innovation, Competitiveness and PPPs for information and guidance at its fourteenth session in March 2020.

The secretariat is grateful to EBRD, the Project Team leader, the team members<sup>4</sup> and the UNCITRAL secretariat for their cooperation and for hosting sessions of the drafting group.

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<sup>4</sup> See Appendix 1

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## I. PREAMBLE

The purpose of this law is to establish the legal framework for “People-first” Public-Private Partnerships (PPPs) and the contracts that give effect to them in [host country], including the rules and procedures governing their selection, preparation, appraisal, procurement and implementation, the contractual principles and institutional arrangements applicable to them, and certain other related matters. This law applies to PPPs, structured on a “People-first” basis, but not to other types of commercial or contractual interface between public and private sectors.

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

This law enshrines and gives effect to the Guiding Principles on People-first Public-Private Partnerships, set out in the document of that title published by the United Nations in 2019<sup>5</sup> (the “People-first PPP Principles”). These principles represent a new vision for PPPs, designed to achieve a range of sustainable development outcomes which are critical to the SDGs and which build on the PPP attributes described above, including the following:

- i. Increased access to essential services and decreased social inequality and injustice;
- ii. Enhanced resilience and responsibility towards environmental sustainability;
- iii. Improved economic effectiveness and sustainability;
- iv. Replicability and the development of further projects; and
- v. Full involvement of all stakeholders in the projects.

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

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<sup>5</sup> “Guiding Principles on People-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals” (ECE/CECI/2019/5).

## II. CHAPTER I GENERAL PROVISIONS

### Article 1. Scope of the Law

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

2. **All PPPs.** This law applies to all forms of PPP, as defined in this law, including those referred to or described as “concessions” or “BOTs,” or under other labels or acronyms, and those that involve a transfer of demand risk to the private partner as well as those that do not,

### Article 2. Key Terms and Definitions

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

- (a) “**Applicable law**” means the laws of [*host country*] in force and effect at the relevant time, including all national, regional and local laws, any regulations or rules made thereunder, laws giving effect to the country’s international obligations and commitments, and any judgments, decrees, orders or injunctions of any court or tribunal having the force of law;
- (b) “**Bidder**” means any legal entity or person (or consortium thereof) participating in a tender organised pursuant to chapter iv and in accordance with its terms;
- (c) “**Closed tender**” means and refers to a tender or selection process where the contracting authority pre-qualifies and/or selects the tenderer(s) permitted to participate by notice and without advertising the tender openly;
- (d) “**Competent body**” means the government, a line ministry, or any public authority either having the legal power and authority under applicable law or specifically authorised by the government under this law or the PPP regulations to perform certain functions in the field of PPPs;
- (e) “**Contracting authority**” means any public authority or other competent body having the requisite legal capacity that enters into (or proposes to enter into) a PPP contract pursuant to this law.
- (f) “**Direct agreement**” means an agreement between the contracting authority and the lenders, typically together with the private partner, setting out the terms on which (amongst other things) the lenders may be entitled to exercise step-in rights, prevent a threatened termination of the PPP contract, receive payments upon its early termination and/or exercise certain other specified rights;
- (g) “**Government**” means the government of [*enacting state*] and includes (where the context so requires) any public authority or competent body performing any function or exercising any power under this law or the PPP regulations;
- (h) “**Implementation resolution**” means a resolution referred to in article 13 confirming a formal decision by a contracting authority to implement a PPP;

- (i) [**"Institutional private partner"** means, in the context of an institutional PPP, any legal entity or person with which the contracting authority concludes a PPP contract in accordance with this law, where such legal entity or person is a joint venture or mixed public-private ownership company (a "jointly owned company"), constituted between a contracting authority or its designated representative (on the one hand) and another private-sector legal entity or person having majority ownership (on the other), with governance arrangements in place which require that the private-sector legal entity or person (and not the contracting authority or its representative) retains control of the jointly owned company];
- (j) [**"Institutional PPP"** or "iPPP" means a PPP where the private partner is an institutional private partner;]
- (k) "**Lender**" means any bank, financial institution or other form of lender that provides or intends to provide debt financing (and/or any related commitments, such as guarantees) to the private partner in connection with a PPP contract;
- (l) "**Official channels**" means the official journal(s) or vehicle(s) of communication used by the government (or any competent body) to publish certain information which it wishes to draw formally to the public's attention, including in connection with tender proceedings it is organising (such as an official gazette or the official government website);
- (m) "**Open public tender**" means and refers to a tender or selection process where the contracting authority pre-qualifies and/or selects the participating tenderers on the basis of responses to one or more public advertisement(s) to which in principle any legal entity or person meeting the specified criteria can respond;
- (n) "**People-first PPP principles**" has the meaning given that expression in the preamble;
- (o) "**PPP contract**" means a mutually binding contract or contracts concluded between the contracting authority and private partner that set(s) forth the terms and conditions for implementing a PPP, in accordance with the requirements and procedures provided by this law;
- (p) "**PPP guidelines**" means any PPP-related guidelines, studies, recommendations or explanatory or advisory papers (or similar documents) issued and published by the government pursuant to article 3 from time to time, but not having binding legal effect;
- (q) "**PPP regulations**" means the regulations applicable to the selection, preparation, appraisal, procurement and implementation of PPPs (and other related matters) made pursuant to article 3 from time to time and having binding legal effect;
- (r) "**Private initiator**" means any legal entity or person (or consortium thereof) that submits an unsolicited proposal to implement a PPP in accordance with **Error! Reference source not found.**Article 14;
- (s) "**Private partner**" means any legal entity or person [(including where applicable an institutional private partner)] retained by the contracting authority to implement a PPP under a PPP contract;
- (t) "**Public authority**" means any local, national or supra-national agency, authority, council, ministry, municipality, department, inspectorate, committee, court, official, or public or statutory person or any other executive, legislative or administrative entity of the government or under its control (or, where the context so permits, any combination of them), including a regulatory agency;

- (u) "**Public infrastructure**" means any (tangible and/or intangible) asset(s) of public interest or benefit used directly or indirectly for or in connection with the provision of public services, including physical facilities and systems;
- (v) "**Public-private partnership**" or "PPP" means an undertaking meeting the criteria and requirements set out in article 4.1, 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;
- (w) "**Public service**" means an activity performed to or for the benefit of the general public or the public good or otherwise in the public interest which is customarily provided by and/or on behalf of public authorities and/or for which a public authority is primarily responsible;
- (x) "**Public-private partnership unit**" or "PPP unit" means the dedicated advisory and administrative body in the area of PPPs established pursuant to article 9, having the functions and responsibilities related to the implementation of PPPs referred to therein;
- (y) "**Regulatory agency**" means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the public infrastructure or the provision of public services to which the PPP relates.
- (z) "**Stakeholder**" in relation to a PPP, means and includes any persons who is or is likely to be involved with or materially affected or impacted by the implementation of the PPP, whether directly or indirectly, positively or negatively, including the contracting authority, other relevant public authorities or competent bodies, the private partner, its owners, investors and lenders, end-users of the relevant public infrastructure and/or beneficiaries of the relevant public services, the owners of property or assets affected by it, other providers of relevant services, and/or households and the wider community (including indigenous peoples) living in or near its place of implementation;
- (aa) "**Sustainable Development Goals**" or "SDGs" means those goals and objectives for sustainable economic and social development for the general good adopted and published by the united nations in the general assembly resolution 70/1 "transforming our world: the 2030 agenda for sustainable development" (A/RES/70/1), united nations, 2015, and in the context of this law specifically refers to those goals and objectives related to PPPs (including the People-first PPP principles) set out therein;
- (bb) "**Unsolicited proposal**" means a proposal for a PPP submitted by the private initiator upon its own initiative to the contracting authority (and/or other relevant competent body) and not in response to a request or solicitation issued by the contracting authority in the context of a selection procedure under this law.
- (cc) "**Value for money**" or "**value for people**", when used in this law, means and refers to the overall, long-term, net value of a PPP to consumers, government, and the broader public, taking into account the long-term quantity and quality of services delivered and whole-life costs to the economy, including fiscal, environmental and social costs, measured in accordance with any detailed methodology (if any) set out in the PPP regulations.



### Article 3. PPP Regulations and Guidelines

1. **Issue.** The Government shall issue the PPP regulations required under this law and may also issue and publish any PPP guidelines it considers appropriate from time to time. The Government may designate one or more competent bodies to issue the same on its behalf.
2. **Purpose.** The purpose of the PPP regulations shall be to give effect to and develop certain aspects of the operation and implementation of this law, whilst the purpose of the PPP guidelines shall be to provide guidance and clarification to both public and private sectors as to its interpretation and workings, as well as to certain aspects of PPP projects in practice.
3. **Revisions and Publicity.** The PPP regulations and guidelines may be revised as necessary by the Government (or any such competent body) from time to time and shall be published through the official channels.
4. **Interpretation.** The provisions of this law should be construed in conjunction with (and subject to) any relevant PPP regulations relating to them (if any) where the context so requires.

### Article 4. PPP Criteria and Fundamental Requirements.

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

- (a) Be long-term in nature (in accordance with Article 8) and implemented on the basis of a contract or contracts, including in particular a PPP contract;
- (b) [Have a minimum initial estimated value (if any) established and calculated in accordance with the relevant criteria and methodology set out in the PPP regulations (but subject always to paragraph 3 below)];
- (c) Involve the design, development, construction, reconstruction/rehabilitation, operation and/or maintenance of public infrastructure and/or relate to the provision of public services or similar services of general interest;
- (d) Involve the long-term participation of a private partner on a risk-bearing basis, and a sharing or allocation of project-related risks as between the public and private partners throughout its term;
- (e) [Involve an element of private finance].

2. **PPP Requirements and Objectives.** Any PPP undertaken in [*host country*] shall comply with all other applicable requirements of this law, including the relevant procedural requirements for the selection, preparation, appraisal, procurement and implementation of PPPs. It shall also be designed and structured to accomplish the relevant public interest purposes and objectives referred to in the Preamble to this law, and in particular to be compatible with and give effect to the relevant People-first PPP Principles.

3. **[Small Projects.** Where the initial value of an individual PPP established in accordance with paragraph 1 b) above does not meet any minimum amount (if any) referred to thereunder, it may nevertheless, where the PPP regulations so provide, be treated as a PPP for the purposes of this law and governed by its relevant provisions, but subject to any special procedures (if any) relating to its preparation, appraisal, procurement and implementation specified therein, either individually or in combination with a ‘bundle’ of other similar projects].

**4. [Institutional PPPs.** The provisions of this law relating to PPPs shall also apply to Institutional PPPs, subject to any further specific conditions or requirements provided for the same in the PPP regulations. In particular, the provisions relating to the private partner and its selection by the contracting authority shall apply to the private-sector legal entity or person [owning and] controlling the institutional private partner, and those relating to the PPP contract shall apply to the contract concluded by the institutional private partner with the contracting authority.]

## **Article 5. Authority to award and enter into PPPs**

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

2. [Alternative 2]. **[Specific.** The following public authorities have the power to enter into PPP contracts for the implementation of PPPs falling within their respective spheres of competence: *[the enacting State lists the relevant public authorities of the host country that may enter into PPP contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof]*

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

## **Article 6. Applicable Sectors and Activities for PPPs**

1. **Permitted Sectors and Activities.** PPPs may be undertaken in [any] [the following] sectors or areas of activity, provided they are consistent with the People-first PPP Principles and are not specifically excluded by this law, any other rule of applicable law or the PPP regulations, [including]:

(a) [Energy (gas, power, electricity and heating), especially projects involving the use of sustainable energy sources and energy efficiency;

(b) Water (water supply, treatment and distribution, wastewater collection and treatment and irrigation systems);

(c) Transportation infrastructure including highways, roads and road structures (such as bridges and tunnels), electric vehicle charging points, railways, metro systems, bus stations and other bus-related infrastructure and services, other public transportation services, airports, ports, weight-control systems and other transportation infrastructure;

(d) Waste collection, processing, recycling and disposal;

(e) Municipal parking and other municipal services;

(f) Postal infrastructure and services;

(g) Telecommunications and digital infrastructure;

- (h) Health care-related infrastructure, including hospitals, clinics, emergency centres and hospices;
  - (i) Education-related infrastructure, including schools, universities, student accommodation, nursery schools and adult-education facilities;
  - (j) Tourism, culture and sport, including stadia, theatres, concert halls, opera houses, other performing arts centres, public sports centres and training facilities;
  - (k) Social housing;
  - (l) Social support facilities, such as centres for the aged and infirm, centres for the homeless or youth-care, and food banks; and
  - (m) Any other sectors and subsectors not specifically excluded by law as aforesaid, subject to the prior approval of the responsible public authority or competent body].
2. **[Prohibited Sectors and Activities.** PPPs may not be undertaken in the following sectors or areas of activity (except where and to the extent that PPP regulations may provide otherwise):
- [list any excluded (if any)]

## **Article 7. Parties to a PPP Contract**

1. **Main Parties.** Subject to paragraphs 2 and 3 below, the parties to a PPP contract are the contracting authority and the private partner.
2. **Acknowledgments.** It is acknowledged that, as parties to the PPP contract, the contracting authority may represent or include more than one public authority and that the private party may have more than one owner or stakeholder (including an owner or stakeholder which may itself be government-owned).
3. **Additional Parties.** The parties to a PPP contract may agree to include other parties to the contract where they deem it necessary to do so (subject to any relevant conditions in the PPP regulations).

## **Article 8. PPP Term**

1. **[Minimum Term.** Every PPP contract shall have a minimum term of [ ] years (or such other minimum term (if any) as may be determined in accordance with the PPP regulations)].
2. **Duration.** The PPP contract shall set forth its duration, which shall take into account the following factors and be limited to the period of time necessary to give effect to them;
  - (a) The purposes and objectives of the PPP identified as part of its appraisal and approval process under Chapter III, taking into account all relevant factors (including public affordability);
  - (b) The contracting authority's needs and requirements in relation to the facilities or services concerned;
  - (c) The nature and amount of investment required to be made by the private partner, including the term of any debt and appropriate returns on equity investments;
  - (d) The normal depreciation period for the permanent physical assets comprised in the PPP.

(e) any relevant policies concerning the competition and market structures for the infrastructure or service sector concerned, as reflected in any applicable laws.

(f) The PPP regulations may set out methodology and criteria for applying these and any other relevant factors to the determination of the contract's duration.

3. **Extension of Term.** The duration of the PPP contract may, in exceptional circumstances specified in the PPP contract, be extended in accordance with its terms for any necessary time period(s), if any, provided for therein, but subject always to any relevant conditions or restrictions in the PPP regulations.

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

### III. CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES

*[Consider including provisions in the law dealing with the respective powers, roles and responsibilities of different ministries and government bodies (including where appropriate parliamentary bodies) relating to the selection, preparation, approval, procurement and implementation of PPPs. These provisions may need to provide for the interface between them and any relevant procedures and processes involved. The purpose of such provisions, where they are necessary, is to provide administrative clarity and to help ensure that PPPs (and any government programmes for them) are properly integrated with the wider public investment process and other relevant decision-making or regulatory mechanisms and plans. In particular, they should be fully integrated with the country's wider strategic vision for infrastructure development, its long-term planning and prioritization processes and associated budgeting arrangements. These should include the country's long-term sustainable development and SDG plans (such as nationally-determined contributions for carbon emissions under the Paris Climate-Change Agreement).*

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

#### **Article 9. Public-Private Partnership Unit and Administrative Coordination**

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

2. **Structure.** The PPP Unit shall be deemed to form part of and be subordinate to the Ministry of [*The host country specifies the relevant ministry*]. The director of the PPP Unit shall be [*state position and ministry*], who shall be responsible for organising and coordinating its activities and day-to-day operations. The PPP Unit shall be appropriately staffed on the basis of a range of skills, expertise and experience (including a grasp of the People-first Principles), with a view to enabling it to perform its functions and responsibilities

effectively and efficiently. A record of its composition and staffing shall be kept up-to-date at all times and publicly available.

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

- (a) [Propose methodologies, procedures and guidelines for structuring and implementing PPPs;
- (b) Assist in implementing and giving effect to the Government's PPP policies;
- (c) Review and comment on proposed policy and strategy changes and refinements relating to PPPs as required by Government;
- (d) Prepare (or assist in preparing) official documentation describing the methodologies, procedures and guidelines referred to above, including for the purposes of their publication, and assist with regularly up-dating them;
- (e) Prepare standard bidding and contract documents for use by contracting authorities;
- (f) Assist the parties to PPPs (and in particular the contracting authorities) as necessary to prepare, appraise, award and implement them in accordance with the requirements of this law, and advise them on the methodologies involved, including the People-first Principles;
- (g) Identify potential improvements and refinements to the structuring and implementation of PPPs, including those related to the People-first Principles, and make recommendations accordingly;
- (h) Exercise such powers of appraisal and approval (and/or coordination of approvals), if any, over aspects of PPPs as may be provided for in this law or the PPP regulations;
- (i) Review and confirm the proper completion of the feasibility study (and other key reports and studies) for individual PPPs and the conformity of preparation work with the law's requirements and procedures, as provided for in this law or the PPP regulations;
- (j) Assist with the coordination and development of individual PPP projects and PPP-related activities;
- (k) Maintain an up-to-date registry of all PPP projects, containing relevant details of their registration and that of the related PPP contracts;
- (l) Act as a point of contact and source of information for parties implementing or seeking to implement PPPs (whether public or private); provide guidance, advice, consultations and/or clarifications to them as necessary;
- (m) Organize and provide training for public sector staff involved in PPPs (including educational sessions and workshops);
- (n) Keep track of the monitoring and oversight by contracting authorities of the implementation of PPPs for which they are responsible;
- (o) Advise the Government on administrative procedures related to PPPs;
- (p) Organise, collate and continually refine and develop a knowledge-base (including an electronic database) of PPP-related know-how, information, guidelines, assessments, research, studies, precedents, model clauses, opinions, methodologies and other documentation to aid the regular progress of PPPs and the PPP sector in [*host country*];

- (q) Ensure that elements of the documentation referred to in this Article are publicly available and/or published as required or appropriate;
- (r) Assist with the constructive resolution of problems and issues during the implementation of PPPs ('trouble-shooting');
- (s) Assist generally with the promotion of PPPs in [*host country*] and public education on the subject;
- (t) Such other functions (if any) as may be provided for in the PPP regulations from time to time.]

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

5. **Administrative Coordination Mechanisms.** The Government shall also be responsible for establishing institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorisations required for the implementation of PPPs in accordance with statutory or regulatory provisions under applicable law on the construction and operation of infrastructure facilities of the type concerned. Provision for any such mechanisms may be set out herein and/or in the PPP regulations.

## Article 10. Information about PPPs

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

2. **Matters Included.** Such information may include the contents of PPP policy papers, the PPP regulations, the PPP guidelines and practice notes, appraisal and evaluation criteria and procedures (including fiscal transparency considerations), the progress of PPPs being implemented, results of tenders, material contractual terms (subject to any confidentiality restrictions), recommended contractual terms and conditions, the 'pipeline' of future PPP projects being planned or considered, the conclusions reached in reviews, studies and reports, the strategic, environmental and social impact assessments for PPPs, and any other matters it considers appropriate.

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

4. **Tender Information.** Where tenders for PPPs take place in accordance with this law, such information containing such detail as the PPP regulations may specify concerning the relevant pre-qualification or tender requirements and results, the names and identities of any pre-qualified, short-listed, preferred or winning bidders, and (where applicable) the grounds on which they have been selected, shall be posted on the official web-site of the contracting

authority and published as required through the official channels without delay, during or following the relevant stage(s) of the tender.

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

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

## IV. CHAPTER III. INITIATION AND PREPARATION OF PPPS

### Article 11. Initiating and Preparing PPPs

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

2. **Initiation of PPPs.** A proposed PPP may be initiated by either the contracting authority or (in the case of unsolicited proposals) its private initiator

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

4. **Meaning and Scope of Preparation.** In this law, the expression “prepare/preparation of a PPP” refers to and includes the detailed initial work of documenting, describing and specifying it, and setting out its principal scope, characteristics and features, in sufficient detail for it to be appraised in accordance with this law, to form an adequate basis for detailed proposals by bidders or a private initiator, and for the procedures hereunder for approving and awarding it to be applied. The detailed aspects of such work (including documentation requirements and applicable appraisal criteria used in accordance with Article 12) and the steps and procedures applicable to them (including review and approval requirements) shall be set out in the PPP regulations, and may differentiate between different types or scale of PPP and different project characteristics.

5. **Feasibility Study.** Except to the extent the PPP regulations provide otherwise, the work of preparing a PPP shall include a comprehensive feasibility study, covering its material elements and aspects, including in particular those referred to in the relevant appraisal criteria set out in Article 12 and showing how those criteria will be satisfied.

6. **Studies to be included.** As part of or in addition to the feasibility study, the work of preparing a PPP shall;

- (a) Assess its anticipated social, economic and environmental impact;
- (b) Identify the technical requirements and expected inputs and deliverables;
- (c) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority;
- (d) Identify the licences, permits or authorisations that may be required in connection with the approval or implementation of the PPP;
- (e) Identify and assess the main project risks and describe the proposed risk allocation under the PPP contract;

(f) Identify any proposed form of Government support needed for the implementation of the PPP;

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

(h) Identify the appropriate procedure for contract award;

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

7. **Review and Approval.** The compliance of such feasibility study and other studies and reports with the relevant appraisal criteria and approval procedures referred to herein shall be subject to review and approval by the PPP Unit or other competent body (if any) authorised for this purpose pursuant to Article 12.2.

8. **Preliminary Studies.** The work of preparing a PPP may include reports prepared (such as pre-feasibility studies) and review procedures applied at earlier stages of preparation than the comprehensive feasibility study referred to in paragraph 5. The appraisal criteria to be applied at any such earlier stage shall be derived from the appraisal criteria set out in Article 12, adjusted as necessary and appropriate to suit the more preliminary nature of the information available at such stage.

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

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

## **Article 12. Appraisal and Approval Procedures**

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

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

(a) Ascertaining whether a proposed PPP is worthwhile being carried out as a PPP;

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



- (c) Confirming that the PPP meets the specific appraisal criteria applicable to it;
- (d) Reviewing the contracting authority's capability for carrying out the proposed PPP and making appropriate recommendations;
- (e) [reviewing [and approving] the draft tender documents prepared by the contracting authority to ensure conformity with the approved proposal]. ]

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

- (f) [the PPP's compliance with the criteria and requirements set out in Article 4;
- (g) In particular, the PPP's anticipated socio-economic and public-service net benefits (including the inclusivity and accessibility thereof) and the extent to which they satisfy and advance the People-first PPP Principles and the wider public good;
- (h) The extent and urgency of the need and demand for the PPP;
- (i) The PPP's alignment with the Government's wider sector objectives, plans and strategies for infrastructure and economic development;
- (j) Its commercial and financial viability;
- (k) Its technical feasibility and strengths (including implementation timescales);
- (l) Its legal, regulatory and institutional viability;
- (m) Its environmental and social sustainability and impact manageability, taking account of its long-term resilience and adaptability;
- (n) The cost-effectiveness, acceptability and affordability of the PPP for both users (including vulnerable groups), on the one hand, and the host country from a budgeting/fiscal and sustainable debt perspective, on the other;
- (o) The need and scope for any anticipated public sector payments, finance, guarantees or other support for the PPP;
- (p) The appropriateness of the PPP's proposed (preliminary) risk-allocation and incentive profile;
- (q) The cost effectiveness and value-for-money of implementing the project on a PPP basis relative to other procurement methods;
- (r) Generally, the extent to which the PPP is expected to meet the purposes and objectives set out for it in the documents drawn up as part of its definition and preparation under Article 11;
- (s) Any other relevant requirements of applicable law relating to public investments;
- (t) [any other appropriate criteria (if any), consistent with the foregoing as may be specified from time to time in the PPP regulations].]

4. **Matters included in Appraisals.** In appraising the PPP, due regard shall be had (inter alia) to the contents of the feasibility study and any related reports prepared under Article 11 and the extent to which it/they demonstrate(s) compliance with the applicable appraisal criteria, as reviewed and certified by the PPP unit or other competent body. Due regard shall also be had to the results of all public consultations and/or public hearings which have taken place at that stage of the appraisal process in relation to the PPP in accordance with Article 11.9.

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

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

### **Article 13. PPP Implementation Resolutions**

1. **Issue of Resolution.** Where a proposed PPP has complied with the applicable appraisal criteria and approval procedures referred to above, and a decision has accordingly been made by the contracting authority to implement it, a formal resolution to that effect shall be issued by the contracting authority ('implementation resolution').

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

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

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

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

(d) A summary of the material conclusions reached about the PPP pursuant to the appraisal and approval process carried out in accordance with Article 12, identifying the key criteria applied in reaching them, including in particular the extent to which the PPP is expected to satisfy and advance the People-first PPP Principles, the public benefits or goods expected to result therefrom, and the principal results of the feasibility study prepared in accordance with Article 11.5;

(e) The rationale for implementing the project in question as a PPP, as opposed to another form of procurement, certifying the contracting authority's belief that the proposed PPP structure is the most appropriate basis for implementing it;

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

(g) The anticipated (approximate) amount and nature of any public funding or other public support (such as guarantees) expected to be used;

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

(i) A summary description of the consultation procedures held pursuant to Article 11.9, the material issues raised, and the conclusions reached in response to them, as well as of the mechanisms available to stakeholders for addressing objections and grievances to the PPP;

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

3. **Publication and Copies.** The implementation resolution shall (subject to any exceptions permitted by this law) be published on the official website of the contracting

authority and in the official channels. In the case of an unsolicited proposal, it shall also be notified and copied to the private initiator. Where a competitive tender is being held pursuant to Chapter IV, a copy of the implementation resolution shall be included with the tender documents released to bidders.

## **Article 14. Unsolicited Proposals**

1. **Initiation.** A private initiator seeking to implement an unsolicited proposal for a PPP may at any time define and submit its proposal in preliminary form to the relevant contracting authority (and any other competent body authorised by the PPP regulations to receive such proposals), which shall have a discretionary power to consider and review it. An unsolicited proposal shall only be deemed eligible for consideration and review if it does not already appear in selection procedures that have been announced or a plan or pipeline of future PPPs developed on behalf of the contracting authority or the Government.
2. **Preliminary.** The preliminary unsolicited proposal shall describe the proposed PPP in sufficient detail to enable it to be given a preliminary review by the contracting authority (and any such other competent body) and shall be accompanied by all documents necessary for this purpose. The contracting authority (and any such other competent body) shall carry out any preliminary review of the proposal that it decides to make, reach a preliminary decision about whether or not it is considered to be potentially in the public interest and intends to proceed further with it, and notify the private initiator accordingly.
3. **‘Open Door’.** The private initiator may enter into discussions and an exchange of information at any time regarding the proposed PPP with the relevant contracting authority.
4. **Detailed Preparation.** Following a preliminary decision to proceed further with the unsolicited proposal, the detailed work of preparation of the PPP shall then be carried out in accordance with the requirements of Article 11, by either the contracting authority, the private initiator, or both of them jointly (as the contracting authority may specify). To this end, the contracting authority shall invite the private initiator to submit as much information on the proposed PPP as is feasible at this stage to allow the contracting authority (and any other relevant competent body) to make a proper evaluation of the private initiator’s qualifications and the technical and commercial feasibility of the PPP, and to determine whether the PPP is likely to be successfully implemented in the manner proposed on terms acceptable to the contracting authority (and any other relevant competent body). For this purpose, the private initiator shall, if and to the extent reasonably required by the contracting authority, submit a technical and commercial feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.
5. **Protection of Private Initiator’s Rights.** In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the unsolicited proposal. It shall therefore not make use of information provided by or on behalf of the private initiator in connection therewith other than for the evaluation of that proposal, except with the consent of the private initiator, and shall, if the proposal is rejected, return to the private initiator all documents prepared and submitted by it during the evaluation process.
6. **Review, Appraisal and Implementation Decision.** The contracting authority (and/or any such other competent body) shall then arrange for a review and appraisal of the unsolicited proposal to be carried out in accordance with Article 12 and shall reach a final decision about whether or not the PPP should be implemented, either on the original terms proposed or on other terms modified from the original (discussed as necessary with the private initiator during the review and appraisal process), and shall notify the private initiator

accordingly. If a decision is made to implement it, an implementation resolution to that effect shall be issued and published by the contracting authority in accordance with Article 13. The provisions of Article 21 shall then apply.

## V. CHAPTER IV. SELECTION OF PRIVATE PARTNER

### Article 15. Procedures for Selection of Private Partner

1. **Competitive Tenders Standard.** The contracting authority shall select the private partner for a PPP on the basis of a competitive tender as set out in Articles 15 – 20, save only where applicable law permits otherwise, including in the case of unsolicited proposals under Article 21 (to the extent provided therein) and direct negotiations as set out in **Error! Reference source not found.**

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

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

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

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

(b) **Tender Evaluation and Contract Award:** value propositions, technical quality (including soundness and innovativeness) of proposal, quality of services and measures to ensure their continuity, operational feasibility, relevant environmental and socio-economic criteria, risk allocation, pricing terms (including the value of the proposed tolls, and tariffs, fees or contracting authority payments, as the case may be, evaluated on an appropriate basis), other commercial terms, costs (whether capital or operational), the nature and extent of any public sector support sort, qualifications to terms and conditions of contract, structure and quality of management team, strengths of financial plan and availability of committed finance;

together with such other matters as may be specified in the PPP regulations from time to time. The tender criteria and evaluation methodology shall be clear, transparent, non-discriminatory, reasonably appropriate for each PPP and consistent with the criteria applied and conclusions reached in appraising and approving the PPP pursuant to Article 12 (as reflected in the its implementation resolution).

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

## **Article 16. Tender Structures and Procedures: General**

1. **Choice of Tender Structure.** The detailed aspects of the tender process to be used for the award of each PPP shall be decided by the contracting authority (subject to Article 15) and set out in the tender documents prepared and made available to potential bidders in accordance with Article 17. They shall also be summarised in the public announcement of the tender.

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

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

4. **Eligible Participants.** Participants in tenders can in principle be any persons with legal capacity (whether domestic or foreign) under applicable law, including companies, partnerships and natural persons, or combinations or consortia of such persons, but subject always to any relevant restrictions under this law or the PPP regulations as to such participation.

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

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

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

8. **Tender Security.** The tender documents may require the provision of tender security, such as bid bonds, by the bidders, in an amount and on terms which are reasonable in the circumstances. In that event, the tender documents shall precisely specify the circumstances

in which any such tender security may be forfeited by bidders. A bidder shall not forfeit its bid security in any circumstances other than those specified.

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

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

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

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

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

## **Article 17. Tender Documents, Requirements and Information**

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

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

(b) An indication of other essential elements of the PPP that need to be identified at the relevant stage of the tender process, such as the services to be delivered by the private partner, the financial and commercial arrangements envisaged by the contracting authority

(such as payment mechanisms and funding sources) and the nature and extent of any public sector support to be provided to the PPP;

- (c) A comprehensive and precise description of the applicable tender procedures;
- (d) Project specifications and key performance indicators (“kpis”), as appropriate, including the contracting authority’s requirements regarding safety and security standards, environmental protection and the People-first Principles;
- (e) A draft of the PPP contract or, where preparing a full draft would not be practicable in the circumstances, a summary containing the main proposed terms and conditions and reflecting the allocation of key risks, including an indication of which terms, if any, are deemed to be non-negotiable;
- (f) The detailed tender criteria and methodology, including relative importance or weighting, to be applied to the pre-qualification (if any) of bidders, the evaluation of bids and proposals and the final selection of the private partner and award of the PPP contract; and any relevant thresholds, if any, set by the contracting authority for identifying non-responsive proposals;

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

3. **Amendments to Tender Documents.** The contracting authority may, save where this law or the PPP regulations provide otherwise, and whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise or amend any element of the tender documentation or the request for proposals during the tender process, including the draft PPP contract, provided it notifies all bidders of any such amendments without delay. The deadline for the submission of proposals shall be prolonged as necessary to allow time for any such amendments and any responses to them. The contracting authority shall indicate in its record of the selection proceedings to be kept pursuant to this law the justification for any such revision or amendment.

4. **[Review of Tender Documents.** The tender documents shall be subject to the review [and approval] of the PPP Unit or other competent body as provided in Article 12.2].

## Article 18. Tender Committee

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

2. **Members.** The tender committee shall have an odd number of members. The contracting authority (and/or other competent body, as aforesaid) shall appoint its chairman and deputy chairman. Other members shall be appointed as required by the PPP regulations.

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

4. **Records.** The tender committee shall document the tender process and evaluation in reasonable detail and give reasons for its selection and award decisions.
5. **Interpretation.** References in this Chapter IV to the contracting authority may be construed as including references to the tender committee where the context so requires.

## Article 19. Tender Stages

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

- (a) Tender announcement and request for expressions of interest and/or pre-qualification submissions;
- (b) Expressions of interest and/or pre-qualification submissions and short-listing of bidders;
- (c) Formal invitation to tender (one or two-stage);
- (d) Preparation and submission of tender proposals (one or two-stage);
- (e) Evaluation of tender proposals and selection of the winning or preferred bidder;
- (f) Finalisation of the terms and conditions of the PPP contract and all other required aspects of the PPP with the winning or preferred bidder; and
- (g) Award and conclusion of the PPP contract.

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

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

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

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

- (a) The invitation to participate in the pre-qualification proceedings shall be published in accordance with the requirements of the PPP regulations, containing all such information required thereby as may be necessary to enable bidders to submit responsive applications by the specified deadline;
- (b) The contracting authority shall make a decision with respect to the qualifications of each bidder that has applied for pre-qualification, based on the criteria specified in the invitation to participate, and shall then invite all pre-qualified bidders to submit proposals for the PPP in accordance with the tender procedures and requirements.
- (c) Where the contracting authority has reserved the right in the invitation to participate to request proposals from only a limited number of bidders that best meet the pre-qualification criteria, it shall rate the bidders accordingly and draw up a short-list of bidders



that will be invited to submit proposals, up to the maximum number specified (but at least three, if possible). Those bidders shall then be invited to submit proposals for the PPP in accordance with the tender procedures and requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Following the dialogue, the contracting authority shall request all bidders who have not withdrawn from the process to present their best and final offers with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place and deadline for presenting best and final offers. Unless the PPP regulations and the tender documents otherwise permit, no negotiations shall take place between the contracting authority and the bidders with respect to their best and final offers;

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

## **Article 20. Conclusion of the PPP Contract**

1. **Winning Bidder.** The winning bidder shall be the bidder which the contracting authority and/or the tender committee determine(s), at the conclusion of the tender process,

has submitted the most favourable compliant bid according to the evaluation criteria and methodology laid down in the tender documents.

2. **PPP Contract Signatories.** The PPP contract (once agreed) shall be entered into by the contracting authority with the winning bidder (or with another private legal entity established by it for this purpose), which shall become the private partner in the PPP for the purposes of this law. Any such other private legal entity established by the winning bidder shall meet any formal or substantive requirements for such entity specified by the tender documents or otherwise agreed with the contracting authority. The PPP contract may contain provisions relating to the establishment and capitalisation of any such legal entity and any approvals required from the contracting authority to its structure, ownership, corporate documentation (including its statute and by-laws) and material changes to them.

3. **Publication of Contract Award.** The contracting authority shall cause a notice of the contract award to be posted on its official web-site and published through the official channels in accordance with the requirements of Article 10.4. The notice shall identify the private partner and include a summary of the essential terms of the PPP contract (subject to any applicable confidentiality restrictions).

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

## **Article 21. Conclusion of PPP Contract for Unsolicited Proposals**

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

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

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

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

summarising and describing the proposed PPP as appropriate, and invite further expressions of interest.

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

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

(a) An adjustment to the evaluation score of the private initiator under the tender documentation (in an amount pre-determined before issue of the tender documents); and/or

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

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

## Article 22. Direct Negotiations

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

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

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

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

(d) Where the proposed PPP is of short duration (especially one below any minimum referred to in Article 8.1) and its anticipated initial investment value does not meet or exceed the figure (if any) referred to in Article 4.1(b);

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

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

2. **Procedures Applicable to Direct Negotiation.** The detailed procedures, requirements and conditions applicable to any such direct negotiations, including in the case of unsolicited proposals under Article 21.2, shall be specified in the PPP regulations, including in relation to any approvals required by another competent body for the use of the

same, the monitoring by and reporting back to Government of their progress and the terms and efficacy of any PPP implemented as a result.

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

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

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

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

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

### **Article 23. Review and Challenge Procedures**

1. **Remedies for Public Authority Breach.** Any bidder or potential private partner that claims it has suffered or may suffer loss or injury as a result of any alleged breach or non-compliance of a decision or action of the contracting authority or other competent body or with the requirements of this law, the PPP regulations or any other relevant applicable law, in connection with the selection, preparation, appraisal, procurement or implementation of a PPP, may challenge the decision or action concerned and pursue any available remedies in accordance with the relevant review and appeal procedures provided by this law or otherwise under applicable law. The PPP regulations may provide specifically for such procedures.

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

3. **Other Procedures to allow for Interim Measures.** The PPP regulations shall aim to ensure that the detailed procedures drawn up under this law (including Article 12.5), for the purposes of selection, preparation, appraisal, procurement and implementation of PPPs, shall provide for sufficient time, following the taking of key decisions or the issue of key approvals or resolutions thereunder, to allow for the interim or interlocutory measures and steps referred to in paragraph 2 above to be taken.

## VI. CHAPTER V. PPP CONTRACTS

### Article 24. Main Terms and Conditions of PPP Contracts

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

- (a) The parties to the PPP contract;
- (b) The subject matter of the PPP contract, including the nature and scope of works to be performed and services to be supplied and the public infrastructure and/or the public services to which it relates;
- (c) The (relevant) technical and economic characteristics and requirements of the public infrastructure comprised in the PPP;
- (d) The specific rights and obligations of the parties in relation to the PPP's implementation, including the nature and extent of exclusivity, if any, of the private partner's rights;
- (e) Any conditions precedent to the parties' rights and obligations (in whole or part);
- (f) The duration of the PPP contract and any mechanism for extending it (subject to Article 8);
- (g) Applicable performance levels, volumes and/or standards for the works, good and/or services to be provided by the private partner, including Key Performance Indicators (kpis) and guarantees, and any obligations of the private partner to modify public service levels to meet actual demand and ensure its continuity and provision under essentially the same conditions for all users;
- (h) Any performance penalties payable by the private partner for failing to meet the requisite performance levels, volumes and/or standards;
- (i) The private partner's rights (if any) to charge third parties (including end users) for its works, goods and/or services, any conditions applicable thereto (such as the amounts and methods of payment), any mechanisms for revising or modalities for varying them, and provision for any public subsidy where applicable;
- (j) Any payments (if any) to be made to the private partner by the contracting authority and/or any other public authority for its works, goods and/or services (such as availability payments, 'shadow tolls', output-based payments, other types of performance-based payment, off-take payments or otherwise), the methods and formulae for calculating them, any other conditions applicable thereto, any mechanisms for revising or modalities for varying them, any relevant cost breakdowns and the applicable payment procedures;
- (k) Any payments to be made by the private partner to the contracting authority (or the Government) for the PPP (whether lump sum, regular, periodic or otherwise), including PPP fees and (where applicable) revenue sharing, and/or its obligations to collect tariffs on behalf of the Government;
- (l) Any requirements relating to the incorporation of the private partner (including a special-purpose vehicle formed in accordance with this law) and its corporate structure and capitalisation, and to subsequent changes to them;

- (m) The nature of and responsibility for funding and/or financing the PPP (whether by means of public support, private finance, debt, equity and/or other sources);
- (n) Responsibility for obtaining relevant licenses, permits and consents from other public authorities and/or assisting with the processes involved;
- (o) Coordination of activities comprised in the PPP with other public authorities;
- (p) Procedures for regular interfacing and co-operation between the parties, with a view to promoting collaboration and the amicable resolution of potential differences and disputes;
- (q) Applicable design and construction (or reconstruction/ rehabilitation) obligations, requirements and procedures;
- (r) Applicable operational and maintenance obligations, requirements and procedures;
- (s) Time periods for performance of specific obligations (and any mechanisms for extending them);
- (t) Procedures for determining or certifying completion of specific obligations;
- (u) Responsibilities for acquisition, transfer, use and maintenance of the site for the PPP and access to it, including any easements;
- (v) Responsibilities for protecting and securing the PPP and the site;
- (w) The nature and allocation of property rights and interests relating to the PPP, the site and the assets it comprises (including any assets which the private partner may be allowed to own outright or indefinitely);
- (x) The nature of any supporting infrastructure, transport linkages and/or utility supplies, and responsibility for their provisions and maintenance;
- (y) Development and use of facilities ancillary or incidental to the PPP and any revenues generated from them;
- (z) Employment and labour-related (including 'local content') requirements;
- (aa) Compliance with applicable laws;
- (bb) The monitoring, review, inspection and approval rights and powers of the contracting authority throughout the term of the PPP contract;
- (cc) Information-provision and reporting responsibilities and procedures;
- (dd) Obligations of each of the parties to engage with stakeholders and address their legitimate grievances through appropriate grievance mechanisms;
- (ee) Sub-contracting and the private partner's responsibility and liability for its sub-contractors;
- (ff) Any 'step-in rights' (as defined in Article 29) granted to the contracting authority;
- (gg) Any 'step-in rights' (defined as aforesaid) granted to the private partner's lenders;
- (hh) The private partner's rights to grant financial security interests in and over its PPP-related assets and rights;
- (ii) Ownership and use of intellectual property;
- (jj) Confidentiality;

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

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

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

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

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

(pp) Insurance requirements (including if relevant insurance relating to climate-change events);

(qq) Environmental and social obligations, including any specific requirements relating to the SDGs and the People-first PPP Principles, together with obligations to manage, monitor and report on relevant impacts and to implement corrective actions as necessary throughout the life of the project;

(rr) Governing law and dispute-resolution mechanisms;

(ss) Liability and indemnities;

(tt) Waivers of sovereign immunity;

(uu) Representations and warranties;

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

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

## **Article 25. Conclusion, Amendment and Termination of PPP Contracts**

1. **Conclusion of Contract.** The PPP contract for any PPP shall be concluded by the contracting authority with the private partner selected on the basis of Chapter IV of this law, together with any other person(s) whom they agree shall be a party to it.

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

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



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

(b) [ALTERNATIVE 2: In particular, any amendment or modification (other than one already provided for in clear and precise terms in the contract) which would render the contract substantially different in character from the one initially concluded shall require the approval or endorsement of the competent body designated for this purpose (if any) herein or in the PPP regulations before such amendment or modification becomes effective. An amendment or modification shall be deemed to be substantial where it meets one or more of the following conditions:

- (i.) The total value of the remuneration of the private partner resulting from the amendment would exceed [ ] per cent of the total value of all remuneration which the private partner is expected and entitled to receive from the PPP over its term, assessed on a comparable, present value basis. Where several successive amendments or modifications are made, such value shall be assessed on the basis of the net cumulative value of the successive modifications, over a period of [ ][months/years];
- (ii.) The modification introduces conditions which, had they been part of the initial contract award procedure for the PPP, would have allowed for the admission of bidders other than those initially selected or for the acceptance of a proposal other than that originally accepted or would have attracted additional participants in the contract award procedure;
- (iii.) The modification extends the scope of the works to be carried out and/or services to be supplied by the private partner under the contract by more than [ ] per cent;
- (iv.) Where a new private partner replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under this law].

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

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

- (a) The fair value of any assets transferred to the contracting authority;
- (b) Appropriate compensation for the value of equity investments in the PPP and/or the returns expected by equity investors over the term of the agreement;
- (c) Amounts necessary to discharge outstanding debt obligations at the time of termination;
- (d) Compensation for costs and losses suffered by either party as a result of early termination, including lost profits;
- (e) The amount of any outstanding liabilities of either party at the time of its termination.

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

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

- (a) Mechanisms and procedures for the transfer of assets to the contracting authority;
- (b) The compensation to which the private partner may be entitled in respect of assets transferred to the contracting authority or to a new private partner or purchased by the contracting authority;
- (c) The transfer of technology required for the operation and maintenance of the PPP;
- (d) The training of the contracting authority's personnel or of a successor private partner in the operation and maintenance of the PPP;
- (e) The provision, by the private partner, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the PPP to the contracting authority or to a successor private partner;
- (f) Mechanisms and procedures for the decommissioning of the PPP, including the preparation of a decommissioning plan, the parties' respective obligations for carrying it out and their financial obligations in that respect.

## **Article 26. Property and Related Matters**

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

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

3. **Transfer of Contracting Authority Property.** The contracting authority shall be entitled to transfer to the private partner the use and occupation (with or without ownership)

of any available real property in its possession and/or under its control or operational management and which it is not precluded by law from transferring, including public infrastructure and any related land, buildings or similar property, which is needed for the purposes of the PPP, in accordance with the terms of the PPP contract and any related documents.

4. **No Further Tenders.** It shall not be necessary to conduct a separate tender in connection with the provision of any property or assets referred to in this Article in accordance with the terms of a PPP contract.

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

- (a) Acquire or obtain the same by agreement with the relevant third parties;
- (b) Arrange for their compulsory acquisition or alienation in accordance with applicable law (and subject always to the requirements thereof, including as to appropriate planning, consultation, compensation, relocation and monitoring duties); and/or
- (c) Otherwise acquire or procure such other legal rights over and to such assets in accordance with applicable law

as may be necessary for the purposes of the PPP and the discharge of its responsibilities under this Article 26.

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

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

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

## **Article 27. Types of Payment under PPP Contracts**

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

- (a) Payments from end users, such as tolls, tariffs, fees and other forms of usage or 'direct user' payments, subject to any applicable legal or regulatory restrictions;
- (b) Payments from the contracting authority to the private partner, such as availability payments, other performance-based payments, shadow tolls, capacity payments, off-take payments, subsidies and other forms of regular or periodic payment or 'revenue stream', subject to any applicable legal or regulatory restrictions;
- (c) Any other legally available and permissible forms and types of payment

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

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

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

## **Article 28. Liability of Parties to the PPP Contract**

1. **General.** The parties to the PPP contract shall have such liability for any breach of its provisions and be subject to such remedies (including damages and penalties) as may be provided for under its terms and/ or applicable law.
2. **Specified Remedies.** Any remedies specifically provided for in the PPP contract shall not be deemed to be exclusive or exhaustive except to the extent that the agreement expressly provides otherwise.
3. **Sub-Contracts etc.** The private partner shall be entitled to sub-contract, sub-lease or sub-license its rights and obligations under the PPP contract to third parties in accordance with the terms of the contract and shall have such liability for the acts and omissions of any such third parties as may be provided thereunder.

## **Article 29. Step-in Rights and Substitution of Parties to the PPP Contract**

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

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

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

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

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

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

## VII. CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES

### Article 30. Protection of Parties' Interests under the PPP Contract: Miscellaneous

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

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

3. **No Undue Interference.** The contracting authority shall not take any steps or measures which would have the effect of unduly interfering with, obstructing or prejudicing the private partner's freedom to control and manage the assets and activities comprised in the PPP and to exercise its rights and perform its obligations thereunder, including its rights to receive and enjoy the revenues and returns on investment properly derived therefrom, save only as permitted by the express terms of the PPP contract and/or applicable law.

4. **Adequate Returns from Payments.** The parties to the PPP contract shall be entitled to agree on and include such payment terms, and such mechanisms for revising and adjusting them from time to time, as can be reasonably expected to provide adequate compensation and returns to the private partner (and its investors and lenders) for its (and their) costs, expenses, investments and commitments in connection with the implementation of the PPP, based upon the efficient performance of the private partner in accordance with the contract's terms [notwithstanding that any regulated tariffs or prices payable in [*host country*] for the works, goods or services comprised in the PPP may not otherwise ensure such adequate compensation].

5. **Exceptional Events.** PPP contract may also contain such provisions as the parties thereto may agree identifying or listing certain types of 'special event', including changes in

law, *force majeure* or other exceptional events, which may trigger certain consequences under the contract designed to protect the party affected by such event and compensate it for the costs or losses sustained as a result, including financial or economic costs or losses, such as:

- (a) Relief from liability of a party prevented from performing its obligations under the agreement;
- (b) Amendments to the terms of the PPP contract, including (by way of illustration) amendments changing the scope of work, the time for performance, applicable standards or the contract's duration;
- (c) Adjustments to charging and payment rates, amounts and levels;
- (d) Obligations to provide financial compensation;
- (e) Unilateral rights of early termination of the PPP contract and the payment of related compensation.

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

## **Article 31. Government and Public Support for PPPs**

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

- (a) Any of the forms of payment referred to in Article 27
- (b) Construction and/or operational grants;
- (c) Subsidies;
- (d) Contributions of physical assets and property;
- (e) Guarantees and incentives, including guarantees of PPP revenues, whether from end users, off-takers or otherwise;
- (f) Guarantees of minimum quantities of off-take or consumption by the contracting authority;
- (g) State or municipal financial guarantees;
- (h) Loans and other forms of funding or investment;
- (i) Compensation or direct responsibility for certain types of costs and risks;
- (j) Tax and customs benefits and exemptions;
- (k) Other guarantees and/or indemnities and/or incentives.

2. **Support to be Compliant.** Any such support, assets and/or commitments must be consistent with the appraisal and approval criteria applied under Article 12, the implementation resolution and the tender documents for the PPP for which they are to be

used. The terms and conditions applicable to any such support, assets and/or commitments shall be set out in the PPP contract (and/or in any related agreement).

## **Article 32. Protection of Lenders' and Investors' Rights and Interests**

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

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

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

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

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

## **Article 33. Protection of End Users and the General Public**

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

2. **Grievance Procedures.** Such procedures shall provide as appropriate for the adoption of suitable mechanisms for lodging formal objections or other complaints or grievances by

members of the general public and end users to or about any aspect of such implementation by which they may be materially adversely affected, including where appropriate a regulatory or parliamentary ombudsman procedure. No such mechanisms shall in any manner limit or prejudice any other rights and remedies available to such members of the general public or end users under applicable law in relation to any PPP or its selection, preparation, appraisal, procurement or implementation. Any such procedures shall take account as appropriate of such other rights and remedies.

3. **Private Partner's Operational Grievance Mechanism.** Where the PPP involves the provision by the private partner of services to the public or the operation of infrastructure facilities accessible to the public, the contracting authority shall require the private partner to establish simplified and efficient mechanisms for handling claims submitted by the members of the public receiving the services or using the infrastructure facility, as well as other parties affected by the PPP. The PPP contract shall provide for any such requirements. The private partner shall maintain accurate and complete records of the operation of any such mechanisms and the claims submitted and handled thereunder.

4. **Public Services: Specific Provisions.** Where the PPP involves or relates to the provision by the private partner of services to the public, the PPP contract shall, if necessary and as appropriate (in accordance *inter alia* with any applicable requirements of the relevant regulatory body), set forth the nature and extent of any obligations of the private partner, over the term of the contract, to ensure:

- (a) Any necessary modifications of or adjustments to the services so as to meet changing demands for them;
- (b) The continuity of the services;
- (c) The provision of the services under essentially the same conditions for all users;
- (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network or system operated by the private partner in connection therewith.

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

## VIII. CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION

### Article 34. Governing Law

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

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



## Article 35. Dispute Resolution

1. **Dispute Resolution Mechanisms as agreed.** Any differences or disputes arising out of the contracts or documents relating to a PPP shall be resolved or settled through the mechanisms, processes and procedures agreed by the parties thereto, but subject always to any specific requirements relating thereto under applicable law.
2. **Freedom of Choice.** The parties to such contracts and documents may (subject as aforesaid) freely choose the mechanisms, processes and procedures for resolving such differences or disputes, including mediation, binding or non-binding expert appraisal or determination, national or international commercial arbitration or investment arbitration, and the procedural rules relating to the same.
3. **Waiver of Sovereign Immunity.** The contracting authority shall not to be entitled to any state or sovereign immunity in relation to any differences or disputes under any such contract or document which it has properly agreed to waive thereunder.

## IX. CHAPTER VIII. IMPLEMENTATION AND MONITORING OF PPPs

### Article 36. Monitoring and Reporting on the Implementation of PPPs

1. **Supervision by Contracting Authority.** Subject to the terms of the relevant PPP contract, the contracting authority shall be entitled to exercise such powers of supervision and monitoring of any PPP as may be necessary to satisfy itself that it is being implemented in accordance with its terms, including by means of regular reports, reasonable access to the site and physical assets comprised in it, access to and copies of any documentation relating to it and independent audits.
2. **Contracting Authority Reports.** Each contracting authority shall prepare regular reports on the implementation of the PPPs for which it is responsible, as required by the PPP regulations or otherwise by the Government from time to time, which shall be made available to the Government and copied where required to the PPP Unit. Copies of all such reports shall generally be publicly available.
3. **Additional Information.** Each contracting authority shall also provide any additional specific information to the Government and/or the PPP Unit as it may reasonably require from time to time in relation to the implementation of any PPPs for which such contracting authority is responsible.
4. **Contracting Authority Records.** Each contracting authority shall maintain accurate and complete records in reasonable detail of the procedures followed, decisions made, and conclusions reached by it in connection with the identification, selection, preparation, procurement and implementation of any PPP for which it is responsible.

### Article 37. PPP Database and Register

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

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

## X. CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS

### Article 38. Entry into Force

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

2. **Monitoring Antecedent Projects.** The Government shall be entitled to require that any existing PPPs (or equivalent or similar projects) implemented before the date of entry into force of this law become subject to the monitoring and reporting requirements provided for in Article 36 (but without limiting any rights of cost recovery that the parties to any relevant agreements may have as a result of meeting any such requirements).

### Article 39. Legislative Acts to be Invalidated upon Entry into Force of this Law

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

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

### Article 40. Consequential Revisions to Existing Legislation

1. **Disapplication of Specific Laws.** The provisions of the following laws shall not apply to PPPs awarded or implemented after the date of entry into force of this law pursuant to Article 38 above, subject to the additional qualifications specified below:

[SPECIFY]

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

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

[ENACTMENT FORMALITIES TO BE SET OUT BELOW]

## **Annex I**

### **Draft UNECE/EBRD People-first Model PPP Law**

#### **Introduction and commentary**

##### **I. Preface**

This document is a supporting commentary on the draft UNECE/EBRD People-first Model PPP Law (the ‘Model Law’). It contains short summaries of its articles and provisions, together with brief explanations of the thinking behind them and some discussion of the issues they typically give rise to in practice. The Model Law is designed to be read and understood on its own terms, however. Its provisions should be clear and largely self-explanatory. This commentary provides some additional elucidation of its text, where this might be helpful, written in non-legal language, but does not attempt to re-state every one of its provisions.

The Model Law has been drawn up as part of the wide-ranging corpus of guidance documents, modules and studies on the subject of Public-Private Partnerships (‘PPPs’) currently being produced on behalf of both the United Nations Economic Commission for Europe (‘UNECE’) and the Legal Transition Programme within the European Bank for Reconstruction and Development (EBRD), to assist the governments seeking to create or develop PPP systems of their own, especially those doing so for the first time. These documents cover a wide range of subjects in the PPP area, with a view to promoting a deeper understanding of the structures and issues involved. Further information can be found on the UNECE and EBRD websites.

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

Many PPP laws have been adopted by different countries around the world in the past few years<sup>6</sup>. Others are now doing so or planning to do so. However, there is still a considerable disparity in the quality of those laws already in place around the world. Some constitute extremely well thought-out and structured ones, others rather less so. Moreover, most of these laws do not yet take into account the challenges that have arisen in attracting private business to infrastructure in connection with the adoption of the UN Sustainable Development Goals,

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<sup>6</sup> See for example the periodic studies and assessments carried out in this field by the EBRD in relation to its countries of operation, available on its website.

and in particular their ‘People-first PPP Principles’.<sup>7</sup> In the authors’ view, this reinforces the case for publishing a new PPP Model Law.

In drawing up this Model Law, the authors have made extensive use of those existing laws which they believe represent leading precedents and international best practice in this field<sup>8</sup>. On the one hand, the availability of these documents has made the production of a Model Law based on them readily feasible; on the other, the number of countries still seeking to enact new or revised legislation of this kind provides a clear justification for publishing a model, in terms of offering further available guidance.

Moreover, UNCITRAL have recently revised and finalised their own Legislative PPP Guide (with template clauses) on this subject, which has been a leading authoritative text in this field for the past 20 years<sup>9</sup>. The authors of the Model PPP Law have drawn heavily and fruitfully on both the existing published UNCITRAL clauses-and their recent revisions<sup>10</sup> in structuring and wording its provisions, which cover a good deal of the same ground and are designed to be generally compatible with them. Many of the same concepts and much of the same phraseology has been used where possible. The documents are accordingly very similar and, we believe, wholly consistent. Any differences between them come down largely to the individual judgment and style of the different authors behind them, and the slightly different approaches taken to their production, in particular the fact that the Model PPP Law is a joint UNECE-EBRD exercise. It is also worth remembering (see further below) that there is no single perfect provision for any model law, especially one designed for use by governments all over the world. There can only ever be helpful suggestions, with various ways of crafting them.

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

Readers should also be aware that, in May 2019, a new vision or paradigm for PPPs was formerly adopted by the UNECE. Referred to under the rubric ‘**People-first PPP**’, this has been conceived specifically with a view to encouraging governments to design and structure their PPPs in ways which are likely to foster and achieve the UN Sustainable Development Goals (‘SDGs’), and to stimulate and attract private-sector involvement on this basis. Above all, it aims to prompt governments to focus on the tangible and vital human aspects of PPPs, rather than simply approaching them as economic or financial constructs. It invites them to think hard about the impact of PPPs and their implementation at a social, environmental, ethical and human rights level, in ways which are fully compatible with the SDGs, and to ensure that PPPs genuinely advance those objectives. Hence the title ‘People-first PPP’. The principles behind the concept have been discussed and explained in a paper published by the UNECE in 2019<sup>11</sup>. They aim to ensure that PPPs are accessible, affordable, sustainable and

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<sup>7</sup> See further below.

<sup>8</sup> Please see the list set out in Appendix 2.

<sup>9</sup> [Insert precise cross-reference and title once published].

<sup>10</sup> We would like to express our gratitude to UNCITRAL for making the latest drafts of their revised clauses available to our team to draw on as our document was being finalized, and for the personal willingness of their team leader, Jose Angelo Estrella-Faria, to cooperate with and assist our efforts.

<sup>11</sup> Guiding Principles on People-first Public Private Partnerships in support of the United Nations Sustainable Development Goals’ (ECE/CECI/2019/5). See in particular the ten key principles into which they are broken down.

resilient; and that they are implemented in ways which discharge environmental responsibilities, ensure proper stakeholder consultation and involvement, avoid corruption and help to promote social justice.

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

The People-first PPP concept has now been formally supported, and its use recommended, by four United Nations Regional Commissions, namely UNECE, ECA, ESCWA and ESCAP<sup>12</sup>, which in May 2019 announced their decision to collaborate and work together to make PPPs 'fit for purpose' for the 2030 Agenda for Sustainable Development. The Model Law has been drawn up specifically with the People-first PPP objectives in mind and makes them intrinsic to its provisions, many of which have been crafted to give effect to them. The five core principles behind them are cited in the Preamble. Article 4.2 requires all PPPs implemented under its terms to be compatible with them and designed to reflect them. Other Articles contain a number of cross-references to them. The People-first PPP Principles are accordingly referenced in the document's title.

The Model Law is not, of course, a template piece of legislation which can simply be pulled down and enacted by any country introducing a law of this kind<sup>13</sup>. It is designed to offer guidance, not 'cut-and-paste' clauses. Careful thought will always be needed in making use of it. In the end, there are many different ways of approaching laws of this kind and the various provisions they contain. They give rise to questions and issues to which different countries will offer different answers and reach different conclusions. Furthermore, any PPP law adopted by a country must be fully compatible with its wider legal system, jurisprudence and legislative traditions, as well as the idiosyncrasies of its PPP system. Taken together, these factors may call for extensive modification to the Model Law where it is being used as a precedent.

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

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<sup>12</sup> [Full titles to be inserted]

<sup>13</sup> In this commentary, and in the Model Law, these countries are referred to as 'host countries', and the PPP law they introduce as 'the Law' or the 'PPP Law'.

It should also be noted that the Model Law is not directed primarily or even at all at member countries of the European Union (EU) or accession countries in the process of joining it. The EU already has a wide-ranging body of laws and requirements applicable (directly or indirectly) to PPPs and their procurement. Because these reflect the complexities and idiosyncrasies of EU-based law as it stands, which are not necessarily compatible with the legal systems of other countries around the world, we thought it better not to try to make the Model Law fully consistent with the former<sup>14</sup>. It seemed to us unnecessary to do so. Any EU accession countries (or even member states) that do seek to draw on its provisions, then, should also think carefully about the need to harmonize their PPP laws with the EU *acquis* and adapt the clauses from the Model Law accordingly.

The Model Law assumes a relatively low level of general regulatory control by government over the PPPs implemented under its terms (at least outside the scope of the contractual powers vested in each contracting authority<sup>15</sup>) and a correspondingly high degree of freedom of contract for the parties to the relevant PPP contracts. Some countries may prefer to include additional tiers of approval and control over a PPP's elements, terms and implementation. The degree of regulatory control that any country seeks to establish is a matter about which it must, again, make its own decisions, in light of its political and jurisprudential traditions and socio-economic system.

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

The Model Law and this commentary are the work of a team of distinguished legal (and some non-legal) experts in this field, who have been collaborating on this exercise for over 18 months, under the aegis of the UNECE and the EBRD. The names of the participants are listed in Appendix 1. They comprise a wider group of some 60 professionals from around the world, who have contributed thoughts and suggestions from the outset, and a drafting sub-group of about 15, who were closely in the document's contents and wording. Grateful thanks are due to both the members of the team for all their efforts, as well as to these two eminent international institutions for their unflinching confidence and support.

November 2019.

## II. Textual Commentary

### Preamble

The Preamble is designed as a simple introduction to the Law. It allows the host country to summarise the purpose of the law and to capture some of its main policy objectives and priorities in making use of PPPs. It may be more appropriate to do this in a Preamble, which

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<sup>14</sup> We are not, though, aware of any clear areas of incompatibility between the Model Law and EU law, although there are certain obvious differences. For example, EU law makes a formal distinction between 'Concessions' and other types of 'Public Contract', applying different principles to their respective procurement. The Model Law does not do this. Rather, it puts all PPPs in the same conceptual and linguistic category.

<sup>15</sup> The PPP contract itself obviously represents a form of regulatory instrument, allowing the relevant line ministries and other authorities reflected in its terms to exercise a degree of control over the private partner's activities. A PPP is also different to a regulated utility, where extensive regulatory control will be exercised by government, usually in the context of a sophisticated sector-regulatory regime.

can be written in non-legal language, than in the more precise and binding legislative language of the statute's provisions<sup>16</sup>. The text uses a short-form preamble, keeping the key messages brief and simple. Some countries may prefer to discuss the background justification for PPPs at greater length.

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

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

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

## **CHAPTER 1. GENERAL PROVISIONS**

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

### **Article 1. Scope**

This article summarises the scope of the Law. Some countries may prefer to leave this largely or even entirely to the Preamble<sup>17</sup>. The authors felt on balance that, notwithstanding the repetition, it was appropriate to make some of the same statements legally binding in an article, to assist the interpretation and application of the Law.

<sup>16</sup> 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.

<sup>17</sup> Although the scope of the law will of course need to be clear for interpretative purposes.

In particular, the article makes it clear that the Law applies to all forms of PPP, as defined by its terms, regardless of the labels that may be attached to them. Note that some countries distinguish formally and as a matter of jurisprudence between different types of PPP, in particular between ‘concession’ and ‘non-concession’ PPPs, not infrequently limiting the latter to structures involving government revenue streams and the former to those based on direct user charges<sup>18</sup>. This can sometimes lead to the adoption of two different laws dealing respectively with each (as in China and Serbia, for example, and in some ways France). EU law also makes a formal distinction along these lines. Most countries, however (including common law ones), tend to prefer to lump them all together conceptually, so to speak, and subject them to essentially the same statutory provisions and principles. That is the approach we have taken in this Model Law. It offers the advantages of simplicity, consistency and comprehensiveness. It will usually be more straightforward, both conceptually and practically, to treat all types of 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.

The Article, following UNCITRAL, mentions the fundamental general principles underlying its terms, but also includes a reference to the People-first Principles.

### **Article 2. Key Terms and Definitions.**

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

- ‘**applicable law**’ is simply a generic term for all of the host country’s domestic laws which may be relevant to PPPs one way or another. Where those laws give effect to its international obligations (e.g. under public international law), those too may need to be taken into account in interpreting the Articles. Laws which are particularly relevant to the SDGs and the People-first PPP Principles, such as laws relating to the environmental, human rights, health and safety, indigenous peoples and citizens’ rights should be carefully thought about.
- The expression ‘**Government**’ is intended to be understood widely, as referring to any part of the administrative or executive branches of government legally entitled to exercise powers or perform functions under the Law. Some of these will arise by virtue of the Law’s provisions. Others will already be vested in the Government under the country’s wider legal system (including its constitution). Careful thought needs to be given to the inter-relationship between these two categories, and any possible conflict between them.

Each host country may wish to be more specific about which Government bodies are being referred to in certain articles than we have been in the Model Law. If so, the necessary amendments can easily be made. We have also allowed for this possibility with the generic term ‘competent body’ which is used in a number of places in the text. There can also be uncertainties about the extent to which local or regional bodies are being empowered under the Law, especially where combinations of different Government bodies are involved simultaneously in the exercise of certain functions (as contracting authorities under the same project, for example); this, too, may need to be addressed expressly in the host country’s PPP law.

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<sup>18</sup> 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).



- **‘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<sup>19</sup>. EU law does so, for example, as do the laws of a number of countries around the world. Many others do not. That is why we have included the expression in square-brackets. Host countries may or may not wish to do so.

In essence, Institutional PPPs are PPPs where the contracting authority (or perhaps another public body, such as its affiliate or an SOE) and the private partner form a joint entity (‘Institutional Private Partner’) to perform some or all of the tasks under the PPP contract. It remains critical, however, that the private-sector participant should retain a majority and controlling interest in structures of this kind. For the project to be a PPP in any meaningful sense, the private sector must still assume the main responsibility for implementing it. The definition of Institutional Private Partner in the Model Law makes that clear. (The further requirements of Article 4 would also lead almost inevitably to that result). 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 otiose. A separate formal category may simply 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. (There may also be formal legal requirements under local law determining whether it should do so). The text assumes that both will be used, with the regulations containing legally binding secondary legislation filling out the details of many of the articles, and the guidelines consisting of non-binding guidance documents designed to facilitate an understanding of the workings of the PPP law and regime. Some countries may prefer to allow for only one or the other, or even to combine them in a looser, joint term (e.g. ‘PPP enabling framework’).
- **‘public authority’**. Note that this term is not intended to refer simply to contracting authorities. It has a wider scope, designed to take in any public authority whose powers may affect or impact PPPs (including their initiation, selection, appraisal, procurement or implementation).
- **‘public infrastructure’**. Host countries should give thought to the breadth and scope of this definition, to tailor it to its expectations for the range of PPPs it plans to use. The Model Law defines the term very broadly, to avoid any potentially awkward or unintentional restrictions on their scope and make the Model Law compatible with future developments. It includes intangible assets (such as intellectual property) and other types of asset and their operation which may be only indirectly related to infrastructure service provision (such as IT systems).
- **‘PPP’**. The term is not always as straightforward to define as one might think! It is perhaps best not to attempt to make a definition more accurate or perfect than it needs to be, however. The critical thing is to use a short, simple definition, which captures the essentials and is reasonably robust and workable at a practical level, and above all is fully consistent with the critical requirements set out in Article 4, rather than one that is conceptually flawless. It also needs to be designed to help clarify the distinction between the PPP law and other forms of public procurement for other purposes.
- **‘Value for Money’/‘Value for People’**. The use of this term needs very careful consideration. The PPP world has been subject to years of difficult debate about how it should be defined and interpreted. The definition in the Model Law stresses the need

<sup>19</sup> The terminology, which derives from EU provisions, is somewhat unfortunate. There is nothing particularly or clearly ‘institutional’ about these arrangements.

for a wide perspective, looking at the value of a PPP in terms of its broad impact on the economy, society, the environment and the government's finances over its life, and the net benefits it stands to generate. As such, it is very much a 'value for people' test as well as a 'value for money' test. The two terms are therefore treated as interchangeable in the definitions. But host countries should reflect carefully on the meaning they wish to give it, in terms of the key tests to be taken into account when it is applied. The draft allows for a detailed methodology for those tests to be set out in the PPP regulations. A narrow definition (e.g. lowest price) is *not* likely to be appropriate.

### **Article 3. PPP Regulations and Guidelines**

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

### **Article 4. PPP Criteria and Fundamental Requirements**

This article seeks to define the essential features and characteristics ('criteria') of any PPP. It makes it clear that a PPP which complies with them is to be undertaken in accordance with all the law's requirements. This is necessary to create clarity about which type of project properly falls into this category, and so is subject to its provisions and procedures.

Para. 1 sets out these base criteria for judging whether a particular project is indeed a PPP. The tests are cumulative, not alternative-i.e. all of them should be met. The following should be noted:

- Sub-para a. Reminds legislators that PPPs need to be long-term in nature (with a minimum term established in accordance with article 8 (if included)) and implemented on the basis of a PPP contract that accords with chapter v.
- Allowance is made in sub-para. B. Made for a possible minimum or threshold (estimated) value for PPPs, but in square brackets. In essence, this is because of the complex nature of PPPs and the time and resource necessary to make them work. Host countries may or may not want to do this, however. If not, the sub-para. Should be deleted. Because it can be difficult to establish what exactly any minimum value should be, and how it should be calculated, as a matter of law, the draft assumes this will be dealt with in the PPP regulations, rather than being firmly set out in the main body of the law. That also introduces some flexibility to modify the threshold test over time without amending the primary legislation.
- Sub-para. C. Is designed to allow an appropriate degree of flexibility in terms of the combination of physical activities which a PPP may comprise. The long-term, risk-exposed nature of these activities should always be kept in mind. A PPP is not the same as a construction contract or simple contract for services. It needs to contain an appropriate element of long-term responsibility for the public infrastructure and/or public services;
- Sub-para d. Highlights the all-important element of risk allocation between the parties throughout the life of the PPP project. There should be a clear element of risk-sharing between them from beginning to end of any PPP;

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

Paragraph 2 then makes it clear that, when a project which fits the PPP criteria set out in para 1, it must be undertaken in accordance with the remaining requirements of the law applicable to it. (Most, but not necessarily all, of them will be applicable). There is then a link back to the public interest goals and objectives summarized in the Preamble. If these have been carried over into the law itself, the cross-reference should be to the relevant article. Note, however, that if those goals and objectives are to be enshrined in law, controversy can arise about how exactly they are expressed and interpreted. That is why the authors preferred to set them out in the (non-binding) Preamble to the Model Law. Fundamentally, given their importance to the UNECE, these goals and objectives must also include the People-first PPP Principles, to which there is therefore a cross-reference in the Article. Each PPP project must be designed and structured to accomplish and give effect to them.

Paragraph 3 is designed to create some flexibility in the treatment of smaller projects falling below the threshold value for PPPs referred to in sub-para b. *Prima facie*, these would be outside the scope of the law. However, legislators may wish to make special provision of some kind for at least some of them in the regulations, perhaps by way of abbreviated and simplified procedures<sup>20</sup>. In particular, they may decide to allow for the ‘bundling’ together of such smaller projects and their implementation in a group as a PPP subject to the law’s requirements. If no threshold value is specified, the paragraph may be redundant, and so best deleted, although some countries may find it helpful to recognise the possibility of bundling projects in any case.

If the PPP Law allows formally for Institutional PPPs (see comments under article 2 above), it will need to ‘complete the picture’ by making it clear whether and to what extent its provisions apply to them. This is addressed in paragraph 4, but again in square brackets, as the PPP Law may not give them separate recognition at all. Our assumption is that all its provisions should apply to them. Any specific departures from those provisions should always be carefully thought through and closely identified.

#### **Article 5. Authority to award and enter into PPPs**

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

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

<sup>20</sup> The Model Law also allows them to be the subject of direct negotiation under Article 22.

alternative, it allows the enacting state simply to list in the Law those public authorities that are allowed to award and implement PPPs<sup>21</sup>. Countries should decide which provision they prefer.

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

#### **Article 6. Applicable Sectors and Activities for PPPs**

This article defines the range of sectors and economic/commercial activity to which PPPs can apply in the host country. It is usually desirable to make any such provision broad and flexible, and any list it contains inexhaustive, since formal legal restrictions or exclusions are often, in the end, simply unnecessary. (Governments can always then make *ad hoc* decisions about whether or not to use of a PPP in a particular area). The draft therefore allows PPPs to be used in any sector or area not specifically excluded by this or any other law, provided, of course, that they are compatible with the People-first PPP Principles. The list set out below is essentially illustrative rather than prescriptive and can be expanded or reduced by the host country as appropriate. If the host country prefers to be specific rather than general about the sectors to which PPPs can apply, the article should be modified accordingly. (The draft allows for this in square brackets).

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

One sector which sometimes proves problematic in this context is the natural resource/extractive industries sector, which is often distinguished and excluded from the scope of PPPs and 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)<sup>22</sup>. In that case, it may be better to carve out the relevant sector and industry from the scope of the new PPP Law, even though the ‘concessions’ in use there may be conceptually very similar to PPPs, and subject to many of the same principles. This is an analysis each host country should carry out. Appropriate exclusions can be set out in this article and/or in the definitions of PPPs and scope provisions in Articles 1 and 2. It should be kept in mind, however, that the power sector, which is obviously closely related to public services and public infrastructure, may need to be addressed specifically and treated differently to other energy or natural resource concessions of which the same cannot be said. The former is more susceptible to categorisation with other types of PPP<sup>23</sup>. For all these reasons, we have put the reference to ‘energy’ at the top of the list in square brackets.

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<sup>21</sup> This is the approach taken by UNCITRAL

<sup>22</sup> In addition, some projects in this sector may not be able to satisfy the ‘People-first’ principles.

<sup>23</sup> This seems to be particularly the case with renewable power projects, especially in jurisdictions where long-term PPAs are being relinquished in favour of periodic auctions and/or feed-in tariff arrangements.

### Article 7. Parties to a PPP Contract

There will often be only two parties to a typical PPP contract—the contracting authority and the private partner (as we call them). The article acknowledges, however, that, on the one hand, there may occasionally be more than one public authority participating as contracting authority<sup>24</sup>, such as where several municipalities are involved, for example, or a SOE (state-owned enterprise) teams up with a line ministry, whilst, on the other, the private partner will often consist of a consortium of companies which become shareholders in the SPV (special purpose vehicle) company incorporated to fulfil this role under the contract. The two principal parties may also agree to bring in additional third parties to the PPP contract, where the project’s particular circumstances or needs call for it.

### Article 8. PPP Term

The article envisages a statutory minimum term for all PPPs. Host countries should think carefully about what this should be and how it should be calculated. The period can be inserted (in years) if they wish to specify one. (Some countries may not). A term of at least 5 years is likely to make sense, given that PPPs are inherently long-term structures, with all their complexity and the importance of long-term risk-sharing between the parties. Because there is no commonly recognised basis for establishing a minimum term, however, the draft leaves the details to be set out in the regulations (if at all). These details should be consistent with any minimum value (if any) specified under Article 4.

A maximum term is also envisaged for PPP contracts in paragraph 2. 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. Again, no figure is specified in the text, as there is much debate about what an appropriate term should be. Some take the view that very few PPPs need be longer than 25 or 30 years, as this should always be sufficient to make a project financeable and investible. Others believe that significantly longer periods can make sense; there are indeed not a few examples of them in practice.

For that reason, a specific figure is not suggested in the Model Law. Instead, the article assumes that an appropriate basis for calculating one will be available to the contracting authorities (and perhaps again developed or set out in the regulations<sup>25</sup>), and that the maximum term will simply be specified in each PPP contract. This is also the approach taken by UNCITRAL. The basic principles to be taken into account in framing any maximum term are set out in paragraph 2. Host countries should add any further criteria that they regard as fundamental.

Notwithstanding the principles reflected in paragraph 2, PPP contracts usually contain mechanisms which allow their term to be extended in exceptional circumstances described in their provisions<sup>26</sup>. This may occur, for example, where events of *force majeure* seriously delay progress or interrupt operations, or a change in law necessitates major changes to aspects of the design and construction works. For the contracting authority, an extension of the term to compensate the private partner for its resulting losses (by allowing it to earn revenues for longer) may be a preferable remedy to paying it cash compensation. Paragraph

<sup>24</sup> 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.

<sup>25</sup> This is likely to be more a matter of judgment and experience, however, based on the criteria referred to in the article, than trying to define a single applicable scientific test or methodology.

<sup>26</sup> 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.

3 allows for this, together with the possibility of further conditions being specified in the regulations (*inter alia* to prevent the extension mechanism being abused).

The expiry of the PPP contract should not, of course, affect the private partner's title to any assets comprised in the PPP of which it is entitled to retain ownership<sup>27</sup>. This is made clear by para. 4.

## **CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES**

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. (Indeed, there seems to be an increasing expectation on the part of IFI<sup>28</sup> experts in this field that such provisions *should* be included). The decision-making processes behind the different stages of a PPP's preparation, approval, award and implementation certainly need to be properly accountable. The wider aim here is to achieve the necessary administrative clarity in relation to the implementation of PPPs.

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

There are many possibilities, which the 'placeholder' in the draft touches on. Cross-referring to the wider public investment process is one, integration with long-term infrastructure development planning another (including its SDG strategy), the application of budgetary and fiscal rules and procedures a third, the powers of sector regulators a fourth. Other examples might include the role of a PPP Commission, the role of the Ministry of Finance or Economy and its Risk Management Unit<sup>29</sup>, and additional tiers of approval or control where the exceptions to normal procedures come into play under the Law (as in the case of unsolicited proposals or direct negotiations).

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

### **Article 9. PPP Unit and Administrative Coordination**

Article 9 deals 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 with the implementation and refinement of the new system and to disseminate a proper understanding of it, within both the public and private sectors. However, their structure, responsibilities and powers vary widely from country to country, depending

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<sup>27</sup> As in a BOO (Build-Own-Operate) structure, for example, and even perhaps a BOT (Build-Operate-Transfer).

<sup>28</sup> International Financial Institutions. See note 29 below.

<sup>29</sup> The MoF frequently has a leading part to play in the decision-making behind a country's PPP system, unsurprisingly, since the ways in which PPP projects may impinge (or not) on a government's finances are usually a prime consideration in their application.

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.

Each host country should think carefully about how it wants to structure, organize, staff and empower its PPP Unit, and amend the article as necessary accordingly. The draft requires it to be adequately staffed, on the basis of a spread of skills and backgrounds (including a grasp of the People-first PPP Principles). It allows for a controlling ministry and director to be specified in the law, without prescribing solutions (even though the Ministry/ Minister of Finance or Economy are frequently specified).

The list of functions and responsibilities in para 3 is a broad 'wish list', containing the full range of matters which are often allocated to such units. It should be amended by host countries as necessary. Few, if any, real PPP Units around the world would have such a wide array of responsibilities. Functions should be chosen and allocated in ways which avoid potential conflicts of interest with respective ministerial duties or conflicts between different responsibilities within the PPP Unit (para. 4).

Para. 5 allows mechanisms to be put in place designed to coordinate the issue of relevant licences and permits for PPPs between the different ministries and public authorities likely to be responsible for them. This 'one stop shop' arrangement is often referred to in discussions of institutional arrangements, as it self-evidently seems a helpful step to take, especially in light of the large number of permits that can sometimes be required<sup>30</sup>.

#### **Article 10. Information about PPPs**

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

The need to publish relevant information about competitive PPP tenders and their results, on web sites and/or official publications, is also addressed. Host countries should consider any other specific requirements of this kind which they would like to see included in its PPP Law, such as mechanisms for independent audits of aspects of the published information, and procedures for public reviews or hearings where appropriate<sup>31</sup>.

### ***CHAPTER III. INITIATION AND PREPARATION OF PPPs***

This and the next Chapter are perhaps the most 'central' chapters of the Model Law, dealing with the all-important subject of the selection, preparation and award of individual PPP projects. These are often a principal focus of laws of this kind. The Model Law aims to set out a clear, robust framework for the procedures and principles involved, leaving much of

<sup>30</sup> Actual examples of such mechanisms are hard to find, however. They may be something of an elusive ideal. Note that the EU, however, is currently devising some helpful provisions long these lines, at least for cross-border projects.

<sup>31</sup> It is not just the transparency of the available information which is important, but the right to take appropriate action where it reveals deficiencies or abuses.

the relevant detail (such as timescales, deadlines, precise formalities, definitive rules and methodologies) to be addressed in the regulations and tender documents. Chapter III deals with the early stages of a project's initiation, preparation and approval, Chapter IV with its award and implementation.

#### **Article 11. Initiating and Preparing PPPs**

This Article describes the steps and procedures that must be followed as a PPP is defined, initiated, appraised and approved. Under para.2, PPPs can be initiated by either the relevant contracting authority, or a private initiator in the case of unsolicited proposals. However, the article assumes that the detailed work of preparation of any PPP will usually be carried out, or at least managed, by the contracting authority, since this will allow it to retain an appropriate degree of control over its contents. (In some jurisdictions, including ones with limited relevant experience of PPPs or relatively constrained government resources, it may nevertheless be necessary to delegate at least some of this work to the private sector. The article therefore allows for exceptions to the general rule to be identified<sup>32</sup>). Para. 4 gives an idea of what the preparation work should aim to cover and achieve.

The preparation work needs to include a comprehensive feasibility study (para 5), showing how the applicable appraisal criteria will be met, together with (or covering) a strategic impact assessment (reviewing its social and environmental impact) and reports on various other fundamental matters that should be examined and confirmed before the PPP can go ahead. These are identified in para. 6, and include an initial risk allocation pattern, an assessment of the contracting authority's capacity to launch and carry through a PPP and proposals for the most appropriate basis for awarding it. 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 (para 7).

The draft assumes that host countries will in time want to reduce the processes involved to a more detailed set of procedures in the PPP regulations, allowing for differing requirements to be met at different stages of a project's preparation (para 8). The preparation work must allow for any public consultations and hearings, structured to allow issues to be properly aired and ideas for improvements to be put forward (para 9). It must be possible to make changes and adjustments to any set of PPP proposals during their preparation to ensure they are fully compliant with all the law's requirements; this is mentioned in para 10.

#### **Article 12. Appraisal and Approval Procedures**

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

Paragraph 2 summarises the powers and responsibilities of the competent body given the task of reviewing the PPP preparation work submitted to it by the relevant contracting authority, to make sure it has been carried out in accordance with the procedures and criteria. The requirements are comprehensive and tight (as they are in UNCITRAL). Enacting states should decide whether they want such a rigorous supervisory role over the actions of contracting authorities in preparing and awarding PPPs, and whether it should include formal powers of approval (as opposed to simple review). Some states may wish to split the review and approval functions, perhaps giving the first to an administrative body (such as the PPP

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<sup>32</sup> Note that, when this happens, it will be vital for the contracting authority to be in a position to carry out a thorough review and assessment of the private partner's preparatory work in all its aspects- technical, financial, legal, environmental, social etc. It may need to hire in independent expert advisers for this purpose.



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.

Para 3 then sets out a broad, suggested ‘wish-list’ for the relevant appraisal criteria themselves. Compliance with the requirements of Article 4 and the People-first PPP Principles is placed at the head of this list (although the Principles are also built into several of the other specific criteria listed). Host countries should consider which ones to include in any definitive list(s) of their own, either in the main PPP law or the regulations. Whilst most of the criteria suggested are likely to be relevant to any PPP assessment, they will not necessarily all be, at least not in all circumstances. Their relative importance or weighting will also vary from context to context. The PPP law should therefore retain an element of flexibility about them, as they are likely to differ depending on the type of project being considered<sup>33</sup>. Allowance is made for other criteria to be used and included in future.

For these reasons, we have used the words ‘as appropriate for [the] purpose’ of appraising the relevant PPP. Careful thought should be given to the question of which criteria will always be applicable-mandatory-and which will only sometimes come into play. The answers are likely to be reflected in detailed mechanisms and procedures linked to a specific context, which the regulations rather than the law would provide for. This is acknowledged by para 5. The criteria and procedures are also likely to evolve and need refinement over time. Para. 6 places responsibility for their determination and revision, and for publishing their contents, on the government.

### **Article 13. PPP Implementation Resolutions**

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

### **Article 14. Unsolicited Proposals**

This article deals with the initial stages of an unsolicited proposal. Unsolicited proposals can be controversial, with many commentators regarding them as unnecessary and wide open to abuse. Others see them as essential in emerging-market countries with little experience of PPPs. The host country needs to decide whether and to what extent to permit them. The provisions in the Model Law assume that they will be used and seeks to make the procedures

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<sup>33</sup> For example, a PPP procurement will not always be the most cost-effective and efficient basis for tendering a project. Indeed, it will often not be. The ‘value for money’ test referred to, however, may still justify approaching a project as a PPP rather than a conventional procurement, as other long-term benefits can accrue which mean it nevertheless represents optimum value for money for the country, considered in the round over time. This will involve judgments about the applicable criteria and their relative importance as decisions are made.

applicable to their use, and the award of the resulting PPPs, as transparent, fair and competitive as possible, as well as consistent with those applied to PPPs initiated by contracting authorities.

Under the article, the private initiator must submit its preliminary proposal for the proposed project, in the required form, to the relevant contracting authority (and any other competent body authorised to receive it. Host countries may wish to provide for this to reduce the risk of any system abuse). The latter has a discretion but not an obligation to review it and make a preliminary decision about moving to the next stage. The rationale for this discretion is that the potential contracting authority may have neither the time, resources nor inclination to review every unsolicited proposal presented to it, especially if many of them are coming forward or they are clearly incompatible with its wider strategic or policy priorities. (The host country may still prefer to turn this into an obligation to review them, together with a duty to give reasons for the conclusion reached).

Only proposals which do not relate to projects which have already been officially ‘lined up’ should be considered. The contracting authority can require the private initiator to provide as much of the relevant information as is needed to make its preliminary assessment, including impact studies (e.g. technical and commercial feasibility) and information as to its own qualifications for the task. Any exclusive rights of the private initiator in relation to the project (such as IP) are protected under para. 5. If the contracting authority decides formally to review the PPP and move forward, the provisions of articles 11 and 12 then come into play, covering the project’s detailed preparation, appraisal and formal approval. If an implementation resolution is then passed to proceed with it, the provisions of article 21 will govern the next stage.

#### ***CHAPTER IV. SELECTION OF PRIVATE PARTNER***

##### **Article 15. Procedures for Selection of Private Partner**

Para.1 of the Article requires competitive tendering to be used to select the private partner, save only where exceptions are expressly permitted, including in the case of direct negotiations under article 22. It is widely recognized today that competitive tendering is generally much the most efficient, effective, transparent and fair basis for awarding major contracts, and the best way of mitigating any risk of local corruption. It is also often an explicit requirement of International Financial Institutions (IFIs)<sup>34</sup>, such as the EBRD, and a condition of their financing for particular projects (albeit not an invariable one). The Model law therefore assumes that, as a general rule, it will be used.

The question always arises with PPP laws 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 for PPPs (as in the EU, for example). Where it has been drawn up before the country has started to make use of PPPs, extensively or at all, however, it will often not be readily applicable to the very large, complex, high-value structures that PPPs typically represent.

It may be possible to amend or modify the existing procurement regime to accommodate PPPs. On the other hand, this may be difficult to do and may also give rise to considerable confusion about how exactly the revised provisions will apply in the context of the new PPP law. For that reason, host countries often prefer to create a comprehensive, self-standing

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<sup>34</sup> i.e. development banks and similar international funding organizations, as opposed to private sector banks and investors. They include the World Bank (IBRD), IFC, EBRD, ADB, AfDB, AIIB, LADB and others.

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<sup>35</sup>. This is the approach reflected in many PPP laws and the one suggested by the Model Law. Para. 2 is drafted accordingly. If the host country decides to amend its existing procurement regime, or concludes that it can be used without amendment, the provisions of Chapter IV (or equivalent) of its PPP Law may differ significantly from the Model Law, as they will either need to cross-refer explicitly to the relevant requirements of the former, or invoke them as a whole, disapplying specific provisions that do not work in this context. The draft also allows for this possibility (as does UNCITRAL).

Para. 3 again makes it clear that the more detailed aspects of the applicable tendering procedures will be set out in the regulations but shall be governed by the principles set out in that paragraph, which are almost universally recognized today as appropriate governing tests for such processes. The host country should decide whether to include the word ‘proportionality’ with these principles. It may or may not wish to. The term does not have a universally recognised meaning in this context but is often understood to refer to the efficient use of available tendering resources, at a level appropriate to the project concerned.

The exact criteria and evaluation methodology for the pre-qualification and selection of successful bidders, appropriate for the relevant PPP and the tender structure being used, will then have to be chosen (by the contracting authority) and set out in the relevant tender documents. Para. 4 contains a further wide-ranging wish list of possible tests which can be used. These would have to be refined and made more precise in the tender documents. They must always be consistent with the criteria used to approve the PPP at preparation stage and the implementation resolution for it. Para. 5 places a standard non-discrimination duty on the contracting authority in relation to the award and implementation of PPPs.

#### **Article 16. Tender Structures and Procedures: General**

Article 16 deals with an assortment of general matters that will apply to any tender structure adopted. The tender structure 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.

Para. 2 provides 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 pre-qualification and a one- or two-stage process. Closed tenders-where bidders are specifically selected by the contracting authority without a public advertisement-are only permitted in the very limited circumstances described. Each host country should decide on the scope of these exceptions. Specifying them with precision in the law is recommended and considered common best practice.<sup>36</sup>Where closed tenders are used, the contracting authority should still try to maximise the element of competition involved, as required by para. 3. There are many recognised methods of doing this.

Para. 4 provides that any person, or groups of persons, with legal capacity can participate in a tender, subject to any applicable legal restrictions. These restrictions are intended to refer in particular to rules excluding persons who may have been convicted of relevant offences, such as corruption, illicit employment practices (e.g. using child or slave labour) or similar

<sup>35</sup> If the host country is an EU accession country or even member state, it would need to ensure that any bespoke procurement procedures for PPPs were fully consistent with EU law on procurement and state-aid. However, as we have explained, the Model Law is not primarily directed at such countries.

<sup>36</sup> Host countries which are EU member states or accession countries must also take the possible exceptions under EU law into account, in particular under Art 10 – 17 of the EU Directive 2014/23 on the award of concession contracts; under Art 7 – 17 and Art 32 of the EU Procurement Directive 2014/24 as well as under Art 18 - 35 and Art 50 of the Sector Procurement Directive 2014/25.

prohibited acts. National security considerations may also come into play in this context. Where consortia are involved (as they usually will be), their joint qualifications to perform their responsibilities, as well as those of individual members, must be assessed (para. 5).

Under para. 6 all decisions during the tender process, concerning pre-qualification, 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 that they know what they are dealing with).

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

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

#### **Article 17. Tender Documents and Criteria**

This article lays down the general requirements for the contents of any set of tender documents to be drawn up by the contracting authority. They are designed to ensure the documents are sufficiently complete and transparent to enable bidders to participate effectively on the basis of a 'level playing field'<sup>37</sup>. The underlying principle is to maintain an adequate, 'healthy' (but not excessive<sup>38</sup>) level of competition throughout the process. Paragraph 1 summarises the typical essential components of the documents, which should be drawn on as appropriate.

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

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

Para 4 allows (in square brackets) for the possibility of tender documents, as well as the preparatory work for a PPP, being reviewed and approved by another competent body, if that is what the enacting state has decided to do<sup>39</sup>.

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<sup>37</sup> The article obviously needs to be read and interpreted in conjunction with all the other provisions of the Model Law governing the tender process.

<sup>38</sup> Which may lead to 'dumping'.

<sup>39</sup> See comments under para. 2 of Article 12.

### **Article 18. Tender Committee**

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

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

### **Article 19. Tender Stages**

This article provides a framework for the various stages of a PPP tender, depending on which structure (open or closed, one- or two-stage, with or without pre-qualification) is used. Paragraph 1 summarises them. Certain provisions are then set out in the ensuing paragraphs in relation to each. Note, though, that these do not amount to a complete picture, a comprehensive set of procedures. It will be for the PPP regulations to contain the complete story, including all the 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 aim of the PPP law-in the case of this Article as well as others-is to define the main ‘pillars’ of the system, its over-arching framework. These paragraphs therefore set out only a few statements about each tender stage, in terms very similar to those used by UNCITRAL<sup>40</sup>.

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

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

The second, summarised in paragraph 9, is more unusual. Known as the ‘competitive dialogue’ procedure, it can be used where it is not feasible for the contracting authority to

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<sup>40</sup> 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.

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 that a straightforward competitive tender can then be deployed in the concluding phase. As the provision makes clear, only certain aspects of the tender should be opened to dialogue in this way-i.e. those that require greater clarity and specificity which can only properly be achieved with in-put 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 lies in the level of uncertainty about fundamental project features, which can only be defined in dialogue with bidders. The two-stage procedure in para. 8 is more about simply refining, or fine-tuning, certain aspects of a project. In practice, the use of the competitive dialogue procedure is relatively limited, as it calls for a certain level of capacity, competence and sophistication on the part of contracting authorities and bidders for it to work, which may only be found in the more established PPP markets<sup>41</sup>. 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), which the PPP regulations can provide for.

#### **Article 20. Conclusion of the PPP Contract**

This provides for the conclusion of a PPP contract with the winning bidder identified by the tender committee on the basis of the relevant evaluation criteria and methodology, or (more usually) with a special purpose vehicle (SPV) incorporated by it. Requirements for the capitalisation of the SPV and subsequent changes to its structure are allowed for. A formal notice of contract award must then be posted on the contracting authority's web-site and published through the official channels. The draft also allows for the public disclosure of PPP contracts (subject to applicable confidentiality restrictions) where the law requires this. It is assumed that governments may be slightly hesitant about publishing all their contracts as their new PPP systems are taking shape, but that this may in time come to be perceived as advantageous to all, and so provided for in the PPP regulations or elsewhere. (The same provisions apply to PPP contracts entered into under Articles 21 and 22).

#### **Article 21. Conclusion of PPP Contract for Unsolicited Proposals**

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

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<sup>41</sup> In some of them-such as France-it has indeed become the norm.

If third party expressions of interest are put forward, tender proceedings must then be organized in accordance with this Chapter. Para. 4 provides 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. The article suggests a couple of options. Compensation for pre-tender costs incurred (up to a maximum amount) should be relatively straightforward. Finding a suitable basis for adjusting tender evaluation scores can be much more difficult. Some countries prefer not to provide for this at all; others may already address them in other regulations.

#### **Article 22. Direct Negotiations**

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

The Model Law treats only a few, specific classes of project as being viable in this regard (several of which are also listed in UNCITRAL): (a) where only a single compliant bidder has surfaced in the context of a tender process (subject to the relevant qualifications); (b) where the unsolicited proposal provisions allow it; (c) perhaps, where there is an urgent need to maintain public services and holding a tender would be impractical. (This exception is in square brackets, as some experts counsel against it); (d) in the case of small, short-lived projects that do not meet the usual statutory thresholds; (e) where the state’s vital security interests do not permit tendering; and lastly (f) where it has been clearly established, based on an independent expert report, that there is only one source actually capable of implementing the project (e.g. in the case of unique patented technology or IP).

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

#### **Article 23. Review and Challenge Procedures**

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

The article acknowledges that these established channels and mechanisms may need to be reinforced or supplemented in the regulations<sup>42</sup>. Careful thought should also be given to the question of the speed and efficiency, as well as efficacy, of any such channels, and the availability of suitable interim measures. It is much better to solve a problem caused by an

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<sup>42</sup> In many cases they will need to be, as the complexity of PPPs means that they often have to be subject to ‘bespoke’ procedures and mechanisms at almost every level.

abuse of process at an early stage, than to have to wait until it has done damage to the project at a later or more advanced one; ‘prevention is better than cure’.

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

## ***CHAPTER V. PPP CONTRACTS***

### ***Article 24. Main Terms and Conditions of PPP Contracts***

This makes it clear that, under the Model Law, the drafting and negotiation of the contents of a PPP contract shall be governed by an overriding principle of freedom of contract. The parties can agree essentially whatever provisions they choose, 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).

Within those constraints, the Model Law envisages that it will usually be most productive to allow the parties to a PPP contract to have wide latitude in settling its terms and contents, to reduce the risk of clauses which seem to them to be appropriate being treated as unavailable or challenged as illegal. PPP contracts are long, complex documents, often heavily negotiated by the parties to them. The parties usually need the help of sophisticated professional advisers to get them right. Where those advisers are available, it tends to make most sense for the law to trust the parties, so to speak, to reach 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.

The Model Law sets out a lengthy ‘wish list’ of provisions typically found in agreements of this kind, to help focus minds on the relevant ones and remove possible doubts about their legitimacy but leaves it to the parties to make the final decisions about which to use and how to word them. Many other types of clause are also possible in a PPP contract. The list touches on the People-first PPP Principles in a number of places where they are likely to be highly relevant to the contract terms, including key performance indicators (KPIs), most obviously, but also in areas where novel clauses may have to be thought through and structured in ways that are perhaps less obvious or familiar. These include providing for adequate dialogue with stakeholders and exercising step-in rights or rights of early termination in a manner which maintains public services and minimises potential harm to end users.

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



The Model Law's approach is also consistent with the drawing up and publication of model clauses for PPP contracts. Most countries find it helpful to do this, as it sets standards, promotes an understanding of the system and reduces the scope for unnecessary negotiation and wasted 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 counter-productive and an obstruction to the rapid evolution of the system.

Para. 2 contains a reference to the wide range of possible PPP structures that the industry has evolved over the past few decades, with the many familiar acronyms used to describe them (e.g. BOT, BOOT, BOO, DBFO, BLT<sup>43</sup> etc. etc.). It is again designed to reinforce the sense that the parties will have maximum freedom to use the structure which seems to them most appropriate for the project in question. If host countries have any serious reservations about any of them, they should modify the provision accordingly.

### **Article 25. Conclusion, Amendment and Termination of PPP Contracts**

The article makes it clear 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 (see comments under article 8 above). It can be amended or terminated by mutual agreement, but subject to any relevant restrictions in the contract, the regulations or otherwise at law (para.3). Some countries may wish to specify applicable conditions and criteria for contract amendments with precision in the PPP regulations. Others-particularly those from a common law tradition-may prefer to leave a wide discretion on the subject to the parties. It generally goes without saying, though, that any elements of the PPP contract 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.

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

Alternative 2 is an example of how to do this (based closely on the UNCITRAL approach). It contains tighter and more detailed definitions of what amounts to a material amendment, requiring further approvals, or even (as in the UNCITRAL original) subject to outright prohibition. These clauses may be considered too long and elaborate by some host countries (hence the square brackets). It should also be remembered 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 counter-productive. The underlying commercial and political reality is that, if major changes need to be made to a PPP, let alone any fundamental re-structuring, other government bodies will almost certainly be drawn into the process.

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<sup>43</sup> Build Operate Transfer, Build Own Operate Transfer, Build Own Operate, Design, Build, Finance Operate, Build Lease Transfer. There are many others. The standard texts on PPPs should be consulted for fuller explanations.

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. The article (para. 5) also provides in some detail for the payment of compensation on an early termination of a PPP contract. This is because the subject almost invariably proves highly challenging and contentious when these contracts are being negotiated, with the potential payment of very large amounts ‘on the table’.

The article makes it clear that either party may be entitled to compensation on an early termination of the contract *for any reason*, in accordance with its terms (and those of any direct agreement). The notion that a defaulting party may be entitled to compensation where it is itself at fault can often meet with great scepticism on the part of government bodies attempting PPPs for the first time. The article therefore spells out that this may, indeed, be the case, since the assets transferred to the contracting authority on an early termination will usually have a long-term value far in excess of the amount of any losses suffered by it as a result of any default. Moreover, they will usually have been funded largely or wholly by the private partner. All that funding will be lost and written off in the absence of any compensation.

Best international practice therefore usually entails the payment of at least some compensation for those assets and costs, an approach reinforced by the fact that project finance lenders will nearly always insist on being paid down in these circumstances. This is also consistent with the relevant legal principles of many jurisdictions (e.g. rules against unjust enrichment). The article does not specifically *require* such compensation to be payable as a matter of law, however. The final decision about that question is again left to the parties negotiating the PPP contract. It simply obliges them to give due consideration to the principles governing any such compensation when they are concluding it, listing several likely to be relevant in para. 5. The applicable details will have to be worked out and specified in the contract.

Paragraph 6 then lists some of the other matters that may need to be specifically addressed or provided for in connection with a termination of the agreement, such as transfer or purchase of certain assets (e.g. technology), training of government personnel, residual support services (e.g. spare parts) and decommissioning. These should be covered as appropriate in the PPP contract.

### **Article 26. Property and Related Matters**

This article addresses some of the main property (real estate) issues likely to arise as a PPP is being structured and negotiated. The contracting authority is given general responsibility in para. 1 for ensuring that the physical property (typically, the site) and associated rights (such as easements) and assets needed for the PPP are provided to the private partner, in accordance with the terms of the PPP contract (where all the relevant details will be set out). Para. 2 makes it clear that this must extend to the crucial but sensitive subject of rights of access to and from, and rights to fix installations on, third party property. Under para. 3, these rights can apply to any real property in the contracting authority’s use, occupation or control which it is entitled to transfer to the private partner, including public infrastructure. If such property belongs to third parties, the contracting authority is obliged under para. 5 to acquire it (using any available compulsory purchase powers as necessary), together with the necessary legal rights and interests.

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

The law of many countries might require competitive tenders to be held in relation to any such property transfers, and so para. 4 makes it clear that an additional tender on top of the wider tendering process governing the award of the PPP will not be necessary.

Para 7 makes it clear that the parties to the PPP contract can grant each other whatever property-related rights or interests are needed for the purposes of the project, in accordance with its terms. These may include outright ownership, leases, licences, rights of use and so on. The private partner is in turn entitled under para. 6 to grant ‘back-to-back’ rights and interests to its third-party contractors. Para. 8 acknowledges that the parties may decide in the PPP contract to identify and list different classes of asset, depending on their treatment on termination; namely assets which are to be transferred or sold to the contracting authority, and others which the private partner may freely dispose of or retain. It is worth noting, though, that a complete categorisation of this kind in the initial terms of the contract may be impracticable and so relatively unusual.

#### **Article 27. Types of Payment under PPP Contracts.**

This article confirms that the PPP contract may contain such forms, conditions and amounts of payment for the proper performance of the private partner’s responsibilities as the parties may agree. Local law may impose certain constraints in this area-such as regulatory requirements-which are allowed for. The article contains a broad, illustrative list of the types of payment that may be used, including direct user charges (typical of a ‘concession’ structure) and payment streams from the contracting authority, making it clear that any available form of permissible payment may be used. Payments to the contracting authority from the private partner may also be included, such as PPP fees, royalty payments or profit shares. The article ‘casts a wide net’ on this subject with a view to eliminating any unnecessary restrictions or doubts on the forms and types of payment that can be made.

#### **Article 28 Liability of Parties to the PPP Contract**

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

#### **Article 29. Step-in Rights and Substitution of Parties to the PPP Contract**

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

Article 29 therefore expressly entitles the parties to include step-in rights in the PPP contract (and in a ‘direct agreement’ with the lenders), although without imposing any obligation to do so. The relevant details, procedures and conditions will have to be agreed and set out in the contracts. In line with the People-first PPP Principles, the Article requires those procedures and conditions to be drawn up with the aim of ensuring that step-in rights are exercised in a way which does not adversely affect the provision of public services to end

users<sup>44</sup>. Because the nature and effect of lenders' step-in rights can be particularly startling to contracting authorities negotiating PPPs, para. 2 summarises the main powers they typically bestow on those lenders. Para. 3 again makes it clear that it shall not be necessary to hold any additional public tenders where step-in rights are properly exercised (since they will have formed part of the contractual matrix at the time of the original PPP award).

#### **CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES**

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

##### **Article 30. Protection of Parties' Interests Under the PPP Contract; Miscellaneous**

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

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

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

Para. 4 again confirms that the parties are allowed to agree on such payments terms as may offer the private partner and its lenders and investors adequate cost coverage and returns in compensation for the proper performance of the private partner's obligations, even where any regulated tariffs or prices in the host country may not otherwise ensure it.

Para. 5 allows for '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 includes an illustrative list of the sort of consequences that may be specified in the contract. These clauses again tend to feature amongst the more difficult and challenging ones in negotiation. The authors thought it important to highlight their availability in principle.

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<sup>44</sup> This is a novel requirement, reflecting the novel 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...'), since step-in rights are often considered fundamental components of PPP contracts, by both contracting authorities and project-finance lenders. A more restrictive, unqualified obligation along these lines might be considered unacceptable by both. The Model PPP Law seeks to work with the grain of both government expectations and concepts of 'bankability' in the international finance markets, not against it.

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

### **Article 31. Forms of Public Support for PPPs**

This article represents another ‘avoidance of doubt’ provision, stating that the full range of the various forms of government support, assets or commitments which the host country government is entitled to provide under applicable law shall also be available to PPPs. These will of course also be subject to any relevant constraints under applicable law<sup>45</sup>. Under para. 3, the Government can also provide for these specifically in the PPP regulations and explain them in the guidelines. Examples of them are given in the article. The terms and conditions applicable to them must be set out in the PPP contract (para.2). Host countries should add references to any other specific forms which they think need to be included (if any) or qualify or remove any they regard as inappropriate.

### **Article 32. Protection of Lenders’ and Investors’ Rights and Interests**

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

The rationale for the article is that doubts and 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. Step-in rights, in particular, can prove problematic. Where a host country does indeed wish (or is legally obliged) to qualify those protections, it should modify the article accordingly. In that case, however, careful thought should be given to the danger of applying principles or imposing restrictions which may threaten the ‘bankability’ of PPP projects. If new principles need to be crafted and restrictions disapplied, the PPP law may represent a vehicle for doing so. Existing law may have to be modified or repealed as a result.

Paragraph 4 starts from the assumption that the PPP can be subject to all forms of available security in the host country over its assets, other than those public property assets that are specifically designated as exempt from such security. Para. 5 confirms that the private partner’s shareholders can grant similar security over their ownership interests in the project company. Para. 6, however, provides (following UNCITRAL) that any transfer of the private partner’s rights *and obligations* will require the consent of the contracting authority, as provided for under the PPP contract. Care needs to be taken with this provision. It should not stand in the way of what is known in common law countries as assignments by way of security (i.e. 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

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<sup>45</sup> For example, EU member states and accession countries will be subject to EU state aid rules. Many other countries will have equivalent restrictions.

partner. This should always need the contracting authority's consent, even where that consent is automatically provided for as in a direct agreement. Sub-contracts and sub-leases of part of those obligations are also of course allowed.

### **Article 33. Protection of End Users and the General Public**

This is a simple, broad provision, designed to alert governments to the importance of ensuring adequate protection for the general public and end users of public services as PPPs are implemented. This might seem obvious, but in reality, is too often and easily forgotten or down-played. It is a fundamental aspect of the People-first PPP Principles. The Article obliges governments, in drawing up their detailed procedures for implementing PPPs, to be set out in the PPP regulations, to take due account of the needs and best interest of members of the general public and end users who stand to be affected by such implementation. It requires 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 specifically directed at PPPs, in the procedures. Such mechanisms should never 'oust' or limit other existing rights and remedies, however. The Article makes this clear.

Para 3 allows the contracting authority to require the private partner to put in place an 'operational-level grievance mechanism', which will be designed to facilitate the efficient handling of complaints and claims by the public. This would need to be provided for in the PPP contract. Where the PPP involves services to the public, para. 4 allows for the appropriate adjustment of those services over time as circumstances dictate, together with (if necessary) non-discriminatory third-party access to any related infrastructure network or system. Para. 5 allows the private partner to make rules governing the use of public infrastructure by third parties and the public.

## ***CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION***

### **Article 34. Governing Law**

Para.1 allows the parties to a PPP contract to choose and agree on the system of law which governs it. This may seem surprising to some. However, the authors felt that, on balance, it would be better for the law to bestow this freedom of contract than to impose local law automatically. Many legal systems do the latter in the case of government agreements. Occasionally, this can be problematic or even fatal to a PPP regime, however, if the perception of international investors and financial markets is that the host country's legal regime is not compatible with a project's 'bankability'. Sometimes very innovative contractual structures need to be deployed 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 between all the parties, which (by definition) is not that of one or more of the jurisdictions involved<sup>46</sup>. It was therefore thought to be helpful and constructive to allow the parties at least the possibility of choosing a different system of governing law other than that of the host country.

The choice of a foreign system of governing law is a somewhat theoretical possibility, nevertheless. PPP contracts are almost invariably governed by local law, for a range of cogent

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<sup>46</sup> The most famous example is the Channel Tunnel, the concession agreement for which was made subject to (in crude terms) 'common principles' under both English and French law, with specific provision for resolving inconsistencies between them.

reasons (especially at the sub-sovereign level). All the underlying assets will be governed by it anyway, for example, especially the real property involved. Public infrastructure and public services will therefore be governed by local law, and it would be very difficult politically for a government to accept the use of foreign law on a large-scale, high-profile infrastructure project. Host countries should therefore keep in mind that local law will nearly always apply to the PPP contract in practice in any case. The Article therefore builds in a ‘presumption’ that local law will be used, save in exceptional circumstances. Finally, if the contract does not expressly provide otherwise, local law has to be applied.

Other agreements and documents relating to the PPP (there will always be a plethora of them) are unlikely to be subject to quite the same sensitivities as the PPP contract. Para.2 allows 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 sub-contracts, and an internationally recognised system of foreign law for the credit agreements and the other major commercial contracts.

### **Article 35. Dispute Resolution**

This article again applies the principle of freedom of contract to the agreement by the parties of appropriate dispute resolution mechanisms in the PPP contract, explicitly mentioning a wide range of possibilities. Some legal systems will prescribe specific procedures in this context, as the article acknowledges. If they do so, in ways which are perceived as problematic, the relevant legislation may have to be amended in accordance with Article 39. International arbitration under a well-recognised system or set of rules (e.g. ICC/UNCITRAL, ICSID or LCIA) is usually a ‘*sine qua non*’<sup>47</sup> of any bankable PPP contract. Para. 3 confirms the efficacy of any waivers of sovereign immunity included in the contract; these will usually be essential for legal proceedings to be successfully brought against the contracting authority or other sovereign body.

## **CHAPTER VIII. IMPLEMENTATION AND MONITORING OF PPPs**

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

### **Article 36. Monitoring and Reporting on the Implementation of PPPs**

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

Para. 2 then obliges the contracting authority to provide regular reports about its PPPs to central government, copies of which shall generally be publicly available, as well as any specific information requested from time to time. This is designed to help promote that central store of useful information mentioned above.

Para. 3 requires contracting authorities to keep accurate and complete records of the decisions made and procedures followed by them in connection with all aspects of PPP implementation

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<sup>47</sup> An unavoidable condition.

under the PPP law. This is considered important from the perspectives of both transparency and accountability (both of which constitute People-first PPP Principles).

**Article 37. PPP Database**

This article in turn mandates 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. It aims to promote the transparency of the whole system, which is likely to be in the best interests of all involved. The detailed workings of the database can be set out in the regulations.

***CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS***

The last three articles deal with the formalities of entry into force of the PPP law. They provide for the cancellation of certain existing laws (which can be listed), the disapplication to subsequent PPPs of provisions of existing laws which are not cancelled, and the consequential amendment as necessary of others (allowing for either a list in the Law itself, or a deadline for making the amendments, or both). As a backstop, Article 38 also provides for the primacy of the PPP law over other laws relevant to PPPs in the event of a conflict between them. Host countries should conform these articles to their legislative customs and style as appropriate.



## Appendices

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## **Appendix 2 [list of leading precedents used in drafting Model Law]**

### **CIS Model PPP Law**

#### **PPP (or equivalent) Laws for the following countries**

- France
- Lithuania
- Russia
- Serbia
- Mongolia
- Croatia
- Egypt
- Georgia
- Uzbekistan
- Kenya
- [others to come]

#### **Relevant EU Legislation**

**Appendix 3. Some leading sources of reference and further reading about PPPs and PPP Legislation. To include:**

- **UNCITRAL Legislative Guide** on Privately Financed Infrastructure Projects, 2001 (hereinafter the "**PFI Guide**") or the "**Guide**" including the Legislative Recommendations (hereinafter the 71 "Recommendations" or "**Rec**") and **UNCITRAL Model Legislative Provisions** on Privately Financed Infrastructure Projects, 2004 (hereinafter the "**MLP**")<sup>1</sup>;
- Note by the Secretariat to the UNCITRAL Commission for its 50<sup>th</sup> session, Vienna 3-17 July 2017, Possible future work in procurement and infrastructure development (A/CN.9/912); report of the "Third International Colloquium on Public-Private Partnerships (PPPs) 23-24 October 2017, Vienna<sup>1</sup>.
- **European Commission Guidelines for Successful Public-Private Partnerships** (2003); **Commission Interpretative Communication** Brussels, 05.02.2008. C (2007)6661 on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP); **Directive 2014/23/EU** of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Official Journal L 94, 28.3.2014, p. 1; **Directive 2014/24/EU** of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65; **Directive 2014/25/EU** of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; OJ L 94, 28.3.2014, p. 243;
- **EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team, 2005<sup>1</sup>**;
- The **PPP Reference Guide** published by the **World Bank (IBRD)** in [ ]
- **UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines)<sup>1</sup>**;
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- **OECD Basic Elements of a Law on Concession Agreements, 1999-2000**;
- **CIS PPP Model Law<sup>1</sup>**;
- **The EPEC PPP Guide to Guidance 2011<sup>1</sup>**; and
- **Policy Challenges in the Implementation of Performance-used Contracting for Road Maintenance, EBRD 2016.**
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