

# PREPARING A PUBLIC-PRIVATE PARTNERSHIP LAW

## OBSERVATIONS FROM THE INTERNATIONAL EXPERIENCE

*Philip Kelly*

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## Preparing a Public–Private Partnership Law: Observations from the International Experience

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Philip Kelly is an independent legal and economics advisor on public–private partnerships.

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## ABSTRACT

This working paper draws on international good practices to provide observations and suggestions on the preparation and strengthening of public–private partnership (PPP) laws. Common themes and trends in the evolution of PPP laws are identified, along with their practical implications. While the emphasis is on developing East Asia, the observations and suggestions have relevance throughout developing Asia.

The central message of the working paper is that a PPP law should facilitate a sound PPP program, as well as the implementation of individual PPP projects on a case by case basis. Such a PPP program should dovetail with public investment management and planning, and public financial management to optimize impact. The PPP law should enable a PPP program to select and implement priority public investment and public services projects based on achieving better value for money in a PPP arrangement than through conventional public procurement.

The modern PPP law pays much closer attention to fiscal issues than the initial PPP laws. The bad experiences of many countries has made it abundantly clear that a PPP law must ensure that projects are affordable to users and government, and that the aggregated fiscal risk exposure of government in the entire PPP program is assessed and managed.

The quality of a project development determines the health of a country’s PPP program, and the modern PPP law plays a key role in ensuring project quality. The law should outline a single, streamlined PPP project life-cycle process in which different parts of government play a role. Because a PPP program cuts across a wide range of government activity, it is essential that all government entities know their roles and how these roles seamlessly knit together. Cooperation and coordination is vital to achieving synergy between the different parts of government working as a network. Otherwise, a clear picture of which parts of government are responsible for different elements of implementation will not emerge. The PPP law and program must be clear and certain for potential partners, investors, lenders, and government entities. Unless the PPP law and program are clear and certain, the process of implementation will be disjointed and limited in impact.

A bankable PPP arrangement must of course satisfy the reasonable expectations of partners, lenders and investors.<sup>1</sup> Partners, lenders, and investors pay close attention to how both the PPP law and the broader legal framework allocates and manages project risks. A robust PPP law and legal framework would provide:

- (i) a credible base for a sound and stable PPP legal framework, which includes the PPP law and other related legislation as well as procedures and practices;
- (ii) confidence in the PPP procurement regime and competition among potential partners encouraged by clear rules and the fair application of objective selection criteria in selecting a partner;
- (iii) stable regulatory environment that instills confidence and that brings stability to the income (revenue) stream of the PPP arrangement;

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<sup>1</sup> A “bankable PPP” means that a financial institution is willing to provide financing for the PPP arrangement.

- (iv) fair dispute resolution mechanisms and effectiveness and enforceability of PPP agreements;
- (v) protection of lender rights (e.g., security rights); and
- (vi) confidence that there will be fair treatment by government throughout the life of the project.

One of the important trends in PPP laws internationally is their flexibility in admitting new and hybrid arrangements. Changing forms and combinations of innovative financing, revenue streams, and ownership and control structures continue to emerge through experience and international knowledge dissemination. It is inevitable that a country's PPP program will produce innovative forms and combinations of arrangements that are difficult to anticipate now. For that reason a PPP law should enable a wide and flexible interpretation of PPP, the sectors and activities where PPP can be applied, and variety in the forms of PPP and methods of payment by users, government, and combinations of user and government payments.

## ABBREVIATIONS

ADB	-	Asian Development Bank
BOT	-	build-operate-transfer
CIS	-	Commonwealth of Independent States
EBRD	-	European Bank for Reconstruction and Development
ECJ	-	European Court of Justice
EPEC	-	European PPP Expertise Centre
EU	-	European Union
IADB	-	Inter-American Development Bank
IPPP	-	Institutional PPP
OECD	-	Organisation for Economic Co-operation and Development
PPP	-	public-private partnership
SOE	-	state-owned enterprise
UNCITRAL	-	United Nations Commission on International Trade Law
UNECE	-	United Nations Economic Commission for Europe



## I. INTRODUCTION AND OVERVIEW

1. The Asian Development Bank (ADB) has played an important role in preparing the legal and regulatory framework for public–private partnerships (PPP) in developing East Asia. ADB helped Mongolia prepare the 2010 Law on Concessions, and is now advising both the central government and the Ulaanbaatar Municipal Government on strengthening the legal and regulatory framework for PPPs.<sup>2</sup> ADB is also advising the People’s Republic of China in preparing a concession law.<sup>3</sup> ADB’s ongoing technical assistance is deepening the awareness of the legal and regulatory environment needed for sound PPPs that deliver high quality public services in a fiscally sustainable manner.

2. This working paper draws on international good practices to provide observations and suggestions on the preparation and strengthening of PPP laws. Common themes and trends in the evolution of PPP laws are identified, along with their practical implications. While the emphasis is on developing East Asia, the observations and suggestions have relevance throughout developing Asia.

3. The working paper has six parts including this introduction and overview:

*PPP Legal Framework:* The second part of the working paper outlines how a PPP law fits within a wider legal framework and that a PPP law on its own will not create a legal environment conducive to a successful PPP program. It shows how PPP is connected with other subjects and laws, and with the needs and concerns of partners, investors, and lenders to PPP arrangements.

*Key Terms:* The third part of the working paper considers the terms PPP, concession, and franchise—terms used by various countries and organizations. There is no single, internationally accepted definition of each of these terms and confusion can result from the same term being used to refer to different forms of arrangements. The working paper emphasizes that the substance of arrangements and the contents of PPP agreements are more relevant than the labels of PPP, concession, franchise or other term.

*Contents and Trends in PPP Laws:* The fourth part of the working paper sets out the key contents and trends in PPP laws and guidance.

*Observations and Suggestions:* The fifth part of the working paper addresses a range of issues and questions that are among those that should be considered when preparing a PPP law, and contains observations to assist preparation of a PPP law.

*Concluding Suggestions:* The sixth part of the working paper puts forward key suggestions to advance the preparation of a PPP law.

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<sup>2</sup> ADB. 2009. *Technical Assistance to Mongolia to Support Public–Private Partnerships*. Manila (TA 7291-MON); ADB. 2010. *Technical Assistance to Mongolia for Public–Private Partnership Development*. Manila (TA 7577-MON); ADB. 2012. *Technical Assistance to Mongolia for Developing a Conducive Environment for Public–Private Partnerships*. Manila (TA 8236-MON); ADB. 2014. *Technical Assistance to Mongolia for Transaction Advisory Services for the Combined Heat and Power Plant 5*. Manila (TA 8637-MON), and; ADB. 2015. *Technical Assistance to Mongolia for Ulaanbaatar’s Municipal Services*. Manila (TA 8939-MON, financed by the Japan Fund for Poverty Reduction).

<sup>3</sup> ADB. 2014. *Technical Assistance to the People’s Republic of China for Preparing a Concession Law for Infrastructure and Public Services*. Manila (TA 8717-PRC).

4. Appendix A contains a list of PPP laws from a large variety of countries and model laws and guidelines produced by international organizations that were studied and reviewed during the preparation of the working paper.<sup>4</sup> Other appendices and references present useful material for preparing or strengthening a PPP law.

## II. THE PPP LEGAL FRAMEWORK

### A. PPP Legal Framework

5. The European PPP Expertise Centre (EPEC) PPP Guide sets out the purpose and key contents of a PPP legal and regulatory framework. This framework is broader than the core PPP law as it also includes other relevant laws (e.g., content, application and enforcement of laws relating to contract, secured transactions and financing), policy statements, guidance and contracts.

“A legal and regulatory framework that supports PPPs is meant to facilitate investments in complex and long-term PPP arrangements, reduce transaction costs, ensure appropriate regulatory controls, and provide legal and economic mechanisms to enable the resolution of contract disputes. The design of PPP legal frameworks varies across European Union (EU) countries, depending on legal tradition and existing laws. A PPP legal framework should include:

- (i) provisions that make a PPP project possible and facilitate its functioning (e.g., the legal right to establish a PPP company, the terms and conditions under which public assets may be transferred to nonpublic entities, the power of the PPP company to choose subcontractors on its own terms); and
- (ii) provisions that enable governments to provide financing, where relevant (for example, to provide subsidies or to make long-term commitments of public expenditure for the life of the PPP contract).

A PPP legal framework is typically identified in laws and regulations, but also in policy documents, guidance notes and in the design of PPP contracts. The exact nature of the legal and regulatory framework applicable to a particular PPP transaction also depends, among others, on the financing mechanisms contemplated and the scope of responsibilities transferred to the PPP company. These are issues on which the public sector should always secure advice from suitably qualified advisers.”<sup>5</sup>

6. A comprehensive approach to PPP contains policy, law, regulations, and procedures setting down what needs to be done by different parts of government, and how the work of the different parts of government throughout the PPP project cycle knits together. There should also be a manual of tools and techniques, a set of clauses and a user guide to the clauses that can be revised and updated as the PPP program unfolds and evolves. Finance is required for project preparation and government support is needed to attract investors, lenders, and high quality construction and operating partners. There needs to be access to professional legal, financial, and technical advisers that are experienced in PPP in the relevant sector or activity.

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<sup>4</sup> Some of these PPP laws are available at <http://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concession-laws>

<sup>5</sup> EPEC PPP Guide. <http://www.eib.org/epec/g2g/annex/2-legal-frameworks/>

7. It is the combination of policy, law and other legal instruments, procedures, implementation manuals, relationships with other laws and organizations, public administration and private sector systems, expertise and experience that determine if a country has a workable legal framework for PPP. The choice of where content of the legal framework is located—in a law, regulations, guidance, procedures—depends on the individual country’s history, legislation style, practice, and circumstances. The form of expression of the PPP legal framework is country specific. International lenders will require a clear legal right for the conduct of a PPP or absence of any restrictions.

## **B. PPP and Legal Context**

8. Successful PPP implementation requires consistency and synergy between a PPP law and other laws, procedures, and practices that can have an impact on the PPP program and projects.

9. Appendix B discusses issues that are likely to have an impact on the PPP program and projects. These should be addressed in the PPP law, or other laws and supporting instruments, or in the PPP agreement.<sup>6</sup> The choice of where these issues are addressed depends on circumstances of an individual country. Appendix B addresses the interface between PPP and the following issues:

- (i) government approval and award of PPP;
- (ii) PPP procurement;
- (iii) monitoring and regulation of PPP arrangements, price setting, and obligations;
- (iv) PPP finance, security for loans, and government and lender step-in rights;
- (v) PPP and public investment management and planning, and public financial management;
- (vi) PPP and government support;
- (vii) PPP land, environmental and social issues;
- (viii) PPP and contract law, administrative law, dispute resolution;
- (ix) PPP and insolvency or enterprise bankruptcy law, including reorganization or company rescue; and
- (x) PPP and matters that include taxation, consumer protection, health and safety, labor, standards and public liability, investor protection, foreign investors, foreign exchange, and insurance.

## **C. Needs and Concerns of Partners**

10. Potential partners are made up of contractors (construction and operational), investors, and lenders. They are the target group to participate in PPP procurement processes and to invest in PPP arrangements. There are significant expenses and risks incurred in participating in a PPP procurement process and substantial risk in investing in PPP projects. Partner needs and concerns must be adequately addressed by the PPP legal framework either in the PPP law and supporting instruments or in the PPP agreement as is best suited to an individual country’s circumstances (Box 1).

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<sup>6</sup> World Bank, ADB, Inter-American Development Bank. *PPP Reference Guide*; and World Bank Public–Private Partnership in Infrastructure Resource Center (PPPIRC) website provide links to key questions on laws and subjects that can be usefully considered when implementing an infrastructure program, project, or drafting a PPP law. <http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-environment>. A due diligence checklist on the PPP legal environment is available at <http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/due-diligence-checklist>

### Box 1: Partner Concerns

#### Concerns of Contractors and Investors

- (i) Cost, time, and quality of the PPP bid process: are major approvals (e.g., land) still pending?
- (ii) Clarity and stability of the legal and regulatory framework.
- (iii) Criteria for evaluating bids.
- (iv) Quality of the public sector project team and its advisers.
- (v) Security of the project's income stream (demand risk and credit risk attaching to public sector commitments in the PPP agreements).
- (vi) What are the deliverables and how performance is assessed?
- (vii) Availability and cost of long-term debt funding.
- (viii) For financial investors in the project company, there will be a concern with the credibility and track record of the construction contractor and operator to deliver the service on time and within budget.
- (ix) Status and availability of connecting infrastructure and inputs and terms of supply.
- (x) Effectiveness and enforceability of the PPP contract and related agreements.
- (xi) Potential foreign exchange risks.
- (xii) The overall operating environment for private capital.
- (xiii) Allocation of risks both between the public and private sectors, and among the private parties.
- (xiv) Returns commensurate with the risks to be assumed under the agreements.
- (xv) Effectiveness with which the public sector will manage the contract and make decisions.
- (xvi) Opportunities to refinance the debt or sell the investment.

#### Concerns of Lenders

- (i) Soundness and stability of the legal framework, including the PPP law and other related legislation, procedures and practices.
- (ii) Confidence in the procurement regime; clear rules and objective selection criteria for partner.
- (iii) Stable political and regulatory environment that instils confidence.
- (iv) Effectiveness and enforceability of the PPP contract and other agreements in event of dispute.
- (v) Risks that are understood, controllable, finite, and appropriately allocated to the party best placed to manage them.
- (vi) Reliability of the project cash flows for meeting debt service requirements.
- (vii) Who bears the demand risk.
- (viii) Government credit risk; credibility of government entities and bankability of their obligations.
- (ix) Ability of contractors to perform and the quality of their management.
- (x) Bankability of contractors and quality of contractor guarantees.
- (xi) Reputation and impact of the project (environmental, land, social—including resettlement and safeguard— assessments).
- (xii) Right to step-in if a project fails and availability of alternative construction and operating contractors.
- (xiii) Availability and effectiveness of insurance cover.

Source: Adapted from E. Farquharson, C. Torres de Mästle and E.R. Yescombe with J. Encinas. 2011. *How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets*. Public-Private Infrastructure Advisory Facility (PPIAF). World Bank.

11. Useful perspectives on the needs and concerns of partners and project risk are provided by international rating agencies such as Moody's, Fitch Ratings and Standard & Poor's (S&P).

12. Moody's Investors Services report is of particular interest because it addresses the risks and benefits of PPP in infrastructure.<sup>7</sup>

<sup>7</sup> For example, see *Moody's Investor Service*. 2015. Sub-Sovereign Benefits of PPP Infrastructure Funding in China Will Take Time to Materialize. 21 July. [https://www.moodys.com/research/Moodys-Benefits-of-PPP-infrastructure-funding-in-China-will-take--PR\\_330472](https://www.moodys.com/research/Moodys-Benefits-of-PPP-infrastructure-funding-in-China-will-take--PR_330472)

13. Based on international experience, Fitch Ratings apply rating criteria for infrastructure and project finance, and specific sector criteria for transportation and energy infrastructure, to identify the major risks that projects face.<sup>8</sup> When analyzing a project, Fitch considers (i) the project rationale, (ii) the partner and legal structure of the project, (iii) completion risks, (iv) technology risks, (v) operating and maintenance risks, and (vi) risks to gross revenue of the project from variations in volume, price or availability. Sovereign, political, and industry risks are considered together with future capital expenditure and information quality. Risk allocation is a key feature of project finance. Fitch assesses its impact on the project company, as appropriate for each risk factor, which in most cases will include a minimum level of creditworthiness consistent with the significance of the allocated risk. The report contains a select set of PPP examples that illustrate these risks. Fitch Ratings has published criteria outlining the approach to rating the obligation of the government counterparty (sovereign, state, provincial, regional and local governments, departments and agencies, and public sector entities) in PPP financing for public infrastructure assets.<sup>9</sup>

14. S&P ratings framework for project finance based on international experience assesses components that include:

- (i) counterparty risk criteria (the credit quality of a project's key counterparties, including the buyers of the project's output or a provider of services and materials to the project);
- (ii) construction phase criteria project risk;
- (iii) operations phase criteria project risk; and
- (iv) transaction structure criteria to assess the constraints, legal framework, and protection around a project. For example, can a project issue additional debt (and under what circumstances), or when can the project distribute cash flow?<sup>10</sup>

15. While the S&P rating methodology is for project finance, it is instructive for any government that wants its PPP program to attract finance because it demonstrates the issues in PPP projects that will concern responsible lenders and investors. The Fitch report and the S&P report illustrate the issues that partners and lenders are concerned about and which government needs to understand. The Fitch report shows that it is impossible to provide in an agreement for all events that may occur during the life of a PPP project. The PPP law and agreements must have flexibility to recognize that changes during the life of the agreement may be necessary.

16. Many of these concerns can be addressed during the course of PPP project preparation, choice of transaction structure, the procurement documentation and process, and in the PPP agreement. However, the PPP law needs to enable the process.

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<sup>8</sup> *Fitch Ratings Global*. 2013. PPP Lessons Learned Special Report. <http://ibtta.org/sites/default/files/documents/IBTTA%20Publications/Fitch%20Ratings%20Global%20PPP%20Lessons%20Learned%202013.pdf>

<sup>9</sup> <https://www.fitchratings.com/site/fitch-home/pressrelease?id=988412>

<sup>10</sup> For a detailed account of how project finance ratings criteria are assessed see [http://www.spratings.com/documents/20184/86990/SPRS\\_Project%2BFinance%2BRatings%2BCriteria%2BReference%2BGuide\\_FINAL/cdfde690-57d1-4ff4-a87f-986527603c22](http://www.spratings.com/documents/20184/86990/SPRS_Project%2BFinance%2BRatings%2BCriteria%2BReference%2BGuide_FINAL/cdfde690-57d1-4ff4-a87f-986527603c22)

### III. DEFINING KEY TERMS

#### A. Distinction of Terms

17. There is no single internationally accepted definition of the terms: PPP, concession, and franchise. There are different meanings in different countries and various meanings in the same country, depending on circumstances and context. The term PPP, concession, or franchise could unintentionally give rise to uncertainty or unnecessarily limit the range of potential arrangements unless there is a common understanding in terminology.

18. Distinctions between countries on types of PPP arrangements are mainly driven by attitudes toward provision of public services, state or public property (particularly where property owned or controlled by the State has a different legal status from property owned or controlled by persons other than the State), and the historical evolution of government—private sector relations in providing facilities and public services. Some countries have different laws for different types of PPP arrangements or for different sectors or activities. The various laws for PPP arrangements have usually emerged in piecemeal fashion over a period of years in response to gaps in legislation, or the need to accommodate new forms of arrangements. In the case of some European Union (EU) member states, change in legislation arose because existing PPP laws did not comply with EU single market requirements and the opening of public procurement and PPP arrangements to enterprises from all member states.

19. This part of the report reviews the use of PPP, concession, and franchise in other countries and offers suggestions designed to optimize the benefits of PPP.

#### 1. PPP

20. A review of the definition of PPP before considering other similar terms will be undertaken. Appendix C provides sample definitions of PPP from international organizations and various countries and shows that there is a wide range of definitions. When considering different types of PPP projects, it is necessary to consider the details of the project structure and not rely on a label placed on the project.

“Activities that fall under this umbrella (PPP) may sometimes be characterized, for example, as ‘concession’ or ‘franchise’ or ‘build-operate-transfer’ deals. At one extreme there are ‘fully’ public sector enterprises, and at the other ‘fully’ private firms; in between exists a continuum of arrangements that combine public and private roles in different ways. The public sector may delegate construction and operation to a private party. It may just delegate operation or just management or only some services, like metering electricity.

Whatever term we use, it is important to understand the details. For example, proponents of private participation in the water sector have made much of the difference between the French approach—concession—and the English and Welsh privatization. Looking closer there is no significant difference. Can an English water company turn off the tap, because it owns the water? No, it has to provide service. Can it close the business, dig out the pipes, and leave? No. But the ownership is private, whereas in France it remains public and the assets return to the public sector when the concession period ends, say after 25 years. Well, under its license, an English water company may lose the license, if the responsible ministry so decides at any time

and without reason, as long as notice of 10 years has been given. The assets are then taken over by the government. Hence, there is no substantive difference between the two approaches. At the other end of the spectrum, even when the enterprise is deemed fully public, construction is typically outsourced to the private sector as are a number of services such as office cleaning or catering.”<sup>11</sup>

21. The definition of PPP in the PPP Reference Guide is “a long-term contract between a private party and a government entity for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance”.<sup>12</sup>

22. The PPP Reference Guide adds that “this definition encompasses PPPs that provide new assets and services, and those for existing assets and services. It can include PPPs in which the private party is paid entirely by service users, and those in which a government agency makes some or all of the payments. The project functions transferred to the private party—such as design, construction, financing, operations, and maintenance—may vary from contract to contract, but in all cases the private party is accountable for project performance, and bears significant risk and management responsibility”. The key elements in any PPP arrangement are how risk is allocated and that payments to the partner in the arrangement are related to performance.

23. The definition refers to long-term, which is usually considered to be five years or more. A shorter period would be considered to be more in the nature of an outsourcing or contracting out arrangement. This would normally not be adequate for performance-related payments particularly where the arrangement included construction of a public asset. The relationship is usually between a partner that is a private party and a government entity. A state-owned enterprise (SOE) or other government entity may be involved with a private party as a partner in providing a public asset or service through an institutional PPP (IPPP). An IPPP is a term used by the EU for the purposes of deciding on the application of different public procurement rules with a view to ensuring access to markets by enterprises in all member states where there is a government entity involved with the private sector in providing public works or services. In this context, an IPPP arises from the establishment of an entity, held jointly by a government entity and a private party, to deliver infrastructure assets or public services. The IPPP may involve the creation of a new entity, or transfer of part ownership, or participation in an existing government entity to the private party. Where the entity is a company, the shares may be held in varying proportions by government or the government entity and the private party. The European Commission guidance on IPPP says that apart from the contribution of capital or other assets, the private input to the IPPP consists in the active participation in the operation of the contracts awarded to the public-private entity, or the management of the public-private entity, or both. A capital contribution made by private investors into a government-owned company does not on its own constitute IPPP.<sup>13</sup> It is not common for an SOE to be a partner with government in PPP arrangements, but there are some examples.

<sup>11</sup> M. Klein. 2015. Public-Private Partnerships Promise and Hype. *World Bank Policy Research Working Paper*. No. 7340. [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/06/26/090224b082f92d16/1\\_0/Rendered/PDF/Public0private00000promise0and0hype.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/06/26/090224b082f92d16/1_0/Rendered/PDF/Public0private00000promise0and0hype.pdf)

<sup>12</sup> <http://api.ning.com/files/lumatxx-0jz3owSB05xZDkmWIE7GTYYA3cXwt4K4s3Uy0NtPPRgPWYO1ILrWaTUqybQeTXIeuSYUxbPFWlysyNI5rL6b2Ms/PPPReferenceGuidev02Web.pdf>

<sup>13</sup> Commission of the European Communities. 2008. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:mi0001> [Note: the guidance is not a law on IPPP and the guidance is provided for the purposes of determining which public procurement rules apply. The guidance predates the three 2014 Directives on Public Procurement, Concessions and Public Utilities. The purpose of these directives is to further the aims of the single European market through access to markets and fair competition. The primary purpose is not the promotion or enabling of PPP. There is an EU directive on concession but there is no EU directive on PPP arrangements. In procuring a PPP partner, the governments of member

## 2. Concession

24. As with the term PPP, there is no single, internationally accepted definition of the term *concession*.

25. Dictionary definitions of “concession” provide a number of meanings. One of these is a term to describe a license, right or permission to use land or other property for a specified purpose that is granted by a government, corporate body, or other controlling body. Concession can refer to a commercial operation set up by agreement within the property of a larger entity (e.g., within a department store), or a right given to sell goods or services within a specified geographic area. Concession has a number of other meanings or usages, as in preferential allowance or rate granted by a body, e.g., a tax concession or a reduced price for an item available to a specified category of person.

26. Delmon illustrates different meanings of concession:<sup>14</sup>

“The term ‘concession’ is used globally for a number of different purposes. At its most basic, the term means the grant by a government of a right to provide a service or to use an asset, for example the grant of the right to exploit natural resources located on or under a particular plot of land. It is also used to refer to different PPP structures. In Russia, a ‘concession’ is a federal government structure whereby the project company builds a facility, transfers it to the grantor and operates it over a long period. In France, also defined by law, it means giving a private entity the right to use government owned assets for their maintenance, operation and management over a period. The French model does not usually involve a significant investment obligation of the concessionaire. In Brazil, a managed concession is one where the concessionaire runs public assets and earns its revenues from tariffs charged to consumers, while a sponsored concession includes a payment by the grantor to top up the revenue stream. In Chile, the concession is used for refurbishing and building toll roads and for the privatization of the water sector. The water concession in Manila involved the transfer of existing assets to the project company, as well as a large amount of existing debt, with the project company responsible for operation, maintenance and expansion of the system and delivery of services to consumers. And, of course, in the extractive industries (e.g., oil, gas and mining) it means having the right of extraction in a given area, usually against a royalty paid to the government. The word ‘concession’ is the most common and probably the least precise of the concession terminology.”

27. A concession involving public infrastructure and public services should be distinguished from (i) a natural resource concession (for exploration or exploitation of oil, gas, mining, forestry, rubber, palm oil or other resource) which may be granted in an agreement or by a power contained in legislation, (ii) other forms of concessions or licenses (e.g., a retail outlet concession at an airport or a sports facility granted in an agreement), or (iii) licenses or permits granted for regulatory purposes usually by a power contained in legislation, e.g., a broadcasting license.

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states are bound by general EU principles and obligations arising from Treaties and other laws regarding access to markets.]

<sup>14</sup> J. Delmon. 2010. Understanding Options for Public-Private Partnerships in Infrastructure - Sorting out the forest from the trees: BOT, DBFO, DCMF, concession, lease... *Public Policy Research Working Paper*. No. 5173. The World Bank. [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2010/01/11/000158349\\_20100111150559/Rendered/PDF/WPS5173.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2010/01/11/000158349_20100111150559/Rendered/PDF/WPS5173.pdf)

28. A concession involving public infrastructure or public services can be a grant of a right to operate and manage a public asset or service. In some countries, a concession is used to describe an arrangement where the revenue (income) stream, or largest portion of the revenue stream, is derived directly from user payments. In other countries, a concession refers to an arrangement that is financially viable without government support.

29. It is best to avoid confusion arising from different usages of the term concession. Rather, it may be worthwhile to regard a concession of public infrastructure and public services, however defined, as a form of PPP to be addressed through a single streamlined PPP project life cycle process.

### 3. Franchise

30. The term *franchise* is used at times in the discussion of PPPs. There is no single internationally accepted definition of the term “franchise” in connection with public infrastructure and public services. Franchise, in connection with intellectual property, is a right given under a franchise agreement to engage in a specified business or business with a particular trademark in a specified area. But, franchise is used in a different sense in connection with public infrastructure and public service arrangements. “Franchising entails the allocation of temporary monopoly rights to carry out an activity, typically using the mechanism of an auction to control entry to the market. The basic premise is that competition for the market effectively substitutes for competition within it: to enjoy monopoly rights, the private firm first has to engage in competition to secure those rights. As with contracting-out, with which it overlaps, franchising is appropriately considered as a process, involving both the design and operation of award procedures and monitoring, negotiation, and sanction under the rubric of franchise management.”<sup>15</sup>

31. An infrastructure franchise can refer to a rail service operation franchise in the United Kingdom (UK) or Australia,<sup>16</sup> electricity distribution franchise in India,<sup>17</sup> *affermage* in France (a form of lease or service concession under which the private operator is not required to make significant capital investments),<sup>18</sup> or a form of delegated service contract. In these instances, franchise refers to the right to exploit (collect tariffs, fees or tolls from users), and to operate and maintain an existing facility or network, usually in exchange for a fee paid to government. There may be a requirement on the franchisee to set aside a portion of the sums it collects for future rehabilitation of the facility.

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<sup>15</sup> For a discussion on public franchising in the UK when it was initially introduced into government activities see: C. Harlow and R. Rawlings. 1997. *Law and Administration*. 2<sup>nd</sup> ed. Butterworths. p.270. For a general discussion on franchising and government in the same initial period of encouraging more private participation in provision of government services in the UK see: R. Baldwin and M. Cave. 1996. *Franchising as a Tool of Government*. London Centre for Study of Regulated Industries.

<sup>16</sup> UK Government Department of Transport Rail Franchising. <https://www.gov.uk/government/collections/rail-franchising>; and Victoria Public Transport Partnership Agreements. <http://ppp.worldbank.org/public-private-partnership/library/victoria-public-transport-partnership-agreements?device=mobile>

<sup>17</sup> Pargal, Sheoli, and Sudeshna Ghosh Banerjee. 2014. *More Power to India: The Challenge of Electricity Distribution Directions in Development*. Washington, DC: World Bank.

<sup>18</sup> French Guide to Lease Affermage Agreement for Distribution of Drinking Water, prepared for Association des Maires de France, designed to update 1980 model affermage agreement. <http://ppp.worldbank.org/public-private-partnership/library/new-model-leasing-contract-public-drinking-water-distribution-services>; and updated sample agreement <http://ppp.worldbank.org/public-private-partnership/library/new-model-leasing-contract-public-drinking-water-distribution-services>

## **B. Concluding Observations**

32. Countries and organizations use different terms to describe similar PPP arrangements, while the same term can have different meanings within a country. The substance of rights, obligations, and risk allocation recorded in the PPP agreement is more important than the label placed on an arrangement.

33. The aim is to ensure that the PPP program and projects deliver priority public infrastructure and public services, represent value for money compared with conventional public procurement, are affordable to users and government, and do not expose government to excessive fiscal risk.

34. The questions to be considered are:

- (i) Is the project considered a priority project irrespective of the method of procurement by conventional public procurement or PPP?
- (ii) Is the project suited to be considered as a PPP project?
- (iii) Does the PPP business case (PPP feasibility study) demonstrate better value for money through PPP compared with conventional public procurement?
- (iv) Is the project affordable for users and government?
- (v) What are the fiscal risks of the project and can these be managed?
- (vi) What PPP transaction structure, including levels of private financing, government support, and sources of revenues (from users or government or combination of both), will optimize the project objectives for government, the partner, and lenders?

35. The PPP transaction structure should emerge from the project development (preparation) process. It should not be decided in advance of the necessary analysis. There is evidence of countries deciding on the transaction structure before carrying out project preparation. This results to limited partner, lender and investor interest, or poorly structured projects that do not deliver expected results. Deciding on the PPP transaction structure too early in the PPP project cycle and without the necessary PPP project development work is inefficient and ineffective.

36. A broad definition of PPP allows flexibility in designing and choosing the best structure for a PPP arrangement. Projects should be evaluated for PPP within a single, streamlined process, with clearly stated steps implemented by different parts of government exercising their specific functions and responsibilities as part of the integrated network.

## **IV. PPP LAWS: TRENDS AND CONTENT**

### **A. PPP Trends**

#### **1. Colloquium on UNCITRAL Guidelines 2014**

37. Studies and consultations on developments in private finance in infrastructure carried out by the United Nations Commission on International Trade Law (UNCITRAL) Secretariat and advisers,

and at a 2014 Colloquium on updating UNCITRAL Guidelines and Model Legislative Provisions identified the following issues:<sup>19</sup>

“The Colloquium recalled that PPPs were now generally recognized as a legal concept, but that no universal definition of PPPs existed. However, it was agreed that a project must include certain features to be classified as a PPP, including: the selection by a public authority of a private party to construct, renovate, maintain and/or to operate infrastructure, and/or to provide services, and a long-term contractual relationship between those parties.... It was agreed that a legislative text on PPPs should include those based on the minimum features of a PPP ..... a text would most usefully address projects for the design, construction, renovation and finance of infrastructure, with the provision of associated services (both maintenance-type and public services), whether the payment for the services was derived from the public authority, from end users or from a combination of the two”.

38. The Colloquium findings indicated that:

- (i) Existing UNCITRAL Guidelines and Model Legislative Provisions are not suited to innovative funding models. Emerging forms of funding mechanism and risk distribution are changing the governance and structure of PPPs. Different project selection methods need to be considered that permit better advance planning of projects. Consultation with potential participants prior to seeking proposals mean there is a need to develop PPP procurement for identification of a preferred partner. Changes should also be made to improve the mechanism for review and challenge to the selection of a preferred partner.
- (ii) Private finance of infrastructure was initially based on an assumption that the private partner would be allocated most of the project risk. Governments are now taking on increased risk, including risk on the level of demand for public services and revenue streams. Availability-based PPPs under which the government pays project revenue have become more common.<sup>20</sup>
- (iii) Project planning, including the allocation of risk and government support, needs greater emphasis.

<sup>19</sup> United Nations General Assembly A/CN.9/821 UNCITRAL. Forty-seventh Session. New York, U.S.A. 7–18 July 2014 and; “Possible Future work on PPPs Report.” *UNCITRAL Colloquium on PPPs. 3–4 March 2014. Vienna, Austria.* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V14/017/93/PDF/V1401793.pdf?OpenElement>

<sup>20</sup> In Europe there were a large number of historical concession arrangements in France, Spain and other countries which relied mainly on user payments. Many of these arrangements were granted to SOEs facing limited or no competition in the market, or were arrangements that came to be nationalized especially in the first half of the 20<sup>th</sup> century. The need to promote access to a single market in the EU is opening these concessions and new arrangements to greater competition. In more recent years, the EU government pay PPP projects are far more common than user pay projects. For example in 2014, 82 PPP projects in EU-28 countries as well as Turkey and countries of the Western Balkans region, i.e., Albania, Bosnia-Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro and Serbia) reached financial close. The projects had an aggregate value of €18.7 billion. Over 85% of these projects were availability payment (government pay) projects. The transactions were structured as design-build-finance-operate (DBFO), design-build-finance-maintain (DBFM) or concession arrangements which feature a construction element, the provision of a public service and genuine risk sharing between the public and the private sector. The projects financed through project financing reached financial close in the relevant period. Each project had a debt plus equity value of at least €10 million (excludes any government contribution). This value may be substantially lower than total capital investment costs. See *EPEC Market Update Review of the European PPP Market in 2014* [http://www.eib.org/epec/epec\\_market\\_update\\_2014\\_en.pdf](http://www.eib.org/epec/epec_market_update_2014_en.pdf)

- (iv) Transaction costs, including postcontract management and project running costs, are increasing relative to project value because of excessive bid and fee payments. Pension funds potential for investing in infrastructure and public services, using competitions to provide debt or equity finance before procurement of the project, governments arranging pooled debt, and other means of reducing transaction time and costs need to be explored and reflected in the legal framework.
- (v) Other subjects where UNCITRAL Guidelines and Model Legislative Provisions could be updated include:
  - a) dispute settlement—to recognize the complexity of arrangements and disputes and to arrive at a workable resolution while retaining confidence of government, private parties, lenders and the general public;
  - b) unsolicited proposals—for better management and control over the process where unsolicited proposals are permitted;
  - c) allocating provisions between a law and an agreement—to reflect what are considered essential elements while permitting flexibility to tailor agreements to individual project arrangements;
  - d) transparency and other issues to build credibility and confidence; and
  - e) international infrastructure projects which cross borders of countries.

## **2. UNCITRAL SECRETARIAT 2015**

39. The UNCITRAL Secretariat produced a paper on future work on infrastructure development for the 48th Session of UNCITRAL, in July 2015.<sup>21</sup> The Secretariat obtained information from countries or regions of activity that would be of assistance in reforming the UNCITRAL Legislative Guidelines and Model Legislative Provisions, and reviewed the provisions of these texts. The Secretariat noted emerging convergence in policy issues and the similarities in planning, preparation, and procurement of user pay and government pay PPP. While there are some differences between different types of PPP arrangements, the Secretariat considered that a revised legislative text could address elements relevant for all types of PPP.

40. Appendix D summarizes the content that UNCITRAL Secretariat identified in 2015 for updating the UNCITRAL Guidelines and Model Legislative Provisions.

## **3. PPP Laws and Guidelines—Findings**

41. Analysis of laws and guidelines in Appendix A identified evolving trends and developments in laws and practice. A key finding is that as experience and international knowledge dissemination grows, there is increasing convergence in how laws in different countries address emerging trends and developments. This convergence is driven by exposure to a wider variety of project and financing arrangements, and to the transfer and application of knowledge and experience from international sources.

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<sup>21</sup> UNCITRAL. “Planned and possible future work in procurement and infrastructure development.” Note by the Secretariat A/CN.9/850 29. April 2015. (Prepared for UNCITRAL Commission’s consideration at the Forty-eighth Session. Vienna, Austria. 29 June–16 July 2015).

42. The evidence and analysis shows that as a country gains experience with successful PPP, more opportunities emerge for wider PPP application. These opportunities are seen across more sectors and activity areas, and through the emergence of more creative project structures and financing arrangements. The PPP law, and other related laws, evolve to enable implementation of these arrangements. They also evolve to remove obstacles and inconsistencies that inevitably arise during PPP implementation. The PPP legal framework needs to be able to achieve certainty without being a straitjacket. There must be flexibility to allow positive changes to PPP programs and projects to take place.

43. An examination of the experience of countries with mature PPP programs show that the broad PPP legal framework, and the organizational framework and processes of PPP implementation, have undergone regular updating and improvement. These reflect lessons learnt and increased skills and knowledge of PPP in government and among potential partners, lenders, and investors. The legal framework, processes, practices and organization of PPP implementation in the earlier phases of developing a PPP program will inevitably be modified with changed circumstances.

44. PPP legal frameworks in many countries are evolving to address key issues that relate to the recognition and promotion of:

- (i) innovative finance from private and public sources: examples include a wider range of government support mechanisms, including grant and capital contributions that blend with private finance, and other financial and nonfinancial support that make priority projects bankable;
- (ii) changing attitudes to the optimal allocation of demand risk;
- (iii) availability-based PPPs under which the government pays project revenue and bears most demand risk have become more common;
- (iv) better preparation of projects through project development funding;
- (v) improved contract management and monitoring during the operational phase of a project to review service performance and performance related payments,
- (vi) regular reviews to ensure achievement of expected value for money;<sup>22</sup>
- (vii) an emphasis on the aggregate impact of an overall PPP program of projects and the project pipeline, and less emphasis on a series of one-off projects;
- (viii) competition between potential partners for projects to encourage innovation, greater efficiency, and better value for money;
- (ix) public investment management in selecting priority projects for PPP based on economic and financial viability and value for money;<sup>23</sup>

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<sup>22</sup> In many jurisdictions there is a trend toward using the supreme audit institution (or subnational equivalent entity) to review the PPP program and individual projects to establish if projected value for money gains have been obtained and there is compliance with PPP legislation and procedures. The supreme audit institution will require the necessary authority and capability to carry out value for money analysis. The need for the PPP law or other relevant law to reflect this role should be considered (see International Organization of Supreme Audit Institutions. 2007. *Guidelines on Best Practice for the Audit of Public-Private Finance and Concessions*).

<sup>23</sup> There is a trend away from pursuing PPP projects as a series of one-off projects that are identified and selected through a separate process from public investment management selection of projects. As the emphasis has shifted to PPP programs of projects, governments are moving to identify projects that are suited to PPPs from among projects already identified as satisfying criteria for priority projects for public investment. Value for money has become the main criteria for choosing PPP in many jurisdictions. Value for money is defined by UK to be the optimum combination of the whole of life cost and quality (or fitness for purpose) of the good or service to meet the user's requirements. Value for money looks at the costs, risks, and benefits over the lifetime of the different project output delivery options, and is used to test whether public or private finance (or some combination of public or private finance) is best for the project. PPP law or some other law

- (x) public financial management for fiscal risk assessment and management, and affordability decisions;<sup>24</sup>
- (xi) risk identification, management and allocation at different stages of the project, and a realization that the optimum balance between parties produces the highest value for money;
- (xii) moving away from viewing private financing as off-balance sheet financing and temporary escape from budget constraints, toward the inherent benefits of PPP in delivering value for money;<sup>25</sup>
- (xiii) PPP programs and projects cut across government functions and responsibilities which require a coordinated approach implemented through a network of government entities working together at both national and subnational levels.

## B. The Content of PPP Laws

45. Appendix E, Table E.1 contains information showing subject matters and issues that arise in PPP arrangements and that should ideally be addressed in a comprehensive PPP legal framework. Table E.1 contains subject matter and issues referred to in guidelines, model legislative provisions, and principles issued by UNCITRAL, Organization for Economic Co-operation and Development (OECD), European Bank for Reconstruction and Development (EBRD), United Nations Economic Commission for Europe (UNECE), European PPP Expertise Centre (EPEC) and the Commonwealth of Independent States (CIS) Model Law.

46. Table E.1 does not review or evaluate the content or quality of the references in these sources. A reference to a subject matter in one of the sources in Table E.1 does not imply that the content of the reference is comprehensive or satisfactory. It merely reports that the subject matter is addressed to some degree or in some manner. A topic that is not addressed in a law or guidelines may be addressed in supporting regulations, opinions, decisions or guidance on PPP contracts, or in other laws connected with PPP, e.g., public procurement law or public financial management law.

47. Appendix E, Table E.2 outlines trends, purposes and good practices in relation to the topics listed in Table E.1.

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should recognize the link between PPP projects and priority public investment projects. (See A. Rajaram, T. Le, K. Kaiser, J. Hyung Kim, and J. Frank, eds. 2014. *The Power of Public Investment Management: Transforming Resources into Assets for Growth*. Directions in Development. Washington, DC: World Bank. <http://dx.doi.org/10.1596/978-1-4648-0316-1>; and G. Schwartz, A. Corbacho and K. Funke. 2008. *Public Investment and Public-Private Partnerships: Addressing Infrastructure Challenges and Managing Fiscal Risks*, International Monetary Fund, Washington, D.C.).

<sup>24</sup> There is a trend away from PPPs as one-off projects toward a program of projects that maximizes overall impact. This reflects in the impact of projects on public finances. Actual, hidden, implicit and contingent liabilities can lead to unexpected demands for government funds. Individual PPP projects may satisfy value for money criteria, but collectively the exposure to demands on government funds may exceed what is available. Assessments of affordability and fiscal risk exposure are essential at critical stages of the process for user pay and government pay projects as there is fiscal risk exposure arising from a variety of sources under both types of projects. The PPP law, a public financial management law or other relevant law should reflect the need for fiscal risk and affordability assessments at appropriate stages of preparing and procuring PPP projects (see World Bank. 2013. *Implementing a Framework for Managing Fiscal Commitments from Public Private Commitments*, Operational Note, Washington, D.C.).

<sup>25</sup> Provision should be made in the PPP law or supporting documentation or in some other legislation for how PPPs will be recognized in government financial accounts and in national income accounts. (See F. Katja, T. Irwin and I. Rial. 2013. *Budgeting and reporting for public-private partnerships*, OECD International Transport Forum Joint Transport Research Centre Discussion Papers).

48. An analysis of the laws in Appendix A indicates that PPP laws in a wide range of countries address broadly similar subject matter. While a PPP legal framework is specific to an individual jurisdiction, these subjects are typically addressed:

- (i) scope of the law including:
  - a) definition of different types of PPP arrangements,
  - b) types of public infrastructure, public utilities, and public services that may be the subject of PPP arrangements,
  - c) role and authority of different government entities at national and subnational levels in participating in the approval and decision-making processes for projects and partners entering into PPP arrangements, and
  - d) which entities can become a partner with government in a PPP arrangement?
- (ii) administration of PPP including horizontal and vertical coordination in implementing the law, policy, procedures and practices for PPP arrangements, and how the PPP program fits alongside public investment management (selecting priority projects and value for money analysis), public financial management (affordability and fiscal risk assessment), public procurement, and the delivery of facilities and services;
- (iii) procedures and responsibilities for identification, selection, preparation and approval of projects suited to PPP arrangements (PPP screening, prefeasibility and feasibility—the PPP business case, PPP project development);
- (iv) procedures and responsibilities for identification and selection of a partner (PPP procurement);<sup>26</sup>
- (v) sources of revenues and payments to a partner, PPP finance and government support;
- (vi) indicative and permissive, but not prescriptive, contents of PPP agreement including risk allocation between parties and that address force majeure, political, legal and macroeconomic risk and compensation conditions, default, termination and dispute resolution, and clarification on issues that may be provided in an agreement where these issues have not previously arisen for government; and
- (vii) contract management and monitoring.

### C. Conclusions

49. The contents and trends identified in PPP laws, its rationale, the interface between PPP and laws on other subjects, and the needs and concerns of partners, investors and lenders, consistently point to the same key elements being required in an effective PPP law and supporting instruments or in the broader PPP legal framework. These key elements are:

- (i) Use broad definitions or descriptions of PPP arrangement, public infrastructure, and public services that are capable of readily admitting new types of arrangements—sectors, facilities and activities. Instead of trying to list the types of PPP arrangements and project structures, the focus should be on the aims and characteristics of PPP. This broad and open approach to PPP provides flexibility to accommodate new and hybrid arrangements

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<sup>26</sup> Procurement of PPP projects should satisfy the principles of good quality conventional public procurement. PPP procurement processes are different from conventional public procurement (e.g., more scope for structured forms of consultation and negotiation at various stages of the process). The specialized nature of PPP procurement should be recognized in PPP law or as a separate chapter in public procurement or tendering laws.

that come with innovations in finance, blending government support with private finance, application of PPP to new types of arrangements and new sectors and activities, while leaving detailed risk allocation in individual PPP arrangements to PPP agreements.

- (ii) Clearly specify which parts of government may enter a PPP agreement with a partner, what type of entities may be a partner to a PPP agreement, and if there are reserved sectors or activities for particular types of entities.
- (iii) Ensure that the roles of government entities in their areas of responsibility, and how government entities interface with each other, in designing and implementing PPP programs and projects are clearly specified and understood. Design and implementation of PPP cuts across a range of government functions and responsibilities. PPP is connected with public investment, public financial management, public procurement, public accounting, and delivery of public facilities and services. Each of these subjects may be the responsibility of different parts of government. To be efficient and successful, there needs to be a network and interlinking. Decisions and actions cannot be left to government entities operating as isolated silos in their own area of responsibilities. The practices and procedures of implementing the PPP program and projects must be transparent, clear and certain for potential partners, lenders and investors and the general public as well as government entities. The extent to which provisions are specified in the PPP law, or in supporting legal instruments or other format, is specific to an individual country.
- (iv) Set out the phases in the PPP project cycle and provide for the making of procedures for implementation of steps in those phases. The design of procedures and steps should fit with the specified roles and responsibilities of government entities and interface between government entities. The assessment and selection of suitable PPP projects, assessments of value for money, affordability and fiscal risk assessment, the procurement process for selecting a partner, evaluation of proposals and the government approvals required throughout the process, need to be addressed. The level of detail in the PPP law depends on the style of legislative drafting in individual countries, and the extent to which other laws can effectively address issues such as public procurement and tendering. Most often, an outline of key phases is described in the PPP law with detailed procedures being left to supporting instruments.
- (v) The law should provide in a permissive manner for flexibility in terms of sources of revenue for partners be it from users, government, or various combinations of payments by users and government. The law should also provide in a permissive manner for flexibility in providing various types of government support for PPP projects with necessary approvals from relevant government entities.
- (vi) Permissive references to indicate the essential contents of the PPP project agreement may be mentioned in the PPP law, without prescribing how these matters should be addressed in a PPP agreement. There should be flexibility for the contents of agreements to be tailored to each project. The law may indicate matters that should be addressed, but should not prescribe how these be addressed in an individual project agreement. For example, the PPP law may provide for various forms of dispute resolution, but the form or forms of dispute resolution to be included in a PPP agreement should be a matter for agreement between government and the partner.
- (vii) The PPP law may provide that contract management and monitoring measures are to be put in place for each project to achieve key principles and purposes, while leaving it to the PPP agreement to outline the details of the arrangements to be put in place. The PPP law may also specify roles for particular government entities in contract management and monitoring. For example, the supreme audit institution of a country may be given a

role in the PPP law, or in its own founding law, for ensuring adherence to PPP procedures, or for verifying that the expected value for money is realized as the facilities and services are being delivered.

## V. OBSERVATIONS AND SUGGESTIONS

50. Observations and suggestions are provided here for consideration in finalizing a PPP law. These observations and suggestions stem from:

- (i) The findings on the contents and trends in laws described earlier which were obtained from the review and analysis of laws from different countries and international model legislative provisions in Appendix A and the ADB International Stock-take of PPP laws May 2015.
- (ii) Comparison of legislation listed in Appendix A and international guidelines listed Appendix E, Table E.1.
- (iii) The rationale for the content of PPP laws described in the conclusions on the broad contents of a PPP law and set out in more specific detailed form in Appendix E, Table E.2.

### A. PPP Law: Scope and Definitions

#### 1. Observations

51. The discussion earlier in the working paper on PPP, concession, and franchise indicated that PPP is a broad term that can encompass many different types of PPP arrangements including user pay, government pay, or combinations of user pay and government pay arrangements. While some countries have different laws for different types of PPP arrangements, or for different sectors or activities, it is suggested that there is greater certainty with a PPP law that is broad in scope. There will probably be a need to have regulations, notices, or guidance that elaborates on the PPP law for particular sectors or activities, but it is suggested that the broad principles, aims, and core content of the PPP law should apply to all sectors and activities.

52. It is best to allow for flexibility in the form of arrangements. Trends in PPP policies and laws in recent years show an evolution away from describing different combinations of design, build, finance, operate, manage elements of projects or sources of revenue to broad descriptions of forms, sectors, and activities that enable:

- (i) varied new and hybrid forms of projects with a greater emphasis on risk allocation and management,
- (ii) innovative finance from private and government sources and a wider range of government support mechanisms,
- (iii) a greater variety and range of combinations of revenue streams from payments for facilities and services by users and/or government ,
- (iv) greater emphasis on performance-related payments,
- (v) the types of infrastructure and public services to be provided through the arrangements are not unduly restricted,

- (vi) a variety of partner selection (project procurement) methods to be available but the default method should be competitive tendering, and
- (vii) enable institutional PPP (IPPP) arrangements while recognizing their different risk allocation from other forms of PPP arrangements.

53. An example of a broad PPP definition is in the Kosovo PPP Law (see Appendix C). It provides that a PPP is any contractual or institutional cooperation between one or more public authorities, and one or more private partners, where the private partner:

- (i) provides a public service or a public infrastructure on behalf of the public authority;
- (ii) assumes financial, technical, construction and operational risks, including demand and/or availability risks, in connection with the provision of the public service or the public infrastructure; and
- (iii) receives a benefit for providing the public service or the public infrastructure in the form of payment made by the public authority from its budget; receives charges or fees to be collected by the private partner from users or customers of a public service or a public infrastructure provided to them, or a combination of public authority payment and charges or fees from user or customers.

## **2. Suggestions**

54. A PPP law should be capable of admitting new and hybrid arrangements. This is because changing forms and combinations of innovative financing, revenue streams, and ownership and control structures, continue to emerge through experience and international knowledge dissemination. A country's PPP program will produce innovative forms and combinations of arrangements that are now difficult to anticipate. For that reason, a wide and flexible interpretation of the mode, methods of deployment, sectors or activities where the mode can be deployed, is desirable.

55. A PPP law can exclude build-transfer arrangements that do not have a performance related payment, and which should be subject to conventional public procurement and bidding laws. A build-transfer arrangement is conventional public procurement with deferred payment made on completing construction. There is a need for legal certainty as to what is, and what a PPP arrangement is not. This is to avoid ambiguity being used to defeat the aims of PPP (or other aims such as the aim of managing and monitoring local government financing and debt to limit exposure).

56. To eliminate avoidance of applying the PPP law, provisions on PPP procurement and bidding should be clear in the PPP law, or in special PPP chapters in the public procurement law. There are significant differences between conventional public procurement and PPP procurement. These differences should be recognized and appropriate provisions made.

## **B. SOEs as Partners**

### **1. Observations**

57. A PPP with the partner being 100% owned or controlled by a person other than government is the default position in most countries. A typical PPP arrangement relies on the use of a competitive process for establishing a contract with clearly defined responsibilities and performance requirements related to payments. A PPP arrangement is much more than a broad agreement to cooperate. It relies

on the government buyer of the service using competitive pressures in the selection of a partner to enhance the incentives facing the partner to provide better value for money.

58. The World Bank, ADB, and IADB PPP Reference Guide’s definition of PPP refers only to a private party as counterparty to government. This is also similar with other definitions shown in Appendix C. A private partner (i.e., not directly or indirectly owned or controlled by the government entering the PPP arrangement) is the counterparty to government in the vast majority of PPP arrangements internationally.

59. Some model laws and PPP laws in some countries expressly state that a private party cannot be government owned or controlled, or that a party that can enter a PPP arrangement for, or on behalf of, government is not eligible to be a partner in a PPP arrangement.<sup>27</sup> Some laws expressly refer to the partner as a private owned or controlled partner, while others are based on a presumption or implied understanding that government cannot enter a PPP arrangement with an entity that it owns or controls.

60. Some countries do not use the term public or private when referring to what is, in essence, a PPP arrangement. For example, France does not use the term PPP in laws. Instead, it has terms that describe a variety of arrangements that have features of PPP arrangements. These include partnership contract, delegation of public service (a French form of PPP), authorization to temporarily use property in the public domain, or lease with early redemption clause. Many of these arrangements in France, especially in the past, were between central government or municipal governments and SOEs.

61. In other countries, the definition of SOE may be narrow. In these circumstances, an entity that is established as a company under company law, in the same way as a company owned or controlled by persons other than government, may be considered as not being part of government even where it is directly or indirectly owned or controlled by government. Therefore, it would be seen as a partner in the context of a PPP arrangement.

62. The positive or negative impact of SOE being counterparty to government depends on the nature of the PPP arrangement in practice. This includes factors such as transparency and fair competition with private entities and other SOEs to participate in the PPP arrangement and objective evaluation of proposals.

63. The World Bank considers PPP a potential benefit in terms of exposing SOEs and government to increasing levels of private sector participation, and structuring PPPs to ensure transfer of skills. This can lead to national champions that can later export using skills and experience to bid for projects and joint ventures externally.<sup>28</sup>

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<sup>27</sup> Article 14 CIS Model Law states: “No party that, pursuant to this Law, other national laws or other legal acts, may act as a public partner in public–private partnerships and no legal entity controlled thereby may act as a private partner. A legal entity is deemed to be under control of a public partner if the latter or any parties controlled thereby hold(s) a majority stake in the charter (share) capital of the legal entity in question and/or if such controlling party (parties) has (have) the right (powers), whether on the basis of an agreement or otherwise, to determine actions or decisions of such legal entity, appoint its one–person executive body and/or more than 50 per cent of members of its collective executive body and/or if such controlling party (parties) is (are) unconditionally able to elect more than 50 per cent of members of such legal entity’s board of directors (supervisory board) or other collective management body. A party that, pursuant to this Law, national laws or other legal acts, may act as a public partner in public–private partnerships may not be a member of an association of legal entities and/or individual entrepreneurs acting without creating a legal entity which is deemed to be a private partner for the purpose of its participation in a public–private partnership.”

<sup>28</sup> World Bank PPIRC PPP Objectives. <http://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives>

64. Where a SOE that is directly or indirectly owned or controlled by a government is a partner of that government in a PPP arrangement, there is no effective allocation of risk. Ultimately, the risks of both the partner and government are retained by the government. There are likely to be conflicts of objectives between government, the SOE, and the PPP project company that will distort incentives and dampen PPP performance. Where a SOE is connected with a government and is participating in the PPP procurement process with a view to becoming a partner in a PPP arrangement, there will be no competition to be a partner as other participants will be deterred. As competition is the main spur to achieving efficiency and value for money in a PPP arrangement, the absence of competition will limit value for money gains.

## **2. Suggestions**

65. A PPP law can clearly define who may or may not be a partner, and which parts of government that can enter a PPP arrangement. Different issues and risk exposure arise when a SOE is the partner in a PPP arrangement (with the government that directly or indirectly owns or controls the SOE) than where the partner is not connected with the government. Where the SOE is a partner, care is needed not to undermine the achievement of the main objectives of PPP, i.e., better value for money from greater efficiency derived from fair competition.

66. If there is widespread presence of SOEs in providing public infrastructure and public services, it may be impractical to exclude unconnected SOEs that are directly or indirectly owned or controlled by a government, other than the government seeking a partner in a PPP arrangement. Doing so will reduce competitive pressures when projects are bid out, and may rule out service providers that are lower cost and suitable in all respects other than government ownership.

67. These considerations suggest that SOEs owned by a government should not be the private partner in a PPP, while a commercialized SOE that is not connected to government could be the partner in a PPP arrangement. There may well be a timing issue in that SOEs may play a larger role in PPPs on the interim. But, as confidence and credibility of the PPP program grows, there is greater potential to expand the role of local and international private partners.

68. PPP can promote marketization of SOEs. It can also help prepare SOEs for future restructuring and encourage the private sector to play a greater role in SOE management, as well as promote diversified ownership. This view coincides with that expressed by the UK Treasury in a recent report on the People's Republic of China when it said "contracts between a public body and a SOE could reflect some PPP principles, but are perhaps best regarded as transitional structures on the journey toward more market-based relationships and achieving fully-fledged PPPs between public and private bodies".<sup>29</sup>

## **C. Institutional PPP**

### **1. IPPP**

69. There has been a growth in the variety and mix of PPP arrangements in recent years. There are joint venture PPP arrangements, where a government entity and a private entity combine as partner to government in a contractual or equity joint venture, and other hybrid arrangements, including where government itself is an equity shareholder in the partner along with private investors, and blending

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<sup>29</sup> United Kingdom HM Treasury. 2015. *Supporting the Development of PPPs in the People's Republic of China: An International Perspective*. March 2015.

where government loans and grants and loans and grants from international sources can be combined with private financing.<sup>30</sup> Government support in the form of contribution to the capital of the partner in the PPP arrangement may be used to offset share capital contributions from private investors, to maintain control by the government over certain project decisions, or to obtain access to information about the project company that might otherwise be difficult to obtain.

## 2. Observations

70. Many of the PPPs seen in the People’s Republic of China share similarities with the mixed private–public ownership companies seen in Spain and Latin America, the *empresa mixta*.<sup>31</sup>

71. In more recent years, the EU has issued guidance on IPPP arrangements<sup>32</sup>. It should be noted that the guidance is not intended to provide information on how to create or operate an IPPP. Instead, the guidance is meant to assist in determining when EU directives on public procurement and concessions apply to an IPPP type of an arrangement. The fact that a private party and a government contracting entity cooperate within a public–private entity does not exempt the government contracting entity from having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to this private party or to the public–private entity. The European Court of Justice held that the participation, even as a minority, of a private undertaking in the capital of a company in which the government contracting entity is also a participant, excludes the possibility of an in-house relationship (EU public procurement law does not apply to an in-house arrangement) between that contracting entity and that company

72. The UK has published its approach to joint venture and equity participation in PPP arrangements. Details of consultation with the private sector, and the government’s response on the issues involved, have also been published.<sup>33</sup>

<sup>30</sup> For further information on blending and combining various sources and financial instruments [see EPEC PPP Guide. *Combining Cohesion and Structural Funds with PPPs*. <http://www.eib.org/epec/g2g/annex/3-struct-cohes-ppp/index.htm>, and; *From Billions to Trillions: Transforming Development Finance Post-2015 Financing for Development: Multilateral Development Finance* prepared jointly by the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the Inter-American Development Bank, the International Monetary Fund, and the World Bank Group for the April 18, 2015 Development Committee meeting. [http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23659446/DC2015-0002\(E\)FinancingforDevelopment.pdf](http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23659446/DC2015-0002(E)FinancingforDevelopment.pdf) “Multilateral Development Banks have a role to play as client governments and official entities engage at the individual project level to mitigate risks and support innovative financing. This role may involve bringing together public and private sector partners and developing individual PPP transactions with relevant guarantees, risk insurance, blended finance, and other risk mitigation measures (e.g., structured finance, tapping investors with higher risk tolerance for instance through diaspora bonds).

<sup>31</sup> V. Castro and J. Janssens. 2011. *Mixed Private-Public Ownership Companies “Empresa Mixta”*. [http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/EmpresaMixtaAFDpublicationJune7\\_0.pdf](http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/EmpresaMixtaAFDpublicationJune7_0.pdf)

<sup>32</sup> Commission Interpretative Communication on the Application of Community Law on Public Procurement and Concessions to Institutionalize PPP (IPPP) [2008/C 91/02 – Official Journal C 91 of 12.4.2008]. [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2008.091.01.0004.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2008.091.01.0004.01.ENG); and Commission of the European Communities. 2008. *Public Procurement: Commission Issues Guidance on Setting Up Institutionalized Public-Private Partnerships – Frequently Asked Questions*. MEMO/08/95. Brussels.

<sup>33</sup> HM Treasury. 2013. Government response to: A New Approach to Public-Private Partnerships consultation on the terms of public sector equity participation in PF2 projects. October. (The aim of this document is to summarize the responses received and to set out the Government’s response); HM Treasury. 2012. A New Approach to Public-Private Partnerships. December; HM Treasury. 2013. A New Approach to Public-Private Partnerships: Consultation on the Terms of Public Sector Equity Participation in PF2. July; [see Allen and Overy response to consultation on the terms of public sector equity participation in PF2 projects. August 2013. <http://www.allenoverly.com/SiteCollectionDocuments/Response%20to%20consultation%20on%20terms%20of%20public%20sector%20equity%20participation%20in%20PF2%20proj>

73. There may be instances where a joint venture arrangement is necessary to be formed between two or more government entities for the purpose of entering a PPP arrangement with a private partner. For example, there may be a need for some form of joint venture arrangement between government entities and a neighbouring state for the purpose of a cross-border PPP arrangement for roads or electricity interconnection.

74. PPPs with shared government-private ownership of the partner include joint ventures and arrangements that transfer some stock (shares) of an SOE to a private entity.

75. IPPP brings additional challenges. Shared ownership creates a conflict of objectives in the PPP arrangement because the government selecting the partner is a part owner of the selected partner. The conflict of objectives is more intense where government is the regulator of the sector or activity that is the subject of the PPP arrangement. The government is, to a certain extent, effectively regulating itself.<sup>34</sup> Shared ownership places additional demands on the management skill of government, as it must help manage the partner that is the service provider, as well as managing the PPP agreement. If the government and private participants in the partner have different goals, management practices, or core values, the management problem may be extremely challenging.<sup>35</sup> The management arrangements may need to be more complex than where the partner is independent of government.

76. As Delmon indicates, government equity contribution to a PPP project company raises particular challenges for governments and investors. Delmon lists these challenges under conflict of interest, decision processes, and management and monitoring of government shareholding.<sup>36</sup>

“Conflict of interest—where the government is on both sides of the concession agreement, and as such will have conflicting interests, private investors will be concerned that when difficult decisions must be made, government will be incentivized in a manner different than the commercial priorities of the project. For example, where the project company has the right to submit a claim against the government, will the government as shareholder permit the company to make such a claim, and will the government’s access to information about the project company and its strategy as shareholder disadvantage the project company’s claim strategy. This conflict of interest is often addressed by isolating government representatives from conflict decisions and information on conflict issues.

Decision processes—government procedures are often a poor fit with good corporate governance, for example voting procedures, appointing board members, and selecting management. Investors will ask whether government will be sufficiently commercial. How will the risk of political capture be managed? How will the market perceive government involvement? How will project decisions be made—on a commercial or political basis? And, will decisions be made quickly enough?

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ects%20(email).pdf; Other responses are available at <https://www.gov.uk/government/consultations/a-new-approach-to-public-private-partnerships-consultation-on-the-terms-of-public-sector-equity-participation-in-pf2-projects>

<sup>34</sup> Discussion of the potential unintended consequences of joint ventures in PPPs is provided in Government of India. 2008. *Scheme and Guidelines for Financial Support to Public Private Partnerships in Infrastructure*. Ministry of Finance. New Delhi.

<sup>35</sup> Esteve, M. and Ta. Ysa. 2010. *Institutional Public-Private Partnerships: Mixing Oil and Water?* Paper delivered at 14th International Research Society for Public Management Conference The Crisis: Challenges for Public Management. April (Berne).

<sup>36</sup> J. Delmon. 2014. *Public-Private Partnership Programs Creating a Framework for Private Sector Investment in Infrastructure*. Kluwer Law International.

Management and monitoring of government shareholding—often, government auditors and other political functions will have special powers to oversee, monitor and audit entities with a large or majority government shareholding. This may complicate management of the project company.”

77. A government entity is exposed to greater risk in an IPPP than in a contractual PPP (Box 2).<sup>37</sup> These difficulties derive from the differences between public and private sector approaches including different goals, management practices, and core values. These differences mean that achieving the goals of an IPPP requires complex management arrangements.

78. The allocation of risks to government as a whole, where the private partner is an SOE or the project is an IPPP arrangement, is likely to be much less favourable to government than where the partner is owned or controlled by a person other than a government entity.

### **Box 2: IPPPs Key Issues**

If the IPPP is unsuccessful, the government entity may not receive full or any value for assets transferred to the IPPP. There are risks facing the IPPP and its management, risks facing the government entity as participant in the IPPP, and risks facing the government entity in obtaining services and making payments for services to the IPPP. A key question: is it the most efficient and effective use of resources to engage in an IPPP?

There are costs for the government entity in time and resources to set up and actively engage in an IPPP. Is this the most efficient and effective use of these resources?

There are potential conflicts of interest for management and staff between duties to the IPPP and duties to the government entity. The government entity may be paying for services to be delivered by the IPPP in which it is a shareholder.

Source: Author.

### **3. Suggestions**

79. A government decision to enter an IPPP should be based on different criteria from procuring a facility or service by way of a PPP arrangement. A PPP law should make clear who may be a private partner, and who may be a government partner, in a PPP arrangement. If IPPPs are permitted, additional provisions may be required in the PPP law.

80. Among IPPP questions to be addressed are:

- (i) Is an IPPP partner subject to a law on public procurement when procuring supplies or goods, works, consultant services, finance and other services?
- (ii) Is the selection of a partner by government for the purposes of forming an IPPP partner be subject to a law on public procurement or is it subject to PPP law?
- (iii) To avoid double tendering in the form of seeking an IPPP partner and competing with other entities for the PPP project, it is usually advisable to have a competition for the IPPP partner of the government entity with the project being awarded to the IPPP.

<sup>37</sup> For a report that focuses on the main management difficulties of IPPPs, see “Institutional Public–Private Partnerships: Mixing Oil and Water?” Esteve and Ysa. 2010. op.cit.

## D. PPP Law—How Much Detail?

81. This is a matter of style of legislation which varies by country. In principle, the PPP law should focus on broad principles but with sufficient details as to provide for certainty. Regulations, notices, opinions, guidance, and manuals on the details of how to implement PPP can supplement the PPP law and support implementation. Appendix E contains a comparison of the contents of model laws with a list of contents usually found in PPP laws. The working paper sets out key content that should be included in a PPP legal framework. The practice and style of drafting laws and supporting implementation instruments in a country should determine the level of detail to be included in the PPP law and the contents of supporting instruments.

## E. Coordinating PPP Implementation

### 1. Observations

82. PPP cooperation and coordination matters to be addressed in the PPP legal framework and in relationships between different parts of government include:

- (i) the links between public investment management and choice of priority projects for PPP feasibility and choice of transaction structure (business case preparation, evaluation for value for money and preparation of project tender documentation including draft agreements);
- (ii) public financial management (affordability and fiscal risk assessment at appropriate stages in the PPP project life cycle);
- (iii) achieving sound procurement objectives in the process of identifying and selecting partner;<sup>38</sup> and
- (iv) cooperating and coordinating approvals and decision-making during procurement and implementation of PPP program and projects at national and subnational levels.<sup>39</sup>

83. How are cooperation and coordination (which should be distinguished from control and supervision) and streamlined decision-making between government departments and entities to be carried out in practice? Whether these questions are answered through a law or other form of legislative instrument or notice depends on circumstances in an individual country. PPP is a cross-cutting issue involving different government entities. There is a need for horizontal cooperation and coordination between entities in the same level of government and vertical cooperation and coordination between entities at national and subnational levels of government. The effectiveness of horizontal and vertical cooperation and coordination depends on the willingness and experience of government entities to be a part of a network that addresses PPP program and project issues. There is a need to make clear and certain the roles and responsibilities of different parts of government at

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<sup>38</sup> Sound procurement should aim to be accountable, competitive, and nondiscriminatory; provide for equality of treatment, fair and transparent, and; conducted with probity and integrity.

<sup>39</sup> *Coordination*: Joint or shared information ensured by information flows between organization. Coordination implies a particular architecture in the relationship between organizations (either centralized or peer-to-peer and either direct or indirect), but not how the information is used. *Cooperation*: Joint intent on the part of individual organizations. Cooperation implies joint action, but not their relationship with one another. *Collaboration*: Cooperation (joint intent) together with direct peer-to-peer communications between organizations. Collaboration implies both joint action and a structured relationship between organizations. (See OECD. 2005. E-Government Project: E-Government for Better Government). [http://www.keepeek.com/Digital-Asset-Management/oecd/governance/e-government-for-better-government\\_9789264018341-en#page27](http://www.keepeek.com/Digital-Asset-Management/oecd/governance/e-government-for-better-government_9789264018341-en#page27)

national and subnational levels and to specify approval and decision-making authority at different stages of a PPP program and PPP project.

84. Divisions of responsibility should be made clear to the public, as well as within government so that partners and lenders can be sure they have obtained all necessary approvals and complied with all applicable laws.

85. The legislative styles and practices of individual countries, and the efficiency, effectiveness, and responsiveness of the public administration system to various types of internal communications help to decide on how clarity of responsibilities and coordination are communicated. Some jurisdictions may favour doing this through provisions in either the PPP law or through subsidiary legislation (regulations, rules), while other jurisdictions may be satisfied with issuing procedures, instructions, or circular letters that carry authority and have respect within government and the private sector.

86. PPP law would usually state the entities responsible for approvals and decisions on specific matters. Each entity would then issue detailed provisions and standard forms in notices, regulations, instructions, or guidance.

87. Where task force or committee type cooperation and coordination is envisaged on certain matters, the PPP law may contain an outline framework. More details on the workings of that framework may need to be included in a PPP law or supporting regulations where the public administration system is weak, or there is no track of effective cooperation and coordination between government entities.

## **2. Suggestions**

88. A PPP law should set out the need for various government entities to make policies for regulating and administering PPPs, and for cooperation and coordination by subnational entities with entities at other levels of government. It is the details, practices and procedures, and the willingness and capacity to operationalize those arrangements that will determine effectiveness. There is a need to go beyond saying that there should be coordination and indicating how this is to work in practice. As mentioned above, once that is decided then a choice is required on the most appropriate place to set down the coordination mechanism—in a PPP law, supporting instruments or other means.

## **F. Disputes**

### **1. Observations**

89. To place disputes and dispute resolution in context, it should be understood that defaults in PPP transactions are largely the result of weak project analysis and preparation resulting in overestimated demand (or underestimated costs), rather than friction between the parties or outright default by the grantor. The possible interaction between disputes that are subject to civil law, and disputes subject to administrative law where some, but not all, of the same parties may be involved in both disputes, would need to be considered.

90. A country that is implementing PPP needs a dispute resolution mechanism that satisfies the needs and concerns of parties to a PPP agreement, builds confidence, and is fair and equitable. A partner, investors, and lenders will each want to be satisfied that they will be treated fairly and equitably during the course of the PPP program, procurement process, and during the life of the project. A foreign partner, investor, or lender will have different needs and concerns and will be more risk averse than a domestic private party or a SOE that is a partner in a PPP arrangement.<sup>40</sup>

91. There is no single answer to these issues. Different countries have adopted different approaches. There are different understandings (based on history, political science, political ideology, public administration traditions, more than strictly legal issues) between countries on the status of government and private parties in a PPP agreement. There are different understandings of the role and status of the State, public service, public law, and private law, administrative law, administrative litigation, which courts adjudicate on different issues and how the courts are organized, and whether the State or government may participate in arbitration proceedings when none of the parties is a foreign person.

92. The proven track record, fairness, equitable treatment, knowledge and expertise of adjudicators, and quality of process in a civil court, administrative court, or alternative dispute resolution mechanism, are the critical elements that give confidence.

93. Where a private partner is not an equal party to government in terms of legal status, or where government has capacity to unilaterally change an agreement, there must be a countervailing understanding that changes will be reasonable, and not capricious, and that the private partner will be promptly, adequately and effectively compensated.

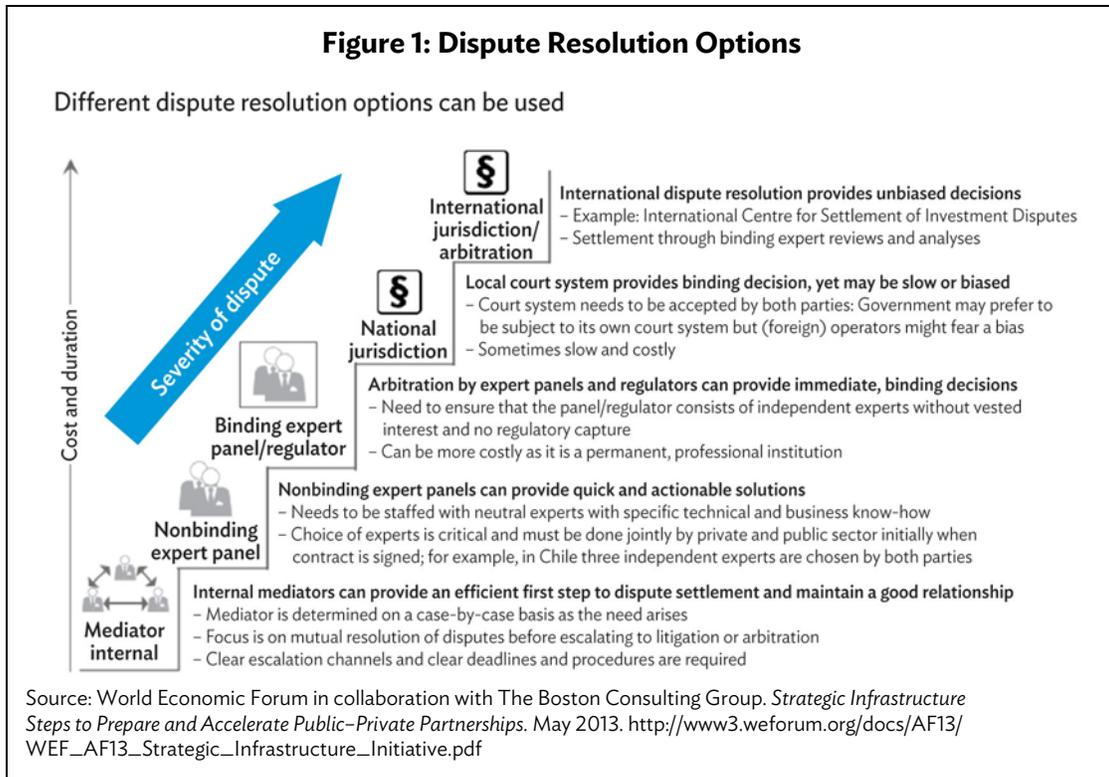
94. A PPP law would not usually state whether dispute resolution was to take place in a civil court, or administrative court in a civil law system, or whether the agreement is classified as being a subject of public law or private law. That would be known from general legal principles and practice.

95. The figure below from the World Economic Forum, prepared in collaboration with The Boston Consulting Group, illustrates a range of dispute settlement mechanisms that are used in different countries to resolve infrastructure related disputes.

96. There are civil law jurisdictions that did not, or do not, permit arbitration where the government is a party to a dispute. Of these, some have moved to permit arbitration for certain types of PPP arrangements. Changes to the law of a country can be made to permit arbitration in PPP disputes, e.g., Brazil introduced changes to permit arbitration in certain types of PPP arrangements. Other civil law jurisdictions (e.g., Germany) have long permitted arbitration in matters where government is a party to an agreement.

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<sup>40</sup> World Bank. *Enforcing Public-Private Partnership Contract: Role of Incentive Contract and Fiscal Institution* Manabu Nose. May 2015. [http://www.worldbank.org/content/dam/Worldbank/Event/DEC/ABCDE/ABCDE-2015/PPP\\_and\\_Investment\\_Nose.pdf](http://www.worldbank.org/content/dam/Worldbank/Event/DEC/ABCDE/ABCDE-2015/PPP_and_Investment_Nose.pdf)



97. In general, dispute resolution mechanisms permitted by law or practice should be set out in the PPP agreement and tiered according to the nature and severity of the dispute. International experience shows a range of possible options ranging from an internal mediator, binding or nonbinding expert panels, arbitration and court adjudication. The parties should be permitted to agree on the most appropriate form of resolution for different types of disputes.<sup>41</sup>

98. Differences are likely to arise during the construction and operation of a project, but many of these do not merit description as a dispute or require a dispute resolution mechanism. All differences and disputes require active management and some may require changes to the agreement.

99. At all times, there is a need to balance investor and lender interest in financial sustainability with the government value-for-money objective. Insolvency and service disruption are costly events to be avoided, but that should not pressure the government into saving projects that have run into difficulty. It may be better to seek a new private partner.

## 2. Suggestions

100. Lessons learned of a country from its experience implementing various forms of dispute settlement mechanisms between government and the private sector should be considered, when deciding on the best rules and procedures that are to be included in the PPP law or PPP agreements. In

<sup>41</sup> Where a dispute arises, it is best to try and resolve it as soon as practicable through fast, informal means by attempting to understand the other side's position and actively search for outcomes that benefit the project and the parties. This is the best means of limiting damage to a long-term relationship. An informal dispute resolution mechanism can be set up between the parties through the PPP agreement. If there are no independent regulatory institutions, an expert panel is an alternative. The expert panel can be established by contract provisions in the PPP agreement.

principle, the PPP law should be open to different methods of dispute resolution which the parties may choose to use to resolve different types of disputes.

101. A PPP law should provide for alternative dispute resolution methods especially where arbitration, mediation, and expert panels are not well established, or have not been used in disputes between government and private parties from within a country or foreign private parties. In many countries that have well established and effective dispute settlement, the PPP agreement will contain the relevant provisions on dispute settlement. Foreign investors will generally view the right to resolve disputes through offshore arbitration as a fundamental bankability requirement.

102. Initial bidding for a PPP helps select the best firm to implement a project, bearing in mind risks, rewards and project benefits. Changes are inevitable during the course of a long-term PPP arrangement, and agreements will need to be adjusted in response. Agreement adjustment is a form of standard price and quality regulation which is needed under public ownership or control, as well as under a PPP arrangement.

103. The PPP law should permit entering into agreements that anticipate the need for adjustment or renegotiation. The agreement should contain a framework with principles for adjusting terms, the processes to go through for the adjustment, and the various entities that will be involved. Private partners and their financiers are generally comfortable with PPP agreements that allow for change, such as processes for dealing with an increase in costs due to risks that are not easily managed (such as change in law provisions). It is, however, best to avoid change, and if changes must be made, to ensure they do not disadvantage any party and are agreed by all.<sup>42</sup>

104. Some jurisdictions attempt to discourage opportunistic changes on the part of partners or government. Among the measures that can be applied include: (i) review and arbitration panels, (ii) no renegotiation for a set period of time after entering a PPP agreement, (iii) charging a fee for contract-change requests, (iv) enforcing a period of prohibition from future government contracts and PPP arrangements for a partner that is in gross noncompliance, and (v) placing a ceiling on renegotiation amounts are among the measures that may be applied. Some of these may require being in the PPP law; others may be set out in the PPP agreement.

## **G. Administrative Law and Contract Law**

### **1. Observations**

105. There are examples of civil law countries and of common law countries that distinguish between disputes arising before and after entering a binding agreement. A two-tiered approach to dispute resolution is taken. Where the dispute arises before entering a PPP agreement, e.g., in relation to the administration of the PPP procurement process, the dispute is considered to fall within the jurisdiction of the administrative courts, or the decision reached may be subject to judicial review in a common law country.<sup>43</sup> The second tier arises after signing the agreement. Where the dispute is a commercial matter under the terms of an agreement between government and the private party, the matter is within the jurisdiction of the civil court under contract law. Some, but not all, civil law

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<sup>42</sup> Dealing with change is discussed at International Bank for Reconstruction and Development/The World Bank, Asian Development Bank, and Inter-American Development Bank. 2014. ADB Public-Private Partnerships Reference Guide. Version 2.0. pp. 210–213.

<sup>43</sup> The terms administrative law and administrative litigation have different meanings in different countries.

countries treat all matters that arise at all stages of a PPP project between government and the private sector as within the jurisdiction of the administrative courts.

## **2. Suggestions**

106. There is a need for clarity and certainty on the following matters:

- (i) Is a PPP agreement subject only to administrative law or are the commercial elements of the agreement subject to civil law and to jurisdiction of civil courts?
- (ii) Is arbitration excluded as a dispute resolution mechanism?
- (iii) What are the capabilities and experience of administrative courts and civil courts on what may be complex commercial, financial, and technical arrangements in PPP projects?
- (iv) How will a dispute involving different participants in a PPP project (some or all of the contractors, subcontractors, partner, lender, government) and arising out of a single incident be resolved?
- (v) Do government and the partner that are parties to the PPP agreement have equal legal status regarding matters in the agreement?

107. Clarity is needed on these matters for government, SOEs, private and foreign owned entities, as well as potential investors and lenders.

## **H. Appeals and Remedies**

### **1. Observations**

108. Participating in a PPP procurement process is expensive, particularly for bidders. There should be a mechanism for informing unsuccessful bidders on the process and outcome (not merely the result), and an opportunity for valid questions to be asked. In many instances, it is only after the bid award has been made, and information regarding the winning proposal becomes available, that the other bidders realize that correct procedures may not have been followed.

109. The approach to PPP and procurement varies by country. PPPs are different from conventional public procurement, e.g., earlier interaction between government and potential private parties before submission of proposals as in a form of negotiated procedure or competitive dialogue process. There should be a PPP part in either the PPP law or the general procurement law but details would be contained in regulations rather than the law.

110. Some countries have a Public Procurement Commission, or similar entity, that regulates conventional public procurement and hears appeals against awards or implementation of processes. The evaluation and selection criteria in identifying a partner for PPP arrangements are often more complex than in conventional public procurement. A case can be argued for a different process and form of adjudication for a PPP procurement dispute where price is often the critical factor, and the exposure and understanding of PPP matters among Commission members, may be limited.

### **2. Suggestions**

111. A system for handling complaints would typically include:

- (i) identifying who will be responsible for hearing and deciding complaints and appeals;

- (ii) defining the basis for preparing and submitting complaints and appeals;
- (iii) how complaints and appeals will be heard; and
- (iv) setting a timetable for submitting complaints and issuing decisions.

112. The complaints and appeals system should try and avoid holding a second evaluation of bidders' proposals. Instead, focus should be on whether the correct process and criteria were applied in a fair and reasonable manner.

113. The best way to avoid or reduce complaints or appeals to the selection of a partner is to have clear tender procedures, robust bidding documents, and accurate records of proceedings. Complaints and appeals are likely to arise from time to time. While complaints and appeals should not be permitted to be misused by bidders to obstruct the procurement process, there should be provision for genuine complaints and appeals to build confidence and credibility in the process, and to help ensure that the process is conducted in a fair and objective manner.

## **I. Unsolicited Proposals**

### **1. Observations**

114. An unsolicited proposal is a proposal to undertake a PPP project that is put forward to the government by a private sector entity when the government has not issued a request for a proposal. The unsolicited proposal should not be a mere suggestion for a project or a project concept. It should include detailed construction, operation, maintenance, and financing plans to permit an evaluation to be made as to whether the project and proposal are worthy of further consideration by government. Unsolicited proposals can arise as special cases in the provision of different types of infrastructure facilities and services which have limited competition.

115. Private sector entities often propose projects with the specific objective of avoiding a competitive process. If the private sector entity is granted exclusivity for the project, it will usually seek to negotiate the details of the project on a sole source basis with the government. Entering an agreement with a sole source supplier without inviting competing proposals has led to criticism and suspicion in many countries, because of a lack of competition and transparency. International experience shows that entering an agreement with a sole source supplier, without inviting competing proposals, causes reputation problems for the overall PPP process and undermines credibility for future projects.

116. Different approaches have been taken by governments on unsolicited proposals:

- (i) refuse to receive unsolicited proposals on the grounds that the government has identified project priorities in its public investment plans and does not need to be deflected from those choices by proposals for projects that are not in the plans. Where the unsolicited proposal is made for a project that is in the infrastructure plan, then it is viewed purely as a matter of timing as to when the government should seek proposals for the project.
- (ii) submit the proposal to the same process as a proposal from a government source with no preference being given to the proposer of the unsolicited proposal;
- (iii) provide an opportunity to competitors to submit counterproposals but give the proposer of the unsolicited proposal an advantage, such as a bonus in the evaluation ratings or under a Swiss Challenge process permit the proposer of the unsolicited proposal to match the best counterproposal that is better than the unsolicited proposal;

- (iv) offer compensation for project proposal development costs to the proposer of an unsolicited proposal.

117. Where unsolicited proposals are permitted, the process for handling unsolicited proposals for private participation in public infrastructure is designed to ensure that imaginative proposals receive a fair hearing. To limit unsolicited proposals to genuine cases, strict criteria should be applied to determine if a proposal is an unsolicited proposal of a type that can be considered for admission to the PPP process for assessment, in the same way as if the proposal had been submitted by a government entity. Where a country decides that it will permit unsolicited proposals, then it should restrict these proposals to cases where the proposal:

- (i) is not relating to a project that has been or is being considered for admission to the PPP project cycle for feasibility testing;
- (ii) is independently originated and developed by the proposer;
- (iii) is prepared without supervision or involvement of a government entity; and
- (iv) includes detailed information to permit evaluation of the proposal in an objective and timely manner.

118. If the proposal is found to be a priority project, is suited and feasible for procurement as a PPP arrangement, and there is no special reason (e.g., intellectual property) why the proponent should be given priority, then the proposal should as far as practicable be subjected to competitive tendering.

## **2. Suggestion**

119. Where a country decides that it will permit unsolicited proposals, provisions should be included in the PPP law to ensure that the government manages and controls the process by which these proposals may be submitted, evaluated and procured, so as to ensure best value for money for government. The provisions in the law should be aimed at encouraging genuine proposals of high-quality, discourage poor quality proposals, ensure competitive tension for the project and provide transparency.

120. A government needs to consider the likelihood of receiving unsolicited PPP proposals for priority infrastructure or public services that are not already included in a government's investment plan, an estimate of the number of these proposals, the sources from which they will emerge, and the resources that will be required to consider the unsolicited proposals. There is a need to guard against unsolicited proposals derailing the government's priority infrastructure projects and public services by using up valuable resources and expertise in considering unsolicited proposals.

## **J. Partner Revenue and Government Support**

### **1. Observations**

121. User payments are found in different forms of arrangements and are not confined to PPP arrangements. For example, a government may charge user payments for facilities or services that government has financed and operates. In that example, the user payments are collected by government, or by a partner engaged to collect payments on behalf of government. In another type of arrangement, a partner that is operating a facility may collect user payments on behalf of government and transfer the collected revenue to the government, with government paying availability payments

to the partner. Instead of an availability payment, a government may pay a shadow toll or user charge where the partner continues to bear the demand risk.

122. User payments and availability payments paid by government produce different risk profiles. In a user pay arrangement, there is a risk for the partner in managing demand risk, but there is also a public response risk for government due to likely opposition to user payments, or in managing the consequences of project failure. The partner is exposed to a revenue risk where availability payments are related to performance in delivering a facility or services, as should be the case in a PPP arrangement. Where a partner collects and retains user payments, there is an opportunity cost to government from loss of revenue that it could have charged for the facilities and services.

123. The government is subject to exposure to risk, including fiscal risk (e.g., potential exposure to termination payments), under both user pay and government pay arrangements. At all times, the government is responsible to the public for the provision of facilities and services, regardless of the source of the revenue stream. In the event of project failure, the government may have no choice but to take over a project and resolve the project's financial problems to maintain provision of essential public services.

124. The core driver of PPP arrangements is optimising risk allocation and incentives for efficiency between government and a partner, with a view to delivering better value for money than an alternative arrangement. The source and degree of risk of a revenue stream from users, government, or a combination of users and government, are some elements of the risk allocation matrix within an arrangement.

## **2. Suggestions**

125. There needs to be clarification in a PPP law that payments may be user payments, government payments (availability payments), or a mix of both. There also needs to be clarification on the forms of government financial support. As this working paper suggests, the PPP law should provide for a wide and flexible range of PPP arrangements, the types of payment that can be made to the partner and the forms of government financial support should not be limited so as to permit flexibility for innovative financing of PPP.

## **K. PPP Agreements**

### **1. Observations**

126. PPP laws often indicate subject matter that should be addressed in a PPP agreement, but without specifying in a prescriptive manner how these should be addressed in an individual PPP agreement. In particular, the law may indicate a subject matter for inclusion in the PPP agreement where government has little or no prior experience, e.g., government or lender step-in rights or direct agreements between government and lenders.

127. The PPP law usually does not encourage use of standardized contracts because there is a danger that it will be applied without adaptation to the particular circumstances of an individual project. Use of the standardized contract (with necessary adaptation) may be a requirement for approval of a PPP agreement by the entity that grants final approval to enter the PPP agreement.

128. Having standardized definitions and clauses available to be drawn upon in agreements for individual projects, along with guidance on the issues involved (e.g., on refinancing and sharing gains between government and the private partner) without over generalization, helps to build knowledge and awareness and accelerates the procurement process. It can also be helpful where parties to the PPP arrangement may speak different languages. Care is needed to avoid standardized clauses or agreements being applied in a rote manner to every project without considering essential adaptation to the individual project.

## **2. Suggestions**

129. Agreements should be made available to potential bidders during the procurement process. Bidders may be asked for their views on the agreements and to submit proposed amendments at the request for proposal stage of procurement. When proposed agreements are included in the tender documents for selecting a PPP partner, the extent to which bidders seek changes to the proposed agreements may be taken into consideration in evaluating proposals. Experienced advisers are necessary to determine the extent of risk transfer and value for money impact of the proposed changes on the project.

### **L. Fiscal Risk**

#### **1. Observations**

130. A key trend in developing PPP laws is to emphasize fiscal risk assessment. This is more so than the current UNCITRAL Guidelines and Model Legislative Provisions designed almost 15 years ago.

131. Fiscal risks arise from the possibility of deviations in fiscal variables from what was expected at the time of the budget or other forecast. Fiscal exposure arises *directly* from capital cost contributions, service payment obligations (including availability fees, shadow tolls); and *indirectly* from (i) contingent contractual (explicit) obligations in the form of compensation events (risks that the authority keeps for itself), variations, indexation provisions and hedging commitments (interest rate, currency), guarantees (e.g., financing, demand, revenues), force majeure provisions, termination payments, and; (ii) contingent noncontractual (implicit) obligations from changes, rescues.

132. Examples of countries that suffered fiscal stress from PPP projects include Portugal and Brazil. Fiscal stress arose from a failure to adequately assess fiscal risk, including contingent liabilities, affordability during selection, preparation of projects, and during procurement.<sup>44</sup>

133. Fiscal risks arise from (i) inadequate research, (ii) appraisal and preparation of projects, (iii) optimism bias, (iv) affordability and value for money not demonstrated or not reviewed during the procurement process, (v) poorly drafted contracts with inadequate assessment of fiscal risk, (vi) lack of competition in identifying private partner, (vii) technological or commercial changes, (viii) demographic changes, (ix) political or legal changes, and (x) poor contract management.

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<sup>44</sup> See World Bank. 2013. Implementing a Framework for Managing Fiscal Commitments from PPP. [https://library.pppknowledgelab.org/attached\\_files/documents/2290/original/ON-FCManagement-ForDistribution.pdf?1433886710](https://library.pppknowledgelab.org/attached_files/documents/2290/original/ON-FCManagement-ForDistribution.pdf?1433886710)

## **2. Suggestions**

134. Much of the failures that lead to fiscal risk exposure arise because of a lack of project development funding to engage advisers experienced in PPP in the sectors and projects under consideration. The PPP law should recognize that fiscal risk and affordability assessments are essential at key stages in the PPP project cycle. Inadequate project preparation and lack of use of specialist PPP advisers results in poorly selected and procured projects. In turn, this leads to a failure of the procurement process to produce a quality private partner, and failure of the PPP project to optimize value for money and affordability.

135. Generally, risk allocation is left to the PPP agreement. However, the PPP law may provide for steps that can assist with optimizing risk allocation, e.g., enabling government support, direct agreements, and step-in rights without specifying how the agreement addresses these issues as they are generally project specific. Sometimes, there is a limit on the fiscal risk exposure of government through PPP arrangements perhaps set as a percentage of its gross national income that can be entered into in a given year or over a number of years.

### **M. Excess Profits**

136. Responsibility for managing the PPP relationship and avoiding excess profits rests with government. A competitive PPP procurement process is usually a good starting point for preventing excess profits during the life of the project. The PPP law would not usually address this issue except to the extent it requires competitive bidding. The PPP preparation and procurement process, the PPP agreement, contract management, and regulation of the project address potential excess profits. Monitoring of costs, revenues, and financial and service performance will take place through the independent regulator or under the terms of the agreement.

137. The government will want to avoid having to buy out the private party to limit public criticism where there are windfall profits. Some PPP agreements provide for sharing of gains where windfall profits exceed optimistic scenarios in financial models at the time of entering the PPP arrangement. The approach can be linked to various forms of sharing losses where these exceed pessimistic scenarios. The government will not be keen to share losses but it may be necessary to avoid having to step-in and pay for all losses. It is too soon to say whether these approaches can work effectively or discourage more innovative partners or proposals, such as the nonprofit distribution model being pursued in Scotland. There are other examples of sharing of gains in PPP, including sharing of refinancing gains between the partner and government.

### **N. Revisions to PPP Laws**

138. Countries that start with narrow concepts of PPP (e.g., user pay arrangements only) usually revise or introduce new laws to permit wider forms of arrangements (e.g., government pay or combination of user pay and government pay) within a number of years because of poor performance in attracting bidders.

139. Countries that do not recognize that PPP is a new system, and fail to include enabling provisions in laws on issues that have not arisen before PPP was contemplated, will also need to make amendments to the PPP law and other laws to achieve successful bankable projects.

140. Countries that fail to address partners, investors, and lender needs and concerns in the initial PPP law and other laws will have to make changes to be competitive in attracting investors and lenders.

141. Countries that fail to address the relationships between PPP law and other laws will require revisions to the PPP law, or other laws, to make implementation of the PPP process efficient and effective, and to make projects bankable and attractive to potential partners.

## VI. CONCLUDING SUGGESTIONS

142. This working paper provides observations from an international perspective that are relevant to preparing and strengthening PPP laws in developing Asia. The observations are derived from analysis and experience of the PPP legal framework in a variety of countries. Laws and guidance from many countries have been reviewed to identify common content and trends in how these have evolved in the light of implementation experience. The analysis identifies a broad consistency as to what are considered to be desirable and undesirable elements in the overall PPP legal framework, while recognizing that the distribution of content between a PPP law and supporting legal instruments and guidance varies between countries. The appendices to the working paper provide supporting evidence for the observations set out in the main body.

143. The working paper addresses how a PPP law needs supporting instruments in the form of notices, opinions, regulations, and guidance to provide an effective PPP legal framework. There needs to be a balance in the distribution of contents of the PPP law and the supporting instruments to ensure that the core content of the law is not overshadowed by detailed procedures that are best left to supporting instruments and guidance, and which enables amendment of details based on experience.

144. The key aim of a PPP law and supporting instruments is to ensure success in delivering public infrastructure facilities and public services that produce value for money for government, attract finance and partner interest, and provide benefits and services to the people.

145. The observations throughout the working paper indicate that a PPP law should seek to be a law that has a blend of both certainty and flexibility. It is desirable to have a PPP law that goes beyond permitting PPP or prescribing in detail how PPP should be implemented. Detailed prescription in the law may give a sense of greater certainty and control over PPP, but it will be at the cost of flexibility and innovation on the part of government and the private sector that successful PPP needs. Details regarding the PPP implementation process and procedures can be set out in supporting instruments that can be more readily adapted in the light of experience.

146. A PPP law is most effective where it is an enabling law that promotes and encourages governments, partners and lenders to positively lead and drive PPP implementation, while ensuring that all needs and concerns are addressed.

147. In finalizing a PPP law, consideration should be given to enabling new and different forms of relationships and cooperation between government and the private sector to evolve. The PPP law should avoid being constrained in what can be achieved (or it becoming an obstacle to progress) by unnecessarily limiting the types of PPP arrangements to those that are currently envisaged. As experience and knowledge disseminates about new approaches from a country's experience and that of other countries, the range and type of PPP arrangements will expand.

148. Flexibility in the PPP law, as to the nature and types of PPP arrangements and the sectors and activities where PPP can be implemented, can help avoid the need for early amendments of the law to

accommodate the wider range and types of PPP arrangements that will inevitably emerge. It is desirable that all types of PPP projects be provided for in one law to avoid unnecessary confusion or decisions being taken on the type of PPP arrangement before completing studies and analysis. The working paper shows that where the PPP law has been narrowly constructed and interpreted, there will need to be, within a short period of time, amendments or preparation of a new law to enable a successful PPP program.

149. The working paper discusses how a PPP law and supporting instruments interface with other laws that are relevant to PPP implementation. It is suggested that in finalizing the PPP law and supporting instruments that consideration be given to the overall legal environment for PPP to ensure compatibility and synergy. Without taking this step, there is a possibility that PPP implementation will be disrupted, although the PPP law and supporting instruments are fit for purpose. The obstacle to PPP progress may be found in provisions or omissions in other laws and legal instruments.

150. The working paper reviews key issues that arise in PPP before offering observations and suggestions for consideration. It indicates that during the process of finalizing the PPP law, there is much to be gained in streamlining the PPP law and the supporting instruments to promote consistency, certainty and confidence for government entities, investors, lenders and partners and for different parts of government involved in the PPP program.

151. For smooth and effective implementation of the PPP law, the working paper emphasizes the need for clarity and certainty in the roles and contribution of different parts of government at national and subnational levels in designing, approving, agreeing and implementing PPPs.

152. Like a well drafted PPP law, the working paper is not prescriptive. The observations in the working paper are based on international experience and presented here with supporting evidence in the appendices. The working paper is designed to relate international PPP experience to developing Asia with an emphasis on developing East Asia. It suggests issues to be considered and addressed when finalizing a PPP law but leaves open how these should be resolved.

## APPENDIX A: PPP LAWS AND GUIDANCE

1. Commonwealth of Independent States (CIS) Model PPP Law, 2014.
2. Crown Agents Comparison of 58 Country PPP Laws with UNCITRAL Guidelines and Model Legislative Provisions Instruments, February 2014.
3. Directive 2014/23/EU on the award of PPP contracts (Official Journal L 94 of 28 March 2014), Directive 2014/24/EU on public procurement (Official Journal L 94 of 28.3.2014), Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Official Journal L 94 of 28 March 2014).
4. European Bank for Reconstruction and Development (EBRD), Core Principles of Modern Concession Law (MCL), 2006.
5. EBRD Concessions Laws Assessment 2011 Analysis, May 2012.
6. Economist Intelligence Unit (EIU), Evaluating the Environment for Public Private Partnerships in Asia-Pacific: The 2014 Infrascop, 2015.
7. European PPP Expertise Centre (EPEC), Establishing and Reforming PPP Units Analysis of EPEC Member PPP Units and Lessons Learnt 2014 (also individual country reports).
8. EPEC, Overview of the PPP Legal and Institutional Frameworks in the Western Balkans, July 2014.
9. Economic Research Institute for ASEAN and East Asia (ERIA), PPP in ASEAN Member Countries at a Glance, 2014.
10. OECD Basic Elements of a Law on Concession Agreements, 2003.
11. UNCITRAL Legislative Guide to Privately Financed Infrastructure Projects Guide, 2001.
12. UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003.
13. UNCITRAL Secretariat Overview Note Colloquium on UNCITRAL Guidelines and Model Legislative Provisions, 2014.
14. United Nations Industrial Development Organization (UNIDO), Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects, 1996.
15. United Nations Economic Commission for Europe (UNECE), Simmons & Simmons Report to the Third Session of the Team of Specialists on Public-Private Partnerships regarding Model PPP Laws, 18-19 April 2011.
16. United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), A Guidebook on PPP in Infrastructure, 2011.
17. Various reviews of Concessions Laws and legal and institutional frameworks international comparisons of laws, e.g., C'M'S Lawyers Report on PPP in Europe, 2012.

18. Policies, laws and instruments at national and subnational levels of individual countries including:

- (i) Australia (including New South Wales, Victoria)
- (ii) Austria
- (iii) Brazil
- (iv) Canada (including British Columbia, Quebec)
- (v) Chile
- (vi) Croatia
- (vii) Czech Republic
- (viii) France
- (ix) Germany
- (x) India (including Andhra Pradesh, Gujarat)
- (xi) Indonesia
- (xii) Ireland
- (xiii) Japan
- (xiv) Kazakhstan
- (xv) Kenya
- (xvi) Republic of Korea
- (xvii) Kosovo
- (xviii) Lithuania
- (xix) Mauritius
- (xx) Mongolia
- (xxi) Netherlands
- (xxii) Papua New Guinea
- (xxiii) Philippines
- (xxiv) Portugal
- (xxv) Russian Federation
- (xxvi) Serbia
- (xxvii) Spain
- (xxviii) South Africa
- (xxix) Tanzania
- (xxx) Thailand
- (xxxi) Timor-Leste
- (xxxii) Turkey
- (xxxiii) United Kingdom (including Scotland, Northern Ireland)
- (xxxiv) United States (including individual States and Puerto Rico)

## APPENDIX B: PPP INTERFACE WITH OTHER LAWS

Before finalizing a PPP Law, the following types of issues need to be considered. Many of the issues referred to below will be the subject of existing laws, opinions, and guidance. There needs to be consistency between the various laws and other instruments to ensure clarity and certainty.

- (i) Government Approval and Award of PPP
  - a) Can a government entity delegate provision of an essential public service to the private partner?
  - b) The PPP law should ensure clarity and consistency with laws, procedures and practices on government decision-making and administration including legal status and authority to decide on arrangements and enter agreements.
- (ii) PPP Procurement
  - a) Is procurement of a PPP project through selection of a partner governed by (i) the general provisions of public procurement law, (ii) by a special chapter on PPP procurement in the general public procurement law, or (iii) the law on PPP arrangements?
  - b) The aim is to achieve the same principles and purposes of conventional public procurement (transparency of procedures and criteria, accountability, equal treatment of participants including equal access to information, and fair competition among participants), while recognizing the special features of PPP procurement that make it different from conventional public procurement.
  - c) Issues to be considered include the PPP procurement legal framework, organization framework for PPP procurement, PPP procurement capacity, PPP procurement procedures and tools, PPP procurement decision-making and control system, PPP contract administration, monitoring and management, and the system for addressing complaints about the PPP procurement process.
  - d) Is there provision for challenges to the selection of a private partner by other participants in the procurement process?
  - e) If a SOE is selected as private partner, does public procurement law apply to procurement by the SOE for the purposes of the PPP arrangement?
  - f) What happens at selection of a new partner if a project fails and lender step-in rights are exercised?
- (iii) Monitoring and Regulation of PPP arrangements and price setting<sup>45</sup>
  - a) How are economic regulation and other forms of regulation of the sector or activity that is the subject of the PPP arrangement to be organized—is the PPP arrangement regulated through the terms of the PPP agreement or by an objective, independent sector regulator established by law?

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<sup>45</sup> Economic regulation is the setting of price levels and structures, registration of companies, company reporting and auditing of accounts, monitoring costs of operation, setting entry and exit requirements into the sector, and creating a level playing field to ensure fair competition. Other forms of regulation refers to setting of quality standards and monitoring performance, setting environmental and planning rules and enforcement, setting procurement rules for contracting out by public utilities and enforcement, health and safety regulations and monitoring and enforcement.

- b) Where there is an independent sector regulator, how does the price setting and review and cost monitoring mechanism that may be in the agreement reconcile with the price setting and review and cost monitoring mechanism that may be set out in a law establishing the independent sector regulator?
  - c) How will the partner and lenders be assured that the sector regulator will not override the terms of the PPP agreement, or payments will not be made in accordance with the price setting and review mechanism in the agreement?
  - d) What happens if an independent sector regulator is established by law after the commencement of the project, which is regulated through the PPP agreement?
  - e) Will the partner be able to enforce collection of revenues and impose penalties or refuse to serve users who do not pay?
  - f) Will the partner be able to engage in price discrimination and other arrangements to reflect market conditions and customer loyalty?
- (iv) Obligations<sup>46</sup>
- a) What about universal service obligations, community service obligations, or public service obligations and the cost of meeting these?
- (v) PPP Finance and Security for loans<sup>47</sup>
- a) Is finance available from sources other than state owned or controlled financial institutions?
  - b) Apart from bank loans to corporations, what other forms of financing are available for PPP arrangements, e.g., project finance, syndicated loans, project bonds, blending

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<sup>46</sup> Obligations may be imposed by government or regulators on PPP arrangements: universal service obligation (USO) is an economic, legal and business term used mostly in regulated industries (especially networks in energy, telecommunications, transport, postal services, etc.) referring to the practice of providing a baseline level of services to every resident of a community or geographical area. Community service obligations (CSO) in Australia are noncommercial activities undertaken by government trading enterprises at the direction of government to achieve social policy objectives, but may also apply in PPP arrangements with payments from government to offset the costs incurred. CSOs can range from transport concessions for pensioners, below-cost electricity charges, or the provision of noncommercial ferry services. A public service obligation (PSO) in the EU is an arrangement in which a governing body or other authority offers an auction for public transport subsidies. It permits the auction winner to operate as a monopoly supplier of a specified service of public transport for a specified period of time for the specified subsidy. A competition based on level of subsidy can be found in PPP procurement: "Infrastructure services may be assessed as warranted on net social benefit grounds where private revenues necessarily fall short of private costs. In these cases, public funding will be needed but public funding may not require public investment: it may be feasible for the government simply to 'buy' otherwise uncommercial services from the infrastructure provider on behalf of the community (e.g. to service a regional area). These contracts can be structured as an ongoing payment for services, through community service obligations (CSOs), as a one-off up-front contribution in cash or in kind, or as another arrangement." (E. Poole, C. Toohey and P. Harris. 2014. *Public Infrastructure: A Framework for Decision-making Reserve Bank of Australia Conference*. pp 97–135. <http://www.rba.gov.au/publications/confs/2014/pdf/poole-toohey-harris.pdf>)

<sup>47</sup> J. Röver. *Security in Project Finance*. <http://www.ebrd.com/downloads/legal/secured/roever7m.pdf> (Note: EBRD provides a good overview and contains a bibliography on secured transactions in various countries and regions.); J. Röver. Security in Project Finance and PPP and the Implications for Secured Transactions Law: Security is a Shield not a Sword in Frederique Dahan (ed) *Research Handbook on Secured Financing in Commercial Transactions*. Elgar. 2015; and EBRD. 1994. *Model Law on Secured Transactions*. <http://www.ebrd.com/news/publications/guides/model-law-on-secured-transactions.html> UNCITRAL. *Legislative Guide on Secured Transactions*. 2010. [https://www.uncitral.org/pdf/english/texts/security-ig/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](https://www.uncitral.org/pdf/english/texts/security-ig/e/09-82670_Ebook-Guide_09-04-10English.pdf); and *Secured Transactions Law Reform Project*. <http://securedtransactionslawreformproject.org/> for discussions on reform of law in England & Wales and reforms taking place in other countries.

of government and private sources of finance or what changes in law or practice are needed to widen the range of sources of finance?<sup>48</sup>

- c) Is it possible to take security (mortgage, pledge, floating charges, etc.) over:
    - the project’s assets or land on which assets are located?
    - the shares of the PPP project company?
    - the PPP agreement and other key project agreements?
    - revenues to be received?
  - d) Does existing legislation and practices permit taking and enforcing of security by lenders over state-owned property, and is it clear and certain which project assets must be state-owned or which project assets may be private-owned?
  - e) As a matter of good practice in drafting legislation it is better that specialized matters are addressed in specialized legislation. For example, tax matters are best addressed in a tax law. It would be better for taking of security to be addressed in a law on that subject. In the absence of a specific law on these matters, or to clarify special or unique issues that may arise in taking security over various types of assets in a PPP arrangement, the PPP law can contain relevant provisions.
  - f) How do multiple lenders take security over assets, shares and cash flows?
- (vi) Bankruptcy and Step-in Rights
- a) Is there a robust bankruptcy/insolvency law?
  - b) What are priorities among creditors when a PPP project company is insolvent/bankrupt?
  - c) How do enterprise bankruptcy or company rescue and reorganization operate where there is financial distress of a PPP project company? How will essential public infrastructure and public services continue to be provided when the PPP company is in financial distress?
  - d) If reorganization with change of partner is permitted, what will happen to existing liabilities?
  - e) Is there a register of security over assets?
  - f) Can government exercise step-in rights, and do step-in rights comply with Company Law and Enterprise Bankruptcy Law?
  - g) Can lenders be given step-in rights and how can these be exercised to comply with Company Law and Enterprise Bankruptcy Law?
  - h) Can there be a direct agreement between government and lenders?
  - i) If government or lender step-in rights can be exercised, how is the new partner to be identified and selected—does the selection process in the PPP law prevail or can the lender select a replacement partner?
  - j) PPP law should indicate that a government entity has authority to enter direct agreements and provide for step-in rights where required, leaving the details to PPP agreement. PPP law is likely to clarify this authority where direct agreements and step-in rights have not been encountered previously.

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<sup>48</sup> S. Chong and E. Poole. 2013. *Financing Infrastructure: A Spectrum of Country Approaches Bulletin*, September Quarter 2013. Reserve Bank of Australia, 65–76. <http://www.rba.gov.au/publications/bulletin/2013/sep/pdf/bu-0913-8.pdf>

(vii) PPP and Public Investment and Public Financial Management

- a) PPP Law should dovetail with public investment and public financial management laws, as PPP projects should be considered as priority projects in the public investment plan. As such, these should be assessed for fiscal risk and affordability, which is a separate form of assessment from financial and economic viability and value for money.

(viii) PPP and Government Support

- a) Does government have the legal authority to provide financial and other support, e.g., a guarantee to projects and what approvals are needed?

(ix) PPP Land, Environmental and Social Issues

- a) Can a government entity transfer ownership, management or control over public assets to the private partner?
- b) Where land and other assets are transferred to the project company, is the process clear, certain, and timely?
- c) Who is responsible for environmental liabilities at the time of transfer to the project company and at the time of transfer to government?
- d) Who is responsible for resolving social and community issues at the project site, e.g., resettlement of residents at the project site? And, is there legal authority and processes for compensating people displaced by the project?
- e) Is there legal authority and processes for granting way-leave rights, e.g., laying water pipes over lands occupied by persons other than government or the private partner?

(x) PPP Employment Issues

- a) Will government employees be displaced or transferred to the private partner's operation and are there processes for handling this?

(xi) PPP and Contract Law, Administrative Law, Dispute Resolution

- a) Is a PPP agreement subject to contract law or administrative law?
- b) If a PPP agreement is subject to administrative law, what impact does this have—are the parties to the agreement of equal status or does government have rights to take unilateral actions?
- c) If government has rights to take unilateral action in the public interest, what protection is there for PPP partners (i) through limits on government powers to take action to specific circumstances, and (ii) provision for appropriate and timely compensation?
- d) What dispute resolution mechanisms are available for a PPP agreement?
- e) Does the dispute resolution system generate confidence among potential partners and lenders?
- f) Is the dispute resolution system credible and capable of resolving complex disputes?
- g) Is domestic and international arbitration available as an alternative to court litigation?

- h) Is mediation, conciliation or independent expert determination available?
  - i) Can arbitration decisions be enforced, and is enforcement effective and timely?
- (xii) PPP and matters that include Taxation, Consumer Protection, Standards and Public Liability, Health and Safety, Foreign Investors, Investor Protection, Foreign Exchange, Insurance.<sup>49</sup>

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<sup>49</sup> D. Hunt and V. Onderka. 2014. Insurance Considerations in Public-Private Partnership Projects Part 2 Professional Practice Issues for Consulting Engineers in P3s; D. Hatem and P. Gary (ed). 2014. Public-Private Partnerships Opportunities and Risks for Consulting Engineers American Council of Engineering Companies. [http://www.michaelbradydesign.com/Transfer/ACEC%20files/PPP/Ch\\_7\\_Hunt\\_1st\\_round.pdf](http://www.michaelbradydesign.com/Transfer/ACEC%20files/PPP/Ch_7_Hunt_1st_round.pdf) and; World Bank. PPPIRC. <http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/insurance-checklist>

## APPENDIX C: PPP DEFINITIONS

There is no widely recognized definition of PPP, and there are many different definitions and variations between countries and organizations.

**ADB:** Public-Private Partnership Operational Plan 2012-2020: A PPP refers to a contractual arrangement between public (national, state, provincial, or local) and private entities through which the skills, assets, and/or financial resources of each of the public and private sectors are allocated in a complementary manner, thereby sharing the risks and rewards, to seek to provide optimal service delivery and good value to citizens.... in ADB operations. PPPs are a way of procuring efficient and modernized public service, and should not be viewed as just getting private finance for asset creation. It should be one type of modality for the management of infrastructure facilities and delivery of public services through a long-term partnership. It aims to deliver improved services for customers and better value for money for taxpayers through optimal risk allocation, management synergies, encouragement of innovation, efficient asset utilization, and asset management with a whole-of-life-cycle approach. In PPPs, certain defined aspects of service delivery, infrastructure development, and operations should be placed with the private sector, while other elements are retained under public sector responsibility... Within ADB operations, all contracts such as performance-based contracts (management and service contracts), lease-operate-transfer, build-own-operate-transfer, design-build-finance-operate, variants, and concessions are considered as various forms of PPP. Contracts involving turnkey design and construction as part of public procurement (engineering, procurement, and construction contracts) are excluded. Also excluded are simple service contracts that are not linked to performance standards (those that are more aligned to outsourcing to private contractor staff to operate public assets) and construction contracts with extended warranties and/or maintenance provisions of, for example, up to 5 years postcompletion (wherein performance risk-sharing is minimal as the assets are new and need only basic maintenance). However, in some cases, service contracts can be used as a first step in moving to a higher form of PPP, especially in situations where the public sector is just beginning to explore PPP modalities.

**Andhra Pradesh (AP) State in India (AP Infrastructure Development Enabling Act, 2001):** PPP means investment by private sector participant in an infrastructure project of the government agency or the local authority (local government) in the State. The concessionaire may or may not charge a user fee, depending on the type of contract and the terms of the concession.

**Australia:** PPP projects defined as being where: the private sector provides public infrastructure and any related services; and there is private investment or financing. PPPs as a procurement method are part of a broader spectrum of contractual relationships between the public and private sectors to produce an asset and/or deliver a service. They are distinct from early contractor involvement, alliancing, managing contractor, traditional procurement (design and construct) and other procurement methods.

**European Commission:** *PPP is not defined at community level but in general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management and maintenance of an infrastructure of the provision of a service.*

**European Union:** PPP means “forms of cooperation between public bodies and the private sector, which aim to improve the delivery of investments in infrastructure projects or other types of operations, delivering public services through risk sharing, pooling of private sector expertise or additional sources of capital”. A PPP operation is defined as “an operation which is implemented or intended to be implemented under a public–private–partnership structure”.<sup>50</sup>

**European Investment Bank:** PPP is a generic term for the relationships formed between the private sector and public bodies often with the aim of introducing private sector resources and/or expertise in order to help provide and deliver public sector assets and services. The term PPP is used to describe a wide variety of working arrangements from loose, informal and strategic partnerships, to design-build-finance-and-operate type service contracts and formal joint venture companies.

**Fitch:** defines PPPs broadly as any instance where certain rights and responsibilities to finance, construct, expand, operate, and/or maintain a publicly controlled infrastructure asset, and charge user fees under an established tariff regime or receive a prescribed stream of public sector payments as compensation are transferred to the private sector in frameworks including concessions or private ownership structures. This would include availability payment structures, as well as structures where price and demand risks are borne by investors.

**France** does not define PPP in law. There are arrangements based on practice and law that are similar to forms of PPP found in other countries. Various terms are used to describe these arrangements including concession, affermage, and partnership contract but these terms are peculiar to France and some Francophone countries.

**Gujarat** State of India Gujarat Infrastructure Development (GID) Board Act: The GID Act includes contracts in the nature of concessions defined as the grant of financial assistance or conferment of right on government property and public assets to a person other than the state government, government agency or specified government agency, under terms specified in the concession agreement. Schedule 2 lists contracts included in the definition of concession, build- own-operate transfer, build-own-operate and maintain, build and transfer, build-lease and transfer, build-transfer and operate, lease management, management, rehabilitate-own-operate and maintain, service contract, supply operate and transfer and joint venture agreement. The concessionaire may or may not charge a user fee, depending on the type of contract and the terms of the concession.

**IMF:** PPP refers to arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government. In addition to private execution and financing of public investment, PPPs have two other important characteristics: there is an emphasis on service provision, as well as investment, by the private sector; and significant risk is transferred from the government to the private sector. PPPs are involved in a wide range of social and economic infrastructure projects, but they are mainly used to build and operate hospitals, schools, prisons, roads, bridges and tunnels, light rail networks, air traffic control systems, and water and sanitation plants.

**India:** PPP means an arrangement between a government or statutory entity or government-owned entity on one side and a private sector entity on the other, for the provision of public assets and/or related services for public benefit, through investments being made by and/or management undertaken by the private sector entity for a specified time period, where there is a substantial risk

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<sup>50</sup> Structural and Investment Funds (ESI). 2013. *New Common Provisions Regulation (CPR) for the European Structural and Investment Funds (ESI Funds)*. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1303&from=EN>

sharing with the private sector and the private sector receives performance linked payments that conform (or are benchmarked) to specified, predetermined and measurable performance standards. The *Guidelines for Financial Support to Public Private Partnerships in Infrastructure* under the Viability Gap Funding Scheme of the Ministry of Finance, defines PPPs as a project based on a contract or concession agreement, between a government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges. The Scheme and Guidelines for the India Infrastructure Project Development Fund, issued by the Ministry of Finance, Government of India define PPPs as: the partnership between a public sector entity (sponsoring authority) and a private sector entity (a legal entity in which 51% or more of equity is with the private partner/s) for the creation and/or management of infrastructure for public purpose for a specified period of time (concession period) on commercial terms and in which the private partner has been procured through a transparent and open procurement system.

**Ireland:** A State authority may:

- (i) enter into a PPP arrangement with a partner for the performance of functions of the State authority specified in the arrangement in relation to: (a) the design and construction of an asset, together with the operation of services relating to it and the provision of finance, if required, or (b) the construction of an asset, together with the operation of services relating to it and the provision of finance, if required, or (c) the design and construction of an asset, together with the provision of finance, or (d) the provision of services relating to an asset for not less than 5 years and the provision of finance, if required.
- (ii) arrange or provide for a payment to a partner.

**Republic of Korea:** a project to build and operate infrastructure such as road, port, railway, school and environmental facilities—which have traditionally been constructed and run by government funding—with private capital, thus tapping the creativity and efficiency of private sector.

**Kosovo:** PPP is any contractual or institutional cooperation between one or more public authorities and one or more private partners whereby the private partner:

- (i) provides a public service or a public infrastructure on behalf of the public authority;
- (ii) assumes financial, technical, construction and operational risks, including demand and/or availability risks, in connection with the provision of the public service or the public infrastructure;
- (iii) receives a benefit for providing the public service or the public infrastructure in form of payment made by the public authority from the budget of such public authority;
- (iv) charges or fees to be collected by the private partner from users or customers of a public service or a public infrastructure provided to them; or
- (v) a combination of such payment and such charges or fees.

**New Zealand:** a long term contract for the delivery of a service, where the provision of the service requires the construction of a new asset, or the enhancement of an existing asset, that is financed from external (private) sources on a nonrecourse basis and where full legal ownership of the asset is retained by the Government (Crown).

**OECD:** defines PPP as a long-term agreement between the government and a private partner where the service delivery objectives of the government are aligned with the profit objectives of the private

partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners.

**South Africa:** defines a PPP as a commercial transaction between a government institution and a private partner in which the private party either performs an institutional function on behalf of the institution for a specified or indefinite period, or acquires the use of state property for its own commercial purposes for a specified or indefinite period. The private party receives a benefit for performing the function or by utilising state property, either by way of compensation from a revenue fund, charges or fees collected by the private party from users or customers of a service provided to them, or a combination of such compensation and such charges or fees.

**Standard and Poor's (S&P) Financial Services:** PPP is any medium- to long-term relationship between the public and private sectors, involving the sharing of risks and rewards of multisector skills, expertise and finance to deliver desired policy outcomes.

**UK:** defines PPP as arrangements typified by joint working between the public and private sectors. In their broadest sense, they can cover all types of collaboration across the private-public sector interface involving collaborative working together and risk sharing to deliver policies, services and infrastructure (HMT, Infrastructure Procurement: Delivering Long-Term Value, March 2008).

**USA Federal Highways Authority:** PPPs (often called P3s in USA) are contractual agreements formed between a public agency and a private sector entity that allow for greater private sector participation in the delivery and financing of transportation projects.

**Victoria (Australia):** defines PPP as relating to the provision of infrastructure and any related ancillary service which involve private investment or financing, with a present value of payments for a service to be made by the government (and/or by consumers) of more than AUD10 million during the period of a partnership that do not relate to the general procurement of services.

**World Bank, ADB, IADB (PPP Reference Guide):** PPP is a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.

## APPENDIX D: UPDATING UNCITRAL GUIDELINES

<b>UNCITRAL Guidelines and Model Legislative Provisions Content Headings</b>	<b>UNCITRAL Secretariat 2015 Update Recommendations</b>
Introduction and background information	<ul style="list-style-type: none"> <li>– Amend the drafting to reflect modern approaches to the concepts of fundamental public interest, value for money comparators, sustainability and other terminological issues and definitions.</li> <li>– Distinguish PPPs in which the project partner is responsible for delivering full or limited public services, so as to reflect the scope of core PPPs and modern practice.</li> <li>– Simplify the text and eliminate unnecessary discussion.</li> <li>– Explain the differences between PPP user pay and government pay.</li> <li>– Update to provide appropriate recent experiences.</li> <li>– Include appropriate cross-references to the UNCITRAL Model Law on Public Procurement.</li> </ul>
Other relevant areas of law	<ul style="list-style-type: none"> <li>– Minor simplification only.</li> </ul>
General legislative and institutional framework	<ul style="list-style-type: none"> <li>– Revisions are needed to:               <ul style="list-style-type: none"> <li>– Balance more effectively the public and private interests.</li> <li>– Support capacity on the part of the public authorities.</li> <li>– Address preparatory measures and project selection.</li> <li>– Broaden the scope of necessary institutional mechanisms and governance aspects of the relevant institutions including, for example, competition authorities as well as PPP Units and Committees, which are commonly found in States using PPPs, and require additional provision in any new legislative text.</li> </ul> </li> </ul>
Project risks and government support:	<ul style="list-style-type: none"> <li>– Improve discussion of the economic aspects of projects.</li> <li>– Discussion of particular risks and risk-sharing.</li> <li>– Expand on the links between risk allocation, provision of guarantees, value for money and overall economic advantages of the project.</li> <li>– Recommend on transparency from the public side.</li> </ul>
Construction and operation: legislative framework and project agreement:	<ul style="list-style-type: none"> <li>– Address contractual forms, limitations on freedom of contract and minimal contractual requirements (with a possible broader scope of the project agreement).</li> <li>– Deeper discussion of subcontracting arrangements and liabilities.</li> <li>– Deeper discussion of renegotiation, refinancing and modification of contracts during the term of the project (including regarding contract specifications).</li> <li>– Clarify that the project agreement may extend to a group of documents.</li> <li>– Clarify on:               <ul style="list-style-type: none"> <li>◇ the scope of the concessionaire’s activity,</li> <li>◇ the different concepts of ownership (and acquiring ownership) of the project site, and</li> <li>◇ tariffs and fees, and guarantees to complement them and mitigate political risks—some of which may be negotiable, and others treated as minimum legal guarantees.</li> </ul> </li> <li>– Operation of infrastructure—more guidance needed on:               <ul style="list-style-type: none"> <li>◇ standards and obligations of the project party,</li> <li>◇ execution of the public authority’s instructions, and</li> <li>◇ appropriate time limits for concessions.</li> </ul> </li> <li>– Greater transparency in terms of making the main terms of the project documents publicly available is recommended.</li> </ul>

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<b>UNCITRAL Guidelines and Model Legislative Provisions Content Headings</b>	<b>UNCITRAL Secretariat 2015 Update Recommendations</b>
Duration, extension and termination of the project agreement:	<ul style="list-style-type: none"> <li>– address time limits for projects.</li> <li>– investment issues and risk occurrence.</li> <li>– better linkage between modifications and termination.</li> </ul>
Settlement of Disputes:	<ul style="list-style-type: none"> <li>– make the guidance more practical.</li> <li>– introduce deeper recommendations on:               <ul style="list-style-type: none"> <li>◇ use of arbitration,</li> <li>◇ when submission to dispute boards may be a mandatory initial step, and</li> <li>◇ introduce emergency arbitration.</li> </ul> </li> <li>– expand guidance on:               <ul style="list-style-type: none"> <li>◇ national as compared with international forums for dispute resolution,</li> <li>◇ ensuring independence of the forum,</li> <li>◇ choice of law, and</li> <li>◇ disputes between shareholders, lending parties, operational consortium partners, regulators and operators and contractors and subcontractors, as well as between the public authority and the project partner.</li> </ul> </li> </ul>

## APPENDIX E: SCOPE AND RATIONALE OF PPP LAWS

**Table E.1: Content of Guidelines and Model Laws**

<b>Subject</b>	<b>UNCITRAL Guidelines and Model Legislative Provisions</b>	<b>OECD Elements of Law on Concession Agreements</b>	<b>EBRD Modern Concession Law Principles</b>	<b>UNECE 2011</b>	<b>EPEC PPP Legal System 2014</b>	<b>CIS Model PPP Law 2014</b>
Definitions	√	√	√		√	√
General purpose and scope of law geographical, national, subnational, sectors and activities (permitted or excluded)	√	√	√			√
Forms of PPP	√	√	√			√
Identify government entities responsible for implementation of PPP program at national– subnational levels, development of PPP pipeline of projects and authority to enter agreements	√	√	√	√	√	√
Identify persons that are eligible or ineligible to be a partner	√		√			√
Roles of different government entities at national and subnational levels	√					√
Administrative coordination, approvals and decision-making process	√				√	√
Regulation of PPP through PPP agreement or through independent regulator under sector law						
Funds for project preparation (project development or preparation funds)	√					
Power to appoint PPP advisers and process for appointment						
Public investment management and project selection–value for money and whole of life costing						
Public financial management–affordability and fiscal risk assessment of actual, hidden, implicit and contingent liabilities						
Procurement principles and purposes: all processes to be fair, transparent, based on objective criteria and with equitable access to information and participation			√	√	√	
Review to ensure value for money achieved						
Government financial accounts and national income accounting for PPP						
Unsolicited proposals			√			√
Selection of partner	√	√			√	√
Methods of selection		√				√

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**Table E.1** *continued*

<b>Subject</b>	<b>UNCITRAL Guidelines and Model Legislative Provisions</b>	<b>OECD Elements of Law on Concession Agreements</b>	<b>EBRD Modern Concession Law Principles</b>	<b>UNECE 2011</b>	<b>EPEC PPP Legal System 2014</b>	<b>CIS Model PPP Law 2014</b>
Limited exceptions permitting selection without competition		√	√			√
Dialogue with potential bidders at different stages of project cycle						
Prequalification	√	√				
Procedures and documentation for requesting proposals		√				
Complex project procedures		√				
Small-scale project procedures and possible bundling (grouping) of smaller projects						√
Evaluation criteria for selection of proposal—partner	√	√				
Confidentiality of commercially sensitive information	√					
Notice of award to participants	√					
Record of proceedings	√					
Complaints or review of validity of award		√	√			
PPP agreement						
Permitted or indicative contents of agreement	√	√				
Output specification, performance standards and performance related payments						
Binding nature of agreement on parties including government entity		√				
Legal status and structure of partner						√
Autonomy of parties to agree on contents and to renegotiate and amend (possibly within limits or under guidelines as to limits in law)	√	√	√	√		√
Agreement to reflect risk allocation and risk management	√		√			√
Revenue stream sources and authority to collect and enforce payments	√					
Price setting and review arrangements	√					
Economic-financial equilibrium	√	√	√			
Force majeure						
Stabilisation Clause-Compensation Events—to protect partner against financial impact of changes in legislation	√					
Agreement duration, extension on expiry, termination, early termination including compensation	√					√

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**Table E.1** *continued*

<b>Subject</b>	<b>UNCITRAL Guidelines and Model Legislative Provisions</b>	<b>OECD Elements of Law on Concession Agreements</b>	<b>EBRD Modern Concession Law Principles</b>	<b>UNECE 2011</b>	<b>EPEC PPP Legal System 2014</b>	<b>CIS Model PPP Law 2014</b>
Project site and assets rights and obligations	√					
Assignment or Transfer of project ownership by partner or Government entity						√
Government step-in rights						
Finance sources	√					
Authority to give, forms, criteria and usage of government project support including financial and other support	√		√	√		√
Security interests for loans – private partner, project assets, revenue streams etc.	√	√	√			
Lender step-in rights and direct agreement			√	√		
Refinancing arrangements (if source of financing is project finance)						
Structures						
Change management						
Settlement of disputes	√	√	√		√	√
During procurement process and between parties to agreement—Form of settlement process, law to be applied and enforceable remedies				√		√
Identify and resolve conflicting provisions in other laws			√	√		
International obligations						
Regulations or procedures to elaborate on law including requirement to issue guidance						

EBRD = European Bank for Reconstruction and Development, EPEC = European PPP Expertise Centre, NDRC = National Development Reform Commission, OECD = Organisation for Economic Co-operation and Development, PFIP = Private Finance Infrastructure Provisions, PPP = Public-Private Partnership, UNCITRAL = United Nations Commission on International Trade Law, UNECE = United Nations Economic Commission for Europe.

Note. √ means guidelines or law includes a reference to this subject. It does not infer that the reference is comprehensive or satisfactory.

Sources: Author's analysis of Commonwealth of Independent States (CIS) Model PPP Law. 2014; European Bank for Reconstruction and Development. 2006. *Core Principles of Modern Concession Law (MCL)*; EPEC. 2014 (July). *Overview of the PPP Legal and Institutional Frameworks in the Western Balkans*; OECD. 2003. *Basic Elements of a Law on Concession Agreements*; UNCITRAL. 2001. *Legislative Guide to Privately Financed Infrastructure Projects Guide*; UNCITRAL. 2003. *Model Legislative Provisions on Privately Financed Infrastructure Projects*; and UNECE. 2011. Simmons & Simmons Report to the Third Session of the Team of Specialists on Public-Private Partnerships regarding Model PPP Laws. 18-19 April.

**Table E.2: General Observations on the Content of PPP Laws**

Subject	General Observations
Definitions	Definitions should be clear and certain but not over restrictive.
General purpose and scope of Law geographical, national, subnational, sectors and activities (permitted or excluded)	To provide confidence and certainty regarding facilities, services, activities that may be subject to PPP at national and subnational levels. The law should identify the range of sectors to which PPPs can apply. The law should be flexible to permit the future addition of new sectors. It may also specify activities that are not subject to the PPP law, e.g., natural resources concessions, short-term (say less than 5 years) outsourcing arrangements. Infrastructure may be classified in various ways, but a typical grouping is: municipal infrastructure, e.g., street lighting, urban roads, bridges and networks (usually underground) of water, sewerage etc. Utilities, e.g., gas, water and electricity. Transport, e.g., highways and rail. Social infrastructure, e.g., schools, hospitals, cultural (museums, etc.).
Forms of PPP	It is best to allow for flexibility in the form of arrangements. Trends in PPP policies and laws in recent years show an evolution away from describing different combinations of design, build, finance, operate, manage elements of projects or sources of revenue to broad descriptions that permit (a) varied new and hybrid forms of projects with a greater emphasis on risk allocation and management, (b) innovative finance from private and government sources and a wider range of government support mechanisms, (c) a greater variety and range of combinations of revenue streams from payments for facilities and services by users and/or government (d) greater emphasis on performance-related payments, and (e) enable institutional PPP arrangements while recognizing their different risk allocation from other forms of PPP arrangements.
Identify government entities responsible for implementation of PPP program at national, subnational levels, development of PPP pipeline of projects and authority to enter PPP agreements	Because PPP have cross-government elements, a PPP Law and institutional framework should reflect that implementation is best served by a coordinated network of Government entities working together.
Identify persons that are eligible or ineligible to be a partner	The law should clarify eligibility and extent of access to be a partner for Chinese private, state-owned and foreign-owned or controlled entities. Can a contractual consortium or contractual joint venture participate? Can a state-owned enterprise join with a private-owned or foreign-owned enterprise in a joint venture? What about institutional PPP arrangements?
Roles of different government entities at national and subnational levels	The law and supporting instruments should provide clarity and certainty for government entities and potential participants in PPP process as to roles, responsibilities.
Administrative coordination, approvals and decision-making process.	<p>Key provisions relate to:</p> <ul style="list-style-type: none"> <li>(i) project identification and selection</li> <li>(ii) PPP feasibility and value for money assessments</li> <li>(iii) affordability and fiscal risk assessments</li> <li>(iv) procurement and selection of partner</li> <li>(v) finalising agreements</li> <li>(vi) construction phase</li> <li>(vii) operation phase</li> <li>(viii) contract monitoring and management</li> <li>(ix) transfer of project and assets to government entity according to the terms of the agreement</li> </ul> <p>Details may be contained in legal instruments made with authority given in law.</p>

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**Table E.2** *continued*

Subject	General Observations
Regulation of PPP through PPP agreement or through independent regulator under sector law	<p>The PPP law or supporting legal instruments should provide clarity and certainty for government entities and potential participants in the PPP process to promote efficiency and effectiveness in how government implements the PPP program. The PPP law and supporting legal instruments must be reinforced by coordinating and streamlining the roles of various government entities in PPPs including an entity responsible for facility or service to be provided, entity responsible for public investment planning and selecting priority projects, for PPP project preparation and evaluation, for procurement, fiscal risk and affordability assessments, decision-making on various matters that arise during the PPP process, value for money audit and evaluation of the completed and operating project, and issuing licenses, permits and consents where these are required.</p> <p>In some jurisdictions, independent sector regulators established by law regulate pricing, reviews of pricing, standards of service, universal service obligations and other aspects of PPPs arrangements. In other jurisdictions, these matters are addressed in PPP agreements through regulation by contract. Responsibility for regulation and the process and criteria involved must be clear and certain under both regulation by law or regulation by contract. Capability and track record of regulators are important sources of confidence in independent sector regulators among investors and lenders. Regulatory risk is a key factor for partners, investors and lenders.</p>
Funds for project preparation (project development or preparation funds)	<p>Good quality preparation is essential to a robust procurement process that attracts high quality participants. It minimises time spent finalising agreements after selection of the partner. Experience shows that in many jurisdictions government entities do not have readily available funds to pay for advisers. For a smooth procurement process and to accelerate the finalisation of agreements, it is essential that project preparation produces high quality documentation, including well developed, clear and certain draft agreements. There is a trend toward governments setting up project preparation funds to develop projects and documentation to reach the high standards that attract quality participants. Experienced and skilled PPP advisers are needed especially in the preparation of initial sets of projects. Under the terms of participation in responding to the requests for proposals the selected partner pays a fee to replace expenditure on project preparation and advisers. The PPP law could consider an enabling provision on this subject that would permit a fund to be established.</p>
Power to appoint PPP advisers and process for appointment	<p>(See European PPP Expertise Centre. 2014. Role and Use of Advisers in preparing and implementing PPP projects, Luxembourg.)</p> <p>Experience shows that specialised and skilled PPP advisers from outside government are essential to a high quality program. In many jurisdictions there is an inherent authority for government entities to engage advisers using general public procurement. For recurrent and rapid engagement of advisers in a PPP program, it may be desirable to form a panel of prequalified advisers. It may be necessary to amend general public procurement law for this, or to include a provision for the regular engagement of advisers in PPP law. In jurisdictions where there is not a tradition of using advisers from outside of government for project preparation and preparation of documentation, PPP law might clarify that advisers may be engaged to overcome inertia but a source of funding for advisers would also be required.</p>

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Table E.2 *continued*

Subject	General Observations
Public Investment Management and project selection—value for money and whole of life costing	<p>There is a trend away from pursuing PPP projects as a series of one off projects, identified and selected through a separate process from public investment management selection of projects. As the emphasis has shifted to PPP programs of projects, governments are moving to identify projects that are suited to PPPs from among projects already identified as satisfying criteria for priority projects for public investment. Value for money has become the main criteria for choosing PPP in many jurisdictions. Value for money is defined by UK to be the optimum combination of the whole of life cost and quality (or fitness for purpose) of the good or service to meet the user's requirements. Value for money looks at the costs, risks and benefits over the life-time of the different project output delivery options and is used to test whether public or private finance or some combination of public or private finance is best for the project. PPP law or some other law should recognize the link between PPP projects and priority public investment projects.</p> <p>(See A. Rajaram, T. Le, K. Kaiser, J. Kim, and J. Frank, (eds.). 2014. <i>The Power of Public Investment Management: Transforming Resources into Assets for Growth</i>. Directions in Development. Washington, DC: World Bank. <a href="http://dx.doi.org/10.1596/978-1-4648-0316-1">http://dx.doi.org/10.1596/978-1-4648-0316-1</a>; and G. Schwartz, A. Corbacho and K. Funke. 2008. <i>Public Investment and Public-Private Partnerships: Addressing Infrastructure Challenges and Managing Fiscal Risks</i>. International Monetary Fund, Washington, D.C.).</p>
Public Financial Management—affordability and fiscal risk assessment of actual, hidden, implicit and contingent liabilities	<p>There is a trend away from PPPs as one-off projects toward a program of projects that maximizes overall impact. This reflects in the impact of projects on public finances. Actual, hidden, implicit and contingent liabilities can lead to unexpected demands for government funds. Individual PPP projects may satisfy value for money criteria, but collectively the exposure to demands on government funds may exceed what is available. Assessments of affordability and fiscal risk exposure are essential at critical stages of the process for user pay and government pay projects as there is fiscal risk exposure arising from a variety of sources under both types of projects. The PPP law, a public financial management law or other relevant law should reflect the need for fiscal risk and affordability assessments at appropriate stages of preparing and procuring PPP projects.</p> <p>(See World Bank. 2013. <i>Implementing a Framework for Managing Fiscal Commitments from Public Private Commitments</i>. Operational Note, Washington, D.C.).</p>
Procurement principles and purposes: all processes to be fair, transparent, based on objective criteria and with equitable access to information and participation	<p>Procurement of PPPs projects should satisfy the principles of good quality conventional public procurement. PPP procurement processes are different from conventional public procurement (e.g., more scope for structured forms of consultation and negotiation at various stages of the process). The specialised nature of PPP procurement should be recognized in PPP law or as a separate chapter in public procurement or tendering laws.</p>
Review to ensure value for money achieved	<p>In many jurisdictions, there is a trend toward using the supreme audit institution (or subnational equivalent entity) to review the PPP program and individual projects to establish if projected value for money gains have been obtained and that there is compliance with PPP legislation and procedures. The supreme audit institution will require the necessary authority and capability to carry out for value for money analysis. The need for the PPP law or other relevant law to reflect this role should be considered.</p> <p>(See International Organization of Supreme Audit Institutions. 2007. <i>Guidelines on Best Practice for the Audit of Public-Private Finance and Concessions</i>.)</p>
Government financial accounts and national income accounting for PPPs	<p>Provision should be made in the PPP law, or supporting documentation, or in some other legislation for how PPPs will be recognized in government financial accounts and in national income accounts.</p> <p>(See K. Funke, T. Irwin and I. Rial. 2013. <i>Budgeting and reporting for public-private partnerships</i>. OECD International Transport Forum Joint Transport Research Centre Discussion Papers).</p>

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**Table E.2** *continued*

Subject	General Observations
Unsolicited proposals	If unsolicited proposals are permitted, the provisions in the law should be directed toward managing and controlling the process, and encouraging fair competition. If unsolicited proposals are permitted the criteria for admitting to consideration must be clear and certain and limited to rare and exceptional circumstances. The proposal should be for a project that meets the criteria of a priority project in the public investment plan. An unsolicited proposal must be more than an expression of interest in providing a facility or service or a project concept. It should contain sufficient detail to be screened for admission to the PPP program and evaluated for value for money. The main source of better value of money is higher efficiency from a partner than is obtained from conventional public procurement. The main catalyst to higher efficiency is competition between potential partners. Unless treated with caution, and in a disciplined manner, there is a risk that unsolicited proposals may undermine these elements.
Selection of partner	The aim of PPP is to achieve better value for money than alternative procurement methods. Competition for a PPP between high quality participants is a key driver to achieving the efficiency gains that are the source of better value for money.
Methods of selection	Lack of competition is likely to result in lower value for money than a competitive process. There may be exceptional occasions recognized in legislation where competition is not feasible.
Limited exceptions permitting selection without competition	Criteria for limited exceptions should be clear and certain and should not be easily satisfied so as to avoid competition.
Dialogue with potential bidders at different stages of project cycle	There is a trend to engaging with potential participants in advance of requests for qualifications and request for proposals to ensure that opportunities for innovation in projects are not lost.
Prequalification	Prequalification on grounds of technical and financial strength and experience with PPPs or the implementing similar sector projects can lead to a better process of competition between quality participants.
Procedures and documentation for requesting proposals	Good preparation and detailed documentation assist in attracting quality participants and selection of quality partners that can deliver efficiency and value for money.
Complex project procedures	Special procedures may be required for complex projects which may require structured negotiated outcomes carried out according to clear rules and procedures.
Small-scale project procedures and possible bundling (grouping) of smaller projects	Small scale projects may not justify advisory and transaction costs required in preparing and procuring projects and finalising agreements under PPP. Bundling small projects into lots of larger value may provide an opportunity to obtain better value for money through PPPs than other procurement methods.
Evaluation criteria for selection of proposal—partner	More jurisdictions are using value for money as a key criterion where participants satisfy other technical, environmental and financial criteria. Value for money is a general term and the sources of value for money will vary by project. The criteria for selection of a proposal–partner should reflect the specified aims to be achieved by a project including output specifications, target performance indicators, whole of life costing. Conventional public procurement often places a high priority on the capital cost of a project to government. PPPs evaluation will usually have a more complex set of criteria weighted according to the priority aims set out for delivering facilities and especially for delivering services.
Confidentiality of commercially sensitive information	To promote confidence among participants sensitive commercial information on participants and their proposals must be protected from being shared with other participants or published with potentially damaging impact on business activities.
Notice of award to participants	In some jurisdictions there is a period between service of notice of award and proceeding to finalisation of agreements to permit unsuccessful participants to raise complaints regarding the validity of the award.

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**Table E.2** *continued*

Subject	General Observations
Record of proceedings	A complete record of the chain of decision-making helps to justify decisions, verify validity of selection of partner. It provides a base of information for the supreme audit institution to ensure that there has been compliance with law and procedures. Is the record published or at least made available to participants?
Complaints and review of validity of award	In some jurisdictions, unsuccessful participants are permitted to under a formal process to make a complaint or seek a review of award. For example, EU remedies directives apply to all public procurement including PPPs. There is a standstill period—contracting authorities need to wait for at least 10 days after deciding who has been identified for award of a public contract before the contract can be signed. This period gives bidders time to examine the decision and decide whether to initiate a review procedure. If bidders seek review within the standstill period, there is an automatic suspension of the procurement process until the review body takes its decision. If these rules are not respected, under certain conditions national review bodies must render a signed contract ineffective. The EU also has stringent rules against illegal direct awards of public contracts—national courts may render contracts ineffective where they have been illegally awarded without transparency and prior competitive tendering. Who conducts the review—is it the same body that might review conventional public procurement or a panel of persons with specialised knowledge of PPPs value for money, etc.?
PPP agreement	The PPP agreement is one of a number of agreements and instruments (e.g., shareholder agreement for the partner, design, construction, maintenance, operating agreements and financing (equity, debt and quasi-equity, innovative finance), service provision or off-take agreements, performance guarantee, insurance arrangements, etc. In Germany, the Netherlands, and the UK, a PPP is a commercial arrangement governed by contract law. Government is a party to the agreement no different from the private party. In some jurisdictions a PPP is part of public law or a grant under administrative law that may be revocable at the will of the government or that might make enforcing the agreement problematic. The partner (especially one from domestic or international private sector) and lenders will have concerns about possible unilateral changes by government, particularly where there is not a track record of government exercising this power in a restrained manner according to established principles of good governance legality, proportionality, legitimate expectations, legal certainty, nondiscrimination, transparency. The law should clarify the nature of the agreement, sovereign immunity and other issues that will especially concern private sector investors and lenders.
Permitted or indicative contents of the Agreement	PPP law should not be prescriptive on matters that are more effectively addressed in the PPP agreement. The law may state novel matters that may be included in the agreement where there is no prior experience of these to remove any doubt or reticence about inclusion in an agreement where suitable.
Output specification, performance standards and performance related payments	The law may recognize that output specifications, performance standards and performance related payments are key elements of PPP projects.
Binding nature of agreement on parties including government entity	There is trend away from viewing PPPs as a privilege and seeing it as a commercial arrangement. It may be desirable to state that the agreement is a commercial agreement that is binding on the government. Commercial aspects of the agreement should be distinguished from pure administrative acts by government that may otherwise be subject to review under administrative law, administrative courts, and judicial review type processes.
Legal status and structure of partner	Is a special purpose vehicle permitted? Can a contractual consortium participate in the PPP procurement process? Can a SOE participate on its own or in an institutional PPP? What will be the status of a PPP agreement between government and a SOE?

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**Table E.2** *continued*

<b>Subject</b>	<b>General Observations</b>
Autonomy of parties to agree on contents and to renegotiate and amend (possibly within limits or guidelines in law)	The law should recognize the autonomy of parties to agree on contents of an agreement and to reach agreement on changes to the agreement. PPP agreements are mainly of long duration (perhaps 25 or more years). It is likely that amendments will be necessary during the course of the agreement to recognize changes in circumstances that can arise from a variety of sources and reasons.
Agreement to reflect risk allocation and risk management	A law is not suited to prescribing on risk allocation because risks vary by project. Parties to a PPP agreement should be able to design and agree appropriate solutions for individual projects. The law may state that the PPP agreement is to specify rights and obligations of the parties that reflect agreed risk allocation. Guidance can be provided on risk allocation and management and user guides to standardized contract provisions can also indicate issues to be considered in framing risk allocation provisions for individual projects.
Revenue stream sources and authority to collect and enforce payments	The law may recognize that various revenue streams may be availed of for a project—users, government or combinations of users and government.
Price setting and review arrangements	The law may state that the agreement is to specify that prices are to be set and reviewed under terms of an agreement unless there is an independent regulator that sets and reviews prices.
Economic or financial equilibrium	The law may state that the PPP agreement may provide for changes in specified conditions and circumstances that trigger compensating changes to the terms of the agreement. Some civil law jurisdictions emphasizes economic or financial equilibrium provisions which entitle a partner to changes in the key financial terms of the contract to compensate for certain types of exogenous event that may otherwise impact returns. Adjustments may be based on a mutually agreed financial model that is maintained over the lifetime of the contract. Some jurisdictions permit a government to unilaterally amend an agreement for reasons of general public interest. This power is usually regulated so that the modification cannot result in a disruption of the overall structure of the contract. The partner is protected as the economic balance of the contract must be maintained and adequate compensation paid for damages suffered. Unexpected changes that merit financial equilibrium may arise from force majeure (major natural disasters or civil disturbances), government action and unforeseen changes in economic conditions.
Force majeure	<p>Force majeure provisions are terms of the PPP agreement that govern the course of action if unforeseen events that are beyond the control of the contracting parties occur and materially affect performance under the contract.</p> <p>They may be uninsurable risks related to external events beyond the control of the parties to the contract, such as natural disasters, war or civil disturbance, affect the project – but the issues of insurance and force majeure need careful consideration. Generally the force majeure terms are left to the PPP agreement but where force majeure and other compensation events are not familiar in agreements with government, it may be desirable to include a reference in the PPP law recognizing that it is feasible to include these provisions in the agreement.</p> <p>(See European PPP Expertise Centre. 2013. <i>Termination and force majeure provisions in PPP contracts</i>. Luxembourg).</p>
Stabilisation Clause— Compensation Events—to protect Partner against financial impact of changes in legislation.	<p>Some PPP agreements (and some host country investment agreements) provide for a claim for compensation for the adverse financial effects of changes in law in different circumstances. Some agreements confine the change in law to one that specifically affects the project as opposed to legislation of general effect that has an impact on all activities. Some jurisdictions view change in law impact as part of economic or financial equilibrium. An enabling provision in the law may be desirable to indicate that this type of clause is permissible for government to include in an agreement.</p>

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**Table E.2** *continued*

Subject	General Observations
Agreement duration, extension on expiry, termination, early termination including compensation	Without unduly limiting flexibility for provisions in the agreement the PPP law may recognize that the PPP agreement may provide for certain matters that may be unusual provisions in government contracts. Duration of agreement should not be prescribed or should have flexibility to reflect the nature and life-cycle of the project, rate of return on investment, value for money. Compensation may be paid on termination in various circumstances and due to different causes and extent of default (if any) on the part of the different parties to the agreement. Early termination may occur because of default by the partner, termination by government, whether due to default or for reasons of public interest, and early termination due to some external reason (e.g., force majeure). Government usually makes a payment to the private party, and takes over control of the project assets (which may be retendered under a new arrangement). If the PPP arrangement is to continue after expiry of the duration of the arrangement, is it necessary to have a procurement process or can an extension be agreed with the incumbent partner?
Project site and assets rights and obligations	The law may state that the agreement can address rights of access, ownership, possession and other rights to land, buildings and other assets including (easements) rights over the property of others to permit the installation of pipelines, cables and other equipment.
Assignment or transfer of project or ownership by partner or government entity	The law may state that the agreement may provide for assignment of rights under the PPP agreement, transfers of ownership of the Partner or government entity or transfer of ownership or control of the project in specified circumstances throughout the different phases of the project.
Government step-in rights	Where step-in rights or measures of equivalent effect are not already available to government under existing law, the PPP law may specify that the agreement may provide for step-in rights for government in specified circumstances. Is a competitive tender process required where the government is seeking to replace the partner?
Finance sources	The law may provide for government sources of finance or supports. Private sources of finance will only be provided to projects that are bankable, i.e., those capable of attracting finance on reasonable terms. The contents of the PPP law and the proposed PPP agreement can positively or adversely affect bankability. Lenders will pay special attention to provisions in the PPP law, other laws and agreement on protection of lender rights (for example, security rights, priority in insolvency), political risk, force majeure, expropriation and creeping expropriation, early-termination payments, residual value of project assets upon termination, dispute resolution, and enforcement. Government support can help bring down the cost of finance and improve the viability of the project.
Authority to give, forms, criteria and usage of government project support including financial and other support	The law may provide authority for the provision of various forms of government support to projects including grants and capital contributions, equity and other forms of financial and nonfinancial assistance. The law may clarify the forms of Government support that may be provided to a project. The forms should be expressed in flexible and permissive terms as there are trends toward more innovative forms of financing and government involvement. Supports might include obligations in the PPP agreement, different forms of asset contribution (e.g., land, existing facilities), equity investment, loans, subsidies, financial guarantees, tax incentives and other supports. Government support that is available to be provided should be stated in the request for proposals and participants may indicate the extent to which they seek to avail of the support as part of the bidding process.
Security interests for loans—private partner, project assets, revenue streams, etc.	Depending on the existing law, practices and procedures for taking security for loans, it may be desirable for the PPP law to clarify that loans may be secured against rights in the PPP agreement (and assignment of those rights), private partner, and different forms of project assets including revenue streams.
Lender step-in rights and direct agreement	The law may provide for direct agreements to be entered into by government and lenders to give step-in rights to lenders in circumstances specified in the direct agreement including default on the part of the partner. The law can clarify whether the identification of a replacement partner is to be conducted through a competitive tender process (preferably not) or is the lender permitted to identify a partner on similar terms and with government approval?

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**Table E.2** *continued*

Subject	General Observations
Refinancing arrangements (if source is financing)	The law may provide that the PPP agreement may specify that where project finance is refinanced the gains from refinancing may be agreed to be shared between partner and government.
Structures	There is a trend to placing greater emphasis on operations, provision of services, performance standards and related payments. This places a greater emphasis on contract management and monitoring and performance measurement to ensure value for money is being obtained. The law may emphasize that PPP agreements should address contract management and monitoring. The agreement can set out agreed structures, processes and rights of access to facilities and information for contract management and monitoring over the construction and operations phases of projects. The law may give authority for a contract management and monitoring fee to be paid by the partner but the fee should be stated in the request for proposals.  (See European PPP Expertise Centre. 2014. <i>Managing PPPs during their contract life: Guidance for sound management</i> . Luxembourg).
Change Management	It is likely that changes to the PPP agreement will need to be made over the course of the agreement. The law may recognize this by stating that the agreement should provide for circumstances and process for raising the need for change and arriving at an agreed outcome. This should help anticipate and resolve issues and differences before disputes emerge.
Settlement of disputes	Flexibility to suit project and nature of dispute. There is a trend toward greater flexibility in adjudicating or resolving disputes relating to the commercial aspects of PPP agreements. Civil court proceedings and various types of arbitration, mediation, expert panels, expert determination are options that parties may agree to include in the agreement for different forms of dispute. (A service provision complaint is a separate matter to a dispute). PPP agreements are complex and adjudication on disputes may be challenging for courts that are not familiar with these agreements. Coupled with delays in court proceedings and a lack of confidence in the capacity and experience of judges on PPPs means that alternative dispute resolution mechanisms are often desirable, especially until confidence is built through establishing a track record of resolving disputes in a fair, equitable, transparent and efficient manner. The extent to which governments may agree to alternative dispute resolution varies.
During procurement process Between parties to agreement— form of settlement process, law to be applied and enforceable remedies	Disputes may arise during the procurement process or in the construction and operation phases of projects. The law may specify in flexible terms the range of dispute settlement mechanisms and processes that may be adopted to permit flexibility for the parties to the agreement to choose the most suitable approach.
Identify and resolve conflicting provisions in other laws	There is likely to be a need to amend other laws or to include provisions in the PPP law to enable the PPP law to overcome what could otherwise be impediments to implementing a PPPs program.
International obligations	The law might refer to obligations arising from treaties, conventions and agreements to which a state may be a party and which may override or provide alternatives to provisions in the PPP law. Examples include bilateral investment agreements, International Convention on Settlement of Investment Disputes, New York Convention on Enforcement of Arbitral Awards—these may apply where there is a partner from another member state.
Regulations or procedures to elaborate on law including requirement to issue guidance	The law will need to be supplemented by detailed procedures, forms, etc. set out in notices, regulations and other instruments. Experience shows that a PPP law on its own is limited in what can be achieved unless supplemented and supported by other instruments and by manuals of tools and techniques that assist government entities to implement PPPs. There is a trend toward preparing these ancillary instruments alongside the PPP law to ensure that a comprehensive legal framework and implementation network is in place.

Sources: Author's review of PPP laws and guidance contained in Appendix A.

## **Preparing a Public–Private Partnership Law**

### *Observations from the International Experience*

This working paper provides observations from an international perspective that are relevant to preparing and strengthening public–private partnership (PPP) laws in developing Asia, with an emphasis on East Asia. The observations are derived from a careful analysis and practical experience of the PPP legal framework in a variety of countries. Laws and guidance from many countries have been reviewed to identify common content and trends in how these have evolved in the light of implementation experience. The analysis identifies a broad consistency as to what are considered to be desirable and undesirable elements in the overall PPP legal framework, while recognizing that the distribution of content between a PPP law and supporting legal instruments and guidance varies between countries. It suggests issues to be considered and addressed when finalizing a PPP law but leaves open how these should be resolved.

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