

UNECE Project Team on Model PPP Law

Team meeting, discussion and action items

Thursday 11th July 2019, Conference call session 16:00-17:00 CET

Participants	
Attendees	Christopher Clement-Davies (Team Leader), Amer Al Adhadh, Giovannella D'Andrea, Bruno de Cazalet, Thomas Hamerl, Vladimir Kilinkarov, Manuel Protásio, Parwana Zahib-Majed, Zeynep Boba (on behalf of Alexei Zverev), Eleni Tyrogianni
Invited	See Appendix A
Apologies	-
UNECE Secretariat	Claudio Meza

The UN Secretariat and Team Leader welcomed the participants on the call. The Team Leader mentioned that the Group had not had a conference call for some months, and offered his apologies for not having arranged further calls more regularly. However, he explained that the drafting sub-group had been very actively engaged since the previous conference call and there had not been a suitable opportunity to involve the wider group in its discussions. The draft of the Model PPP Law was now well-advanced and likely to be finalised in the near future. The time was now right to re-involve the wider group.

The Team Leader summarised the process that had been followed since the last call. The drafting sub-group had been formed, drawn from the 60 or so members of the wider Group. In the interests of efficiency and productivity, a decision had-somewhat reluctantly-been made to limit the sub-group to some 10-12 members (and their alternates), drawn from a number of different countries-including the UK, France, Russia, Ukraine, Austria, the Netherlands, Canada and the USA-and organisations/institutions-including law firms, academic institutions, IFIs and independent consultants. All of its members have very extensive experience of advising governments and IFIs on the contents of their PPP/ Concessions Laws and related policy papers. A list of the members is attached as Appendix B. The secretariat would have liked to involve everyone in the wider group in the drafting process, but this was simply not thought to be practicable. In any event, the Team Leader had promised everyone that they would have a proper opportunity to review and comment on the draft law before it was finalised.

The sub-group had had meetings in person (sometimes over a two-day period) and/or conference calls at least once a month, hosted by its members in different cities. The sub-group had worked on, debated, developed and agreed two documents (originally drafted by the Team Leader); a Heads of Terms for the Model Law, and then the draft Model Law itself. Many of the discussions had been intensive, with some issues and questions being hotly contested. Literally hundreds of comments (perhaps more) on the two documents had been made, discussed and finally resolved. The contents of the two documents have now been agreed by the drafting sub-group. It was therefore now feasible to give them wider circulation. The Team Leader had circulated the final Heads of Terms before our last conference call. A further copy is attached as Appendix C.

The Team Leader gave a rapid overview of the contents of the Heads of Terms, briefly explaining the rationale for its various provisions, and asked if there were any questions about it. A number of questions were asked, inter alia about the thinking behind the Unsolicited Proposal and Institutional PPP provisions, the need to mitigate corruption risk, central authority vs decentralisation and how the balance was maintained between prescriptive clauses ('rigour') and freedom of contract/ the autonomy of the parties ('facility').

The final draft of the Model Law itself has also now been circulated to the drafting sub-group for confirmation that its members have no further comments. A copy will be circulated separately by the Team Leader to the wider group, following release of these minutes. The Team Leader explained that the next step in drawing up the Model Law would be to address any questions or comments from members of the wider group, and then to conform it as far as possible to the revised model legislative clauses recently produced by UNCITRAL. That conforming exercise would ideally be completed before the end of the month. The UNCITRAL clauses are first-rate provisions which we all felt could helpfully improve our draft still further. The UN itself also wanted to make sure that there were no apparent conflicts or inconsistency between the two documents; this approach had been enthusiastically agreed with UNCITRAL at a meeting in Vienna earlier in the year.

The Team Leader explained that a detailed commentary on the draft Model Law had also now been prepared and was under review. This would need to be discussed by the drafting sub-group and then circulated to the wider group for its review, hopefully in the near future.

Claudio Meza on behalf of the Secretariat then explained the process that would need to be followed by the UN to give the Model Law formal approval by the United Nations. Once the 'rapporteurs' (i.e. the wider expert group) had finished their work, the final draft would need to be taken through a public consultation exercise (Public Review). This would involve the UN's various stakeholders and consultative parties, who would need to review it and be given an opportunity to comment. It would then be submitted to the Bureau of the Working Party for consideration and endorsement. Once the Bureau takes its decision for the final draft, the document will be prepared as intergovernmental document to be submitted with a recommendation for endorsement by the Working Party as part of the Intergovernmental process.

The next meeting of the Working Party would take place early in December (3/4). To have a chance of getting the draft approved then, the wider group would need to have signed off on it by mid-September. That in turn meant having largely settled wording in place by the end of this month. We would aim for these deadlines.

The next meeting of the Group was expected to be scheduled towards the end of July. It is unusual for two conference calls of the group to take place in a single month, but it was felt to be appropriate in this case in view of the timescales referred to above.

There being no further business, the meeting was concluded. Time engaged: 1 hour.

Appendix A. Members of the Team		
Title	First name	Last name
Mr.	Amer	Al Adhadh
Mr.	Saidi	Amiri
Mr.	Wilfried	Bassale
Ms.	Ekaterina	Bespalova
Mr.	Patrick	Blanchard
Mr.	Tomas	Brizuela
Ms.	Raushana	Chaltabayeva
Mr.	Shaimerden	Chikanayev
Mr.	Rubayet	Choudhury
Mr.	Christopher	Clement-Davies
Mr.	Anthony	Coumidis
Mr.	Predrag	Cvetkovic
Mr.	Bruno	de Cazalet
Ms.	Natalia	Diatlova
Mr.	Alexander	Dolgov
Mr.	Daniel	Escauriza
Mr.	Marc	Fornacciari
Mr.	Dominique	Gatel
Mr.	Richard	Ginks
Mr.	Bill	Halkias
Mr.	Sulaiman	Hallal
Mr.	Thomas	Hamerl
Ms.	Carla	Hancock
Ms.	Louise	Huson
Mr.	Rufin Serge Wilfrid	Itoba
Mr.	Tomasz	Jedwabny
Mr.	Daler	Jumaev
Ms.	Vicky	Kefalas
Mr.	Vladimir	Kilinkarov
Ms.	Tham	Lai Leng
Mr.	Shijian	Liu
Ms.	Veronica	Lupu
Mr.	Atef	Majdoub
Ms.	Svetlana	Maslova
Mr.	Ian	McGrath
Ms.	Marija	Musec
Mr.	Sreejith	Narayanan
Mr.	Jörg	Nowak
Mr.	Rafael	Pérez Feito
Mr.	Manuel	Protásio
Ms.	Olga	Revzina
Mr.	Peter	Rowen
Mr.	George	Smyrnioudis
Ms.	Irina Viktorovna	Taranova
Mr.	Wim	Timmermans
Mr.	Marius	van Aardt
Mr.	David Joachim Lubbertus	van Ee
Ms.	Marianne	Viola
Prof	Don	Wallace
Mr.	Lars	Wellejus
Mr.	Parwana	Zahib-Majed
Ms.	Irina	Zapatrina
Mr.	Alexei	Zverev

APPENDIX B. DRAFTING SUB-GROUP MEMBERS

1. Christopher Clement-Davies (Team Leader/ Consultant)-C.Clement-Davies
2. Alexei Zverev (Senior Counsel, Law in Transition Team)-EBRD
3. Dr. Bruno de Cazalet (Consultant) -Cazalet Consult
4. Alexander Dolgov (Partner)/ alternate: Konstantin Makarevich (Senior Associate)-Squire Patten Boggs
5. Olga Revzina (Partner)/ alternate: Roman Churakov (Senior Associate)-Herbert Smith Freehills
6. Professor Irina Zapatrina (Chairman of the Board) Ukraine PPP Centre
7. Dr. Wim Timmermans (Partner)-Wimmermans & Simons
8. Richard Ginks (Partner)/ alternative: James Watts (Managing Associate) Linklaters
9. Vladimir Kilinkarov (Partner)/ alternate: Ian McGrath (Partner)-Dentons
10. Professor Don Wallace-International Law Institute
11. Mag. Thomas Hamerl (Partner) CMS
12. Chris Shugart (Consultant) C. Shugart
13. (Partner) -Gide Loyrette Nouel

APPENDIX C. FINAL DRAFT HEADS OF TERMS FOR MODEL PPP LAW.

UNECE PPP GROUP and EBRD

HEADS OF TERMS for
MODEL PPP/ CONCESSIONS LAW

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¹ To be revised again.

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[Draft] Heads of Terms for UNECE Model PPP Law

PREAMBLE

The purpose of this law is to establish the legal framework for Public-Private Partnerships (PPPs) and the contracts that give effect to them in [host country], including the rules and procedures governing their preparation, procurement, development, implementation and monitoring, the contractual principles and institutional arrangements applicable to their use, and certain other related matters.

This law applies to the use of PPPs, but not to other types of commercial or contractual interface between public and private sectors. [It is essentially an enabling statute, designed to create clarity and certainty about what is feasible in [host country] in the PPP context, how PPPs should be structured and approached, and the procedural and regulatory mechanisms that apply to them. The degree of regulatory control that any country seeks to establish over PPPs is a matter on which it must make its own decisions. This law assumes a relatively low level of regulatory control by government, and a correspondingly high degree of freedom of contract for the parties to any PPP agreement. Some countries may prefer to include additional tiers of approval and control over a PPP's elements and contractual terms]².

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

CHAPTER 1 GENERAL PROVISIONS

Article 1. Scope of the Law

This law establishes the legal framework for PPPs in [host country] and the contracts that give effect to them, including the rules and procedures related to their preparation, procurement, development, implementation and monitoring, the core contractual principles and institutional arrangements applicable to their use, and certain other related matters.

Article 2. Key Terms and Definitions

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

² New paragraph as discussed. But having written it I feel it is more appropriate for the commentary than the Preamble, which is designed as a template introduction to the law being enacted by the host country. Do others agree?

[to include: “applicable law”(i.e. all local laws); “bidder”; [“competent body”]; “concession”; “direct agreement”; “end users”; “Government [use wide definition]”; [“implementation resolution”]; [“institutional company”]; [“institutional PPP”]; “investor”; “lender”; “official gazette”; “PPP”/“Public-Private Partnership”; “PPP agreement”; “PPP guidelines”; “PPP regulations”; “private initiator”; “private partner”; “project company”; “public authority”; “public infrastructure”; “public partner”/[“Conceding Authority”]; “public service”; “Public-Private Partnership Unit” or “PPP Unit”; [“public infrastructure” to include similar or related assets]; [“services of general interest”?]; “Sustainable Development Goals”; “unsolicited proposal”.

[Article 3. PPP Regulations and Guidelines

Government shall (or may empower specific competent bodies to) issue and revise the PPP regulations and PPP guidelines from time to time, clarifying and/or giving effect to certain elements of the implementation and interpretation of this law, and providing guidance to both public and private sectors as to its operation and workings or certain aspects of the PPP structures for which it provides]³.

Article 4. PPP Criteria and Characteristics.

1. Any PPP undertaken in [*host country*] after the effective date of this law shall meet all the following criteria. It must;

- a) be long-term in nature (in accordance with Article 8) and implemented on the basis of a contract or contracts, including a PPP agreement;
- b) have a minimum value [of [], or such other amount]⁴ established and calculated in accordance with the criteria and methodology set out in the PPP regulations;
- c) involve the creation, development, construction, reconstruction/rehabilitation, operation and/or maintenance of public infrastructure (or similar assets) and relate to the provision of public services or similar services of general interest;
- d) involve the long-term participation of a private partner on a risk-bearing basis, and a sharing or allocation of all project-related risks as between the public and private partner throughout its term;
- e) if required, involve an element of private finance;
- f) [be designed to accomplish some or all of the purposes and objectives summarised in the Preamble;]
- g) comply with the relevant procedural requirements in this law for the preparation, approval, award and implementation of PPPs;
- h) meet any other requirements for PPPs laid down in or pursuant to this law, including in the PPP regulations.

2. This law applies to all forms of PPP (including “concessions”), save only and to the extent that any other applicable laws in force (if any) specifically provide otherwise⁵.

Article 5. Authority to award and enter into PPPs

1. Any public authority having the legal right (whether pursuant to the constitution or otherwise) to develop and implement projects involving assets and/or services of the kind comprised in PPPs, in sectors in which PPPs are permitted under Article 6 below, and to enter into contracts with private sector persons in connection therewith, shall be deemed to have the power and authority under this law to award and enter into PPPs, except to the extent that this or any other applicable law (or the PPP regulations) specifically provide otherwise.
2. In addition, Government (acting where required through any competent body empowered for this purpose) shall be entitled to vest the specific power and authority under this law to award and enter into PPPs in certain designated public authorities, and to modify the same, as it deems necessary and appropriate from time to time.

³ Bruno wanted to move this paragraph to the end of the law. I have left it here for the time being for the sake of convenience as much as anything (to avoid renumbering the document), but do not feel strongly about its location. Preferences please?

⁴ To be explained in commentary, as discussed.

⁵ Agreed to provide further explanation of this provision in Commentary.

Article 6. Applicable Sectors for PPPs.

1. PPPs may be undertaken in any sectors not specifically excluded by this law, any other rule of applicable law (subject to the relevant principles) or the PPP regulations, including the following:
 - [list all relevant sectors]
2. [PPPs may not be undertaken in the following sectors (except where and to the extent that PPP regulations may provide otherwise from time to time):
 - [list any excluded (if any)]⁶

Article 7. Parties to a PPP Agreement.

1. Subject to paragraphs 2 and 3 below, the parties to a PPP agreement are the public partner and the private partner.
2. It is acknowledged that, as parties to the PPP agreement, the public partner may represent more than one public authority and that the private party may have more than one owner or stakeholder.
3. The parties to a PPP agreement may agree to include other parties to the agreement where they deem it necessary to do so.

Article 8. PPP Term

1. Every PPP agreement shall have a minimum term of [5]⁷ years from the date of its execution (or such other minimum term (if any) as may be determined in accordance with the PPP regulations).
2. Every PPP agreement shall have a maximum term, determined in accordance with any detailed methodology and criteria set out in the PPP regulations, which should be no greater than the period of time from the date of its execution which is necessary to;
 - a. realise the purposes and objectives of the PPP identified as part of its appraisal and approval process under Chapter III, taking account of all relevant factors (including public affordability and the need to promote a competitive environment);
 - b. allow the private partner's lenders to be paid out; and
 - c. allow the private partner's equity investors to achieve appropriate (anticipated) returns on their investments.
3. The term of the PPP agreement may (subject to the PPP regulations and any relevant constraints or approvals they may require) be extended in exceptional circumstances and for any necessary time period(s) (if any) provided for in the agreement.
4. It is acknowledged that, where the private partner is permitted by the terms of the PPP agreement to own any assets comprised within the PPP outright and indefinitely, that right of ownership may continue beyond the end of the term of the PPP agreement.

CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES

[Consider including provisions dealing with the respective powers and responsibilities of different ministries and government bodies, and the procedures and processes between them, in relation to the selection, preparation, approval, implementation and monitoring of PPPs. The purpose of such provision, if they are considered necessary, is to help ensure that PPPs are properly integrated with the wider public investment process and other relevant decision-making or regulatory mechanisms, in particular the role of the budget authority to safeguard public finances and the application of fiscal rules⁸].

⁶ Commentary to explain that this paragraph may not be needed at all, if there is not thought to be a need to exclude any specific sectors.

⁷ Notes to make it clear that this is a variable figure, and that some countries may not wish to include a minimum term at all.

⁸ 'Placeholder' provision left in draft. Fuller explanation to be set out in commentary.

Article 9. Public-Private Partnership Unit.

1. The Government shall establish the PPP Unit and determine its organisational and management structure and its operational regulations.
2. The PPP Unit shall be deemed to form part of and be subordinate to the Ministry of [Finance].⁹ The director of the PPP Unit shall be [state position and Ministry], who shall be responsible for organising and coordinating its activities and day-to-day operations.
3. The PPP Unit's regular functions and responsibilities [shall/may], subject to the PPP regulations, include the following:
 - a. Propose methodologies, procedures and guidelines for structuring and implementing PPPs;
 - b. Generally assist in implementing and giving effect to the Government's PPP policies;
 - c. Review and comment on proposed policy and strategy changes and refinements relating to PPPs as required by Government;
 - d. Prepare (or assist in preparing) [published] documentation describing the methodologies, procedures and guidelines referred to above, and regularly up-date them;
 - e. Assist the parties to PPPs (and in particular the public partners) as necessary to prepare, appraise, award and implement them in accordance with the requirements of this law;
 - f. Identify potential improvements and refinements to the structuring and implementation of PPPs and make recommendations accordingly;
 - g. Exercise such powers of approval over aspects of PPPs as may be provided for in this law or the PPP regulations;
 - h. Assist with the coordination and development of individual PPP projects and PPP-related activities in [*host country*];
 - i. Maintain an up-to-date registry of all PPP projects in [*host country*], containing details of their registration and that of the related PPP agreements;
 - j. Act as an available point of contact and source of information for parties implementing or seeking to implement PPPs (whether public or private); provide advice, consultations and clarifications to them as necessary;
 - k. Organise and provide training for public sector staff involved in the preparation and implementation of PPPs (including educational sessions and workshops);
 - l. Keep track of the monitoring and oversight by public partners of the implementation of PPPs for which they are responsible;
 - m. Organise, collate and continually refine and develop a knowledge-base (including an electronic database) of PPP-related know-how, information, guidelines, assessments, research, studies, precedents, model clauses, opinions, methodologies and other documentation to aid the regular progress of PPPs and the PPP sector in [*host country*];
 - n. Ensure that elements of the documentation referred to in para. l above are publicly available and/or published as appropriate;
 - o. Assist with the constructive resolution of problems and issues during the implementation of PPPs ('trouble-shooting');
 - p. Assist with the promotion of PPPs in [*host country*] and public education on the subject;
 - q. Such other functions (if any) as may be provided for in the PPP regulations from time to time.

Article 10. Information about PPPs.

1. Government responsible for collating, maintaining and (subject to any confidentiality restrictions) publishing up-to-date information about PPPs in such form as it may deem helpful and informative to all stakeholders, investors, other participants in the PPP industry and the general public, and as may be reasonably required to promote the effective operation of the PPP system and the transparency of its workings or as may otherwise be required by applicable law .
2. Such information may include contents of PPP policy papers, PPP regulations, PPP guidelines and practice notes, evaluation criteria (including fiscal transparency considerations), the progress of PPPs being implemented, results of tenders, material contractual terms (subject to any

⁹ Notes to make it clear that ministerial location, structure, powers and responsibilities of PPP units vary widely, and that decisions need to be made by government about these matters..

confidentiality restrictions), recommended contractual terms and conditions, ‘pipeline’ of future PPPs, conclusions reached in studies and reports concerning PPPs, etc., and any other matters it considers appropriate.

3. Each public partner to be responsible for contributing such information concerning any PPPs it is implementing or planning to implement as may be required by Government from time to time or otherwise pursuant to the PPP regulations.
4. Where tenders for PPPs take place, information about pre-qualification or tender results, and the grounds on which pre-qualified, preferred or winning bidders have been selected etc., to be posted on official web-site of the public partner [and official gazette?] without delay following the relevant stages.

CHAPTER III. INITIATION AND PREPARATION OF PPPS

Article 11. Initiating and Preparing PPPs

1. A proposed PPP may be initiated by either the public partner or (in the case of unsolicited proposals) its private initiator.
2. All work of defining and preparing PPPs shall be carried out in accordance with the procedures and methodology laid down for this purpose by the Government and specified in the PPP regulations and guidelines.
3. The detailed work of preparation of any PPP (including one proposed by the private initiator) shall be carried out by the public partner, except where and to the extent (if any) that the PPP regulations provide otherwise.
4. In the case of unsolicited proposals, the work of preparing and submitting the PPP shall be carried out in accordance with Article 14.

Article 12. Appraisal and Implementation Procedures.

1. Any PPP implemented pursuant to this law must be approved under the applicable appraisal criteria and comply with the relevant implementation procedures laid down for this purpose in this law and the PPP regulations.
2. The appraisal criteria and implementation procedures applicable to the proposed PPP [may/shall] include the following:
 - a. generally, the extent to which it meets the purposes and objectives set out for it in the [documents drawn up as part of its definition and preparation under Article 10,] including its socio-economic impact and consistency with the relevant SDGs;
 - b. the extent to which it satisfies the criteria laid down in Article 4;
 - c. its cost, cost-effectiveness and affordability (from both a fiscal and socio-economic perspective, assessed on an appropriate long-term basis);
 - d. its technical viability and advantages, at the level of design, construction, operation and/or maintenance (as applicable);
 - e. relevant timescales for its implementation;
 - f. its priority and urgency in the context of the Government’s wider strategic plans for infrastructure and economic development;
 - g. its preliminary risk-allocation profile;
 - h. the nature and extent of any anticipated public sector payments, finance or other support needed for it;
 - i. the financial and economic implications (including where applicable value-for-money) of implementing it as a PPP compared with a different structure or procurement basis (such as ‘traditional procurement’);
 - j. the adequacy and contents of the feasibility study carried out for it, covering all its material aspects and demonstrating its compliance with the purpose, objectives and criteria referred to above,

k. [OTHER?-INSERT]¹⁰

3. The Government shall be responsible for determining, finalising, revising (as necessary) and publishing all appraisal criteria and implementation procedures, and ensuring that the PPP regulations and guidelines accurately reflect them at all times.

Article 13. PPP Implementation Resolutions.

1. Where a PPP has been approved under the applicable appraisal criteria and [complies with] the implementation procedures referred to above, and a decision has accordingly been made by the public partner to implement it, a formal resolution to that effect shall be issued by the public partner ('implementation resolution').
2. An implementation resolution shall include the following information and components:
[SPECIFY]
3. The implementation resolution shall (subject to any exceptions permitted by this law¹¹) be published on the official website of the public partner and in the official gazette. In the case of an unsolicited proposals, it shall also be notified and copied to the private initiator. Where a competitive tender is being held pursuant to Chapter IV, a copy of the implementation resolution shall be included with the tender documents released to bidders. The public partner shall maintain any PPP-related information published on its official website for such period(s) of time as may be required by the PPP regulations.

Article 14. Unsolicited Proposals.

1. A private initiator seeking to implement an unsolicited proposal for a PPP may at any time define and submit its proposal in preliminary form to the relevant public partner (and/or any other competent body authorised by the PPP regulations to receive such proposals), which shall have a discretionary power to review and appraise it (or not, as it chuses).
2. The private initiator may also enter into discussions and an exchange of information at any time regarding the proposed PPP with the relevant public partner.
3. The preliminary unsolicited proposal shall describe the proposed PPP in sufficient detail to enable it to be appraised in accordance with the applicable criteria referred to in Article 11 and shall be accompanied by all documents necessary for this purpose. The public partner shall carry out a preliminary evaluation of the proposal and make a decision about whether to proceed further with it and shall notify the private initiator accordingly.
4. Following a preliminary decision to proceed further with the unsolicited proposal, the detailed work of preparation of the PPP shall then be carried out in accordance with the requirements of Articles 10 and 11, by either the public partner or the private initiator (as the PPP regulations may require).
5. The public partner (and/or other competent body, as the PPP regulations may require) shall carry out any review and appraisal of the unsolicited proposal in accordance with Article 10 within the time period(s) provided for thereunder and reach a final decision about whether or not the PPP should be implemented, either on the terms proposed or on other terms, and shall notify the private initiator accordingly.
6. Where a decision is made to implement the PPP on other terms than those proposed by the private initiator, the relevant public partner (and/or other competent body) shall enter into discussions in respect of such other terms with the private initiator for such period of time as may be reasonable in the circumstances, at the conclusion of which it shall reach a further decision about whether or not to implement the PPP on any modified terms as may have been agreed between them.
7. Following a final decision to implement the PPP (either on the original or on any modified terms) the public partner shall promptly issue and publish an implementation resolution to that effect on its website and the official gazette in accordance with Article 13, together with a summary and description of the proposed PPP and its principal objectives, and any other relevant

¹⁰ Team: I have tried to strengthen the applicable appraisal criteria as discussed, but these are my own guesses at some more specific and rigorous ones. Please comment. Additional suggestions awaited from CS.

¹¹ e.g. closed tenders.

- documentation, inviting any third parties to submit expressions of interest in implementing the PPP within a specified period of time.
8. If no third party submits an expression of interest by the specified time limit, in circumstances where the public partner is satisfied that all reasonable steps have been taken to attract competitive interest, the public partner and the private initiator may proceed with implementation of the PPP and enter into a PPP agreement for this purpose, subject to any final negotiations permitted by the PPP regulations. If the public partner is not so satisfied, it shall be entitled to extend the time period for submitting third party expressions of interest, and to modify the documentation summarising and describing the proposed PPP and inviting such submissions. If one or more third parties submit expressions of interest by the specified time limit(s), the public partner shall organise tender proceedings for the PPP in accordance with Chapter IV.
 9. Where the public partner organises tender proceedings for the PPP under para 8 above, it [shall/may] offer the private initiator such appropriate incentives or compensation (if any), should it not receive the highest initial evaluation score in the tender, as may be provided for in the PPP regulations, including the following:
 - a) an adjustment to the evaluation score of the private initiator under the tender documentation (in an amount pre-determined before issue of the tender documents); or
 - b) cash compensation for reasonable and documented costs and expenses incurred by the private initiator in connection with the PPP proposal before the start of the tender proceedings, not exceeding a maximum amount provided for in the PPP regulations¹².
 10. The detailed procedures and conditions governing preparation, submission and evaluation of unsolicited proposals shall be set out in the PPP regulations.

CHAPTER IV. SELECTION OF PRIVATE PARTNER

Article 15. Procedures for Selection of Private Partner.

1. Public partner to select private partner on basis of competitive tender as set out in Articles 15 – 20 or on basis of direct negotiations as set out in Article 21 (including where permitted in the case of unsolicited proposals pursuant to Article 14).
2. (*Alternative 1*) Existing public procurement laws and regulations shall not apply to the award of PPPs, except where and to the extent that this law (or any subsequent law) provides otherwise.
(*Alternative 2*) Existing public procurement laws and regulations shall apply to the award of PPPs, except where and to the extent that this law (and any subsequent law) specifically provides otherwise. In the event of any conflict or inconsistency between them, the requirements of this law (and any subsequent law) shall prevail¹³.
3. The detailed procedures and requirements applicable to competitive tenders for PPPs, the pre-qualification and selection of the private partner and the contents of the tender documents shall be as set out in the PPP regulations, and shall be governed by fundamental principles of transparency, equal treatment, non-discrimination and efficient use of resources.
4. Criteria applicable to pre-qualification and selection of private partner shall be as set out in the tender documents in accordance with the PPP regulations and may include any of the following:
 - (a) **Pre-Qualification:** relevant experience and track-record, technical proficiency and capabilities, financial and human resources, appropriate (dedicated) managerial and organizational capacity, composition of consortium [OTHER?];
 - (b) **Tender Evaluation:** value propositions, technical quality (including innovativeness) of tender, risk allocation, pricing, other commercial terms, qualifications to terms and conditions of contract, most economically advantageous offer, relevant environmental and socio-economic criteria (including local participation and efficacy in promoting relevant SDGs), structure and quality of

¹² This paragraph needs further discussion?

¹³ Commentary to make it clear that alternative 2 is unusual and likely to require further amendments to other parts of the law in addition to this statement.

management team, financial plan and confirmation of committed finance
[OTHER?]
together with such other matters as may be specified therein from time to time.

Article 16. Tender Structure.

1. Detailed aspects of tender process to be used for award of PPP to be decided by public partner and notified in the [public announcement], and in accordance with the PPP regulations.
2. An open tender shall [ordinarily] be used, with or without a pre-qualification stage, and involving either a one- or two-stage structure (following any pre-qualification). Alternatively, a closed tender may be used, but only in exceptional cases of [national defence or national security], or such other exceptional circumstances as may be specified by Government in PPP regulations, where the use of an open tender would give rise to serious concerns about state secrets, government confidentiality or would otherwise be prejudicial to the national interest, and therefore also raise material concerns about the feasibility of an open tender and the decision-making processes involved. (For these purposes, a ‘closed tender’ means and refers to a tender or selection process where the public partner makes a decision about the selection and pre-qualification of the tenderer(s) permitted to participate in the process but does not advertise the tender openly or potentially allow any interested parties to participate).¹⁴
3. Where a closed tender is used, the public partner shall take all reasonable steps to structure and organise it in a way which fosters genuine competition and shall request offers from as many sources as is practicable in the circumstances.
4. Participants in tenders can in principle be any persons with legal capacity (whether domestic or foreign) under applicable law, including companies, partnerships, JVs, consortia and natural persons, but subject always to any relevant restrictions under applicable law, including specifically (but without limitation) rules excluding any such persons as a result of criminal convictions relating to corruption, illicit employment practices (such as slavery or child labour) or other prohibited acts.
5. [Announcements]
6. [ALLOW FOR USE OF COMPETITIVE DIALOGUE PROCEDURE?]¹⁵

Article 17. Tender Documents and Criteria

1. Public partner to prepare tender documents, containing detailed description of tender procedures, draft of the PPP agreement (or (where preparing a full draft would not be practicable in the circumstances) a summary containing material terms and conditions and reflecting the allocation of key risks) and all other information necessary for interested parties to prepare and submit pre-qualification applications and/or tender proposals.
2. Public partner may amend tender documents during tender process, as necessary in the circumstances permitted under the PPP regulations, extending relevant deadlines as appropriate.
3. Tender documents to specify detailed tender criteria and methodology, including relative importance and weighting, to be applied to evaluation of bids and tenders and final selection of private partner. Tender criteria and evaluation methodology to be clear, transparent, non-discriminatory and reasonably appropriate for the particular PPP (judged by the criteria laid down in the PPP regulations, including in terms of the resources called for and the cost and expense of bidding¹⁶)¹⁷.

¹⁴ Consider moving to definitions.

¹⁵ **Members of the team agreed in discussion to send through the most helpful precedents for competitive dialogue procedure. Please do so. Is this still wanted?**

¹⁶ We had left open the question of whether to specify ‘reasonable, proportionate and not unduly burdensome’. This is my ‘crack’ at those considerations.

¹⁷ Clear up overlap with Article 15.4

Article 18. Tender Committee

1. Public partner (and/or another competent body, where the PPP regulations so require) to form a tender committee in accordance with PPP regulations for purposes of conducting the PPP tender, evaluating tender bids and proposals, communicating with bidders and determining the preferred or winning bidder. Composition, powers and procedures of tender committee to be determined in accordance with PPP regulations (including a mechanism for addressing any conflicts of interest of its members).
2. Tender committee to have an odd number of members. Public partner (and/or other competent body, as aforesaid) to appoint chairman and deputy chairman. Other members to be appointed as required by PPP regulations].
3. Tender committee to keep minutes of its meetings, to be signed by all members present.

Article 19. Tender Stages.

1. A tender shall include the following stages, subject to and in accordance with the PPP regulations:
 - a) tender announcement;
 - b) expressions of interest and/or pre-qualification and short-listing of bidders;
 - c) preparation and submission of tender proposals;
 - d) evaluation of tender proposals and selection of the winning or preferred bidder;
 - e) finalisation of the terms and conditions of the PPP agreement and all other required aspects of the PPP with the winning or preferred bidder; and
 - f) execution of the PPP agreement.
2. Tender announcement to be followed by request for expressions of interest and subsequently invitation to tender, which shall each contain all information as may be reasonably required to enable bidders to participate in that stage of the tender, as specified in the PPP regulations.
3. A single-stage tender may be used where the PPP regulations so permit, combining the pre-qualification and tender submission stages into one.
4. Tender documentation shall provide as necessary for organisation of transparent communication process with bidders, including conferences and meetings, negotiation of proposed amendments to draft PPP agreement, discussions of technical requirements and specifications, risk allocation and commercial terms, etc. etc.
5. Public partner may amend tender documentation during tender process, including draft PPP agreement. Deadline for submission of final proposals to be prolonged as necessary.
6. A closed tender may be held (where this law so permits) without the need for tender announcement stage, tender participants being informed about the tender by written notice.
7. No bidder may participate in more than one pre-qualification or tender submission, except where PPP regulations and tender documents so permit (including, for example, in the case of sub-contractors). Pre-qualification or tender submissions may be changed or revoked at any time before deadline.
8. Tender documents may (or may not) allow for a final process of clarification or negotiation of certain aspects of the most favourable bid (according to the evaluation criteria and methodology laid down therein), including amendments to the terms and conditions of the draft PPP agreement, provided always that any final amendments to the bid or the draft PPP agreement are consistent with the overall tender process, evaluation criteria and marks awarded, and would not have been likely to lead to the selection of a different bidder if they had been made or agreed to at an earlier stage.
9. It is acknowledged that the tender documents may contain specific provisions modifying aspects of the tender procedure otherwise applicable where only a single bidder submits a compliant bid (such as allowing the public partner to re-tender the PPP or alternatively proceed on the basis of direct negotiations with the bidder where it is satisfied that sufficient competitive pressure has been brought to bear) or qualifying or restricting the right and ability of different bidders to combine together during the tender process for the purposes of submitting a joint bid. The PPP regulations may also provide specifically for situations of this kind.

Article 20. Conclusion of PPP Agreement.

1. The winning bidder shall be the bidder which the public partner determines, at the conclusion of the tender process (including any final clarifications or negotiations), has submitted the most favourable compliant bid according to the evaluation criteria and methodology laid down in the tender documents.
2. The public partner shall conclude the PPP agreement with the winning bidder (or with another private legal entity established by it for this purpose), which shall become the private partner in the PPP for the purposes of this law. Any such other private legal entity established by the winning bidder shall meet any formal or substantive requirements for such entity specified by the tender documents or otherwise agreed with the public partner.
3. **[ALLOW FOR iPPP SITUATION? HOW EXACTLY?]¹⁸**

Article 21. Direct Negotiations.

1. The public and private partners may enter into a PPP agreement without a tender process, on the basis of direct negotiations between them, in the following exceptional circumstances (and subject to the PPP regulations):
 - a. where paragraph 8 of Article 14 (Unsolicited Proposals) so permits;
 - b. where only a single bidder has pre-qualified and/or submitted a compliant bid in a tender process organised under Article 19; or
 - c. where clearly established to proper satisfaction of public partner (and the PPP Unit following presentation of a report) that there is only one source realistically capable of implementing the PPP as the private partner (e.g. in the case of indispensable patented technology or unique intellectual property or know-how), making a competitive tender pointless;
2. The detailed procedures, requirements and conditions applicable to any such direct negotiations shall be specified in the PPP regulations, including in relation to the monitoring by and reporting back to Government of their progress and the PPP implemented as a result.
[MORE REQUIRED HERE?¹⁹]

[Article 22. Institutional PPPs

1. Where this law permits the use of institutional PPPs **[ELABORATE?]**, the provisions of the law relating to the private partner and its selection by the public partner shall also apply to the involvement and selection of a private participant in the institutional PPP (*mutatis mutandis*) and the execution of a shareholders agreement between them, [and to the institutional company itself] to the extent the parties so agree].

[DISCUSS. DELETE? IF INCLUDED, NEEDS FURTHER DEVELOPMENT AND PRECISION?²⁰]

CHAPTER V. PPP AGREEMENTS.

Article 23. Main Terms and Conditions of PPP Agreements.

1. PPP agreements shall contain such terms as the parties to them may agree, or as may otherwise be prescribed by law (expressly or by implication), including terms relating to the following:

¹⁸ We agreed to discuss this further.

¹⁹ The EBRD kindly agreed to circulate a copy of the 'Italian precedent' on this subject. **[NB Still not received].**

²⁰ To be discussed further. I am still not convinced that the right things are actually being said here even if we do allow for iPPPs.

[INSERT-including in particular any terms that may otherwise seem doubtful (e.g. step-in rights/ termination compensation payments etc.)]

2. The parties to a PPP agreement shall give due consideration to the need to include any or all of the clauses referred to above.

3. The parties to a PPP agreement shall be entitled to agree on such contractual forms and structures as seem to them most appropriate for the particular PPP, and which they consider to be best suited to give effect to its principal characteristics and features, including any which are known and used as a matter of recognized international best practice.²¹

Article 24. Conclusion, Amendment and Termination of PPP Agreements.

1 The PPP agreement for any PPP shall be concluded by the public partner with the private partner selected on basis of Chapter III of this law (and any other person whom they agree shall be a party to it).

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

3. Parties may amend or terminate any terms of the PPP agreement by mutual consent at any time, but subject always to its terms (and the terms of any Direct Agreement) and to any conditions or restrictions under applicable law or the PPP regulations.

4. Where it so provides, the PPP agreement may also be terminated unilaterally, by written notice from one party to the other, upon the occurrence of certain specified events (such as material unremedied breach of contract, insolvency or prolonged force majeure) and/or after a specified period of time and subject to the satisfaction of certain conditions (such as the decision of a competent court or tribunal where applicable law so requires) specified (in each case) in the agreement.

5. Where the PPP agreement so provides, either party shall be entitled to compensation from the other upon its early termination for any reason, in amount and on basis calculated in accordance with its terms (and where relevant the terms of any direct agreement). Due consideration shall always be given by the parties concluding a PPP agreement to the principles upon which any such compensation should be calculated, which may include (for example):

- a. the value of any assets transferred to the public partner;
- b. appropriate compensation for the value of equity investments in the PPP and/or the returns expected by equity investors over the term of the agreement;
- c. amounts necessary to discharge outstanding debt obligations at the time of termination.
- d. compensation for costs and losses suffered by either party as a result of early termination.
- e. compensation for any outstanding liabilities of either party at the time of its termination.

The parties to the PPP agreement (and any direct agreement) shall be entitled to agree such terms for the payment of such compensation as seem to them most appropriate in all the circumstances, and which are consistent with applicable law and any relevant constraints it may impose (such as the need to avoid unjust or undue enrichment or any disproportionate penalties for breach of contract). It is acknowledged (but without limiting any of the

²¹Commentary to explain the usual acronyms and confirm that widest range of available structures is envisaged. Perhaps also add comment to the definition of PPPs.

foregoing) that such terms may require compensation to be paid to a private partner in the event of a termination resulting from its own default under the PPP agreement as well as that of the public partner, in particular where the assets comprised in the PPP are transferred to the public partner upon termination.

Article 25. Property Matters.

1. Public partner responsible for ensuring effective provision to private partner of any and all existing land, buildings, facilities, structures, parcels or plots of land, easements, rights of access and egress, and all other real or intangible property assets which are needed for the PPP (whether or not owned or controlled by the public partner), in accordance with the requirements of the PPP agreement, except where such assets have already been acquired by the private partner, or PPP agreement provides otherwise.
2. Without prejudice to generality of preceding paragraph, public partner entitled to transfer to private partner [the use and occupation²² (with or without ownership) of] any available property in its possession and under its control or operational management (and which it is not otherwise , precluded from transferring), including public infrastructure and any related land or property, which is needed for the purposes of the PPP, in accordance with (and subject to) terms of PPP agreement (and related docs.).
3. It shall not be necessary to conduct a separate tender in connection with the provision of any such property or assets.
4. Where any such property or assets are in ownership or possession of third parties, public partner shall (or shall procure that any other relevant competent body shall) either:
 - a. acquire or obtain the same by agreement with the relevant third parties;
 - b. arrange for their compulsory purchase or alienation in accordance with applicable law; and/or
 - c. otherwise acquire or procure such other legal rights over and to such assets in accordance with applicable lawas necessary (in each case) for the purposes of the PPP and arrange for the grant to the private partner of such legal interests and rights in or to any such assets (or relating thereto) as the private partner needs for such purposes and for the timely performance of its obligations under the PPP agreement²³.
5. Parties to PPP agreement entitled to grant each other such legal interests and rights, consistent with applicable law, in or related to any property the subject matter of the PPP as necessary to implement the PPP. Such interests and rights may include (for example) [**SPECIFY POTENTIAL RANGE-e.g. ownership/ lease/ license/ easement**] and such other rights and interests as the parties may agree. All such rights and interests to be provided for under the terms of the PPP agreement (and/or any related agreements).
6. Private partner entitled to grant third parties equivalent or similar rights or interests in or related to any such property (including sub-contracts, sub-leases, etc.) as necessary to implement the PPP, as permitted by (and subject to) the terms of the PPP agreement and applicable law.

Article 26. Types of Payment under PPP Agreements.

1. PPP Agreement may provide for such payments to be made to and/or levied and retained by the private partner, for performance of its responsibilities, in such form and amounts as may be agreed by parties to PPP agreement (and subject to its terms) and not prohibited by applicable law. These may include:

²² Phrase still under consideration.

²³ Shall we still try to merge this and the preceding Article?

- a. payments from end users, such as tolls, tariffs and other forms of usage or ‘direct user’ payments;
 - b. payments from public partner to private partner, such as availability payments, shadow tolls, capacity payments, off-take payments subsidies and other forms of periodic payment or ‘revenue stream’ (subject to any legal restrictions);
 - c. any other available forms and types of payment
2. PPP agreement may also provide that private partner shall make payments to public partner, which may include (for example) PPP fees, rents, royalty payments, revenue or profit shares, whether lump-sum or periodic, or such other form of payment consistent with applicable law as may be agreed by parties to PPP agreement.
 3. PPP agreement may provide for a combination of any of the types or forms of payment referred to above.

Article 27. Liability of Parties to the PPP Agreement²⁴

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

Article 28. Step-in Rights and Substitution of Parties to PPP Agreement.

1. Parties to PPP agreement entitled to include provisions in the agreement and/or any related documents (including in a ‘direct agreement’ with the lenders) which allow either the public partner or the lenders, in specifically-defined circumstances and subject to applicable law, to take over and manage (in whole or part) the operation of the facility and/or provision of the public services comprised in the PPP (‘step-in rights’) to ensure their continued operation and/or provision, and the effective functioning of the PPP, subject to the agreed conditions and procedures.
2. It is acknowledged that the lenders’ step-in rights under their direct agreement may include;
 - a. the right to prevent any threatened termination of the PPP agreement by the public partner from going ahead for specified periods of time and subject to specified conditions;
 - b. the right to substitute the private partner (in whole or part) temporarily with another legal person, who shall be entitled to exercise the rights and obliged to perform the duties of the private partner under the PPP agreement for a period of time, without transferring the PPP agreement to another party; and/or
 - c. the right to replace the private partner altogether with another private partner on behalf of the lenders for the duration of the PPP agreement term, and to transfer the PPP agreement (and all the rights and obligations thereunder) to it.
3. Not necessary for public partner to hold any further public tender where any such step-in or substitution rights exercised provided relevant requirements and procedures complied with.

²⁴ Need for this provision to be discussed further.

CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES.

Article 29. Protection of Parties' Rights and Interests under the PPP Agreement: Some Specific Provisions.

1. Public partner may grant private partner exclusive rights to perform the activities specified in the PPP agreement (subject always to applicable law), in order to promote the technical and economic viability of the PPP and facilitate the achievement of its objectives (including the public benefits envisaged).
2. Private partner to have primary responsibility for obtaining and maintaining all necessary licences and permits for the PPP, in accordance with applicable law. Public partner to provide all appropriate assistance to private partner, including assistance with coordinating and facilitating their application and grant.
3. Public partner may provide private partner with any of those forms of support referred to in Article [30].
4. Public partner shall not take any steps or measures which would have effect of unduly interfering with, obstructing or prejudicing private partner's freedom to control and manage the assets and activities comprised in the PPP, to perform its obligations or to receive and enjoy the revenues and returns on investment properly derived therefrom, save only as permitted by express terms of PPP agreement and/or applicable law.
5. [The parties to PPP agreement entitled to agree on and include such payment terms, and such mechanisms for revising and adjusting them from time to time, as can be expected adequately to compensate private partner for its PPP costs and investments (and those of its investors and lenders), whether by way of availability or lump sum payments, periodic reviews, subsidies or otherwise, notwithstanding that any regulated tariffs or prices payable for the works, goods or services comprised in the PPP may not otherwise ensure such adequate compensation]²⁵.
6. PPP agreement may also contain provisions identifying or listing certain types of 'special' or 'exceptional' event, including change in law or *force majeure*, which may trigger certain consequences under the agreement designed to protect the party affected by such event and provide compensation for any costs or losses (including financial or economic losses) sustained as a result, including any of the following:
 - a. relief from liability of a party prevented from performing its obligations under the agreement;
 - b. amendments to the terms of the PPP agreement, including (for example) amendments changing the scope of work, the time for performance, applicable standards or the duration of its term;
 - c. adjustments to charging rates and levels;
 - d. obligations to provide financial compensation;
 - e. unilateral rights of early termination of the PPP agreement and the payment of related compensation.

The parties to the PPP agreement shall be entitled to include such provisions of this kind in the agreement as seem to them most appropriate in all the circumstances.

Article 30. Forms of Public Support for PPPs

1. Public partner and/or Government (whether national, regional, local, municipal or acting through another competent body²⁶) entitled to provide or make available to PPPs such

²⁵ Provision not yet agreed by group. Discuss further. Commentary to explain that provision may not be appropriate in a well-developed regulatory system.

²⁶ This scope will be captured in the definitions anyway

forms and means of public support and commercial or financial benefits and to contribute such assets as may either be generally permitted or available under applicable law and/or as the Government may specifically determine from time to time in the PPP regulations or guidelines (or otherwise). These may include (among other things):

- a. [any of the forms of payment referred to in Article 26²⁷]
 - b. construction and/or operational grants;
 - c. subsidies;
 - d. contributions of physical assets and property;
 - e. guarantees and incentives, including guarantees of PPP's revenues and/or end users or off-takers;
 - f. guarantees of minimum quantities of off-take or consumption by public partner;
 - g. state or municipal financial guarantees;
 - h. loans and other forms of funding or investment;
 - i. compensation (or direct responsibility) for certain types of costs and risks
 - j. tax and customs benefits and exemptions;
 - k. other guarantees and/or indemnities and/or incentives.
2. Terms and conditions applicable to any such support, benefits and/or assets shall be set out in PPP agreement (and/or in any related agreement).
 3. Government may publish guidelines and recommendations from time to time on this subject and the criteria, rules and/or conditions applicable to them, including in the PPP guidelines or regulations.

Article 31. Protection of Lenders' Rights and Interests.

1. PPP agreement and/or any direct agreement may, for avoidance of doubt, provide for such protections for and rights and powers of the lenders as parties thereto may agree, consistent with applicable law, as may be necessary and appropriate to ensure the successful financing of the PPP.
2. These may (*inter alia*) set out detailed procedures and conditions applicable to exercise of any step-in rights and rights of substitution and/or replacement of the private partner pursuant provided for in the PPP agreement [(and pursuant to Article [28])], together with other specific entitlements of the lenders permitted thereby (e.g. direct payment of termination compensation or insurance proceeds).
3. Not necessary to hold separate public tender in relation to entry into any such direct agreement or exercise of any rights thereunder.
4. The private partner may grant or create in favour of its PPP lenders (and where relevant other investors) any form of security interest over or in relation to any of its assets and rights comprised in the PPP which are not prohibited by applicable law, including [SPECIFY].

[Article 32. Protection of Public Partner's Rights and Interests²⁸].

CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION.

Article 33. Governing Law.

1. PPP agreement shall, subject to applicable law, be governed by the system of law agreed by the parties as being most appropriate in all the circumstances²⁹.

²⁷ Included for sake of completeness.

²⁸ I think this provision can now be deleted in light of amendments to Article 29.

²⁹ Commentary to explain that local law will nearly always be used.

2. Other agreements and documents entered into in relation to PPP (including direct agreement) to be governed by systems of law agreed by the parties to them, taking account of any applicable law requirements.

Article 34. Dispute Resolution.

1. Any differences or disputes arising out of the agreements or documents relating to a PPP to be resolved or settled through the mechanisms, processes and procedures agreed by the parties, and/or as specifically required under applicable law.
2. Parties to such agreements and documents may freely choose the mechanisms, processes and procedures for resolving such differences or disputes, including mediation, binding or non-binding expert appraisal or determination, national or international commercial arbitration or investment arbitration, and the procedural rules relating to the same.
3. Public partner not to be entitled to any state or sovereign immunity in relation to any differences or disputes under any such agreement or document which it has agreed to waive under any such agreement or document.

Article 35. Non-Discrimination as between Local and Foreign Private Partners.

In determining PPP regulations, and awarding or entering into any PPP, neither Government nor public partner shall discriminate as between local and foreign bidders for or participants in PPP projects or accord them unequal treatment save only to the extent permitted under applicable law (including the PPP regulations).

CHAPTER VII. IMPLEMENTATION AND MONITORING OF PPPs

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

1. Public partner entitled to exercise such powers of supervision and monitoring of any PPP as may be necessary to satisfy itself that it is being implemented in accordance with terms of PPP agreement, including by means of regular reports, reasonable access to the site and physical assets comprised in it, access to and copies of any documentation relating to it (subject to detailed terms and procedures), and independent audits.
2. Public partner to prepare regular reports on implementation of PPP, as required by PPP regulations and guidelines (or otherwise by Government), copied where required to PPP Unit. Copies of all such reports to be [generally] publicly available.
3. Public partner to be responsible for providing any additional information to Government and/or PPP Unit as reasonably required in relation to implementation of PPP.

Article 37. PPP Database and Register.

1. Government (or PPP Unit on its behalf) to maintain database of all PPPs that have been or are being implemented after the date of this law, containing such information as may be required by the PPP regulations or guidelines.
2. PPP database to be publicly available (but subject to any applicable confidentiality or non-disclosure restrictions under the PPP regulations, applicable law or otherwise).

CHAPTER VIII. TRANSITIONAL AND FINAL PROVISIONS.

Article 38. Entry into Force.

1. This law shall enter into force on [] but shall not (save where otherwise provided herein or in the PPP regulations) apply to PPPs implemented, or tenders held for PPPs or PPP agreements entered into, before that date.

2. Government entitled to require that any existing PPPs implemented before the date of entry into force of this law become subject to the monitoring and reporting requirements provided for in Article 36 (but without limiting any rights of cost recovery that the parties to the relevant PPP agreement may have as a result of meetings any such requirements).

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

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

2. In the event of any conflict or inconsistency between this law and any earlier laws relating to or applying to PPPs in [host country], the provisions of this law shall prevail.

Article 40. Correlation with Existing Legislation.

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

[SPECIFY]

Article 41. Amendments to Existing Primary Legislation.

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

[SPECIFY]

[Alternative 2³⁰] Government shall, within a period of [] months from the date of entry into force of this law, amend, modify or repeal any other applicable laws relating to or affecting PPPs as necessary to bring the same into conformity with this law.

[ENACTMENT FORMALITIES TO BE SET OUT BELOW]

³⁰ These paragraphs do not of course need to be in the alternative.