

## UNECE Project Team on Model PPP Law

### Team meeting, discussion and action items

Thursday 25<sup>th</sup> July 2019, Conference call session 16:00-17:00 CET

Participants	
<b>Attendees</b>	Christopher Clement-Davies (Team Leader), Amer Al Adhadh, Shaimerden Chikanayev, Sulaiman Hallal, Thomas Hamerl, Svetlana Maslova, David Joachim Lubbertus van Ee, Lars Wellejus, Parwana Zahib-Majed, Alexei Zverev
<b>Invited</b>	See Appendix A
<b>Apologies</b>	Bruno de Cazalet, Louise Huson, Vicky Kefalas, Olga Revzina, Wim Timmermans
<b>UNECE Secretariat</b>	Claudio Meza

The Team Leader welcomed the participants to the call and asked if there were any comments on the minutes of the previous conference call. No comments being received, the minutes were then approved.

The Team Leader then referred to the overview of the Heads of Terms which he had given during the previous call, and the latest draft of the Model PPP Law, which had been circulated with the Agenda. He reminded members that the document had now been under development for close to a year, and had been scrutinized very closely and debated extensively by the Drafting Sub-Group (with its 12 or so members plus their alternates). The Heads of Terms had been through several drafts, and then so too had the draft Model Law itself. Altogether, well over 1000 comments had been made, by lawyers and other experts with voluminous experience in this area. The document was now nearly finalised.

The Team Leader had always said, however, that he would give the members of the wider Group a proper opportunity to review and comment on it, as all of them in the end would be cited as co-authors. A number of questions had already been discussed in recent meetings. Further questions and comments now were welcome, either orally or in writing. He asked if the participants on the call had any more questions about it during this call. A number were discussed, including the following:

- **Article 8.1. Q: Can a minimum term for PPP projects be determined on the basis of the requirements for local leases?**

A: The draft assumes that a number of factors would be taken into account in determining the minimum statutory length of PPP projects and contracts, but without prescribing a fixed approach. It envisages that states seeking to include one in their legislation might wish to provide for this in their regulations. Some countries might not want a statutory minimum at all. If a country has minimum term requirements for leases, that could certainly be another determinative factor.

- **Article 8.3 Q: Ownership of assets often implies an associated ownership of the land on which they are located. Will private partners be in a position to demand the latter from their public partners?**

A: Unlikely. Most PPPs do not involve transfer or ownership of land (although some do). Ownership of the assets on the site will then be determined as a matter of local law. Ownership of assets is not usually a critical concern, however. The vital thing is extensive

control (as appropriate) over the relevant assets by the private partner, rather than ownership.

- **Chapter II. Q: Should more be said about institutional relationships, since these are so important to successful PPPs?**

A: The Drafting Group had discussed this extensively, not least in the light of the often-expressed requests from IFIs to provide for just that. However, we had come to the conclusion that there was no 'standard formula' that we could use to define an appropriate set of such relationships. They would vary widely from country to country, and depend critically on local administrative and even constitutional relationships. Some countries would have no need to provide for them in a PPP law; others might. Where they did, they would have to think carefully about the many possible aspects and variables that would need to be captured in the law. In the Model PPP Law draft, therefore, we did not think we could go further than the 'placeholder' it contains and the guidance that represents. The subject would of course be discussed further in the Commentary.

- **PPP Unit. Q: The draft does not give the PPP Unit any 'teeth'.**

A: No. PPP units are often just advisory bodies, set up within a particular ministry (typically the MoE or MoF). The relevant ministry may of course have certain enforcement powers of its own. But the reality is that the structure, powers and role of PPP units vary widely from country to country. We have therefore included a broad list of them in the draft, making it clear that this is a 'wish list', and that host countries should make their own decisions about which of them to allocate to their Units. If they wish to give them 'teeth' to enforce certain responsibilities, they can do so. Note that the list already includes references to powers of supervision and approval.

- **Article 10.2. Q: Please look again at the wording. Is it a continuation of para.1?**

A: Will do.

- **Article 12.2(a). Q: Is the reference to 'socio-economic' benefit the same as a 'cost benefit analysis'?**

A: No, but the former could of course form part of the latter. (Check wording).

- **Article 12.5. Q: Helpful to give the government responsibility for publishing these matters.**

A: Agreed. That is what the draft tries to do.

- **Article 14. Q: Should the initiator of an unsolicited proposal always have a right of first refusal to implement the project? What is the rationale for giving it special adjustments or compensation in the bid process?**

A: We did not think so. It was agreed that it was important to make unsolicited proposals subject to as much competitive pressure as possible, ideally by way of competitive tendering. However, it also seemed to us helpful to put the initiator in a somewhat privileged position in any tender, by allowing for at least the possibility of an appropriate adjustment to evaluation scores, and/or compensation for the work already put into a proposal, so as not to discourage the private sector from thinking up and proposing plausible PPP projects. How exactly such adjustments or compensation payments would operate is for host governments to work out.

- **Q: Since this is described as a 'Model' PPP Law, what assurance do we have that some important People First SDG principles are not being omitted?**

A: The document has been drawn up in close consultation with the UNECE team, which is putting the People First principles at the top of its list of priorities. The draft already contains at least 4 references to those principles. We are still working out how exactly to 'flesh them out' further, however, in collaboration with a distinguished consultant who specialises in this field (Motoko Aizawa). Further changes are expected to be made soon, to both the draft and the Commentary, to reflect them.

- **Q: What precedents and support documents were used in preparing the draft?**

A: Quite a range. We started the exercise by compiling a library of leading precedents in the field-existing laws which are considered first-rate examples of this type of legislation. We

also drew on the old UNCITRAL model legislative provisions for privately-financed infrastructure projects, long considered an excellent template. Finally, we deployed the actual knowledge of the members of the drafting group, all of whom have very wide experience of advising governments on drawing up this type of legislation.

- **Q: Why does the draft not make more use of the familiar PPP labels for different PPP structures (e.g. BOT/BOO/BOOT/DBFO etc.)?**

A: Because these are just well-known, 'business-speak' acronyms which refer to different structures without actually having precise or rigorous definitions. Many of them are overlapping and interchangeable. They are not defined legal concepts. The draft makes it clear that the whole range of available commercial and practical structures should be available to governments to deploy as they think best.

- **Q: Should the importance of a Value for Money test in using PPPs be brought out more clearly in the draft?**

A: This was also discussed extensively by the drafting group. In the end, we felt we had to be very careful about how we used it, as the term can be extremely problematic in practice, both in terms of what exactly it means and how best to apply it. It is referred to in the tender criteria article.

- **Q: PPP Units are often too weak in practice. Should the draft give some encouragement to those who want to strengthen their powers?**

A: A very similar comment to the one above. Please see the answer above. We can and should do this in the Commentary, but in the end it is for host countries to make their own decisions about their powers.

- **Q: Should the draft say more about anti-corruption measures?**

A: It is a little hard to do this expressly in the draft text, as legislation does not usually express itself in terms of its purposes and priorities in this way. The text in fact already mentions avoiding corruption in several places. As we wrote the draft, we were very conscious indeed of the importance of crafting provisions which would help reduce the risk of corruption and did so in many places. It is more appropriate for the Commentary to bring this out, though, than the Model Law itself. That said, we will happily consider any suggestions from Group members for further appropriate references. One obvious place for this is the Preamble.

Claudio Meza on behalf of the Secretariat then talked the participants once again through the process for finalising and approving the document as an official UN statement. Once the text has been finalised, there would be a public consultation process [60 days], after which the Member States would carry out their official review within the UNECE intergovernmental structure. It would then be subject to formal approval and adoption. The process typically takes some 6-9 months depending on the final date of approval (the intergovernmental meeting is scheduled in December each year, and the document must be finalised 90-120 days before then).

The Team Leader explained that the next stage would be to finalise the Commentary on the draft, this was nearly done. The exercise of conforming the text to the revised UNCITRAL clauses would then be carried out.

There being no further items on the agenda, the call was concluded. Time engaged: 1 hour.

Appendix A. Members of the Team		
Title	First name	Last name
Ms.	Motoko	Aizawa
Mr.	Amer	Al Adhadh
Mr.	Wilfried	Bassale
Ms.	Ekaterina	Bespalova
Mr.	Patrick	Blanchard
Mr.	Tomas	Brizuela
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.	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
Ms.	Svetlana	Maslova
Mr.	Ian	McGrath
Ms.	Marija	Musec
Mr.	Jörg	Nowak
Mr.	Rafael	Pérez Feito
Mr.	Manuel	Protásio
Ms.	Olga	Revzina
Mr.	George	Smyrnioudis
Ms.	Irina Viktorovna	Taranova
Mr.	Wim	Timmermans
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