

**Draft UNECE/EBRD People-first PPP Model law and commentary**  
**Public Review**  
**Log of comments and observations (7 May 2020)**

## Comment Submitter

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Draft version number	Line number	Comments	Proposed changes	Team Leader Response
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WP PPP/LAW/02		<p>The PPP Center over the years has witnessed/accumulated lessons learned and best practices in the undertaking of PPPs in the Philippines. We believe that these may also prove helpful in the drafting of the UNECE’s model PPP law. Specifically, the PPP Center believes that a PPP law should be able to achieve the following:</p> <p><b>Goal #1: A PPP Law should address the concerns of sub-national governments in undertaking PPP projects.</b> In the Philippines, sub-national governments are autonomous from the national government and are allowed to legislate their own ordinances and to enter into contracts independently, as long as they are not contrary to existing national laws. They are also the front-line government agencies with the mandate of ensuring that basic services are delivered to the people, consistent with the Sustainable Development Goals. PPPs provide sub-national governments alternative resources they need to provide these services, even with their limited financial resources compared to the national government. However, the Philippine experience shows that sub-national governments find it difficult to enter into PPP projects due to rigorous regulations, cumbersome requirements, and limited technical capacity to prepare, evaluate, procure, and implement complex projects.</p> <p><b>Goal #2: A PPP Law should have adequate measures to protect public interest.</b> The main objective of implementing PPP projects is to deliver public services traditionally provided by the government. The primary beneficiaries of a PPP project are the public; hence, their interest should be the utmost consideration for the government in entering a PPP project. In order to provide the public, as well as the government, the most advantageous deal, there should be sufficient safeguards in place in a PPP law</p> <p><b>Goal #3: A PPP Law should enable efficient and timely delivery of public services.</b> The efficient and timely delivery of public services through PPPs hinges on a legal framework that does not provide unnecessary impediments in the development, approval, procurement, and implementation of PPP projects. The PPP law should streamline the PPP process so that projects can move from concept to implementation as quickly as possible.</p>		
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<sup>1</sup> Types of comment: ge = general; te = technical; le = legal; ed = editorial

	In view of the foregoing goals, we provide the following comments on the specific provisions in the proposed draft People-first Model PPP Law:		
Art. 1(2)	For countries which have autonomous sub-national governments, a separate legislation by the sub-national government to allow it to implement its PPPs should be avoided. The PPP law should cover all contracting authorities (national and sub-national governments) and all types PPPs, including Joint Ventures (Institutional PPPs).	(We note that our comments are mainly concepts that we suggest be included in a model PPP Law. As long as the UNECE PPP Secretariat are able to capture the intent of our comments, we have no strong preferences on the specific language to be used in the document.)	Agreed. The draft already makes it clear, though, that it is intended to apply to all PPPs implemented in the host country, and to all public authorities with power to enter into them. It discusses the inter-relationship between national and sub-national authorities in a number of places. We think your point should also be specifically brought out in the Commentary, however.
Art. 3(1)	There should be a central policy-making body for all PPP related-matters.		There probably should, but different countries tend to handle this subject in different ways. Sometimes a lead ministry (usually the Ministry of Finance) has primary responsibility for developing PPP policy. Sometimes it is left to the Cabinet or a Special Commission. We therefore did not think it appropriate to make a single prescription for this area. It is another example of the sort of provision that could be included in Chapter III if governments think it appropriate. Again, we will bring this out in the Commentary.
Art. 5(1)	There should be a prohibition against a regulatory body from entering into a PPP contract which it regulates.		It should not be necessary to say that in the legislation. Article 5(1) refers to any public (not regulatory) authority

				which has the power to implement infrastructure projects and enter into commercial contracts. Regulatory bodies-at least independent regulators-would not usually have those powers. And if they do, surely they should also be able to award PPP projects? Again, we will mention this comment in the Commentary though.
	Art. 9(1)	There should be a centralized PPP Unit that shall provide technical assistance and capacity development to contracting authorities, whether national or sub-national, in all PPP-related matters.		Agreed. The draft already provides for just this. Some governments prefer to split the functions we list in Article 9 between different bodies, however. That is a matter for them. But it would, we think, usually be desirable to have a single body of this kind operating at all levels in the host country. We can add a sentence about this in the Commentary.
	Art. 9(2)	Contracting authorities should be allowed to create their own dedicated PPP office/department to manage and facilitate its PPP projects.		Agreed. Another point for the Commentary, we believe. There is nothing in the draft to prevent them setting up their own PPP offices or departments. The internal structuring and functions of different government bodies is not something we attempt to prescribe in the Model Law.
	Art. 9(3)	The central PPP Unit should also be empowered to issue non-policy opinions to clarify how the law shall be interpreted and/or implemented.		It is empowered by our guidelines to offer guidance and advice about any aspect of the PPP system, to both public and private sectors. See for example functions (d), (l), (p). We can add in a reference to the PPP Law as well. But you would not usually expect a PPP Unit to issue formal 'opinions' on the interpretation of a law, as this

				is something for qualified lawyers to do.
	Art. 10(1)	The PPP law should mandate the public disclosure of PPP contracts for increased transparency.		This covered by articles 10.2, 20.3, 20.4 and 21.7. The wording of these provisions was carefully discussed and agreed. We thought that a simple obligation to publish all contracts from the outset would be too crude. But the provisions referred to above come close to one!
	Art. 11(3)	There should be an institutionalized revolving fund as source for sub-national governments for project development studies, among others.		Quite possibly. This is a question of how local authorities are funded, however, and of what financial support they need. It is perhaps a 'behind the scenes' matter rather than one for a PPP law. We doubt there would be much support for the idea of making it a standard legal requirement. Governments can address it in Chapter III if they need to. We can add a further comment about it to the Commentary.
	Art. 12(2)	For countries which have autonomous sub-national governments, the legislative office of the sub-national government should be the approving body for its projects, except if any of the following conditions are present: <ul style="list-style-type: none"> <li>○ The sub-national PPP project entails a national government undertaking;</li> <li>○ The sub-national PPP project exposes the national government to significant fiscal and monetary risks; and</li> </ul> The sub-national PPP project requires an interconnection with a national government project or conflicts with projects identified under existing national masterplans.		We do not disagree. But as explained above, we have not created separate and distinct provisions in the Model Law for sub-national governments, as these may or may not be appropriate for a particular host country. (Please also see the new wording included in Article 1 on this subject, which now specifically addresses it). As the Commentary explains, Article 12.2 is deliberately open-ended (by using square-brackets) about which other 'competent body' or bodies should be empowered to issue the necessary

				approvals, and even which approvals will be necessary, since, again, these will vary from country to country, according to the administrative structures of each. The assumption is that each country will refine this Article as it deems appropriate. We can include a further reference based on your comment in the Commentary.
	Art. 12(3)	The assessment and awarding of PPP projects should give paramount importance on the affordability of user fees and efficiency in public service.		These criteria are already mentioned in the Article (in (g) and (n) (the numbering seems to have gone slightly wrong in the official version)). Please note, though, that Article 12(3) does not attempt to set out a hierarchy of appraisal criteria or to prioritise the criteria suggested. It simply sets out a wide-ranging wish-list. As the Commentary explains, it will be for each host government to do that for itself. Our drafting group discussed this and decided that priorities should be treated as a matter of detail to be addressed in the regulations. We can, though, add a reference to them ('priorities and weightings') to the Article which provides for this, 12(5).
	Art. 12(3)	The PPP law should provide for appropriate risk allocation measures.		We strongly disagree, with respect! Risk allocation patterns can never be a matter for statute, as there is no set pattern or system. It will always be a matter of detail for each project and will often vary from project to project.
	Art. 12(5)	The approval process should be clear and time-bound.		Absolutely. Article 12(5) states that the regulations will need to address this. The exact details are not a matter

				for the PPP Law though, which creates a broad framework.
	Art. 12(5)	There should be separate project approval requirements, processes, and procedures for national and sub-national PPPs, although not necessarily in separate legislations.		Please see our response above. Because there is no set way of providing for how standards and procedures will differ at national and sub-national levels respectively, we have not attempted to provide for this at all in the Model Law. There is no set formula. Another point for the Commentary.
	Art. 14(1)	The PPP law should allow unsolicited proposals for all projects, including those projects contained in plans/priority lists, even if the proposal does not introduce a new concept/technology, subject to restrictions on government support.		Not agreed. I am afraid that our drafting team do not agree with this statement. We had many arguments about when unsolicited proposals should be permitted, and indeed whether they should be at all. The circumstances in which they can be put forward are therefore very carefully circumscribed in the Model Law (as they are in the revised UNCITRAL clauses). It is open to governments to broaden them if they choose to.
	Art. 14(6)	Upon acceptance of unsolicited proposals, the contracting authority should publish sufficient project details, subject to confidentiality concerns, to give potential bidders lead time in the preparation of their bids.		Please see Article 21, paras 1 and 1, which address this.
	Art. 14(6)	There should be an option for the contracting authority to convert an unsolicited proposal into a solicited one for a more competitive bidding process, subject to reimbursement of the development cost incurred by the original proponent.		Agreed, except in certain very specific situations (e.g. unique IP). This is addressed in Article 21.
	Art. 16(9)	Electronic bid submission should be allowed by the PPP law.		They are certainly not precluded by it! The detailed aspects of tendering procedures are to be dealt with in the regulations, which could allow for e-

				tendering. Please see Article 15.3. Let's add a reference there to 'the form of tender submissions (whether paper, electronic or otherwise)'
	Art. 21(5)	The procurement period for unsolicited proposals should be flexible, providing an opportunity to shorten the period for less complex projects and extend the period for more complex projects.		Agreed. But this would always be a matter of detail for individual projects and tender documents and should therefore be addressed in the regulations. Please see Article 15.3 again and also Articles 16.11 and 22.2, which between them create exactly that flexibility.
	Art. 21(6)	The preferred challenge process in unsolicited proposals should be the Best-and-Final offer mode		What do you mean by 'preferred challenge process'? A 'BAFO' process is allowed for in the case of a Competitive Dialogue procedure (Article 19.9), which may be applied to a tender held in response to an unsolicited proposal. We do not see why this should always be the case, however.
	Art. 23(2)	The PPP law should provide a clear and time-bound protest mechanism that losing bidders or aggrieved parties can follow to avoid delays in the project.		That is exactly what article 23.2 (and 23.1) allows for, whilst leaving the detail to the regulations. We decided not to try to establish a complete procedure for this in the law, as the details may vary widely from country to country. Some, with very well-defined procedures in their judicial review or procurement laws, may not find it necessary. Others may. That is a matter for them. But the need for speed and efficiency in the operation of any such procedures is specifically emphasized by Article 23.2

	Art. 25(2)	Termination of PPP projects should be pursuant to the terms of the contract.		Agreed. Articles 24 and 25 make that very clear.
	Art. 25(3)	The PPP law should contain contract re-opener provisions, subject to conditions, to allow future renegotiations between government and the private partner.		We do not agree that the PPP law should set them out. The conditions will always be difficult to specify and subject to negotiation and will accordingly vary from project to project. They are a matter for the PPP contracts rather than the law. We have now added a reference to them in Article 24, however.
	Art. 25(3)	There should be provisions on expansion or extension of an existing project facility, subject to conditions.		This would be a provision for the relevant PPP contract. Let's add a reference to it in Article 24.
	Art. 28(1)	There should be an express prohibition on undesirable actions such as splitting of contracts and penal provisions to deter parties from committing prohibited acts.		I am afraid we do not have a clear idea of how one would describe or word a prohibition against 'undesirable actions' in a statute. Statutes have to be more precise than that, with respect. A PPP contract should set out what is and is not specifically permitted in relation to a PPP project. A country's wider legal system then provides the broader context. Prohibited acts do generally give rise to legal liabilities!
	Art. 31(1)	There should be a risk management/contingent liability fund under the PPP law to ensure fiscal sustainability, enhance the ability of the contracting authority to discharge its obligations under risks allocated to it, and improve terms of financing of PPP projects.		We decided not to include provisions in the Model Law dealing with the funding of different government bodies involved with PPPs, as these will vary so much and tend to be very country specific. A fund of the kind you describe may or may not be necessary in a host country. Such provisions are also surely more a subject for the laws and

				administrative arrangements dealing with fiscal matters and responsibilities, rather than a PPP law. But if you have an example of such a provision in a PPP law, we would be very interested to see it. (We have added a reference to this as a further possibility in the Commentary on Chapter II).
	Art. 36(1)	The PPP law should provide for clear provisions on project supervision to foster accountability of contracting authorities.		Article 36.1 provides for exactly that. But it is for the PPP contract, not the law, to set out their details.
	Art. 36(2)	Upon conclusion of a PPP project, the contracting authority should conduct an impact evaluation of the project.		Accepted. The text has been amended accordingly. Note that Article 36.2 allows for such reports as the regulations may specify to be provided by contracting authorities. An impact assessment could be referred to in the regulations. In addition, Article 36.3 then allows the Government to require any other reports it needs from time to time from Contracting Authorities. Let's add a further reference in the Commentary.
	Art. 36(3)	The supreme audit authority should audit activities and transactions of the PPP project, subject to restrictions under prevailing laws.		We are not sure that a full audit should always be carried out of every PPP project by a supreme audit body, if there is one. What exactly would it audit? But is that not a matter for the laws or regulations governing any supreme audit body? If a provision along these lines is needed in the PPP law, we suspect that Chapter III is the place to insert it. (Chapter III already mentions it, in fact). But I think it is

					difficult to be very specific about what it would say.
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Comment Submitter	Mr. Andrea STUCCHI	E-mail	<a href="mailto:andreastucchi@hotmail.com">andreastucchi@hotmail.com</a>	Delegation / Organization	Independent PPP Legal Specialist	Date submission	27 March 2020
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Draft version number	Line number	Comments	Proposed changes	Team Leader Response
WP PPP/ LAW/02		<p><b>"Value for money" or "value for people"</b> I understand that the draft allows for a detailed methodology of those tests to be set out in the PPP Regulations. I was however wondering whether the two terms should be treated as interchangeable for the purposes of the definitions (line number 271) or whether it would be better to treat them separately if the "value for people" assessment is to end up working as an alternative, additional, assessment to the VfM considerations?</p> <p>"Indeed, essential as it is, the value for money test emphasizes monetarily quantifiable parameters of good governance in infrastructure and public service development. In order to fully assess the benefits – but also potential risks of a PPP – the Government should consider conducting an alternative assessment of the project. Firstly, from a purely financial viewpoint, the authorities involved may wish to calculate the impact of the availability of the</p>	<ol style="list-style-type: none"> <li>1. Introduce a separate defined term of “value for people”;</li> <li>2. Ensure that any value for money consideration works as a separate additional assessment to the value for people consideration (e.g. ensure that the VfM test is actually also adopted throughout the articles of the Model law?)</li> </ol>	<p>The Model Law makes it very clear in many of its articles that all the various tests that go into the so-called ‘People-first Principles’ should be looked at as a PPP is being structured, and as many of them as possible complied with and built into the project. This is brought out in the articles dealing with preparation and review/assessment of a PPP and the tendering documents. It appears again in the article dealing with the contents of a PPP contract. We emphasize again and again that the wider social and economic impact of a PPP should always be considered, as well as its purely</p>

	<p>infrastructure concerned, as much as the fiscal returns on the investment in addition to the cash-flow position. Secondly, as the PPPs projects are by nature of great importance for the public in terms of size and service rendered, the social impact of the project should be addressed by the public authority during the preparatory phase. An assessment should be made to predict and mitigate negative impacts and identify ways to enhance benefits for local communities and society. Of particular importance is a consideration by the Government of the extent to which the project, whether or not carried as a PPP, is in line with relevant United Nations Sustainable Development Goals."</p> <p>I am sure that the definition of value for money and value for people has been given good consideration by the team but thought to bring this up anyway to understand the rationale behind treating the definitions as interchangeable at this stage (VfM or VfP) rather than as two different assessments.</p>		<p>financial aspects. Ultimately, these references all link back to the SDGs.</p> <p>In saying that the terms 'value for money' and 'value for people' should be regarded as almost interchangeable, we certainly did not intend to say that the former should be regarded as an adequate statement of the latter. That is patently not the case. We were trying to say that the former needs to approximate very closely to the latter if it is to have real meaning, i.e. you only achieve true value for money by achieving sufficient value for people. It could be, however, that you have spotted a nuance which none of us intended. I will look at the wording of the Model Law and Commentary again and see if we can bring this out more clearly.</p>
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<sup>1</sup> Types of comment: ge = general; te = technical; le = legal; ed = editorial

Comment Submitter	Ms. Janny YU	E-mail	<a href="mailto:jr.yu@swissengineers.eu">jr.yu@swissengineers.eu</a>	Delegation / Organization	SwissInfrastructure	Date submission	3 March 2020
Draft version number	Line number	Comments	Proposed changes	Team Leader Response			
WP PPP/ LAW/02		<ul style="list-style-type: none"> <li>- Article 2, (g) Government</li> </ul> <p>As also mentioned in the commentaries, local and regional bodies may also be understood under this term. This is very good. However, local and regional bodies will be involved in most people-first projects, especially in the smaller ones.</p> <p>We would therefore suggest to include these public bodies in the main wording of the article and not only in the commentary.</p> <ul style="list-style-type: none"> <li>- Article 4, Section 1 (b)</li> </ul> <p>It is important to leave the minimal value open. People-first projects are often different in size and scope as local requirements may differ to a greater extent.</p> <ul style="list-style-type: none"> <li>- Article 4, Section 3</li> </ul> <p>As already mentioned, many people-first projects could be listed in the category of small projects. It is therefore very important to leave space for such projects. Thank you for having considering that point.</p>		<p>Good idea. Thank you.</p> <p>We have already done so. The whole article is in square brackets, as is the blank for any minimum figure. The Commentary explains that each country must make its own decision about whether or not to use the provision and any figure it chooses to insert.</p> <p>Agreed. Thank you.</p>			

		<ul style="list-style-type: none"> <li>- Article 5  Very good wording, transparent and clear.</li> <li>- Chapter VI We are missing an Article about the rights and duties of the technology suppliers, particularly with respect to the protection of the Intellectual Property.</li> <li>- We would suggest to introduce some adequate considerations on this topic.</li> </ul>		<p>Thank you.</p> <p>You would not expect a PPP law, we do not believe, to prescribe the rights and duties of the numerous third parties involved in a PPPs. These would be governed by contracts made with them by the project company and by the more general laws that might be relevant to their regulation. Technology suppliers are just one example of many. (Others would include contractors, architects, engineers, off-takers, other types of supplier, lenders and investors).</p>
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Comment Submitter	Ms. Purev NARANTSETSEG	E-mail	<a href="mailto:p_narantsetseg@hotmail.com">p_narantsetseg@hotmail.com</a>	Delegation / Organization	Private Advisor, Member of WAPPP Units & PPPs professionals	Date submission	25 February 2020
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Draft version number	Line number	Comments	Proposed changes	Team Leader Response
WP PPP/ LAW/ 02	22	Ed. Official name or title of this law/document is necessary to be suitable and optimal. PPP Model law in the name/title of the UNECE/EBRD People-first	UNECE/EBRD People-first PPP Contract Model and commentary	Not accepted. It is not a PPP 'Contract Model'. It is a PPP Model Law. The final title was chosen by the UN and the EBRD, after careful consideration and discussion, and is in my view entirely appropriate.

		PPP Model <sup>1</sup> law and commentary is not suitable. In accordance with the article 2 (v) and article 4.1, the Public Private Partnerships are long-term cooperative relationship between a public and private partner based on the contract, in particular a PPP contract. So, contract in particular, PPP contract is main instrument of the successful PPPs.		
	278	Ed. Name of “Article 3. PPP Regulations and Guidelines” is not suitable. Because, the article 3 of this document reflected and regulated issue, purpose, revisions and publicity and interpretation of PPP Regulations and Guidelines.	Article 3. Issue, purpose, revisions and publicity and interpretation of PPP Regulations and Guidelines	Not accepted. Too many words, I am afraid!
	106-110	Ed. Purpose of this law is reflected in the Preamble of this law. Main purpose and objectives of this law/contract model is necessary to be reflected in certain article of this law/contract.	Article 1. Main Purpose and objectives of PPPs law/contract	Not accepted. This worsens and confuses the drafting.
	106-141	Ed. The following conceptions are necessary to be reflected in the Preamble of the UNECE/EBRD People-first PPP Contract Model and commentary:		Not accepted. All of these matters are already addressed in the Preamble, but in a very lucid, compressed form. That is the approach our team thought it best to take in drafting it. If certain jurisdictions want to go to the trouble of identifying and

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

		<p>-PPPs and People-first PPPs main purpose,          -PPPs and People-first PPPs main objectives,          -PPPs and People-first PPPs importance,          -PPPs and People-first PPPs contribution to the Global Development and UN SDGs implementations,          -PPPs results,          -Reasons and necessities to issue “the UNECE/EBRD People-First PPP Contract Model and commentary”.</p> <p>PPPs Laws/Contracts main purpose and objectives are necessary to be reflected in the individual article of this Law model/ Contract Model.</p>		<p>spelling out these different ‘conceptions’, as you put it, they can do so.          We have very carefully cross-referenced the contents of the Preamble in various articles of the Model Law, as you can see.</p>
	<p>149-152</p> <p>153-229</p>	<p>Ed, Te, le</p> <p>The most common PPP forms include service contract, management contract, leasing, Joint venture and partnerships, BOT, concession; and BOO, divestiture. Each PPP form has different specifics. This model law applies in all PPPs, so definition of each PPPs form is important to be reflected in this model law. PPPs are not privatization.</p>	<p>In <b>service contract</b>, the public entity pays a fee to a private sector service provider to provide specific operational services.          Under <b>management contract</b>, the private sector assumes responsibility for providing the top-level management team for an existing governmental service delivery system, with the freedom to make day-to-day management decisions.          The goal of <b>lease</b> is typically to improve the overall commercial performance and quality of service of an existing public enterprise.          Under lease, the private sector service provider assumes responsibility for funding</p>	<p>Not accepted. We are well aware of these different forms of PPP. None of them have precise legal definitions which are universally accepted. We therefore did not think it necessary to define them in the law, which aims to embrace all of them. Please see the Commentary on this subject.</p>

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			<p>the regular operations and maintenance of the leased facilities.</p> <p><b>Joint venture or partnership PPP</b> involves the common sharing of risks, responsibilities and rewards of providing a public service by a private sector entity and government.</p> <p>In the <b>BOT and concessions</b>, the private sector entity finances, designs, build, operate and maintain facilities for the private sector. The key difference is that BOTs typically are stand-alone facilities, such as water treatment facilities and electricity generating facilities, whereas concessions generally transfer the responsibility for existing facilities to the private operator. Despite this difference, 2 contracting forms are similar in the revenues generated from the facilities the funding by which the private sector service provider is compensated. The private operator under a BOT and concession is remunerated entirely through collection of tariffs or user fees, these forms of PPP transfer the amounts of risks from government to the private operator.</p> <p>In many ways, Build-Own-Operate (BOO) and divestiture arrangements are similar to concessions and BOTs. All of these forms of PPP transfer responsibility for operations, maintenance and capital investment to the private sector, and all link the operator's remuneration with the tariff or user fee. The key difference, the BOOs and divestiture do not have limits on their duration, whereas concessions and BOTs generally last between 20-30 years. In this sense, both BOOs and</p>	
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			divestiture are what would classically be termed by “privatization”. There is distinct between a PPP and privatization. In a PPPs, ownership of the responsibility for service provision always remains with government.	
	294-309	<p>Te, Ed, Le.          PPPs main criteria and requirements are necessary to be reflected in this model law clearly.          Criteria of the “PPP-ability” is necessary to be included in Article 4. PPP criteria and fundamental requirements. “PPP ability” is main criteria for the project identification, screening and selection which is necessary to be made before the PPP project cycle including PPP Feasibility, PPP Procurement, PPP Contract management, performance, implementation and exit.          The project would make a good candidate for implementation through PPP. To be able to make this important decision, a systemic screening of the project’s “PPP ability” must first be completed.          The project required revenue stream, whether from payments by client government institution</p>	<p>Article 4. 1.(a)          PPP ability. Factors affecting the viability and appropriateness of PPP include:  <b>Nature of project:</b> The type of PPP project must satisfy a well-defined public need for services with a clear and definable revenue stream.  <b>Risks inherent in the project:</b> All relevant material risks inherent in the project must be systematically identified, analysed for the both size of their impact and their probability of occurring and the allocated to the party best positioned to manage and mitigate such risks.  <b>Speed of implementation:</b> By the time a PPP project comes to market, the project must have clear project objectives and be clear of any policy and political hurdles that might delay or prevent its implementation.  <b>Application of end-user charges:</b> Where end-user charges utilized, the application of such charges should be as clearly defined as possible to accommodate the requirements for financing project.  <b>Policy support:</b> The project should fit clearly within the current policies of the Department, institutional sponsor,</p>	<p>These matters are effectively covered in the Model Law in a number of different articles (although one could write an entire book on the subject of what makes a good PPP). See in particular Articles 4, 8, 11 and 12, and Chapter III, together with the explanations in the Commentary.</p>

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		<p>or from end-user should be affordable.</p> <p>Common characteristics of successful candidate projects include:</p> <ul style="list-style-type: none"> <li>-clear and measurable performance in output term,</li> <li>-attractive size and project scale of interest to private sector investors and operators.</li> <li>-significant element of service or operating content,</li> <li>-whole life cost including operations, maintenance, and replacement/renewal cost over the entire of the project,</li> <li>-cost effective allocation of specific risks to the private sector,</li> <li>-value for money for people,</li> <li>-opportunity for innovation.</li> </ul>	<p>Common characteristics of successful candidate projects include:</p> <ul style="list-style-type: none"> <li>-clear and measurable performance in output term,</li> <li>-attractive size and project scale of interest to private sector investors and operators.</li> <li>-significant element of service or operating content,</li> <li>-whole life cost including operations, maintenance, and replacement/renewal cost over the entire of the project,</li> <li>-cost effective allocation of specific risks to the private sector,</li> <li>-value for money for people,</li> <li>-opportunity for innovation.</li> </ul>	
	419-440	<p>Te, Ed, Le.</p> <p>In this chapter, it is necessary to be determined how the PPP projects risk and responsibilities should be structured. Role and responsibilities of the Ministry of Finance and infrastructure line ministries, public institutions and infrastructures authorities are necessary to be clear.</p>	<p>Line ministries and public institutions are responsible for ensuring that public services are being delivered, line ministries should select which project get implemented, conduct feasibility analysis, tender, award, and sign the PPP contract and monitor performance of project. Ministry of Finance should establish procedure and framework for preparing and implementing PPPs projects and reject or disapprove projects that may be in appropriate.</p>	<p>Not accepted. There is no single or simple way of handling this subject (which by the way has nothing to do with project risks). Each country must make its own decisions and prescriptions. See the text of Chapter III and the Commentary.</p>
	573-576	<p>Te, Ed, Le.</p> <p>The PPPs feasibility study is the key tool that will be used by government to determine</p>	<p>Key elements of the PPPs feasibility studies include:</p> <ul style="list-style-type: none"> <li>-Needs analysis,</li> <li>-Affordability assessment,</li> </ul>	<p>These matters are covered in Articles 11 and 12, as you can see.</p>

		<p>whether or not to proceed with tendering and awarding PPP contract. Affordability and suitability is key criteria for PPPs project selection. So key elements, criteria and requirements related to those key elements are necessary to be reflected in this model law. In this case, bankability assessment is required when PPP require new long-term capital investment and private finance is needed. Its purpose is to determine whether the project will provide sufficient revenue to attract private finance.</p>	<ul style="list-style-type: none"> <li>-Value for money assessment,</li> <li>-Preliminary risk assessment,</li> <li>-Stakeholder assessment,</li> <li>-Human resource assessment,</li> <li>-Bankability assessment,</li> <li>-Legal viability assessment,</li> <li>-Market testing,</li> <li>-PPP option selection,</li> <li>-Indicative implementation plan.</li> </ul>	
	294-315	<p>Te, Ed, Le. Two primary private sector sources of funds are applying in the Infrastructure investments: debt and equity. Also there is public sector funding source. Privately funded projects must repay interest and principal to private commercial lenders as well as produce dividends to owners. But in the reality, it is a different. So, lenders look the cash flow generated by the project and the cash flow is necessary to be verified.</p>	<p>For requirements and criteria next regulations are important to be reflected: Project finance definition: -lenders can to the cash flow generated by the project for repayment -forecast and verify cash flow, the cash flow needs to be verified, -risk analysis can demonstrate that there is a very high probability of repayment (&gt;90%)</p>	<p>Not accepted. There is absolutely no reason to define project finance in a statute or explain how it works. We refer in the Model law to each of the possible sources of funding of a PPP-equity/debt/government finance/ guarantees etc. Any of them may be used in the case of an individual PPP. Project finance may or may not be.</p>
	149-152	<p>Te, Ed, Le. Risk is main concept in PPP contracts and it is important</p>	<p>Next steps are necessary to be regulated in the model:</p>	<p>Not accepted. These are not matters for a statute, because there is no single, set prescription! The document makes a number of references to risk</p>

		determinant of the structure of PPP financing. PPP Goal is to minimize credit risks which include all types of risks.	-1. Identify all possible risks to the PPP projects, -2. Categorize risks in areas Commercial or political risks. Political risks are results of government actions, policies, etc. Commercial is related to the business. -3. Allocate risks to parties as private sector or government.	allocation. The exact allocation for any project will depend on its idiosyncrasies and the terms of the PPP agreement.
	773-817	Te, Ed, Le. The PPP procurement refers to process of the acquiring goods, works and services. So, objective of the PPP procurements process is necessary to be clear. Also, the PPP procurement is necessary to be conducted on the following best procurement principles: competitiveness, transparency, fairness and objective selection criteria. The PPP procurement input specifications and output specifications are important to be clear. Three primary forms are applying in the PPP procurement: sole sourcing, competitive negotiations and competitive bidding.	Objective of the PPP procurement process is to ensure that government is able to contract for the desired services that is affordable and provides better value for the public money and for people through appropriate transfer of specific risks to the private sector.  There are three primary forms of procurement can be used for PPP arrangements: 1. Sole sourcing (Direct selection) 2. Competitive negotiation 3. Competitive bidding	All of these matters are already addressed in the draft and the Commentary, as you can see.
	772-895	Te, Ed, Le. Elements of the well-designed competitive bidding procedure for award of PPP contract are necessary to be reflected in the Model law clear. For instances objective of the pre-selection of bidders, RFQ and due diligence	Objective of the stage of the PPP procurement process is to determine short-list firms or consortia, that have necessary technical expertise and resources including financial resources. Only short-listed companies will submit a proposal to Request for Proposal.	Most of these matters are already covered in the draft and the Commentary, as you can see. Some are matters of detail which are best left to the regulations and the tender documents. An enabling, framework law would not seek to put in place a comprehensive, exhaustive system covering every detail of the process, as that would be both unnecessary and inflexible. These articles are also fully consistent with the UNCITRAL provisions

		(DD). Also, clear criteria are necessary to be reflected in the PPP Model law.	Goal DD is to verify necessary information. Methods of the DD is data room, site visit, pre-bid conference, PPP contract workshop.	on this subject, which have long been recognized as leading model provisions of their kind.
	1609-1711	Te, Ed, Le Effective communication and stakeholders participation is important for the successful and sustainable PPPs development. Main elements are stakeholders relationship management, public participation, also identification stakeholders are important.	Lenders and investors interest protection is key function in the stakeholders management.	Correct. These matters are already addressed in the draft and the Commentary, as you can see.
	1734-1797	Te, Ed The successful PPP implementation is related to successful PPP contract management. The PPP contract management requirements are vary in accordance with the PPP agreements. Basic functions for PPP contract management and successful PPP implementation are important to be regulated in the Model law. Government role and government PPP officers role is important to be regulated clear.	Basic functions for the PPP contract management framework are determined by the next functions: partnership management, service delivery management and contract management. Partnership management is concerned with the accountability structures and determined by the relation between government and private sector. Service deliver management is system designed to manage risks and performance. Contract management is relates to the administrative processes. It is ensure that all relevant PPP procedures and documentations are effectively managed.	Any 'contract management' requirements would need to be set out in the relevant PPP contracts. They cannot be regulated by statute, as there will be so much variation between one contract and another.

Comment Submitter	Messrs. Marc FRILET & Vincent PIRON	E-mail	<a href="mailto:marc@frilet.com">marc@frilet.com</a> , <a href="mailto:vincent.piron@gmail.com">vincent.piron@gmail.com</a>	Delegation / Organization	International Specialist Centre of Excellence for Legislation	Date submission	30 Jan 2020
Draft version number	Line number	Comments	Proposed changes	Team Leader Response			
WP PPP/LAW/02	112	Selection, prioritization and appraisal are the initial steps to be taken and the most important	When properly selected, prioritised, appraised, structured and implemented, PPPs can fulfil a range of valuable purposes	True enough, but this is a Preamble, not a legal provision, which we have tried to draft in relatively non-legal language. We do not need to overload the sentence with words. We believe these matters are all implicit in the phrase ‘structured and implemented’.			
	125	Add a sentence about the skill required from the Public authority to manage the whole process of PPP selection, prioritization, implementation and follow-up during the whole life of the contract		Those skills are of course critical. They are referred to in numerous places in the Commentary. What would you like to add here?			
	140	Add a sentence about the necessity to implement a full Cost Benefit analysis, including budgetary impact		This is a matter of detail covered fully in the preparation articles and the Commentary. To add a further sentence here would, we think, be going into too much detail. <u>However, we have now added a further reference to cost-benefit analysis and budgetary impact in the text of Articles 10 and 11 and the Commentary.</u>			
	289	Add “in the [ <i>host country</i> ] where the PPP contract is to be implemented		It is surely clear enough that the PPP regulations are those of the host country where the PPP is being implemented. To say this			

				every time we refer to the PPP regulations would we believe clog up the drafting of the document unnecessarily.
297	If a PPP is for operation and maintenance, what is the minimum estimated value?	Add that this provision applies for PPP with Capex		<u>Good point. Accepted. We can add a sentence about this in the Commentary as well.</u> But please note that there are many ways of calculating value. The draft deliberately leaves this vague, cross-referring to the Regulations.
312	How are measured the objectives in terms of PfPPP principles (welfare and common good)	Indicate the way to measure the efficiency of a PfPPP		How these things are measured will always be a difficult question for each country to determine in its own way. We do not have the answers yet. (We may in future). They will also vary over time. We therefore do not think that the Model Law should necessarily specify a measurement methodology, especially in this provision. The Model Law is a framework, not a complete picture.
344	In a country the PPP cannot be decided independently of the existence of other PPPs, for reason of budgetary sustainability.	Add a paragraph about the registration and follow up of the whole set of PPPs in the country		We do not see what this has got to do with the power of individual public authorities to enter into PPPs (which is the subject of the provision). Your point is correct, but is not about legal vires, but rather system management and budgetary responsibility. <u>It is a point for the Commentary on Chapter III rather than Article 5. It</u>

				<u>is also specifically addressed in Article 11, in the context of the initial feasibility studies.</u>
379	Add, as important actors, the regulator and the end users. They should be quoted somewhere in the contract		Add an observation in the law, saying that the contract is concluded between Public Authority and Private partner in the interest of the final user and under the control of the regulator	<u>These are points for the contract itself, to the extent they need to be said at all.</u> We would also have considerable difficulty with the interpretation of a legal, statutory requirement to this effect. Article 7 simply identifies the main parties to a PPP contract. It does not address its contents, which are dealt with elsewhere. <u>You will see many references elsewhere in the Model Law to both regulators, end users and the general public.</u>
439-448	There are always conflicts between PPP units and line ministries		PPP units may be created at the Line Ministry level for project implementation. PPP unit at the Finance Ministry level should have a role of control (fiscal sustainability of the whole PPP programme in the host country and so on). Decision power of PPP unit (s) should be clearly identified. Paragraph 3 should indicate which PPP unit is doing what, assuming that there is a PPP unit.	The Commentary makes it extremely clear that there are many different ways of structuring and empowering PPP Units. As the document states, we have included a long 'wish-list' of potential powers and functions in the Articles, based on our drafting team's broad experience, not a precise statement of them. It is for each country to decide which it wishes to apply.  You are correct that there are sometimes conflicts between PPP Units and line ministries. <u>But both the existing draft and the Commentary mention the</u>

				<u>importance of avoiding conflicts of interest.</u>
	573	Including KPI on which the payments are based	Add a sentence about obligations of the Private Partner and the way they are measured	We do not necessarily agree that these obligations need to be defined in any detail at the preparation and (initial) feasibility study stage of a PPP (although they may be). They will often come later, in the tender documents and PPP contract. Please see article 17 and 24, where they are clearly referred to. <u>However, we have now added a reference to KPIs, as they may well be identified at preparation stage. We can also mention your point in the Commentary.</u>
	591	The line Ministry is responsible for the output	Add the Line Ministry in the process of approval	The Line Ministry will often itself be the Contracting Authority. To refer to it here as an approving body would give a different impression, which would be confusing. <u>We have already allowed for the possibility of another formal power of approval beside the PPP Unit with the phrase 'or other competent body' authorised under Article 12.</u> This may or may not be a line ministry. It may be a special commission, for instance, or even a cabinet body. It will depend on how each country structures its approval mechanisms.

	593	Who will pay for it? Government has usually no money and if it is payed for by the Private Partner, results are usually twisted		Usually the Government. If the Government has no money or resources to identify and decide on the PPPs it wishes to award, it had perhaps better avoid them altogether! If it decides to recover some of its costs later on from a successful private partner, so be it. There is nothing in the draft to preclude that. But it does not need to be regulated by statute. <u>Your concern can be mentioned in the Commentary.</u>
	599	Who will pay for that preparation step?		Please see preceding answer.
	617	The line Ministry should give its approval, not the PPP unit only	Modify the text accordingly	<u>Please see response to your comment under 591 above.</u> The relevant Line Ministry may or may not have a specific power of approval. It will not where it is itself the contracting authority. This is a matter of detail for the regulations to sort out. <u>The text makes it clear that all these approvals may have to be given by another relevant authority rather than the PPP Unit itself.</u>
	623	Select the type of PPP which is best for the services to be provided	Add a sub paragraph	This Article is about review and approval. The PPP project and structure will already have been 'selected' by the contracting authority as part of its preparation. It is not for the approving bodies to make a

				different 'selection'. But they will be able to comment on whether that selection seems optimal according to the appraisal and approval criteria (as the draft states).
	627	Risk of conflict between official bodies		Yes, but that is perhaps unavoidable, especially in poorer countries learning about PPPs for the first time. <u>Let's add a comment about this to the Commentary.</u>
	728	Who will pay for the independent review?		Please clarify which 'independent review' you are referring to here. It will always be open to contracting authorities to insist on payment for certain types of project by private initiators in appropriate circumstances. But that is a matter of detail for the regulations or ad hoc arrangements. And see comments above about payment for preparatory work. <u>We have now referred in the Commentary to the possibility of a mechanism for re-charging certain costs to the private sector as part of contract award.</u>
	755	There is no reference to competition. See the document made by the World Bank recently	Add a paragraph about competition or a reference to article 21 below	What would you like to say about competition here? This article is about review and appraisal. <u>The use of competition in the context of unsolicited proposals is</u>

				<u>addressed very clearly in subsequent articles, as you can see.</u>
	105 to 111	Misleading for readers; the proposed draft is not inclusive and do not address many of the issues which in practice impair the development of PfPPP in low and middle-income countries. (list of most common issues for Concession PPP family presented in numerous international Forum discussed several times under the UNECE Center of Excellence umbrella). The list of proposed contractual clauses and related underlying legal principles do not address several of the core principles and best practices critical for the success of PPP for essential public services having to be adapted to the need and capacity of the people during the project lifecycle (Concession PPP family that is the backbone of Pf PPP characteristics). In many areas the draft is not consistent with the authoritative UNECE standards, analysis, recommendations contractual guiding principles and best practices published during the last four years carving the detailed nature of PfPPP deserving to be promoted against other delivery forms such as design and built or Turnkey projects.	Delete and rewrite it to take into account the real scope and impact of the proposed draft for the development of Pf PPP in low and middle-income countries.	We strongly disagree with each of these statements. We do not know what you mean by saying the draft is 'not inclusive'. It emphatically 'addresses many of the issues which in practice impair the development of PfPPP in low and middle-income countries'. (The precedents we have used in preparing it are largely taken from such countries). The list of contractual clauses and underlying legal principles most certainly addresses the core principles and best practices critical for success. The draft is fully consistent with the UNECE standards, analyses and recommendations published over the past 4 years. Indeed, it is also consistent with documents of that kind published by UNECE over the past 20 years, as several of us have been collaborating with the team for that long. If it were not, I am sure one of the team members would have told us so by now, as they have been very closely involved in the draft's preparation from the outset. But these are highly critical and

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				<p>sweeping statements, to which I am afraid some of the members of our legal group frankly object. <u>We have now added a statement to the Commentary (in the Preface) nevertheless to make it clear that the draft is <b>directed primarily at emerging market countries, where Pf PPPs are particularly needed.</b> It would not of course be appropriate to say this on the face of the law itself.</u></p> <p>As I have said in a recent e-mail to you, if you wish to try to re-write the Model Law, in a way which addresses your criticisms, please be our guest. We will be happy to look at your alternative draft once you have produced it.</p>
	128 129	<p>Misleading: The PfPPP principles are not a “new vision” but the result of the identification and synthesis of empirical evidence and lessons learned on the institutional regulatory and contractual framework having permitted in some jurisdictions to develop pipeline of PPP by delegating the investment and operation of essential public services to the private sector for a project lifecycle in a framework of stakeholders satisfaction of fair equilibrium and resilience;</p>	<p>Delete and rewrite to take into account the existence of many PPP projects around the world having already many attribute of Pf PPP; PfPPP is essentially an acronym attempting to put in one pot in an inclusive manner the main practical conditions to be fulfilled to overcome</p>	<p>We do not agree with this. The wording was carefully developed by our team and the description agreed with UNECE. In the view of some, it amounts to a “new vision”. The wording closely tracks the UN’s own summary of the PfPPP principles, as the footnote and Commentary make clear. Replacing what we have written with a lengthy, wordy, technical statement along the lines you suggest will not advance</p>

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			the most common issues faced in the majority of PPP irrespective of sector and countries and as such being flagships for accelerating the SDG's compliance in low and middle income countries.	the drafting. The UNECE team were very happy with the phrase "new vision". <u>Since you object to it so strongly, however, we have replaced it with the words "new model"-the phrase used by UNECE in its own documents.</u>
143 to 148	Misleading: if the stated objectives are well written, as mentioned above, the proposed draft does not address several issues and best practices critical for the success of most PPP projects, debated and having given rise to authoritative publications recently (more particularly under the UNECE umbrella) to characterize PfPPP as endorsed by various international organizations.	Delete; the first two line and rewrite to clarify that other institutional legal and contractual issues need to be regulated if the objective of the law is to "establish" an inclusive platform having an effective impact of development of Pf PPP in low- and middle-income countries. ref the 30 issues identified and discussed several times with the IFI's and in UNECE programs	We do not agree. The article does not attempt to state which legal and contractual issues need to be 'regulated'. It sets out the broad objectives and scope of the law in general terms. There is nothing remotely 'misleading' about it. <u>Nevertheless, we will add some words in the Commentary on this article to the effect that many important aspects of PPPs obviously need to be addressed and provided for outside the scope of the law, especially in PPP contracts and the ways in which governments structure and approach their PPP programmes (which the Commentary already explains elsewhere)</u>  You keep using the word 'misleading' in your comments. We do not accept that any of the document is misleading, in any	

				way, and the members of our group object to the word.
149	Misleading and contrary to line 110 providing that the law only applies to Pf PPP	Delete and rewrite to be consistent with the preamble	Not accepted, and certainly not 'misleading' or inconsistent with the Preamble. The Model Law was conceived as a comprehensive piece of legislation for PPPs in any host country seeking to use it. The Preamble encourages governments to try to ensure that all PPPs have at least some 'People-First Principles'.	
153 to 275	Several definitions need to be reviewed for sake of consistency and avoiding overlap with the content of the law (all based on best practice for legislative drafting for intelligible and impactful regulation; the "legistic" science). Too many definitions impairing main quality of a law which is to be written in plain language and easily understandable by stakeholders irrespective their degree of qualification and experience. By contrast, some key definitions mostly for Concession PPP family missing.	Delete and rewrite several definitions. However, since everything is interrelated too early to make wording proposals which will depend of the revised content of the proposed draft law	Not accepted. The article contains only a few definitions, which are clear and simple, internally consistent and most certainly based on best practice. They are also fully consistent with each other and the rest of the draft. The draft has been produced by a team of leading experts who are fully aware of what good drafting amounts to!	
232 to 238	Inconsistent with the minimum characteristics and definition of PPP deriving from lessons learned internationally and often painfully recently for some type of PPP not deserving the status of PfPPP both in low and middle, income countries and OECD countries such as UK and France. Inconsistent with the leapfrog made on Pf PPP, core characteristics and definition under the Umbrella of UNECE deriving from exchanges between PPP experienced practitioners of low- and middle-income	Delete and rewrite after revision of the draft; start or use for instance a simple definition of PfPPP including key ingredients as summarized by the ICoE CLI under its UNECE mandate which is more or less	Our team had many discussions about the definition of PPP. This was the final result. It works extremely well in the wider context of the Model Law. It is certainly based on 'lessons learned internationally' about PPPs. The very lengthy definition you quote below attempts to say too much unnecessarily, by	

		<p>countries (many of those characteristics are published on UNECE website as standards, best or recommended practices or templates)</p>	<p>stabilized after several round of exchanges internationally</p> <p><b><i>“A physical infrastructure which is the support of a public service is financed, designed and built or rehabilitated and operated by a commercial company selected by way of competitive bidding in accordance with the provisions of a contract entered into with the public authority in charge of delivering such a service. The contract based upon functional specifications and performance criteria provides for a compensation of the company by the public authority or by the end users (or a combination of both) for delivering a service remaining adapted to the public needs</i></b></p>	<p>building in elements which are best left to the detailed mechanics of individual PPP structures (all of them covered by other articles of the Model Law). It also contradicts your comment above about the need for clear and simple legislative drafting. It is also in some respects inaccurate (for example, a PPP is not a ‘physical infrastructure’).</p> <p>We do not think it is appropriate to quote or refer to the papers published by a centre of excellence in the text of a Model Law. <u>They can be referred to as appropriate in the Commentary on the document. (We have asked you for references to include in the Commentary).</u></p>
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			<p><i>during the lifetime of the contract. The term is calculated in such a way that the company may amortize all costs and make a reasonable profit At the expiry of the term the infrastructure is transferred in good operating conditions to the public authority without compensation unless exceptionally provided for in the contract</i></p> <p>From this definition it is easy to distinguish the <b>two PPP families; Government pay PPP (or PFIPPP) and Concession PPP.</b> The major differences between the two families triggering several set of distinctive underlying principles and contract conditions can be outlined as follows</p> <p>-Operation of the infrastructure; service</p>	<p>Thank you. We are fully aware of the distinction between user charge PPPs and government-revenue based PPPs. <u>This is</u></p>
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			<p>limited to output or facility management (Government pay PPP) or service delivered to the public (Concession PPP).</p> <p>-Compensation; paid entirely by the public authority (Government pay PPP) or paid entirely or mostly by end users (Concession PPP)</p> <p>We</p>	<p><u>already addressed in the Commentary.</u> We have taken careful account of the different consequences that can flow from them in structuring and drafting the law. In the end, we decided not to make a formal, conceptual legal distinction between them in the Model Law itself, however, as it is unusual to do so. Many countries do not do so and seek to use the same legislation for both. If they do need to distinguish them formally, for jurisprudential reasons (as we believe they do in France, for example), they can do so, as the Commentary explains. (Have you read the Commentary, which accompanies the draft?) Article 1(2) of the Model Law accordingly makes it clear that its provisions are designed to apply to all forms of PPP. <u>But in response to your point we have now expanded on its wording still further to make that point still clearer, both in the text and the Commentary. If Governments want to carve out certain types or forms of PPP, they will need to change this provision and the draft accordingly.</u></p>
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	278	<p>The obligation for the government to issues regulations and guidelines required by the draft law needs to be qualified. In practice a government should primarily refer to sets of norms standards template contracts and procedures representing international best practices as published from time to time consistent with the PPP law and its institutional and legal framework.</p>	Rewrite.	<p>Qualified to say what exactly? That a government must be obliged to take account of published templates and available precedents? Have you ever seen such a provision in legislation? Do you really think that there should be a formal legal obligation to do so in an article which empowers it to issue regulations and guidelines? Who is to judge whether they actually do so? Does this mean that regulations should be invalidated if they do not? If so, we do not agree. <u>But we can add a statement in the Commentary (Article 3) to the effect that Governments should obviously seek to draw on leading international precedents when issuing them.</u></p>
	292 to 306	<p>PfPPP Characteristics and features; this is an incomplete and misleading laundry list on PfPPP definition. Why a minimum initial estimated value as key criteria? This raise many questions on the calculation of the value especially when the Public Authority does not finance the infrastructure. On the reverse a key criteria to distinguish PfPPP from traditional procurement is the obligation of the private party to organize and be responsible for the financing of the venture; this is not mentioned. Another main criteria for sustainable PfPPP of the Concession family is to adapt the infrastructure and service to the need of the people (public interest</p>	<p>Delete and start by a simple definition of Pf PPP as the one summarized by the ICoE CLI proposed above and valid for the majority of PfPPP irrespective of countries and sectors Refer also to the distinguishing characteristics of the two PfPPP family.</p>	<p>This is not a 'laundry list on PfPPP definition', as you put it. It is a statement of certain relevant minimum criteria and characteristics, which our team agreed, after much difficult debate, should be treated as fundamental. The reference to minimum value has been included in square-brackets, as the Commentary explains, for the benefit of governments which decide that such a threshold is a</p>

		<p>purpose) within a framework of economic equilibrium during the project life cycle. The definition and existence of two families of PfPPP triggering in several respects different planning, prioritization and procurement procedures and contract conditions (public payment PPP and family of concession PPP) should be the chapeau of article 4</p>	<p>Consider If there is a benefit of adding criteria as well as requirements and objectives. In all events insure consistency with the UNECE ZTC standards (in particular §23)</p>	<p>helpful way of excluding projects which are too small for the machinery of the PPP Law to deal with. Some may choose to remove it altogether. The possibility of private finance for any PPP, far from being ‘not mentioned’, as you say, is specifically allowed for in para 1(e), as you can see. The obligation to meet PfPPP requirements is dealt with in the next paragraph; we decided it would be helpful to distinguish it from what a PPP actually is i.e. to distinguish between identifying PPP projects in the first place and then setting out what they should aim to achieve, including in PfPPP terms, which we do in para 2. As we have said, we do not accept that distinguishing formally between the two ‘families’ of PPPs, as you describe them, is appropriate, let alone that they should lead to different ‘planning, prioritization and procurement’ procedures as you suggest. For many governments, they should not and do not. The Article is already perfectly consistent with the ZTC Standard. Finally, we have dealt with your definitional point above.</p>
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	406 to 409	The governing principles for extension of term specific to PfPPP based upon the synthesis of well-established empirical evidence, inter alia when the economic and financial viability of the project is affected beyond certain threshold for public interest reasons, should be mentioned	Delete and rewrite in accordance with established PfPPP best practices	Not accepted. The provision is very much in accordance with Pf PPP best practices. There is not a single set of 'governing principles for extension of term' which either can or should be reflected in a PPP law. (We have never come across the principle you then go on to cite). We discussed this in our drafting group, but decided that the PPP contract is the most plausible place to deal with the applicable circumstances, which will vary from project to project. They are nearly always a matter of negotiation. Some governments may nevertheless prefer to provide for them in their regulations, however, <u>which we have already allowed for at the end of the Article. The Commentary also explains this.</u>
	388 to 390	What is the rationale for a minimum term?	Delete	<u>This is already allowed for by the draft.</u> See the remarks in the Commentary on this question. Governments that do not feel a need for this debatable requirement can delete it, which is why it is in square brackets.
	391 to 405	Term The laundry list of criteria for PfPPP is not necessary or at least should be put by order of precedence. Main reference should be made to the time for the amortization of the physical assets which	Delete and rewrite in accordance with established Pf PPP best practices.	We do not agree that this list is unnecessary. Our team came to the conclusion, after much discussion, that certain principles

		are an essential part of the economic and financial model of PfPPP ventures		needed to be reflected in the document governing the maximum term of any PPP contract. (The UNCITRAL clauses take a very similar approach). See the Commentary on this subject. Why do you think they need to be 'put by order of preference'? What is wrong with the existing order? What would be your order of preference? We do already refer, in (d), as you can see, to what you call 'amortization' of the physical assets, but which we decided, following advice from our financial experts, to call 'depreciation'. This Article is most certainly in accordance with established Pf PPP best practice, as is the rest of the document. <u>But we have now added a further statement in the Commentary to the effect that governments may wish to change the order set out here and to convert it into a formal 'hierarchy'.</u>
	410 to 412	Misleading; the physical assets which are essential to deliver the Public service which are the core of a Pf PPP contracts cannot remain the ownership of the private partner beyond the end of the term	Delete	We do not agree. They do so all the time in BOO projects. That is exactly why we have included the provision. <u>We can say in the Commentary, though, that some governments may prefer not to allow BOO projects in their countries, if you think that is the</u>

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				<p><u>case. (We have never come across one).</u>  What is ‘misleading’ about this clause (an offensive term which you keep using)? It is perfectly clear.</p>
	415 to 436	<p>Those italics consideration on desirable institutional arrangements and roles are essential for the success of sustainable PfPPP Projects specially when they provide that PPP should be fully integrated with the country ‘s wider strategic vision for infrastructure development, its long-term planning and prioritization process and associate and budgetary arrangements.</p> <p>Unfortunately, the law does not provide modern directions on the institutional set up other than detailed provision for partnership units which experiences in most cases a lot of difficulty to discharge their duties as entrusted by the law in low and middle-income countries. They are often put in a situation of conflict from various angles (see below). Repeated lessons learned on role, capacity and authority of line ministers in relation to the contracting authorities, other line ministries and particularly ministry of finance and head of state deserve to be taken into account to make impact and core principles provided for in the law</p> <p>The law does not contain any provision for the planning and prioritization process as such a process can be realistically developed in low- and middle-income countries taking into account lessons learned and action plan in many countries.</p>	<p>Add provisions on the core economic financial social institutional and budgetary principles which underpin long term planning and prioritization of infrastructure and the choice of the PfPPP route over other form of modern procurement of global contracts such as Design and Built or Turnkey.</p> <p>Add core principle relating to the role of ministries and competent authorities for project development and project operation Easy reference can be found for project planning and preparation in the UNECE PPP Project Planning and Prioritization report (document under</p>	<p><u>See the Commentary on this subject, which already addresses many of the points you have raised.</u> Of course these arrangements are vitally important, but they are often not a matter for a PPP law at all. They are a matter for a country’s wider administrative, institutional and procedural structures, to which many different laws, regulations and other documents (some not needing legal force) are likely to be relevant. They will also differ from county to country. That is why we have simply inserted a ‘placeholder’ in these paragraphs, not a set of formal legal requirements. We invite governments to think about them and include any provisions relating to them in their PPP Law which they decide are appropriate for it. There is no simply, magic solution, as you seem to suggest. If you know of any helpful examples of any such provisions, however, do please</p>

			<p>approval process drafted by the ICoE CLI) or in the SOURCE publication. For example of low income country modern institutional arrangements and role Burkina Faso is a reference having been discussed in several occasion at UNECE conferences and working party (the institutional arrangements start by a National and Economic and Social Development plan including a whole process leading after due evaluation to the publication of a list of projects that government or contracting authorities are authorized to, develop under a PPP delivery form).</p>	<p>send them through. <u>We will be very interested to see them and can incorporate them as appropriate in the next version of the Model Law.</u></p>
	439 to 507	PPP unit and administrative coordination; PPP units have been in existence in many low- and middle-income countries for several years. Although the	Rewrite article 9 taking into account the lessons learned on the	This Article already takes account of the lessons learned from the

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		<p>concept is appealing, they have been unable in most cases to deliver PfPPP projects as expected in low- and middle-income countries. Many reasons for this such as the real authority of the Unit staff over other senior civil servants in charge of infrastructure procurement, the practice and resources for preparing projects within line ministries or contracting authorities, the role of the finance minister and of the head of state for flagship projects. Experience indicate that utmost care should be given to conflict of interest issues and corruption risks.</p>	<p>problems experienced by most PPP Units in low- and middle-income countries and the principles permitting to, resolve them. Article 9 should inter alia be consistent with the ZTC standards published by UNECE dealing with conflict of interest and the challenges for PPP units, Committees, Boards and Oversight Authorities (§38) and related recommendations. Two important other important UNECE reference for staffing the Unit are found in The ZTC standards for consultants and experts (§39) and the UNECE recommended report (2018) “involving reliable and independent experts to develop PfPPP projects in low- and middle-income countries”</p>	<p>experience of PPP units all over the world. The subject of conflict of interest is already addressed. We can see nothing in the Article which is inconsistent with the ZTC standard, but, if you can, please let us know what it is. This is a Model PPP Law, not another anti-corruption standard. Governments can draw on the latter as much as they like whilst giving effect to the former. <u>We can mention the ZTC standard again in the Commentary on this Article, however.</u></p>
	509 to 524	The experience in low and middle income countries in relation to PPP framework and conditions to	Rewrite the paragraph to clarify that specific	Your comments bring up a wide range of practical considerations,

		<p>successful planning and implementation indicate that PPP information, development and promotion cannot be isolated from public infrastructure planning since PPP is only one of the various form of infrastructure service delivery and for a series of objectives reasons (inter alia budgetary) PfPPP will always be in minority from other delivery form for public infrastructure. The information about PPP should in most cases be develop as an option in a pre-existing planning and procurement and contractual framework. Such framework is often well-structured in low- and middle-income countries due to the role of IFI's (this is particularly true with the lessons learned in the last decade where many specialized and "modern" PPP laws have failed to make impact). Requiring a Government to be responsible for all the tasks proposed in the draft law for a comprehensive information system for PPP is unrealistic in practice in low and middle income countries (it has never been achieved in any developed country so far); when good laws are passed with reasonable chance to make impact they are in fact the synthesis of best practices, norms, standards, guiding principles and authoritative case law representing a consensus at international level and often published by authoritative institutions or private organizations. The law should primarily require the government to refer to authoritative sources and dissemination of information consistent with the law and its regulatory framework Useful information system are often organized summarized and developed through various communication channels and organizations more efficient than government.</p>	<p>information about PPP should be part of a broader information system for planning and procurement of public infra projects and should focus in an inclusive manner of the particulars of PfPPP versus other public infra delivery forms. The direct governmental source of Information which could be dedicated to an ad hoc intergovernmental body such as PPP Unit depending of their scope should be directed to identify select and promote in priority authoritative sources of information consistent with the law and regulatory framework. For PfPPP several of those sources including references to identify and select them can be found in the UNECE PfPPP "body of practical Knowledge" as already developed in</p>	<p>which may make some general sense, but are not appropriate for a PPP Law, in ourview. This is a law, containing binding legal provisions, not a practical guidance document. For example, what is the point of requiring, as a matter of law, that 'specific information about PPP' (all of it or some only? If the latter, which elements?) 'should be part of a broader information system for planning and procurement etc.' How do you identify and define that broader system? Where is the legal obligation to develop it? What do you suppose is the meaning and effect of a legal obligation that information on PPPs 'should focus in an inclusive manner of the particulars of PfPPP versus other public infra delivery forms'? (We deal with the obligation to make comparisons between different forms of procurement elsewhere). Which other types of information should be 'focused' here and with what effect? In what respects do you think your requirement for 'the direct governmental source of information' (what is that?) to be 'directed' (how? By who?) to 'identify select and promote</p>
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			<p>the last four years and for which additional work in progress is under completion. (inter-alia the PfPPP inclusive implementation Toolkit)</p>	<p>authoritative sources of information’ improves on the general provision we already have in paragraph 1? The test we have used there is (inter alia) information which is ‘reasonably required to promote the effective operation of the PPP system and the clarity and transparency of its workings’. Where, exactly, do you think that is insufficient? It is implicit that authoritative and convincing sources will be used for this purpose, not unhelpful and unconvincing ones. How would you interpret the word ‘authoritative’ as a matter of law in this context?  <u>Nevertheless, we will add a statement in both this Article and the Commentary to the effect that helpful information about PPPs should where relevant be provided or understood in the context of a broader system of information about infrastructure procurement and economic development.</u></p>
	532 to 538	Issues and prescriptions for PPP procurement should be part of the Pf PPP procurement Chapter	Delete this paragraph	<p>Not accepted. Our group felt that it would be helpful for this information requirement to appear here. <u>The procurement chapter covers all the essential elements of procurement anyway.</u></p>

	551,552	<p>Confusing; Pf PPP which is only a particular delivery form, of a public infra project are not “initiated” by the contracting authority. In practice the contracting authority complying with applicable regulations best practices and in accordance with its mandate participates only to a process of identification of the public service needs in its sector in accordance with the State vision and published regulations or guidelines for infra development based upon series of criteria and planning a prioritization iterative process. This inclusive process from initial concept, consultation through the use of various matrixes leads to a blue print proposal for primary evaluation within an institutional multidisciplinary framework with various gates leading to the decision to proceed or not for the development of the project.</p> <p>Lessons learned in low- and middle-income countries indicates that PfPPP which must be initiated in accordance with the above cannot realistically be initiated by way of unsolicited proposals failing which the underlying principles governing public procurement of infrastructure will be breached</p>	<p>Rewrite to clarify the meaning of the word “initiate” taking into account issues and best practices in low- and middle-income countries. A lot of authoritative publications processes and standards have been published. Ref in particular to the synthesis document submitted by UNECE to the working Party on November 2017 as item 5 of the provisional agenda “PPP Project Planning and Prioritization” which includes the views developed under the SOURCE project as a part of the well-prepared project program jointly promoted by MDB’s and Industry</p>	<p>We do not believe this Article is confusing at all. We did ot think that the word ‘initiate’ needs to be defined. <u>Nevertheless, at your request, we have now included a definition.</u></p> <p>If you are then saying that contracting authorities initiating PPPs should take account of available published guidance and standards etc., then no doubt they will do so. Many could be relevant, as you say. They will also doubtless have numerous consultations with other relevant government bodies during the process. But there does not need to be a legal obligation to do so. <u>The Commentary can mention the importance of doing so.</u> Anyway, we still do not know what exactly such an obligation would say in a PPP law, as you have not proposed any drafting. You are again confusing sensible practical steps with formal legal requirements.</p> <p>We do not accept for a moment that unsolicited proposals cannot be brought in line with all the applicable standards and best practice norms. We have debated the subject at great length, and</p>
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				circumscribed it very carefully, in ways that are very similar to the UNCITRAL provisions on this subject. <u>The Commentary already explains this in detail.</u> Please read it.
	553 to 555	Confusing; the word “preparation” should have been qualified taking into account the particular nature of Pf PPP over other form, of procurement. In PfPPP the role of the contracting authority is not to carry out the detailed preparation but essentially to describe the objectives including mainly functional criteria for the construction and operation of the infrastructure and for the related service scope and delivery during the project lifecycle; this enables the bidders, within a set of norms and legal framework, to compete for creative and inclusive solution for optimized service delivery in the interest of the public for the project life cycle out	Rewrite to clarify the limited role of the public authority in project preparation; by contrast with traditional procurement. Its role after the initial identification and summary of the main projects objectives and main conditions of service delivery is essentially to monitor compliance of the preparation in accordance with established best practices, norms, SDG’s compliance etc.	We all know that PPPs are output-based structures, and that all the detailed design, engineering and construction work is carried out by the private partner. That is abundantly clear from the law’s wider context, including the next paragraph (4) of this article, and is also mentioned in the Commentary. Nevertheless, a great deal of work will still need to go into the preparation of a PPP before it can be appraised and then awarded in a competitive tender, as the law makes clear. We think you are simply reading too much into the word ‘preparation’. We do not accept that there is room for any confusion here. <u>Nevertheless, it may make sense to add a further sentence to paragraph 4 to bring out the distinction between preparation, on the one hand, and final project definition in the tenders and detailed design and construction work, on the other.</u>

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				<u>We have now done so, in both the text and the Commentary.</u>
	556 to 561	Confusing and contradictory with other provisions. Detailed preparation cannot be entirely carried out or managed by the contracting authority alone This would create problem in many low- and middle-income countries where several ministries have in practice to be involved.	Rewrite for a clear definition of “Detailed Preparation” complying with the core principles for development of Pf PPP in accordance with well-accepted flow charts and best practices. Ref to several documents recently published as Standards or recommended or endorsed by UNECE including Planning and Prioritization (above), The Standards Zero Tolerance to Corruption (ZTC) outlining the 3 stages of Pf PPP procurement, the Proposed list of clauses and guiding principles for Concessions for essential public services meeting then SDG’s (as approved by the bureau in 2019 etc..	This clause already contains a clear statement of what preparation consists of. (We have now added to it further as mentioned above). We do not accept that it is ‘confusing’, let alone ‘contradictory with other provisions’ (which ones?). The word ‘alone’ is not used. Why have you included it? The word ‘managed’ has been inserted precisely because we are well aware that many contracting authorities would not be able to prepare projects by themselves or in isolation. Obviously other government bodies can be consulted and outside advisers used. But someone has to manage the process all the same.  We do not think it is appropriate to include repeated cross-references to other UN standards in this Model Law. They can be drawn on as appropriate and referred to in the Commentary. <u>(They are already mentioned in the Commentary in a number of places).</u>
	566 to - 677	Incorrect; the work of preparing a PfPPP in accordance with the proposed definition of	Rewrite;	We simply do not agree with most of these comments or suggestions.

		<p>preparation in the draft law does not comprises a “feasibility study” in the traditional sense. For mining and Pf PPP sectors which have many common features in relation to project initiation and development the international practice has developed best practices norms and standards having many similarities in low- and middle-income countries. Article 11 does not take into account the particular nature of PfPPP as outlined above and deriving inter alia from cutting edge publications of UNECE. Pf PPP does not involve prefeasibility and comprehensive feasibility during the preparation phase prior to procurement.</p> <p>The illustrative list of steps to carried out by the public authority in order to propose a project mature to the authority in charge of evaluating the proposal and give clearance for the procurement phase needs to be to be reviewed and developed in a hierarchical and realistic order based on lessons learned in Pf PPP projects in low and middle income countries without ignoring several core principles for traditional procurement of essential public services which are also valid for PfPPP;</p> <p>We fail to understand the rationale of distinction between article 11 (in essence laundry list of studies to, be carried out by the contracting authority before the procurement phase) and article 12 (which in fact propose also a laundry list for studies to be carried out by the same authority before the procurement phase) in order to be authorized to develop a public service project under a Pf PPP delivery form.</p>	<ul style="list-style-type: none"> <li>- avoiding the terms of prefeasibility and comprehensive f-feasibility for a Pf PP project before the procurement phase</li> <li>-review the sequence flow chart and inter relations between the contacting authority and the various administrations and authorities involved during the preliminary phase of a Pf PPP before procurement</li> <li>-review the need of 2 laundry lists and consider a much simpler wording for the consultations and studies of all kind to be carried out by the Contracting Authority before the procurement phase.</li> <li>- consider both a more generic and prescriptive form on the organization and objectives for main studies specific to Pf PPP to be carried out before procurement.</li> </ul>	<p>A great deal of thought and discussion went into these articles, which are clear, coherent, and consistent with international best practice and with the revised UNCITRAL clauses. To describe them as ‘incorrect’ is plain wrong and frankly insulting to the exceptional in-depth experience of these matters represented by our combined drafting team. The Model Law creates a framework, leaving many of the more precise matters of detail to the supporting regulations-as so many countries do. Matters such as flow charts and interfaces with other government bodies are a matter of practical detail, not appropriate for a legal framework. However, we specifically do not share many of your views about the preparation stages of a PPP or what exactly they involve. We will just have to agree to differ about them. Article 11 deals with the subject of initiation and preparation of PPPs, primarily by contracting authorities, Article 12 with their appraisal and approval (primarily by others). The titles alone make that clear. I do not see how you</p>
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			- require the Government and authorities to refer to established methodology for PfPPP by reference to various authoritative publications norms and standards with primary reference to the UNECE Center of Excellence best practices, matrix and standards production	could have failed to grasp the distinction between the two.  Your comments here also repeat many that you have made above, which I have already answered.
	678 to 716	<p>Lessons learned in low- and middle-income countries indicate that unsolicited proposals have hardly no chance to become a sustainable PfPPP project. The best practices for public infrastructure planning and prioritization process (which includes the rationale for developing a particular project at a particular period) leads to a country infrastructure action plan which should indicate the preferred delivery form for each project including PfPPP.</p> <p>Since unsolicited proposals are not eligible for consideration for projects for essential public services announced in a plan or otherwise at government or contracting authority level their chances of being considered are extremely low. Furthermore, when exceptionally eligible the unsolicited proposals process have to follow the core principles of competition underlying the procurement of all public contracts including PfPPP which for various practical and financial reasons is</p>	Delete Article 14 to give a clear signal for considering only realistic PfPPP meeting the SDG's in low- and middle-income countries <i>UNECE Ref ZTC standards (§41)</i>	Not accepted. We debated this subject at great length. Unsolicited proposals can be beneficially used in low- and middle- income countries, as elsewhere, provided the applicable requirements and constraints are sufficiently clear and rigorous. Sometimes, the need for them is heightened by the very lack of PPP experience and resource within government in those countries. Our team decided on balance to provide for them, but in carefully circumscribed terms. That is also consistent with the UNCITRAL approach. <u>All of this-and the concerns you raise-are already discussed in the Commentary and</u>

		impracticable for Pf PP in low- and middle-income countries		<u>can be expanded on further there if necessary. The application of competition to unsolicited proposals is covered in Article 21. There is a presumption that it will be used, but this will not always be possible.</u>
	771 to 773	In practice, most of the core principle underlying efficient and competitive procurement embedded in existing procurement laws remain applicable for the procurement of Pf PPP. Pf PPP must always demonstrate after a rigorous methodological benchmark that they are best value for people for the project lifecycle over any other delivery form	Rewrite the sentence to take into account the comments supported by numerous references (inter alia §22 of the ZTC standards)	Comment not understood. We do not see exactly what change you are proposing. The Article deals with the difficult question of whether and to what extent a country's existing procurement laws should apply to PPPs. The subject of what tests should be applied to allow individual PPPs to be implemented is a different one, addressed in other Articles (in particular, 11 and 12).

Comment Submitter	Ms. Hajar BENNAR	E-mail	<a href="mailto:hajar.bennar@gmail.com">hajar.bennar@gmail.com</a>	Delegation / Organization	Rennes 2 University	Date submission	11/01/2020
Draft version number	Line number	Comments	Proposed changes	Team Leader Response			
WP PPP/LAW/02	355	Sanitation is also an important element to add in the "Water" category, even if it seems obvious that water is automatically linked to sanitation. According to a WHO (World Health Organization) report <sup>2</sup> :	Water (water supply, treatment and distribution; sanitation; wastewater collection and treatment and irrigation systems);	Fully agreed. Thank you.			

<sup>2</sup> <https://www.who.int/news-room/fact-sheets/detail/sanitation>

		<ul style="list-style-type: none"> <li>- '2.0 billion people still do not have basic sanitation facilities such as toilets or latrines'</li> <li>- 'Poor sanitation is linked to transmission of diseases such as cholera, diarrhoea, dysentery, hepatitis A, typhoid and polio and exacerbates stunting'</li> <li>- 'Poor sanitation contributes also to malnutrition'.</li> </ul>		
WP PPP/LAW/02	361	Methanization plants help to overcome fossil fuels and make a progressive transition towards sustainable energy where organic waste is liquefied and methanized. In this regard, countries that are suffering the most from waste collection and treatment as well as lack in electricity (production, connection to grids, etc) deployment are developing countries, where the agricultural sector is prominent.	Waste collection, processing, recycling and disposal; methanization plants;	Agreed. Thank you.
WP PPP/LAW/02	364	[Telecommunication and digital infrastructure...] ...Especially those enhancing quality of life with total respect of the environment as suggested by People first PPPs Principles. Smart Cities and Green Cities are a good example in this field.	Telecommunications and digital infrastructure; Smart & Green Cities;	Good idea. Agreed. Thank you.
WP PPP/LAW/02	367	Research centers and laboratories development enables strengthening economic and social situation in emergent and developing countries. There are only very few of them worldwide and are 'expensive to develop and support' <sup>3</sup> . According to an academic study carried out by P. G. Altbach, for developing and middle-income countries, 'research universities are rare, and yet they are especially important as key ingredients for economic and social progress.' <sup>4</sup>	Education-related infrastructure; including schools; universities; universities and non-universities research centers; student accommodation; nursery schools and adult-education facilities;	Another good idea. Thank you.

<sup>3</sup> P.G., Altbach, 2009. 'Peripheries and centers: research universities in developing countries'. Asia Pacific Education Review, March 2009, Volume 10, Issue 1, pp. 15-27.

<sup>4</sup> Idem

WP PPP/LAW/02	380	Based on the precautionary principle in the international legislation, it could be judicious to avoid and prevent any negative consequences on the environment or humans' health. Evidence highlights genetically modified organisms (GMOs) could harm other organisms such as pollen from B.t. corn that would be behind considerable rates of monarch butterfly caterpillars <sup>5</sup> . Furthermore, it created a new allergen causing allergic reaction (to peanuts and other food) to many American and European children. There are also tremendous other unknown effects on human health that need more scientific scrutiny <sup>6</sup> .	Genetically modified foods and animals nourished by genetically modified organisms (GMOs) -or at least the exclusion of cultivation of MON 810 maize.	Whilst the point you make is a good and important one, it may be too much a matter of detail for the text. The list of sectors in the text is purely illustrative. It is up to each country to make its own decisions about them. Why do not we simply include a reference to this concern in the Commentary?
WP PPP/LAW/02	432	Aarhus Convention has settled a stakeholders' participatory process during the miscellaneous steps of project implementation (in a way that all interested parties are included, leaving no one behind).	[The process involved should be transparent and participatory.]. following the guiding principles of Aarhus Convention.	Happy to refer to this in the Commentary. (Could you please forward a link to the Aarhus Convention?)

Comment Submitter	Mr. David BAXTER	E-mail	<a href="mailto:baxterintdev@gmail.com">baxterintdev@gmail.com</a>	Delegation / Organization	International Sustainable Resilience Center	Date submission	Jan 13 <sup>th</sup> , 2020
Draft version number	Line number	Comments	Proposed changes	Team Leader response			
Dec 2020	Front page	General Comment: It might be worthwhile considering making the draft law less prescriptive and introduce language that incentivizes participation. Sections of this draft might be	Change prescriptive language to incentivizing?	We are not sure quite what you mean by that or how we would achieve it. The language of the draft is consistent with other laws of this kind and the UNCITRAL model clauses. Laws contain rules and requirements, and therefore have to			

<sup>5</sup> J.E., Losey et al., 1999. 'Transgenic pollen harms monarch larvae', 20 May 1999. Nature, Volume 399, Issue 6733, p. 214.

<sup>6</sup> E., Martin, 1999. 'The Lancet scolded over Pusztai Paper'. Science, Volume 286, Issue 5440, p.656.

		<p>unpalatable to certain countries and it would be a pity if it was rejected outright</p> <p>It would also be helpful if the section on USPs is strengthened as well as the roles of stakeholders (better define stakeholders)</p> <p>Risk is barely mentioned – allocation needs to be expanded, including force majeure language.</p>		<p>be ‘prescriptive’. The draft also contains a range of incentives to use and implement PFP PPPs. Further detail would be a matter for individual projects and tender criteria.</p> <p>How would you proposed we ‘strengthen’ the USP section further? We spent many months discussing appropriate limits to it.</p> <p>It is not for a law to say more about risk or risk allocation, in my view. Risk is a matter for contracts, not legislation. Please also see the Commentary on this subject.</p>
	112 to 113	Need to harmonize with national laws	Need a comment on compatibility with all other laws (harmonization)	A country’s laws must always be mutually compatible. That goes without saying and surely does not need to be said in model legislation. It is up to the legislators to ensure that they are. The Model Law allows in its final Articles for this process of harmonisation to take place, with provision for repealing and amending existing legislation.
	115 to 117	Need a strong statement on transparent and competitive procurements	Preferences for transparent and competitive procurement language could be strengthened in the draft?	Please see Articles 15.1 and 15.3. These requirements are spelled out there. We do not see quite how they can be ‘strengthened’ further? If you want a statement made in the Preamble about their importance, we could add one, but we believe that becomes very clear from a review of the draft.
	138 to 142	Will only offer value for money and value for people if the law fully embraces transparent and competitive procurement practices that are embedded in the law.	Consider stringer language in this regard	Indeed. They do and are. Please see comment above.

	151 – to 153	Needs to be harmonized with existing laws. Don't define specific PPP models as this can result in a restricted list of models being adopted that in turn will stifle innovation.	Include language that this law needs to be harmonized with other procurement laws and guidelines etc.	Please see comment above. The law does not prescribe specific PPP models. It does the opposite. It allows for the full range. (Please see Article 24.2 and the Commentary). Harmonization with other procurement laws is a vitally important and difficult subject specifically addressed in both the text and the Commentary.
	164 to 166	What about USPs – these are seldom people friendly. Need a strong statement in this regard that a closed tender is not a sole sourced tender? Is a little confusing	Make a comment here on USPs and sole sourced tenders?	Please see the Articles that deal with USPs and Closed Tenders. (14, 21 and 22). We do not agree that they need 'stronger statements'. We have spent many hours over many months making sure that their scope is suitably limited. Please see the Commentary on this subject.
	204 to 207	ditto	ditto	As above
	252 to 260	Need to distinguish between contractually obliged stakeholders and community stakeholders - they are not mutually obliged to behave in a coordinated manner and have different contractual risk obligations. Civil society has none		Correct. But nothing in the draft suggests that they are or do. Please say where if at all you think the draft deals inappropriately with any of these stakeholders. The definition works, in my view, in the context of what we say in the Articles about them
	268 to 271	I would add the caveat that if it is a project that is not being considered by the government or one that is included in an existing project pipeline.		The draft already does so. Please see the second sentence of Article 14.1
	287 to 289	Also ensure that it is harmonized with other laws of the country		Please see comments above
	308		Make it innovative finance	What do you mean by 'innovative finance'? Why does it need to be provided for? I am afraid we do not understand the comment. Please clarify.
	315 to 321	This language could limit sub-national projects which tend to be smaller.	Need a comment on coordination with a central government body so as to ensure that projects are	In what ways could it limit them? It is widely recognised that very small projects are often not appropriate as PPPs, or the complex mechanisms governing their award and implementation set

			prioritized and do not compete with each other.	out in the draft. If this is particularly true of sub-national projects, I fear that that cannot be helped. But we are not sure that a law can satisfactorily address the coordination of projects and avoidance of competition between them; these are practical matters rather than legal ones. One always needs to be aware of the matters that a law can and should provide for, and those it can't. We will make a comment about this in the Commentary (under Chapter II).
	330 to 335		Need a comment on coordination with a central government body so as to ensure that projects are prioritized and do not compete with each other.	The subject of administrative coordination and inter-ministerial management is a very broad one, to which there are no obvious or simple solutions. It will need to be handled in different ways by different countries. Please see Chapter II, the introductory wording to it and the Commentary. We have added a new paragraph to address your point.
	348 to 378		I would not try and come up with an exhaustive list – rather have a list that meets a countries strategic development goals.  Not all projects will be consistent with people first principles- need to clarify this as it will be very prescriptive.	Absolutely agreed. It is not an exhaustive list, as the wording and Commentary make clear. But some countries may prefer to have an exhaustive list nevertheless.  Also agreed that not all sectors and projects will be compatible with PFPs (although most will be compatible with some of them). The Commentary does say that. Do you think we should say it differently?
	382 to 385	Need a primary authority who takes on primary responsibility or there could be a blame game in the case of a project failure		Agreed. The contracting authority would always have primary responsibility for the PPPs it implements. The draft already makes that very clear. Where several authorities sign the same PPP contract, the contract would also have to clarify roles and primary responsibility.

409 to 411	And a comment on national procurement law compatibility		This is addressed in Article 15.2 and the Commentary.
439 to 440	Not all countries have a national PPP Unit – what about ministerial PPP Units?		Correct. Please see the discussion of this subject in the Commentary.
517 to 518	Create a national pipeline that is not discriminatory to sub national entities.		The draft already refers to the pipeline. Where does it suggest that it might be discriminatory? It is surely up to Government to decide which projects to prioritise?
534	Consider including language on an e-procurement platform here		That might be a good idea, although nothing in the draft is actually incompatible with e-procurement. A reference has now been included.
541 to 543	Consider language that includes feeding this information into a national database.		Please see Article 37.
551 to 552		Consider adding - and other national laws	Comment not understood. Please clarify.
588 to 590	Need strong language on including economic and commercial viability as a goal		Article 11.5 requires a comprehensive feasibility study to be prepared, showing how the appraisal criteria (i.e. goals) in Article 12 will be satisfied. Article 12.3(g) mentions ‘socio-economic benefits’, whilst (j) covers commercial and financial viability.
631 to 623		Need an extra point – whether it meets a countries strategic development goals and priorities	That is covered in 12.3(i)
734 to 735	Consideration of an USP should not lead to expectations that the government is committing to its acceptance.		It emphatically does not. The drafting makes it clear that it can consider a USP or not at its discretion, and then decide whether it wishes to move to the next, full review stage. Following the full review, the contracting authority makes a final decision as to its implementation.
736 to 765	Risky A USP should always lead to a competitive procurement where the USP is tested against other proposals from competitors. This should be made		It does. That is exactly what Article 21.1. provides for. That requirement is, in our view, in the right place in the draft.

		clear early on. It is also important that this type of procurement is harmonized with national procurement laws that may prohibit USPs.		Compatibility with existing procurement laws is a complex subject, and is addressed in Article 15.2 and the Commentary.
	769 to 772	This will never result in a People First PPP that has guaranteed VFM.		Comment not understood. Please clarify.
	773 to 775	This could undermine the authority of national procurement authorities – they should have final say.		See comment above. The inter-relationship with the existing procurement regime needs to be carefully thought about, as the Commentary makes clear.
	776 to 783	It is important to note that PPP procurement principles should be aligned with national procurement guidelines – PPP procurements are a subset – not a parallel universe procurement.		Not necessarily. Many countries prefer to ‘start from scratch’, as their existing procurement regime may simply not be suited to PPPs. See comments above. The draft sets out a largely self-standing procurement regime for PPPs, as do many laws of this kind (and in some ways the UNCITRAL clauses).
	802 to 806	And clearly stated in the RFP – it is also suggested that two phases are applied – a technical and a financial evaluation		This is covered by Article 17.1(f). How exactly technical and financial phases are structured and applied will be a matter of detail for each tender, and the tender documents.
	811	Consider a section on e-procurement		We can certainly include a reference to e-procurement. As mentioned above, everything in the tendering Articles is in fact compatible with an e-procurement system. What exactly would a ‘section’ on the subject say?
	829 to 833	Disbarred companies should be prohibited from tendering - also need strong language on conflict of interest.		Article 16.4 allows for this. But it is the law which ‘disbars’ them which should provide explicitly for it. Please propose some language for conflict of interest.
	903 to 905	Also, on rationale, a project description		Comment not understood. Please clarify.
	939 to 941	Need independent oversight – e.g. someone form a ministry or national procurement office to ensure that all procedures are followed.		Article 12.2 provides for high-level review and approval of PPPs before the tender stage is reached. The thinking behind a subsequent tender commission is to allow further

				independent government representatives to be brought in to the tender process itself, to monitor its implementation. I doubt that a further tier of monitoring is needed.
	1082 to 1083	Bidders should never be told the evaluation scores of individual competitors as this could result in outcome being contested in court.		We think this is a matter of detail and of the structure of individual tenders. It may sometimes be entirely appropriate for all scores to be publicly known. Yes, that may result in outcomes being contested in court, but so what? A successful court case would need firm foundations. But the draft also protects legitimate commercial confidentiality.
	1107 to 1110	Needs to inform the USP originator of the process to be followed to ensure that all parties are protected.		That goes without saying, does it not? The private initiator needs to be allowed to participate in the process, as the draft makes clear.
	1170 to 1173	It is important that the negotiations do not lead to the intend of the original procurement being over written – this will defeat the purpose of the competitiveness of the procurement		Agreed (Do you mean over-ridden?). But why should they and how would you provide for this?
	1498	Need a strong comment on the appropriate allocation of risks somewhere in the document.		But what comment would you suggest? The subject is addressed very clearly in the Commentary. The PPP Law cannot prescribe risk allocation. And even a formal legal requirement to achieve an ‘appropriate’ allocation of risks is a hostage to fortune, as it would be comparatively as for aggrieved bidders to claim that the final allocation is not ‘appropriate’. But please see the references to risk allocation already in the draft, in (e.g.) Articles 4.1(d), 11.6(e), 12.3(p), 15.4(b) and 17.1(e)

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Draft version number	Line number	Comments	Proposed changes	Team Leader Response			
	300	To be deleted as min value does not bring budgetary sustainability	Have a demonstrated budgetary sustainability	Please see the explanation for this requirement in the Commentary. Many countries find that they need to set a minimum value, so that time is not wasted on projects which are too small to be attempted as PPPs. That is a simple practical question, not a matter of 'budgetary sustainability'. Nevertheless, this requirement is optional in the text. It may or may not be included. Budgetary sustainability can be an important consideration, but is we think for another part of the document (particularly Chapter II).			
	309	Brackets to be deleted		Why should they be? Please see our explanation in the Commentary. Our drafting group had numerous discussions about this question, and came to a carefully considered conclusion. There does not have to be a formal legal requirement to use private finance in PPPs.			
	316 - 322	To be deleted: micros PPP cannot be structured as large size PPPs by nature	To be deleted	They are not. Quite the opposite. The draft allows special procedures to be put in place by the regulations to deal with micro PPPs, especially as part of a 'bundle' of projects.			
	324-329	This definition creates a confusion with public tender on one side and creates a distortion of competition with non-institutional PPPs	To be deleted	Please see the Commentary on this subject. We had many discussions about Institutional PPPs. Some states do provide for them, although many do not. For that reason, we felt we had to allow for them, but in square brackets, so that host countries can simply delete them if they prefer. We agree that they can be a difficult and controversial subject.			

	337-42	This definition could be dangerous for the appreciation of what is People First	To be deleted	Please explain your comment, which I am afraid we do not understand. (This provision is similar to the UNCITRAL one).
	348-380	This list is useless as PPP is a financial methodology which can apply to any sectors. It would imply that PPPs can be done in any of these sectors, which is not true as it depends on the financial equilibrium of the project	To be deleted	We do not agree that the list is 'useless'. Many countries find it helpful to have an explicit list, 'for the avoidance of doubt'. The list is illustrative, not exclusive. PPP is emphatically NOT a purely 'financial methodology'. It is primarily a commercial and practical one, and to some extent an accounting one. PPPs can only apply to any sectors if the country's law permits them to. A project's 'financial equilibrium' (whatever that really means) is always a secondary matter.
	388-390	This is misleading as one could understand that a private partner profile may be changed after PPP contract attribution which would be detrimental to an ethical competition	To be deleted	Comment not understood. Please clarify.
	392-394	The duration of a PPP is the result of a calculation on a case by case basis based on financing amortization depending on revenue profile plus private sector profits (including industrials and investors)	To be deleted	We do not agree. All the factors listed are potentially relevant to the calculation of a PPP's term. 'Financing amortization' is most definitely not the only one that counts.
	409	Missing point is the necessary benefit for industrials and private sponsors	To be added: benefit of industrials sponsors and subcontractors	This is covered by (c). We do not agree that sub-contractor benefit is a critical determinant of term.
	410-413	This is misleading and could lead to a distortion of competition	To be amended to avoid distortion of competition	We do not agree with your concern. We do not believe the provision is 'misleading' at all. Please explain. How would you amend it?
	414	This is not people first. This should be linked to the real value of the asset	To be deleted	Comment not understood. Please clarify.

	443	Many countries have been doing PPPs without having a PPP unit	“must” to be replaced by “may”	The word ‘must’ is not used. In our experience, most countries use PPP units of one kind or another. The Commentary makes it clear that they vary in size, scope and power very widely. If a country does not wish to use one, it can delete the provisions altogether from the draft.
	453-502	Missing points: PPP Unit must make the demonstration that PPP is better than public tender. PPP unit must make the demonstration that the PPP is sustainable budget wise over the duration of the contract. Is the PPP advice ranking prior to the advice of other ministries?	To be added	We see these questions as primarily the responsibility of the contracting authority, and perhaps the relevant budget authority, not the PPP Unit (as the draft makes clear). Why should PPP Unit advice rank ahead of that of other ministries? Where does the draft suggest that?
	503-505	How?		However, it thinks best! Please see the Commentary on this clause, which is very similar to the UNCITRAL equivalent.
	506	This is already the role of any government		In what sense? It may or may not be. Governments frequently have nothing of the kind in place.
	514	Which body of the Government?	To be precised	Whichever body is given responsibility for this task! Since this will vary from country to country, a Model Law cannot of course ‘precise’ it.
	520	How?		How what?! (Please clarify comment)
	547-550	Who will bear the cost of it?	To be precised that the costs will be charged in the PPP	They will not necessarily be. This would be decided on a case-by-case basis.
	552	It should be precised that preparation is a phase prior to request for proposals and tenders	To be added	The draft already makes it very clear that that is the position. Please look again at the structure of the articles. Since a PPP cannot be tendered until it has been prepared, we did not think this needed to be said.

	646	Emergency is the best way to do bad PPPs	To be deleted	Comment not understood. Please clarify. (Emergencies are not mentioned here).
	647	What is a government objective? does it mean politic?	To de detailed	The government's objectives in structuring and preparing the PPP. It will always have certain 'objectives'.
	1557	This chapter is silent on protection of the economy of industrials and subcontractor	To be amended namely with a payment obligation, right of suspension and to terminated by industrials and subcontractors	These rights are covered in various other articles of the model law, particularly that dealing with the PPP contract (other than 'suspension', which would be an unusual provision for it).
	1634	This chapter should be either deleted either much more detailed as it creates rights to the lenders who are not party to the PPP. Alternatively, equivalent chapter must be inserted to define the rights of the industrial parties	To be amended	It does not really create any rights in favour of lenders. It acknowledges-where it is helpful for a law of this kind to do so-that certain types of right may be created in their favour by the financing documents. The articles contain numerous references to the rights of the 'industrial parties' (as you call them-i.e. sponsors) at one level or another, and protections for their interests.
	1713	Totally unacceptable: the applicable law must be the law of the country including for all contract& finance documentation.	TO BE AMENDED	Unacceptable to whom? Why do you think it must be? Local law almost never governs the financing documents (as opposed to the security documents). It usually applies to the PPP contract, as the draft acknowledges, but there may be exceptions. See the Commentary on this subject.
	1783	Before having this law prevailing, it must be demonstrated that this model law is better for people than the previous one.	To be amended	You surely do not expect the law itself to say that! If the host country has a demonstrably better existing PPP law, why on earth would it want to adopt the Model Law?!

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Draft version number	Line number	Comments	Proposed changes	Team Leader Response
Public Review V1.0	General	<p>Medtronic plc is the world’s largest medical device manufacturer, with operations in more than 150 countries. The Medtronic Mission calls on us to use technology to alleviate pain, restore health, and extend life, through which we can make an impact to patient lives in a meaningful way.</p> <p>Medtronic and others in industry are already working with national, regional, and local governments around the world to achieve Universal Health Care. Through these public-private partnerships, we bring unique resources and ideas — allowing our partners to leverage diverse thinking and global perspectives that are not possible by one group alone.</p> <p>This includes efforts such as improving operational efficiency in hospitals, as well as guaranteeing that the performance of our technologies will lead to better patient results.</p> <p>These are service-related PPPs. However, there is a strong theme in this draft that infrastructure is limited to physical assets and does not include service-based PPPs.</p>	Generally, include references to services	You are absolutely right about the importance of allowing for service-related PPPs. Whilst it is true that the draft tends to focus on physical infrastructure, since so many PPPs involve it, there is absolutely no intention to exclude services. Please see the definition of ‘PPP’, which makes it clear that the phrase includes ‘public services’ and ‘services of general interest’ alone, as well as physical infrastructure (‘and’/‘or’).
Public Review V1.0	363	This paragraph is limited to physical assets but should include medical services and medical support services.	(h) (i) Health care-related infrastructure, including: hospitals, clinics, emergency centres, hospices; (ii) <u>healthcare services</u> and (iii) <u>healthcare related administrative and support services.</u>	Accepted. Thank you.