

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE
WORKING PARTY ON PUBLIC-PRIVATE PARTNERSHIPS (WP PPP)

Proposed Draft

UNECE/EBRD People-first PPP Model¹ law and commentary

Note by the Secretariat²

Background

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

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

The work on the draft model PPP law started on 14 September 2017 and was concluded on 19 November 2019 when the Project Team leader submitted the draft model PPP law and the commentary to the secretariat for further development. In preparing the texts, the Project Team ensured that the draft model PPP law and the commentaries conform as much as possible to the UNCITRAL model legislative provisions adopted in July 2019.

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

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

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

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

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

The secretariat is grateful to EBRD, the Project Team leader, the team members⁴ and the UNCITRAL secretariat for their cooperation and for hosting sessions of the drafting group.

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⁴ See Appendix 1

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31	I.	PREAMBLE 5
32	II.	CHAPTER 1 GENERAL PROVISIONS..... 6
33		Article 1. Scope of the Law..... 6
34		Article 2. Key Terms and Definitions 6
35		Article 3. PPP Regulations and Guidelines 9
36		Article 4. PPP Criteria and Fundamental Requirements. 9
37		Article 5. Authority to award and enter into PPPs 10
38		Article 6. Applicable Sectors and Activities for PPPs..... 10
39		Article 7. Parties to a PPP Contract..... 11
40		Article 8. PPP Term 11
41	III.	CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES..... 12
42		Article 9. Public-Private Partnership Unit and Administrative Coordination 12
43		Article 10. Information about PPPs..... 14
44	IV.	CHAPTER III. INITIATION AND PREPARATION OF PPPS 15
45		Article 11. Initiating and Preparing PPPs..... 15
46		Article 12. Appraisal and Approval Procedures..... 16
47		Article 13. PPP Implementation Resolutions 18
48		Article 14. Unsolicited Proposals..... 19
49	V.	CHAPTER IV. SELECTION OF PRIVATE PARTNER..... 20
50		Article 15. Procedures for Selection of Private Partner..... 20
51		Article 16. Tender Structures and Procedures: General 21
52		Article 17. Tender Documents, Requirements and Information..... 22
53		Article 18. Tender Committee..... 23
54		Article 19. Tender Stages 24
55		Article 20. Conclusion of the PPP Contract 26
56		Article 21. Conclusion of PPP Contract for Unsolicited Proposals..... 27
57		Article 22. Direct Negotiations 28
58		Article 23. Review and Challenge Procedures 29
59	VI.	CHAPTER V. PPP CONTRACTS 30
60		Article 24. Main Terms and Conditions of PPP Contracts..... 30
61		Article 25. Conclusion, Amendment and Termination of PPP Contracts 32
62		Article 26. Property and Related Matters 34
63		Article 27. Types of Payment under PPP Contracts 35
64		Article 28. Liability of Parties to the PPP Contract..... 36
65		Article 29. Step-in Rights and Substitution of Parties to the PPP Contract..... 36
66	VII.	CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES 37
67		Article 30. Protection of Parties' Interests under the PPP Contract: Miscellaneous 37

68	Article 31. Government and Public Support for PPPs.....	38
69	Article 32. Protection of Lenders' and Investors' Rights and Interests.....	39
70	Article 33. Protection of End Users and the General Public	39
71	VIII. CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION.....	40
72	Article 34. Governing Law.....	40
73	Article 35. Dispute Resolution	41
74	IX. CHAPTER VIII. IMPLEMENTATION AND MONITORING OF PPPs.....	41
75	Article 36. Monitoring and Reporting on the Implementation of PPPs.....	41
76	X. CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS.....	42
77	Article 38. Entry into Force.....	42
78	Article 39. Legislative Acts to be Invalidated upon Entry into Force of this Law	42
79	Article 40. Consequential Revisions to Existing Legislation	42
80	Annex	43
81	UNECE/EBRD Model PPP Law for People-First Infrastructure Projects.....	43
82	Introduction and commentary.....	43
83	I. Preface.....	43
84	II. Textual Commentary	46
85	CHAPTER 1. GENERAL PROVISIONS	47
86	CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES	54
87	CHAPTER III. INITIATION AND PREPARATION OF PPPs	55
88	CHAPTER IV. SELECTION OF PRIVATE PARTNER	58
89	CHAPTER V. PPP CONTRACTS	64
90	CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES.....	68
91	CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION	70
92	CHAPTER VIII. IMPLEMENTATION AND MONITORING OF PPPs	71
93	CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS	72
94	Appendices	73
95	Appendix 1 List of Participating Members of Model PPP Law Group.....	73
96	A. List of Drafting Group Members.....	73
97	B. List of Model PPP Law Group Members	74
98	Appendix 2 [list of leading precedents used in drafting Model Law]	79
99	CIS Model PPP Law	79
100	Appendix 3. Some leading sources of reference and further reading about PPPs and PPP Legislation.....	80
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I. PREAMBLE105
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The purpose of this law is to establish the legal framework for “People-first” Public-Private Partnerships (PPPs) and the contracts that give effect to them in [host country], including the rules and procedures governing their selection, preparation, appraisal, procurement and implementation, the contractual principles and institutional arrangements applicable to them, and certain other related matters. This law applies to PPPs, structured on a “People-first” basis, but not to other types of commercial or contractual interface between public and private sectors.

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

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This law enshrines and gives effect to the Guiding Principles on People-first Public-Private Partnerships, set out in the document of that title published by the United Nations in 2019⁵ (the “People-first PPP Principles”). These principles represent a new vision for PPPs, designed to achieve a range of sustainable development outcomes which are critical to the SDGs and which build on the PPP attributes described above, including the following:

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

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

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

141 II. CHAPTER I GENERAL PROVISIONS

142 **Article 1. Scope of the Law**

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

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

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

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

155 (a) “**Applicable law**” means the laws of [*host country*] in force and effect at the relevant
156 time, including all national, regional and local laws, any regulations or rules made
157 thereunder, laws giving effect to the country’s international obligations and
158 commitments, and any judgments, decrees, orders or injunctions of any court or
159 tribunal having the force of law;

160 (b) “**Bidder**” means any legal entity or person (or consortium thereof) participating in
161 a tender organised pursuant to chapter iv and in accordance with its terms;

162 (c) “**Closed tender**” means and refers to a tender or selection process where the
163 contracting authority pre-qualifies and/or selects the tenderer(s) permitted to
164 participate by notice and without advertising the tender openly;

165 (d) “**Competent body**” means the government, a line ministry, or any public authority
166 either having the legal power and authority under applicable law or specifically
167 authorised by the government under this law or the PPP regulations to perform
168 certain functions in the field of PPPs;

169 (e) “**Contracting authority**” means any public authority or other competent body
170 having the requisite legal capacity that enters into (or proposes to enter into) a PPP
171 contract pursuant to this law.

172 (f) “**Direct agreement**” means an agreement between the contracting authority and the
173 lenders, typically together with the private partner, setting out the terms on which
174 (amongst other things) the lenders may be entitled to exercise step-in rights, prevent
175 a threatened termination of the PPP contract, receive payments upon its early
176 termination and/or exercise certain other specified rights;

177 (g) “**Government**” means the government of [*enacting state*] and includes (where the
178 context so requires) any public authority or competent body performing any
179 function or exercising any power under this law or the PPP regulations;

180 (h) “**Implementation resolution**” means a resolution referred to in article 13 confirming
181 a formal decision by a contracting authority to implement a PPP;

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

- 229 (u) “**Public infrastructure**” means any (tangible and/or intangible) asset(s) of public
230 interest or benefit used directly or indirectly for or in connection with the provision
231 of public services, including physical facilities and systems;
- 232 (v) “**Public-private partnership**” or “PPP” means an undertaking meeting the criteria
233 and requirements set out in article 4.1, involving a long-term, cooperative
234 relationship between a public and private partner, on the basis of a PPP contract,
235 with shared risks and responsibilities throughout its term, for the design,
236 development, construction, reconstruction, rehabilitation, operation and/or
237 maintenance of public infrastructure (whether new or existing) and/or the provision
238 of public services or services of general interest;
- 239 (w) “**Public service**” means an activity performed to or for the benefit of the general
240 public or the public good or otherwise in the public interest which is customarily
241 provided by and/or on behalf of public authorities and/or for which a public
242 authority is primarily responsible;
- 243 (x) “**Public-private partnership unit**” or “PPP unit” means the dedicated advisory and
244 administrative body in the area of PPPs established pursuant to article 9, having the
245 functions and responsibilities related to the implementation of PPPs referred to
246 therein;
- 247 (y) “**Regulatory agency**” means a public authority that is entrusted with the power to
248 issue and enforce rules and regulations governing the public infrastructure or the
249 provision of public services to which the PPP relates.
- 250 (z) “**Stakeholder**” in relation to a PPP, means and includes any persons who is or is
251 likely to be involved with or materially affected or impacted by the implementation
252 of the PPP, whether directly or indirectly, positively or negatively, including the
253 contracting authority, other relevant public authorities or competent bodies, the
254 private partner, its owners, investors and lenders, end-users of the relevant public
255 infrastructure and/or beneficiaries of the relevant public services, the owners of
256 property or assets affected by it, other providers of relevant services, and/or
257 households and the wider community (including indigenous peoples) living in or
258 near its place of implementation;
- 259 (aa) “**Sustainable Development Goals**” or “SDGs” means those goals and objectives
260 for sustainable economic and social development for the general good adopted and
261 published by the united nations in the general assembly resolution 70/1
262 “transforming our world: the 2030 agenda for sustainable development”
263 (A/RES/70/1), united nations, 2015, and in the context of this law specifically refers
264 to those goals and objectives related to PPPs (including the People- first PPP
265 principles) set out therein;
- 266 (bb) “**Unsolicited proposal**” means a proposal for a PPP submitted by the private
267 initiator upon its own initiative to the contracting authority (and/or other relevant
268 competent body) and not in response to a request or solicitation issued by the
269 contracting authority in the context of a selection procedure under this law.
- 270 (cc) “**Value for money**” or “**value for people**”, when used in this law, means and refers
271 to the overall, long-term, net value of a PPP to consumers, government, and the
272 broader public, taking into account the long-term quantity and quality of services
273 delivered and whole-life costs to the economy, including fiscal, environmental and
274 social costs, measured in accordance with any detailed methodology (if any) set out
275 in the PPP regulations.
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Article 3. PPP Regulations and Guidelines

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1. **Issue.** The Government shall issue the PPP regulations required under this law and may also issue and publish any PPP guidelines it considers appropriate from time to time. The Government may designate one or more competent bodies to issue the same on its behalf.

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2. **Purpose.** The purpose of the PPP regulations shall be to give effect to and develop certain aspects of the operation and implementation of this law, whilst the purpose of the PPP guidelines shall be to provide guidance and clarification to both public and private sectors as to its interpretation and workings, as well as to certain aspects of PPP projects in practice.

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3. **Revisions and Publicity.** The PPP regulations and guidelines may be revised as necessary by the Government (or any such competent body) from time to time and shall be published through the official channels.

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4. **Interpretation.** The provisions of this law should be construed in conjunction with (and subject to) any relevant PPP regulations relating to them (if any) where the context so requires.

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Article 4. PPP Criteria and Fundamental Requirements.

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

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(a) Be long-term in nature (in accordance with Article 8) and implemented on the basis of a contract or contracts, including in particular a PPP contract;

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(b) [Have a minimum initial estimated value (if any) established and calculated in accordance with the relevant criteria and methodology set out in the PPP regulations (but subject always to paragraph 3 below)];

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(c) Involve the design, development, construction, reconstruction/rehabilitation, operation and/or maintenance of public infrastructure and/or relate to the provision of public services or similar services of general interest;

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(d) Involve the long-term participation of a private partner on a risk-bearing basis, and a sharing or allocation of project-related risks as between the public and private partners throughout its term;

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(e) [Involve an element of private finance].

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

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

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

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

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

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

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

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

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

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

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

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

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

359 (e) Municipal parking and other municipal services;

360 (f) Postal infrastructure and services;

361 (g) Telecommunications and digital infrastructure;

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

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

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

387 **Article 8. PPP Term**

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

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

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

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

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

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414 III. CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES

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

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

437 **Article 9. Public-Private Partnership Unit and Administrative** 438 **Coordination**

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

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

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

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

451 (a) [Propose methodologies, procedures and guidelines for structuring and
452 implementing PPPs;

453 (b) Assist in implementing and giving effect to the Government's PPP policies;

454 (c) Review and comment on proposed policy and strategy changes and
455 refinements relating to PPPs as required by Government;

456 (d) Prepare (or assist in preparing) official documentation describing the
457 methodologies, procedures and guidelines referred to above, including for the purposes of
458 their publication, and assist with regularly up-dating them;

459 (e) Prepare standard bidding and contract documents for use by contracting
460 authorities;

461 (f) Assist the parties to PPPs (and in particular the contracting authorities) as
462 necessary to prepare, appraise, award and implement them in accordance with the
463 requirements of this law, and advise them on the methodologies involved, including the
464 People-first Principles;

465 (g) Identify potential improvements and refinements to the structuring and
466 implementation of PPPs, including those related to the People-first Principles, and make
467 recommendations accordingly;

468 (h) Exercise such powers of appraisal and approval (and/or coordination of
469 approvals), if any, over aspects of PPPs as may be provided for in this law or the PPP
470 regulations;

471 (i) Review and confirm the proper completion of the feasibility study (and other
472 key reports and studies) for individual PPPs and the conformity of preparation work with the
473 law's requirements and procedures, as provided for in this law or the PPP regulations;

474 (j) Assist with the coordination and development of individual PPP projects and
475 PPP-related activities;

476 (k) Maintain an up-to-date registry of all PPP projects, containing relevant details
477 of their registration and that of the related PPP contracts;

478 (l) Act as a point of contact and source of information for parties implementing
479 or seeking to implement PPPs (whether public or private); provide guidance, advice,
480 consultations and/or clarifications to them as necessary;

481 (m) Organize and provide training for public sector staff involved in PPPs
482 (including educational sessions and workshops);

483 (n) Keep track of the monitoring and oversight by contracting authorities of the
484 implementation of PPPs for which they are responsible;

485 (o) Advise the Government on administrative procedures related to PPPs;

486 (p) Organise, collate and continually refine and develop a knowledge-base
487 (including an electronic database) of PPP-related know-how, information, guidelines,
488 assessments, research, studies, precedents, model clauses, opinions, methodologies and other
489 documentation to aid the regular progress of PPPs and the PPP sector in [*host country*];

- 490 (q) Ensure that elements of the documentation referred to in this Article are
491 publicly available and/or published as required or appropriate;
- 492 (r) Assist with the constructive resolution of problems and issues during the
493 implementation of PPPs ('trouble-shooting');
- 494 (s) Assist generally with the promotion of PPPs in [*host country*] and public
495 education on the subject;
- 496 (t) Such other functions (if any) as may be provided for in the PPP regulations
497 from time to time.]
- 498 4. **No Conflict.** Any such roles and responsibilities should, however, be defined and
499 allocated to the PPP Unit in ways which at all times avoid any potential conflicts of interest
500 between them.
- 501 5. **Administrative Coordination Mechanisms.** The Government shall also be
502 responsible for establishing institutional mechanisms to coordinate the activities of the public
503 authorities responsible for issuing approvals, licences, permits or authorisations required for
504 the implementation of PPPs in accordance with statutory or regulatory provisions under
505 applicable law on the construction and operation of infrastructure facilities of the type
506 concerned. Provision for any such mechanisms may be set out herein and/or in the PPP
507 regulations.

508 **Article 10. Information about PPPs**

- 509 1. **Comprehensive PPP System Information.** The Government shall be responsible for
510 preparing, collating, refining, maintaining and (subject to any confidentiality restrictions)
511 publishing up-to-date information about PPPs in such form as it may deem helpful and
512 informative to all stakeholders, other participants in the PPP industry and the general public,
513 and as may be reasonably required to promote the effective operation of the PPP system in
514 [*host country*] and the clarity and transparency of its workings, or as may otherwise be
515 required by applicable law. All such information shall be subject to a presumption of
516 transparency and disclosure to the general public.
- 517 2. **Matters Included.** Such information may include the contents of PPP policy papers,
518 the PPP regulations, the PPP guidelines and practice notes, appraisal and evaluation criteria
519 and procedures (including fiscal transparency considerations), the progress of PPPs being
520 implemented, results of tenders, material contractual terms (subject to any confidentiality
521 restrictions), recommended contractual terms and conditions, the 'pipeline' of future PPP
522 projects being planned or considered, the conclusions reached in reviews, studies and reports,
523 the strategic, environmental and social impact assessments for PPPs, and any other matters it
524 considers appropriate.
- 525 3. **Specific PPP Information.** Each contracting authority shall be responsible for
526 collecting, making available and where necessary publishing, such information concerning
527 any PPPs it is implementing or plans to implement as may be required from time to time by
528 the Government or otherwise pursuant to the PPP regulations or applicable law, including
529 information necessary to ensure that the stakeholders relevant to any such PPP (including
530 local communities) are able to respond to the plans and proposals for it in a timely manner in
531 accordance with their rights under applicable law.
- 532 4. **Tender Information.** Where tenders for PPPs take place in accordance with this law,
533 such information containing such detail as the PPP regulations may specify concerning the
534 relevant pre-qualification or tender requirements and results, the names and identities of any
535 pre-qualified, short-listed, preferred or winning bidders, and (where applicable) the grounds
536 on which they have been selected, shall be posted on the official web-site of the contracting

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

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

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

546 IV. CHAPTER III. INITIATION AND PREPARATION OF PPPS

547 Article 11. Initiating and Preparing PPPs

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

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

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

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

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

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

572 (a) Assess its anticipated social, economic and environmental impact;

573 (b) Identify the technical requirements and expected inputs and deliverables;

574 (c) Consider the extent to which the project activities can be performed by a
575 private partner under a contract with the contracting authority;

576 (d) Identify the licences, permits or authorisations that may be required in
577 connection with the approval or implementation of the PPP;

578 (e) Identify and assess the main project risks and describe the proposed risk
579 allocation under the PPP contract;

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

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

585 (h) Identify the appropriate procedure for contract award;

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

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

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

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

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

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

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

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

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

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

626 (c) Confirming that the PPP meets the specific appraisal criteria applicable to it;

627 (d) Reviewing the contracting authority's capability for carrying out the proposed
628 PPP and making appropriate recommendations;

629 (e) [reviewing [and approving] the draft tender documents prepared by the
630 contracting authority to ensure conformity with the approved proposal].]

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

634 (f) [the PPP's compliance with the criteria and requirements set out in Article 4;

635 (g) In particular, the PPP's anticipated socio-economic and public-service net
636 benefits (including the inclusivity and accessibility thereof) and the extent to which they
637 satisfy and advance the People-first PPP Principles and the wider public good;

638 (h) The extent and urgency of the need and demand for the PPP;

639 (i) The PPP's alignment with the Government's wider sector objectives, plans and
640 strategies for infrastructure and economic development;

641 (j) Its commercial and financial viability;

642 (k) Its technical feasibility and strengths (including implementation timescales);

643 (l) Its legal, regulatory and institutional viability;

644 (m) Its environmental and social sustainability and impact manageability, taking
645 account of its long-term resilience and adaptability;

646 (n) The cost-effectiveness, acceptability and affordability of the PPP for both users
647 (including vulnerable groups), on the one hand, and the host country from a budgeting/fiscal
648 and sustainable debt perspective, on the other;

649 (o) The need and scope for any anticipated public sector payments, finance,
650 guarantees or other support for the PPP;

651 (p) The appropriateness of the PPP's proposed (preliminary) risk-allocation and
652 incentive profile;

653 (q) The cost effectiveness and value-for-money of implementing the project on a
654 PPP basis relative to other procurement methods;

655 (r) Generally, the extent to which the PPP is expected to meet the purposes and
656 objectives set out for it in the documents drawn up as part of its definition and preparation
657 under Article 11;

658 (s) Any other relevant requirements of applicable law relating to public
659 investments;

660 (t) [any other appropriate criteria (if any), consistent with the foregoing as may be
661 specified from time to time in the PPP regulations].]

662 4. **Matters included in Appraisals.** In appraising the PPP, due regard shall be had (inter
663 alia) to the contents of the feasibility study and any related reports prepared under Article 11
664 and the extent to which it/they demonstrate(s) compliance with the applicable appraisal
665 criteria, as reviewed and certified by the PPP unit or other competent body. Due regard shall
666 also be had to the results of all public consultations and/or public hearings which have taken
667 place at that stage of the appraisal process in relation to the PPP in accordance with Article
668 11.9.

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

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

678 **Article 13. PPP Implementation Resolutions**

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

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

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

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

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

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

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

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

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

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

706 (i) A summary description of the consultation procedures held pursuant to Article
707 11.9, the material issues raised, and the conclusions reached in response to them, as well as
708 of the mechanisms available to stakeholders for addressing objections and grievances to the
709 PPP;

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

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

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

717 **Article 14. Unsolicited Proposals**

718 1. **Initiation.** A private initiator seeking to implement an unsolicited proposal for a PPP
719 may at any time define and submit its proposal in preliminary form to the relevant contracting
720 authority (and any other competent body authorised by the PPP regulations to receive such
721 proposals), which shall have a discretionary power to consider and review it. An unsolicited
722 proposal shall only be deemed eligible for consideration and review if it does not already
723 appear in selection procedures that have been announced or a plan or pipeline of future PPPs
724 developed on behalf of the contracting authority or the Government.

725 2. **Preliminary.** The preliminary unsolicited proposal shall describe the proposed PPP
726 in sufficient detail to enable it to be given a preliminary review by the contracting authority
727 (and any such other competent body) and shall be accompanied by all documents necessary
728 for this purpose. The contracting authority (and any such other competent body) shall carry
729 out any preliminary review of the proposal that it decides to make, reach a preliminary
730 decision about whether or not it is considered to be potentially in the public interest and
731 intends to proceed further with it, and notify the private initiator accordingly.

732 3. **‘Open Door’.** The private initiator may enter into discussions and an exchange of
733 information at any time regarding the proposed PPP with the relevant contracting authority.

734 4. **Detailed Preparation.** Following a preliminary decision to proceed further with the
735 unsolicited proposal, the detailed work of preparation of the PPP shall then be carried out in
736 accordance with the requirements of Article 11, by either the contracting authority, the
737 private initiator, or both of them jointly (as the contracting authority may specify). To this
738 end, the contracting authority shall invite the private initiator to submit as much
739 information on the proposed PPP as is feasible at this stage to allow the contracting
740 authority (and any other relevant competent body) to make a proper evaluation of the
741 private initiator’s qualifications and the technical and commercial feasibility of the
742 PPP, and to determine whether the PPP is likely to be successfully implemented in the
743 manner proposed on terms acceptable to the contracting authority (and any other
744 relevant competent body). For this purpose, the private initiator shall, if and to the
745 extent reasonably required by the contracting authority, submit a technical and
746 commercial feasibility study, an environmental impact study and satisfactory
747 information regarding the concept or technology contemplated in the proposal.

748 5. **Protection of Private Initiator’s Rights.** In considering an unsolicited proposal, the
749 contracting authority shall respect the intellectual property, trade secrets or other exclusive
750 rights contained in, arising from or referred to in the unsolicited proposal. It shall therefore
751 not make use of information provided by or on behalf of the private initiator in connection
752 therewith other than for the evaluation of that proposal, except with the consent of the private
753 initiator, and shall, if the proposal is rejected, return to the private initiator all documents
754 prepared and submitted by it during the evaluation process.

755 6. **Review, Appraisal and Implementation Decision.** The contracting authority (and/or
756 any such other competent body) shall then arrange for a review and appraisal of the
757 unsolicited proposal to be carried out in accordance with Article 12 and shall reach a final
758 decision about whether or not the PPP should be implemented, either on the original terms
759 proposed or on other terms modified from the original (discussed as necessary with the
760 private initiator during the review and appraisal process), and shall notify the private initiator

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

764 V. CHAPTER IV. SELECTION OF PRIVATE PARTNER

765 Article 15. Procedures for Selection of Private Partner

766 1. **Competitive Tenders Standard.** The contracting authority shall select the private
767 partner for a PPP on the basis of a competitive tender as set out in Articles 15 – 20, save only
768 where applicable law permits otherwise, including in the case of unsolicited proposals under
769 Article 21 (to the extent provided therein) and direct negotiations as set out in **Error!**
770 **Reference source not found.**2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

900 (c) A comprehensive and precise description of the applicable tender procedures;

901 (d) Project specifications and key performance indicators (“kpis”), as
902 appropriate, including the contracting authority’s requirements regarding safety and
903 security standards, environmental protection and the People-first Principles;

904 (e) A draft of the PPP contract or, where preparing a full draft would not be
905 practicable in the circumstances, a summary containing the main proposed terms and
906 conditions and reflecting the allocation of key risks, including an indication of which
907 terms, if any, are deemed to be non-negotiable;

908 (f) The detailed tender criteria and methodology, including relative importance or
909 weighting, to be applied to the pre-qualification (if any) of bidders, the evaluation of bids and
910 proposals and the final selection of the private partner and award of the PPP contract; and
911 any relevant thresholds, if any, set by the contracting authority for identifying non-
912 responsive proposals;

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

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

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

930 **Article 18. Tender Committee**

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

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

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

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

947 **Article 19. Tender Stages**

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

950 (a) Tender announcement and request for expressions of interest and/or pre-
951 qualification submissions;

952 (b) Expressions of interest and/or pre-qualification submissions and short-listing
953 of bidders;

954 (c) Formal invitation to tender (one or two-stage);

955 (d) Preparation and submission of tender proposals (one or two-stage);

956 (e) Evaluation of tender proposals and selection of the winning or preferred
957 bidder;

958 (f) Finalisation of the terms and conditions of the PPP contract and all other
959 required aspects of the PPP with the winning or preferred bidder; and

960 (g) Award and conclusion of the PPP contract.

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

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

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

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

975 (a) The invitation to participate in the pre-qualification proceedings shall be
976 published in accordance with the requirements of the PPP regulations, containing all such
977 information required thereby as may be necessary to enable bidders to submit responsive
978 applications by the specified deadline;

979 (b) The contracting authority shall make a decision with respect to the
980 qualifications of each bidder that has applied for pre-qualification, based on the criteria
981 specified in the invitation to participate, and shall then invite all pre-qualified bidders to
982 submit proposals for the PPP in accordance with the tender procedures and requirements.

983 (c) Where the contracting authority has reserved the right in the invitation to
984 participate to request proposals from only a limited number of bidders that best meet the pre-
985 qualification criteria, it shall rate the bidders accordingly and draw up a short-list of bidders

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

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

997 **7. Comparison and Evaluation of Offers or Proposals.** The contracting authority
998 shall compare and evaluate each offer or proposal submitted for the relevant PPP in
999 accordance with the evaluation criteria set forth in the tender documents, any relative
1000 weight accorded to each such criterion or the descending order of importance of the
1001 same. For this purpose, the contracting authority may establish thresholds with respect
1002 to the technical, financial, commercial and quality aspects of the offers or proposals.
1003 Offers or proposals that fail to achieve the thresholds shall be regarded as non-
1004 responsive and rejected from the procedure.

1005 **8. Two-Stage Request for Proposals.** The contracting authority may adopt a tender
1006 structure involving a two-stage request for proposals where it assesses that discussions with
1007 bidders are needed to refine aspects of the description of the subject-matter of the
1008 procurement and to formulate them with the requisite detail, in order to obtain the most
1009 satisfactory solution to its procurement needs. In that case, the following provisions shall
1010 apply (subject to the PPP regulations):

1011 (a) Prior to issuing its final request for proposals, the contracting authority shall
1012 issue an initial request calling upon the bidders to submit, in the first stage of the procedure,
1013 their initial proposals and comments relating to project specifications, performance
1014 indicators, financing requirements or other relevant characteristics of the PPP and the main
1015 contractual terms proposed by the contracting authority;

1016 (b) The contracting authority may convene meetings and hold discussions or
1017 dialogue with bidders whose initial proposals have not been formally and properly rejected
1018 as non-responsive or unacceptable. Discussions may concern any aspect of the initial request
1019 for proposals or the initial proposals and accompanying documents submitted by the bidders;

1020 (c) Following examination of the proposals received, the contracting authority
1021 may review and, as appropriate, revise the initial request for proposals by deleting, adding to
1022 or modifying any aspect of the initial project specifications, performance indicators,
1023 financing requirements or other characteristics of the PPP, including the main contractual
1024 terms, and any specified criteria for evaluating and comparing proposals and ascertaining the
1025 successful bidder. Any such deletion, modification or addition shall be communicated in the
1026 invitation to submit final proposals;

1027 (d) In the second stage of the proceedings, the contracting authority shall invite
1028 the bidders to submit final proposals with respect to a single set of project specifications,
1029 performance indicators or contractual terms in accordance with the tender procedure;

1030 (e) The contracting authority shall rank all responsive proposals on the basis of
1031 the evaluation criteria set out in the tender documents and invite the bidder that has attained
1032 the highest rating for final negotiation of the terms of the PPP contract (but excluding any
1033 terms, if any, that were stated to be non-negotiable in the final request for proposals);

1034 (f) If it becomes apparent to the contracting authority that the negotiations with
1035 the bidder invited will not result in a contract, the contracting authority shall inform the bidder
1036 of termination of the negotiations and give the bidder reasonable time to formulate its best
1037 and final offer. If the contracting authority does not find that offer acceptable, it shall reject
1038 that offer and invite for negotiations the other bidders in the order of their ranking until it
1039 arrives at a PPP contract or rejects all remaining proposals. The contracting authority shall
1040 not resume negotiations with a bidder with which negotiations have been terminated pursuant
1041 to this paragraph.

1042 9. **Competitive Dialogue.** The contracting authority may adopt a tender structure
1043 involving a request for proposals with dialogue (“competitive dialogue”) where it is not
1044 feasible for it to formulate a detailed description of the proposed PPP needed for the purposes
1045 of an open public tender in accordance herewith, and it assesses that dialogue with bidders is
1046 needed to achieve the most satisfactory solution to its procurement needs. In that case, the
1047 following provisions shall apply (subject to the PPP regulations):

1048 (a) The contracting authority shall invite each bidder that presented a responsive
1049 proposal in accordance with the initial tender invitation (subject to any applicable maximum)
1050 to participate in the dialogue. The contracting authority shall ensure that a sufficient number
1051 of bidders, and if possible, not less than three, is invited to participate in order to ensure
1052 effective competition;

1053 (b) The dialogue shall be conducted by the same representatives of the contracting
1054 authority concurrently;

1055 (c) The contracting authority shall clearly identify those aspects of the PPP and
1056 the tender documents and process that are to be the subject of the dialogue;

1057 (d) During the course of the dialogue, the contracting authority shall not modify
1058 any material aspect of the proposed PPP, any pre-qualification or evaluation criteria, any
1059 minimum requirements, any element of the description of the PPP contained in the request
1060 for proposals, or any term or condition of the procurement process that is not itself subject to
1061 the dialogue;

1062 (e) Any requirements, guidelines, documents, clarifications or other information
1063 generated during the dialogue that is communicated by the public authority to a bidder shall
1064 be communicated at the same time on an equal basis to all other bidders, save only to the
1065 extent it contains information which is exclusive to the relevant bidder and its disclosure
1066 would breach any applicable confidentiality restrictions;

1067 (f) Following the dialogue, the contracting authority shall request all bidders who
1068 have not withdrawn from the process to present their best and final offers with respect to all
1069 aspects of their proposals. The request shall be in writing and shall specify the manner, place
1070 and deadline for presenting best and final offers. Unless the PPP regulations and the tender
1071 documents otherwise permit, no negotiations shall take place between the contracting
1072 authority and the bidders with respect to their best and final offers;

1073 (g) The winning bidder shall be selected from amongst the best and final offers
1074 submitted in accordance with this procedure, on the basis of the offer that best meets the
1075 needs of the contracting authority as determined in accordance with the applicable tender
1076 evaluation and selection criteria set out in the tender documents.

1077 **Article 20. Conclusion of the PPP Contract**

1078 1. **Winning Bidder.** The winning bidder shall be the bidder which the contracting
1079 authority and/or the tender committee determine(s), at the conclusion of the tender process,

1080 has submitted the most favourable compliant bid according to the evaluation criteria and
1081 methodology laid down in the tender documents.

1082 2. **PPP Contract Signatories.** The PPP contract (once agreed) shall be entered into by
1083 the contracting authority with the winning bidder (or with another private legal entity
1084 established by it for this purpose), which shall become the private partner in the PPP for the
1085 purposes of this law. Any such other private legal entity established by the winning bidder
1086 shall meet any formal or substantive requirements for such entity specified by the tender
1087 documents or otherwise agreed with the contracting authority. The PPP contract may contain
1088 provisions relating to the establishment and capitalisation of any such legal entity and any
1089 approvals required from the contracting authority to its structure, ownership, corporate
1090 documentation (including its statute and by-laws) and material changes to them.

1091 3. **Publication of Contract Award.** The contracting authority shall cause a notice of the
1092 contract award to be posted on its official web-site and published through the official
1093 channels in accordance with the requirements of Article 10.4. The notice shall identify the
1094 private partner and include a summary of the essential terms of the PPP contract (subject to
1095 any applicable confidentiality restrictions).

1096 4. **Public Disclosure of PPP Contracts.** Each PPP contract entered into pursuant to this
1097 Article shall also be subject to such public disclosure (but subject always to any applicable
1098 confidentiality restrictions) as may be provided for pursuant to this law (including Article 10)
1099 or the PPP regulations.

1100 **Article 21. Conclusion of PPP Contract for Unsolicited Proposals**

1101 1. **Testing Competition.** Following a final decision by the contracting authority to
1102 implement an unsolicited proposal for a PPP pursuant to Article 14 (either on the original or
1103 on any modified terms permitted thereby), the contracting authority shall, except in the
1104 circumstances set forth in Article 22, promptly initiate a competitive tendering procedure for
1105 the proposed PPP in accordance with this law, provided always that it considers that (a) the
1106 proposed PPP can be implemented without the use of unique intellectual property, trade
1107 secrets or other exclusive rights owned or possessed by the private initiator; and (b) that the
1108 proposed concept or technology involved is not truly unique or new.

1109 2. **Requirements for Tendering Procedure.** If the contracting authority initiates a
1110 competitive tendering procedure in accordance with paragraph 1 above, it shall publish its
1111 implementation resolution for the PPP on its website and the official channels in accordance
1112 with Article 13, together with a summary and description of the proposed PPP and its
1113 principal objectives, and any relevant documentation, inviting any third parties to submit
1114 expressions of interest in implementing the PPP within a specified period of time.

1115 3. **Exceptions: Contract with Private Initiator.** If the contracting authority does not
1116 consider that conditions (a) and (b) in the proviso to paragraph 1 have been met, or if no third
1117 party submits an expression of interest by the specified time limit referred to in paragraph 2,
1118 in circumstances where the contracting authority is satisfied that all reasonable steps have
1119 been taken to attract competing proposals, the contracting authority and the private initiator
1120 may proceed with the award of the PPP and enter into a PPP contract for this purpose, subject
1121 to any direct negotiations permitted by Article 22 and the PPP regulations (and any specific
1122 procedure for this situation they may contain, including the need for further competent body
1123 approvals).

1124 4. **Re-Testing Competition.** If the contracting authority is not satisfied that all
1125 reasonable steps have been taken to attract competing proposals, it shall be entitled to extend
1126 the time period for submitting third party expressions of interest, modify the documentation

1127 summarising and describing the proposed PPP as appropriate, and invite further expressions
1128 of interest.

1129 5. **Tendering Proceedings.** If any third parties submit expressions of interest by the
1130 specified time limit(s) referred to above, the contracting authority shall organise tender
1131 proceedings for the PPP in accordance with this law.

1132 6. **Participation of Private Initiator in Tender.** The private initiator shall be invited to
1133 participate in any tender proceedings for the PPP organised by the contracting authority,
1134 which may offer the private initiator any appropriate incentive, benefit or compensation (if
1135 any) as may be provided for in the PPP regulations, in consideration of its development and
1136 submission of the proposal, including:

1137 (a) An adjustment to the evaluation score of the private initiator under the tender
1138 documentation (in an amount pre-determined before issue of the tender documents); and/or

1139 (b) Cash compensation (in a pre-agreed amount) for reasonable and documented
1140 costs and expenses incurred by it in connection with the development of the unsolicited
1141 proposal before the start of the tender proceedings, up to any specified maximum.

1142 7. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to
1143 this Article shall be subject to the publication and public disclosure provisions of Article 20.

1144 **Article 22. Direct Negotiations**

1145 1. **Exceptions to Tendering Procedures.** The contracting authority may enter into a
1146 PPP contract with the private partner without conducting a competitive tendering process in
1147 accordance with this law (fully or at all, as the case may be), on the basis of direct negotiations
1148 between them, in and only in the following exceptional circumstances:

1149 (a) Where only a single bidder has pre-qualified and/or submitted a compliant bid
1150 in a tender process organised under Article 19;

1151 (b) Where paragraph 3 of Article 21 so permits;

1152 (c) [when there is an urgent need for ensuring continuity in the provision of the
1153 service and engaging in the competitive tendering procedures set forth in this Chapter would
1154 be impractical, provided that the circumstances giving rise to the urgency were neither
1155 foreseeable by the contracting authority nor the result of dilatory conduct on its part];

1156 (d) Where the proposed PPP is of short duration (especially one below any
1157 minimum referred to in Article 8.1) and its anticipated initial investment value does not meet
1158 or exceed the figure (if any) referred to in Article 4.1(b);

1159 (e) Where the use of the competitive tendering procedures set forth in this law is
1160 not appropriate for the protection of the essential security interests of the state; or

1161 (f) Where it has been clearly established to the proper satisfaction of the
1162 contracting authority (and any competent body authorized by the PPP regulations for this
1163 purpose), following presentation of a thorough report to that effect by an independent expert,
1164 that there is only one source capable of implementing the PPP as the private partner (such as
1165 in the case of indispensable patented technology or unique intellectual property, trade secrets
1166 or know-how, or other exclusive rights owned or possessed by such source), such that a
1167 competitive tender would not be feasible.

1168 2. **Procedures Applicable to Direct Negotiation.** The detailed procedures,
1169 requirements and conditions applicable to any such direct negotiations, including in the case
1170 of unsolicited proposals under Article 21.2, shall be specified in the PPP regulations,
1171 including in relation to any approvals required by another competent body for the use of the

1172 same, the monitoring by and reporting back to Government of their progress and the terms
1173 and efficacy of any PPP implemented as a result.

1174 3. **Further Steps.** Where a PPP contract is negotiated on the basis of such direct
1175 negotiations, the contracting authority shall (except where a closed tender is necessarily
1176 required):

1177 (a) Cause a notice of its intention to commence negotiations in respect of a PPP
1178 contract to be published in accordance with the PPP regulations;

1179 (b) Engage in negotiations with as many persons as the contracting authority
1180 judges capable of carrying out the project as circumstances permit;

1181 (c) Establish appropriate evaluation criteria against which proposals shall be
1182 evaluated and ranked.

1183 4. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to
1184 this Article shall be subject to the publication and public disclosure provisions of Article 20.

1185 **Article 23. Review and Challenge Procedures**

1186 1. **Remedies for Public Authority Breach.** Any bidder or potential private partner that
1187 claims it has suffered or may suffer loss or injury as a result of any alleged breach or non-
1188 compliance of a decision or action of the contracting authority or other competent body or
1189 with the requirements of this law, the PPP regulations or any other relevant applicable law,
1190 in connection with the selection, preparation, appraisal, procurement or implementation of
1191 a PPP, may challenge the decision or action concerned and pursue any available remedies in
1192 accordance with the relevant review and appeal procedures provided by this law or otherwise
1193 under applicable law. The PPP regulations may provide specifically for such procedures.

1194 2. **Grievance Procedures to provide for Effective Challenge.** Any such procedures
1195 specifically provided by the PPP regulations shall aim to ensure (inter alia) that any such
1196 decision or action can be effectively challenged and reviewed without delay and, if possible,
1197 before it is carried into effect in relation to the relevant PPP, and that powers to take
1198 appropriate interim or interlocutory measures and steps are accordingly available, with a view
1199 to correcting the alleged breach or non-compliance and mitigating the loss or injury
1200 concerned at the earliest possible stage. Such measures and steps may (subject to their terms)
1201 include the power to open up, review, revise and/or annul any decision, certificate, approval,
1202 document, order or resolution made or given hereunder, and/or to suspend or cancel any
1203 procedure or course of action being followed under this law. Such procedures may also
1204 (subject as aforesaid) include the power to award compensation or damages to the person
1205 suffering loss or injury and even to cancel or set aside a PPP altogether in appropriate
1206 circumstances specified therein.

1207 3. **Other Procedures to allow for Interim Measures.** The PPP regulations shall aim to
1208 ensure that the detailed procedures drawn up under this law (including Article 12.5), for the
1209 purposes of selection, preparation, appraisal, procurement and implementation of PPPs, shall
1210 provide for sufficient time, following the taking of key decisions or the issue of key approvals
1211 or resolutions thereunder, to allow for the interim or interlocutory measures and steps referred
1212 to in paragraph 2 above to be taken.

1213 **VI. CHAPTER V. PPP CONTRACTS**1214 **Article 24. Main Terms and Conditions of PPP Contracts**

1215 1. **Contract Terms as agreed by the Parties.** PPP contracts shall contain such terms,
1216 consistent with the implementation resolution and tender documents for the relevant PPP, as
1217 the parties to them may deem appropriate and agree between them, or as may otherwise be
1218 prescribed by law (expressly or by implication), including terms relating to the following:

1219 (a) The parties to the PPP contract;

1220 (b) The subject matter of the PPP contract, including the nature and scope of works
1221 to be performed and services to be supplied and the public infrastructure and/or the public
1222 services to which it relates;

1223 (c) The (relevant) technical and economic characteristics and requirements of the
1224 public infrastructure comprised in the PPP;

1225 (d) The specific rights and obligations of the parties in relation to the PPP's
1226 implementation, including the nature and extent of exclusivity, if any, of the private partner's
1227 rights;

1228 (e) Any conditions precedent to the parties' rights and obligations (in whole or
1229 part);

1230 (f) The duration of the PPP contract and any mechanism for extending it (subject
1231 to Article 8);

1232 (g) Applicable performance levels, volumes and/or standards for the works, good
1233 and/or services to be provided by the private partner, including Key Performance Indicators
1234 (kpis) and guarantees, and any obligations of the private partner to modify public service
1235 levels to meet actual demand and ensure its continuity and provision under essentially the
1236 same conditions for all users;

1237 (h) Any performance penalties payable by the private partner for failing to meet
1238 the requisite performance levels, volumes and/or standards;

1239 (i) The private partner's rights (if any) to charge third parties (including end users)
1240 for its works, goods and/or services, any conditions applicable thereto (such as the amounts
1241 and methods of payment), any mechanisms for revising or modalities for varying them, and
1242 provision for any public subsidy where applicable;

1243 (j) Any payments (if any) to be made to the private partner by the contracting
1244 authority and/or any other public authority for its works, goods and/or services (such as
1245 availability payments, 'shadow tolls', output-based payments, other types of performance-
1246 based payment, off-take payments or otherwise), the methods and formulae for calculating
1247 them, any other conditions applicable thereto, any mechanisms for revising or modalities for
1248 varying them, any relevant cost breakdowns and the applicable payment procedures;

1249 (k) Any payments to be made by the private partner to the contracting authority
1250 (or the Government) for the PPP (whether lump sum, regular, periodic or otherwise),
1251 including PPP fees and (where applicable) revenue sharing, and/or its obligations to collect
1252 tariffs on behalf of the Government;

1253 (l) Any requirements relating to the incorporation of the private partner (including
1254 a special-purpose vehicle formed in accordance with this law) and its corporate structure and
1255 capitalisation, and to subsequent changes to them;

- 1256 (m) The nature of and responsibility for funding and/or financing the PPP (whether
1257 by means of public support, private finance, debt, equity and/or other sources);
- 1258 (n) Responsibility for obtaining relevant licenses, permits and consents from other
1259 public authorities and/or assisting with the processes involved;
- 1260 (o) Coordination of activities comprised in the PPP with other public authorities;
- 1261 (p) Procedures for regular interfacing and co-operation between the parties, with
1262 a view to promoting collaboration and the amicable resolution of potential differences and
1263 disputes;
- 1264 (q) Applicable design and construction (or reconstruction/ rehabilitation)
1265 obligations, requirements and procedures;
- 1266 (r) Applicable operational and maintenance obligations, requirements and
1267 procedures;
- 1268 (s) Time periods for performance of specific obligations (and any mechanisms for
1269 extending them);
- 1270 (t) Procedures for determining or certifying completion of specific obligations;
- 1271 (u) Responsibilities for acquisition, transfer, use and maintenance of the site for
1272 the PPP and access to it, including any easements;
- 1273 (v) Responsibilities for protecting and securing the PPP and the site;
- 1274 (w) The nature and allocation of property rights and interests relating to the PPP,
1275 the site and the assets it comprises (including any assets which the private partner may be
1276 allowed to own outright or indefinitely);
- 1277 (x) The nature of any supporting infrastructure, transport linkages and/or utility
1278 supplies, and responsibility for their provisions and maintenance;
- 1279 (y) Development and use of facilities ancillary or incidental to the PPP and any
1280 revenues generated from them;
- 1281 (z) Employment and labour-related (including 'local content') requirements;
- 1282 (aa) Compliance with applicable laws;
- 1283 (bb) The monitoring, review, inspection and approval rights and powers of the
1284 contracting authority throughout the term of the PPP contract;
- 1285 (cc) Information-provision and reporting responsibilities and procedures;
- 1286 (dd) Obligations of each of the parties to engage with stakeholders and address their
1287 legitimate grievances through appropriate grievance mechanisms;
- 1288 (ee) Sub-contracting and the private partner's responsibility and liability for its sub-
1289 contractors;
- 1290 (ff) Any 'step-in rights' (as defined in Article 29) granted to the contracting
1291 authority;
- 1292 (gg) Any 'step-in rights' (defined as aforesaid) granted to the private partner's
1293 lenders;
- 1294 (hh) The private partner's rights to grant financial security interests in and over its
1295 PPP-related assets and rights;
- 1296 (ii) Ownership and use of intellectual property;
- 1297 (jj) Confidentiality;

- 1298 (kk) Mechanisms and procedures for exempting the parties from liability and/or
1299 providing appropriate protection and/or compensation (including by modifying the PPP
1300 contract) to allow for the impact of events beyond the control of the affected party, such as
1301 force majeure, change in law and other ‘exceptional events’;
- 1302 (ll) Any variation (and related cost adjustment or recovery) mechanisms and
1303 procedures for making of other amendments to the PPP contract;
- 1304 (mm) Termination of the agreement, including grounds for termination, procedures,
1305 the effect of lender step-in rights, and provision for any compensation payments;
- 1306 (nn) Appropriate steps to be taken with a view to minimizing the adverse impact of
1307 any early termination on the continuity of public service provision in connection with the
1308 PPP;
- 1309 (oo) Responsibilities relating to expiry of the term, including any hand-over of the
1310 PPP assets (except where the private partner owns them outright) and related training and
1311 transfer obligations, and where appropriate decommissioning and associated financing
1312 responsibilities;
- 1313 (pp) Insurance requirements (including if relevant insurance relating to climate-
1314 change events);
- 1315 (qq) Environmental and social obligations, including any specific requirements
1316 relating to the SDGs and the People-first PPP Principles, together with obligations to manage,
1317 monitor and report on relevant impacts and to implement corrective actions as necessary
1318 throughout the life of the project;
- 1319 (rr) Governing law and dispute-resolution mechanisms;
- 1320 (ss) Liability and indemnities;
- 1321 (tt) Waivers of sovereign immunity;
- 1322 (uu) Representations and warranties;
- 1323 (vv) Such other terms as the parties may agree.

1324 **2. Available Contract Structures.** The parties to a PPP contract shall be entitled to
1325 agree on such contractual and commercial forms and structures as seem to them most
1326 appropriate for the PPP concerned, and which they consider to be best suited to give effect
1327 to its principal characteristics and features, including any which are known and used as a
1328 matter of recognized international best practice.

1329 **Article 25. Conclusion, Amendment and Termination of PPP Contracts**

- 1330 **1. Conclusion of Contract.** The PPP contract for any PPP shall be concluded by the
1331 contracting authority with the private partner selected on the basis of Chapter IV of this law,
1332 together with any other person(s) whom they agree shall be a party to it.
- 1333 **2. Termination of Contract.** The PPP contract shall terminate upon the expiry of its
1334 term (subject to any provisions **expressed** to survive termination). An early termination may
1335 occur where the agreement so permits or in accordance with applicable law.
- 1336 **3. Amendments and Termination by Agreement.** The parties may amend or vary any
1337 terms of the PPP contract or terminate it by mutual consent at any time, but subject always
1338 to its provisions, the terms of any direct agreement and any conditions or restrictions under
1339 applicable law or the PPP regulations, including as to any further consents or authorisations
1340 required.

1341 (a) [ALTERNATIVE 1: In particular, any amendment or modification (other than
1342 one already provided for in clear and precise terms in the contract) which would materially
1343 alter any of the [fundamental or essential elements or aspects] of the PPP or its terms and
1344 conditions, and which played a significant part in either its appraisal and approval under
1345 Article 12 and/or the decision to award the project to the private partner pursuant to any
1346 competitive tendering process held under this law, shall require the approval or endorsement
1347 of the competent body designated for this purpose (if any) herein or in the PPP regulations
1348 before such amendment or modification becomes effective. Such approval or endorsement
1349 may be subject to further specific conditions (including in certain cases even the re-tendering
1350 of the PPP contract). The basis on which any such competent body may give or withhold its
1351 approval or endorsement, and specify further conditions, shall be set out or reflected in the
1352 PPP regulations.]

1353 (b) [ALTERNATIVE 2: In particular, any amendment or modification (other than
1354 one already provided for in clear and precise terms in the contract) which would render the
1355 contract substantially different in character from the one initially concluded shall require the
1356 approval or endorsement of the competent body designated for this purpose (if any) herein
1357 or in the PPP regulations before such amendment or modification becomes effective. An
1358 amendment or modification shall be deemed to be substantial where it meets one or more of
1359 the following conditions:

- 1360 (i.) The total value of the remuneration of the private partner resulting from the
1361 amendment would exceed [] per cent of the total value of all remuneration which
1362 the private partner is expected and entitled to receive from the PPP over its term,
1363 assessed on a comparable, present value basis. Where several successive
1364 amendments or modifications are made, such value shall be assessed on the basis
1365 of the net cumulative value of the successive modifications, over a period of [
1366] [months/years];
- 1367 (ii.) The modification introduces conditions which, had they been part of the initial
1368 contract award procedure for the PPP, would have allowed for the admission of
1369 bidders other than those initially selected or for the acceptance of a proposal other
1370 than that originally accepted or would have attracted additional participants in the
1371 contract award procedure;
- 1372 (iii.) The modification extends the scope of the works to be carried out and/or services
1373 to be supplied by the private partner under the contract by more than [] per cent;
- 1374 (iv.) Where a new private partner replaces the one to which the contracting authority
1375 had initially awarded the contract in other cases than those provided for under this
1376 law].

1377 4. **Unilateral Termination.** Where it so provides, the PPP contract may also be
1378 terminated unilaterally, by written notice from one party to the other, upon the occurrence of
1379 certain specified events (such as material unremedied breach of contract, insolvency, certain
1380 types of change in law or prolonged force majeure) and subject to the satisfaction of any
1381 relevant specified conditions specified in the agreement, such as the lapse of certain time
1382 periods, compliance with applicable procedures or, where applicable law so requires, the
1383 decision of a competent court or tribunal.

1384 5. **Termination Compensation.** Where the PPP contract so provides, either party shall
1385 be entitled to compensation from the other upon its early termination for any reason
1386 (including following a default by the private partner), in an amount and on a basis calculated
1387 in accordance with its terms and, where relevant, the terms of any direct agreement. Due
1388 consideration shall be given by the parties concluding a PPP contract to the principles upon
1389 which any such compensation should be calculated, which may include or take account of
1390 (by way of illustration and without any double-counting) any of the following:

- 1391 (a) The fair value of any assets transferred to the contracting authority;
- 1392 (b) Appropriate compensation for the value of equity investments in the PPP
1393 and/or the returns expected by equity investors over the term of the agreement;
- 1394 (c) Amounts necessary to discharge outstanding debt obligations at the time of
1395 termination;
- 1396 (d) Compensation for costs and losses suffered by either party as a result of early
1397 termination, including lost profits;
- 1398 (e) The amount of any outstanding liabilities of either party at the time of its
1399 termination.

1400 The parties to the PPP contract shall be entitled to agree such terms for the payment of such
1401 compensation as seem to them most appropriate in all the circumstances, and which are
1402 consistent with applicable law and any relevant constraints it may impose, such as the need
1403 to avoid unjust or undue enrichment or any disproportionate penalties for breach of contract.

1404 6. **Other Termination Steps.** The PPP contract may provide, as appropriate, for
1405 any of the following upon or following its termination or expiry:

- 1406 (a) Mechanisms and procedures for the transfer of assets to the contracting
1407 authority;
- 1408 (b) The compensation to which the private partner may be entitled in respect of
1409 assets transferred to the contracting authority or to a new private partner or purchased by
1410 the contracting authority;
- 1411 (c) The transfer of technology required for the operation and maintenance of the
1412 PPP;
- 1413 (d) The training of the contracting authority's personnel or of a successor private
1414 partner in the operation and maintenance of the PPP;
- 1415 (e) The provision, by the private partner, of continuing support services and
1416 resources, including the supply of spare parts, if required, for a reasonable period after the
1417 transfer of the PPP to the contracting authority or to a successor private partner;
- 1418 (f) Mechanisms and procedures for the decommissioning of the PPP, including
1419 the preparation of a decommissioning plan, the parties' respective obligations for carrying
1420 it out and their financial obligations in that respect.

1421 **Article 26. Property and Related Matters**

1422 1. **Provision of Necessary Property.** The contracting authority shall be responsible for
1423 ensuring the effective provision to the private partner of any and all existing land, buildings,
1424 facilities, structures, parcels or plots of land, easements, rights of access and egress, and all
1425 other real property-related assets, which are needed by it for the purpose of implementing the
1426 PPP (whether or not owned or controlled by the contracting authority), in accordance with
1427 the requirements of the PPP contract, except where such assets have already been acquired
1428 by the private partner or the PPP contract provides otherwise.

1429 2. **Rights of Access.** The contracting authority shall also make available to the private
1430 partner, or, as appropriate, assist it to enjoy the right to enter upon, transit through, do work
1431 or fix installations upon property of third parties, as appropriate and required for the purpose
1432 of implementing the PPP in accordance with applicable law.

1433 3. **Transfer of Contracting Authority Property.** The contracting authority shall be
1434 entitled to transfer to the private partner the use and occupation (with or without ownership)

1435 of any available real property in its possession and/or under its control or operational
1436 management and which it is not precluded by law from transferring, including public
1437 infrastructure and any related land, buildings or similar property, which is needed for the
1438 purposes of the PPP, in accordance with the terms of the PPP contract and any related
1439 documents.

1440 4. **No Further Tenders.** It shall not be necessary to conduct a separate tender in
1441 connection with the provision of any property or assets referred to in this Article in
1442 accordance with the terms of a PPP contract.

1443 5. **Third Party Property.** Where any property or assets referred to above are in the
1444 ownership or possession of third parties, the contracting authority shall (or shall procure that
1445 any other relevant public authority shall) either:

1446 (a) Acquire or obtain the same by agreement with the relevant third parties;

1447 (b) Arrange for their compulsory acquisition or alienation in accordance with
1448 applicable law (and subject always to the requirements thereof, including as to appropriate
1449 planning, consultation, compensation, relocation and monitoring duties); and/or

1450 (c) Otherwise acquire or procure such other legal rights over and to such assets in
1451 accordance with applicable law

1452 as may be necessary for the purposes of the PPP and the discharge of its responsibilities under
1453 this Article 26.

1454 6. **Grant of Legal Interests and Rights.** The parties to the PPP contract shall be entitled
1455 to grant each other such legal interests and rights, consistent with applicable law and the
1456 terms of the PPP contract, in or related to any property the subject matter of the PPP, as may
1457 be necessary to implement the PPP. Such interests and rights may include (for example)
1458 outright ownership, leases, sub-leases, licenses, easements, rights of use and such other rights
1459 and interests as the parties may agree. All such rights and interests shall be provided or
1460 allowed for as appropriate under the terms of the PPP contract and/or any related agreements.

1461 7. **'Back-to-Back' Interests and Rights.** The private partner shall be entitled to grant
1462 third parties equivalent or similar interests and rights in or related to any property to in this
1463 Article to those granted to it hereunder (including sub-contracts, sub-leases, sub-licenses,
1464 etc.) as may be necessary to implement the PPP and permitted by the terms of the PPP
1465 contract and applicable law.

1466 8. **Identification of Assets.** The PPP contract may, if appropriate, identify which assets
1467 comprised in the PPP are or shall be public property and which are or shall be the property
1468 of the private partner, and provide for the specific treatment thereof during its term or upon
1469 its termination or expiry. In particular, it may identify which assets belong in the following
1470 categories: (a) assets, if any, that the private partner is required to return or transfer to the
1471 contracting authority or another entity; (b) assets, if any, that the contracting authority may,
1472 at its option, purchase from the private partner; and (c) assets, if any, that the private partner
1473 may retain or dispose of.

1474 **Article 27. Types of Payment under PPP Contracts**

1475 9. **Payments to Private Partner: General.** The PPP contract may provide for such
1476 payments to be made to and/or levied and retained by the private partner, for the performance
1477 of its responsibilities, in such form and amounts and subject to such conditions as may be
1478 agreed by the parties to the PPP contract and not prohibited by applicable law. These may
1479 include:

1480 (a) Payments from end users, such as tolls, tariffs, fees and other forms of usage
1481 or 'direct user' payments, subject to any applicable legal or regulatory restrictions;

1482 (b) Payments from the contracting authority to the private partner, such as
1483 availability payments, other performance-based payments, shadow tolls, capacity payments,
1484 off-take payments, subsidies and other forms of regular or periodic payment or 'revenue
1485 stream', subject to any applicable legal or regulatory restrictions;

1486 (c) Any other legally available and permissible forms and types of payment

1487 The PPP contract may provide as appropriate for the methods and formulas for the
1488 establishment and adjustment of any such payments.

1489 10. **Payments to Contracting Authority.** The PPP contract may also provide that the
1490 private partner shall make certain payments to the contracting authority, such as PPP fees,
1491 rents, royalty payments, revenue or profit shares, whether lump-sum or periodic, or such
1492 other form of payment consistent with applicable law as may be agreed by the parties to the
1493 PPP contract.

1494 11. **Combinations of Payment.** The PPP contract may provide for a combination of any
1495 of the types or forms of payment referred to above.

1496 **Article 28. Liability of Parties to the PPP Contract**

1497 1. **General.** The parties to the PPP contract shall have such liability for any breach of its
1498 provisions and be subject to such remedies (including damages and penalties) as may be
1499 provided for under its terms and/ or applicable law.

1500 2. **Specified Remedies.** Any remedies specifically provided for in the PPP contract shall
1501 not be deemed to be exclusive or exhaustive except to the extent that the agreement expressly
1502 provides otherwise.

1503 3. **Sub-Contracts etc.** The private partner shall be entitled to sub-contract, sub-lease or
1504 sub-license its rights and obligations under the PPP contract to third parties in accordance
1505 with the terms of the contract and shall have such liability for the acts and omissions of any
1506 such third parties as may be provided thereunder.

1507 **Article 29. Step-in Rights and Substitution of Parties to the PPP** 1508 **Contract**

1509 1. **Step-In Rights Permitted.** The parties to the PPP contract shall be entitled to include
1510 provisions in the contract and/or any related documents (including in a 'direct agreement'
1511 with the lenders) which allow the contracting authority and/or the lenders, in specifically-
1512 defined circumstances and subject to applicable law, temporarily to take over and manage,
1513 in whole or part, the operation of the facility and/or provision of the services comprised in
1514 the PPP ('step-in rights') during the term of the PPP contract, to ensure their continued
1515 operation and/or provision, and the effective functioning of the PPP, subject to the agreed
1516 conditions and procedures. Such conditions and procedures may (inter alia) require the
1517 parties to take all reasonable care to exercise any step-in rights in such a way as to avoid or
1518 minimise any material adverse impact on the provision of any relevant public services to end
1519 users or their use of any relevant public infrastructure.

1520 2. **Lenders' Associated Rights.** It is acknowledged that the lenders' step-in rights under
1521 their direct agreement may include;

1522 (a) The right to prevent any threatened termination of the PPP contract by the
 1523 contracting authority from proceeding for specified periods of time and subject to specified
 1524 conditions;

1525 (b) The right to substitute the private partner, in whole or part, temporarily with
 1526 another legal person, who shall be entitled to exercise the rights and obliged to perform the
 1527 duties of the private partner under the PPP contract for a period of time, without transferring
 1528 the PPP contract to another party;

1529 (c) The right to replace the private partner altogether with another private partner
 1530 on behalf of the lenders for the duration of the PPP contract term, and to transfer the PPP
 1531 contract (and all the rights and obligations thereunder) to it; and/or

1532 (d) The right to be paid termination compensation payments directly from the
 1533 contracting authority in satisfaction of amounts owing to them in relation to the PPP.

1534 3. **No Further Tender.** It shall not be necessary for the contracting authority to hold any
 1535 further public tender where any such step-in or substitution rights are exercised, provided
 1536 that the relevant requirements and procedures are complied with.

1537 VII. CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES

1538 Article 30. Protection of Parties' Interests under the PPP Contract: 1539 Miscellaneous

1540 1. **Exclusivity.** The contracting authority may grant the private partner exclusive rights
 1541 to perform the activities specified in the PPP contract (subject always to applicable law), in
 1542 order to strengthen the technical and economic viability of the PPP and facilitate the
 1543 achievement of its objectives, including the public benefits envisaged for it.

1544 2. **Licences and Permits.** The private partner shall have primary responsibility for
 1545 obtaining and maintaining the necessary licences and permits for the PPP relating to its own
 1546 activities, in accordance with applicable law. The contracting authority shall provide all
 1547 appropriate assistance to the private partner in connection therewith, including assistance
 1548 with coordinating and facilitating their application and grant, and shall obtain or provide any
 1549 relevant licences or permits in accordance with their terms for which it is itself responsible.

1550 3. **No Undue Interference.** The contracting authority shall not take any steps or
 1551 measures which would have the effect of unduly interfering with, obstructing or prejudicing
 1552 the private partner's freedom to control and manage the assets and activities comprised in the
 1553 PPP and to exercise its rights and perform its obligations thereunder, including its rights to
 1554 receive and enjoy the revenues and returns on investment properly derived therefrom, save
 1555 only as permitted by the express terms of the PPP contract and/or applicable law.

1556 4. **Adequate Returns from Payments.** The parties to the PPP contract shall be entitled
 1557 to agree on and include such payment terms, and such mechanisms for revising and adjusting
 1558 them from time to time, as can be reasonably expected to provide adequate compensation
 1559 and returns to the private partner (and its investors and lenders) for its (and their) costs,
 1560 expenses, investments and commitments in connection with the implementation of the PPP,
 1561 based upon the efficient performance of the private partner in accordance with the contract's
 1562 terms [notwithstanding that any regulated tariffs or prices payable in [*host country*] for the
 1563 works, goods or services comprised in the PPP may not otherwise ensure such adequate
 1564 compensation].

1565 5. **Exceptional Events.** PPP contract may also contain such provisions as the parties
 1566 thereto may agree identifying or listing certain types of 'special event', including changes in

1567 law, *force majeure* or other exceptional events, which may trigger certain consequences
 1568 under the contract designed to protect the party affected by such event and compensate it for
 1569 the costs or losses sustained as a result, including financial or economic costs or losses, such
 1570 as:

- 1571 (a) Relief from liability of a party prevented from performing its obligations under
 1572 the agreement;
- 1573 (b) Amendments to the terms of the PPP contract, including (by way of
 1574 illustration) amendments changing the scope of work, the time for performance, applicable
 1575 standards or the contract's duration;
- 1576 (c) Adjustments to charging and payment rates, amounts and levels;
- 1577 (d) Obligations to provide financial compensation;
- 1578 (e) Unilateral rights of early termination of the PPP contract and the payment of
 1579 related compensation.

1580 **6. Essential Shareholders.** Except as otherwise provided in the PPP contract (but
 1581 subject always to the PPP regulations), a controlling interest in the private partner or the
 1582 interest of a shareholder whose participation therein is reasonably deemed to be essential for
 1583 the successful implementation of the PPP, may not be transferred to third parties without the
 1584 consent of the contracting authority. The PPP contract shall set forth the conditions under
 1585 which the consent of the contracting authority may be given.

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1587 **Article 31. Government and Public Support for PPPs**

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1589 **1. General and Specific Forms of Support.** The contracting authority and/or the
 1590 Government shall be entitled to provide, contribute or make available to or for the benefit of
 1591 any PPP such forms and means of public support, assets and/or commercial or financial
 1592 commitments, as may either be generally permitted or available under applicable law and/or
 1593 as the PPP regulations may specifically provide for from time to time, such as:

- 1594 (a) Any of the forms of payment referred to in Article 27
- 1595 (b) Construction and/or operational grants;
- 1596 (c) Subsidies;
- 1597 (d) Contributions of physical assets and property;
- 1598 (e) Guarantees and incentives, including guarantees of PPP revenues, whether
 1599 from end users, off-takers or otherwise;
- 1600 (f) Guarantees of minimum quantities of off-take or consumption by the
 1601 contracting authority;
- 1602 (g) State or municipal financial guarantees;
- 1603 (h) Loans and other forms of funding or investment;
- 1604 (i) Compensation or direct responsibility for certain types of costs and risks;
- 1605 (j) Tax and customs benefits and exemptions;
- 1606 (k) Other guarantees and/or indemnities and/or incentives.

1607 **2. Support to be Compliant.** Any such support, assets and/or commitments must be
 1608 consistent with the appraisal and approval criteria applied under Article 12, the
 1609 implementation resolution and the tender documents for the PPP for which they are to be

1610 used. The terms and conditions applicable to any such support, assets and/or commitments
1611 shall be set out in the PPP contract (and/or in any related agreement).

1612 **Article 32. Protection of Lenders' and Investors' Rights and Interests**

1613 **1. General.** The PPP contract and/or any direct agreement may, for the avoidance of
1614 doubt, provide for such protections for and the rights and powers of the private partner's
1615 lenders and investors as the parties thereto may agree, consistent with applicable law, as may
1616 be necessary and appropriate to ensure the successful financing of the PPP.

1617 **2. Direct Agreements Permitted.** Such protections, rights and powers may (*inter alia*)
1618 set out the detailed procedures and conditions applicable to the exercise of any step-in rights
1619 and rights of substitution and/or replacement of the private partner (in accordance with
1620 Article 29), together with any other specific entitlements of the lenders permitted thereby
1621 (such as direct payment of termination compensation or insurance proceeds).

1622 **3. Permitted Security.** Subject to any restrictions that may be contained in the PPP
1623 contract, the private partner may grant or create any form of security interest over any of its
1624 assets, rights and interests comprised in or related to the PPP, which are available under
1625 applicable law, as may be required to secure any financing needed for the PPP. These may
1626 include (by way of illustration) property mortgages, security over movable and immovable
1627 property and over tangible and intangible assets, enterprise mortgages, fixed and floating
1628 charges, assignments, pledges of bank accounts, pledges of the proceeds of the PPP or of
1629 receivables owed to the private partner, and other available forms of security. No such
1630 security may be created over public property or any other property, asset or rights needed for
1631 the provision of a public service where and to the extent that such security is prohibited by
1632 applicable law.

1633 **4. Shareholder Security.** The private partner's shareholders and other owners may
1634 grant or create any form of security interest over their shares or ownership interests in the
1635 private partner that may be available under applicable law.

1636 **5. No Replacement of Private Partner without Consent.** Save as otherwise provided
1637 in paragraphs 3 and 4 above and in Article 29, the rights and obligations of the private partner
1638 under the PPP contract may not (subject to its terms) be assigned and transferred to any third
1639 party in place of the private partner without the contracting authority's consent. The PPP
1640 contract shall set forth the conditions under which the contracting authority may give its
1641 consent to any such assignment and transfer, including valid acceptance by the relevant third
1642 party of all obligations transferred to it, their enforceability against it and evidence of its
1643 technical, managerial and financial capability to perform them. Provided always that no such
1644 restriction shall prevent the private partner from sub-contracting or sub-leasing its rights and
1645 obligations under the PPP contract in accordance with its terms.

1646 **Article 33. Protection of End Users and the General Public**

1647 **1. Detailed PPP Procedures: End Users and the General Public.** Any detailed
1648 procedures specified in the PPP regulations relating to the selection, preparation, appraisal,
1649 procurement and implementation of PPPs shall take due and reasonable account as
1650 appropriate of the legitimate needs and best interests of members of the general public and
1651 end users of the public services to which the relevant PPPs relate and who stand to be affected
1652 by the same.

1653 **2. Grievance Procedures.** Such procedures shall provide as appropriate for the adoption
1654 of suitable mechanisms for lodging formal objections or other complaints or grievances by

1655 members of the general public and end users to or about any aspect of such implementation
1656 by which they may be materially adversely affected, including where appropriate a regulatory
1657 or parliamentary ombudsman procedure. No such mechanisms shall in any manner limit or
1658 prejudice any other rights and remedies available to such members of the general public or
1659 end users under applicable law in relation to any PPP or its selection, preparation, appraisal,
1660 procurement or implementation. Any such procedures shall take account as appropriate of
1661 such other rights and remedies.

1662 3. **Private Partner's Operational Grievance Mechanism.** Where the PPP involves
1663 the provision by the private partner of services to the public or the operation of
1664 infrastructure facilities accessible to the public, the contracting authority shall require
1665 the private partner to establish simplified and efficient mechanisms for handling
1666 claims submitted by the members of the public receiving the services or using the
1667 infrastructure facility, as well as other parties affected by the PPP. The PPP contract
1668 shall provide for any such requirements. The private partner shall maintain accurate
1669 and complete records of the operation of any such mechanisms and the claims
1670 submitted and handled thereunder.

1671 4. **Public Services: Specific Provisions.** Where the PPP involves or relates to the
1672 provision by the private partner of services to the public, the PPP contract shall, if
1673 necessary and as appropriate (in accordance *inter alia* with any applicable
1674 requirements of the relevant regulatory body), set forth the nature and extent of any
1675 obligations of the private partner, over the term of the contract, to ensure:

1676 (a) Any necessary modifications of or adjustments to the services so as to meet
1677 changing demands for them;

1678 (b) The continuity of the services;

1679 (c) The provision of the services under essentially the same conditions for all
1680 users;

1681 (d) The non-discriminatory access, as appropriate, of other service providers to
1682 any public infrastructure network or system operated by the private partner in connection
1683 therewith.

1684 5. **Rules for Use of Infrastructure Facility.** Where the PPP involves or relates to
1685 the use by third parties or members of the public of an infrastructure facility, the private
1686 partner shall have the right to issue and enforce rules governing such use of the facility,
1687 which shall be subject to any requisite approvals of the contracting authority or other
1688 relevant public authority (such as a regulatory body). The PPP contract may provide
1689 for the making of any such rules and their enforcement.

1690 VIII. CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION

1691 Article 34. Governing Law

1692 1. **Governing Law of PPP Contract.** The PPP contract shall, subject to applicable law,
1693 be governed by the system of law chosen by the parties, but subject to a presumption that,
1694 save in exceptional circumstances, the law of [*host county*] shall apply. The law of [*host*
1695 *country*] shall apply where the PPP contract does not provide otherwise.

1696 2. **Governing Law of Other Contracts.** Other contracts and documents entered into in
1697 relation to the PPP (including any direct agreement) shall be governed by the systems of law
1698 chosen by the parties to them, taking account of any applicable law requirements.

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Article 35. Dispute Resolution1700
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1. **Dispute Resolution Mechanisms as agreed.** Any differences or disputes arising out of the contracts or documents relating to a PPP shall be resolved or settled through the mechanisms, processes and procedures agreed by the parties thereto, but subject always to any specific requirements relating thereto under applicable law.

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2. **Freedom of Choice.** The parties to such contracts and documents may (subject as aforesaid) freely choose the mechanisms, processes and procedures for resolving such differences or disputes, including mediation, binding or non-binding expert appraisal or determination, national or international commercial arbitration or investment arbitration, and the procedural rules relating to the same.

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3. **Waiver of Sovereign Immunity.** The contracting authority shall not to be entitled to any state or sovereign immunity in relation to any differences or disputes under any such contract or document which it has properly agreed to waive thereunder.

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1713**IX. CHAPTER VIII. IMPLEMENTATION AND MONITORING OF PPPs**

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Article 36. Monitoring and Reporting on the Implementation of PPPs1715
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1. **Supervision by Contracting Authority.** Subject to the terms of the relevant PPP contract, the contracting authority shall be entitled to exercise such powers of supervision and monitoring of any PPP as may be necessary to satisfy itself that it is being implemented in accordance with its terms, including by means of regular reports, reasonable access to the site and physical assets comprised in it, access to and copies of any documentation relating to it and independent audits.

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2. **Contracting Authority Reports.** Each contracting authority shall prepare regular reports on the implementation of the PPPs for which it is responsible, as required by the PPP regulations or otherwise by the Government from time to time, which shall be made available to the Government and copied where required to the PPP Unit. Copies of all such reports shall generally be publicly available.

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3. **Additional Information.** Each contracting authority shall also provide any additional specific information to the Government and/or the PPP Unit as it may reasonably require from time to time in relation to the implementation of any PPPs for which such contracting authority is responsible.

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4. **Contracting Authority Records.** Each contracting authority shall maintain accurate and complete records in reasonable detail of the procedures followed, decisions made, and conclusions reached by it in connection with the identification, selection, preparation, procurement and implementation of any PPP for which it is responsible.

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Article 37. PPP Database and Register1735
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1. **PPP System Database.** The Government or the PPP Unit shall maintain a detailed database covering all PPPs implemented in [*host country*] [after the date of this law], containing such information as may be required by the PPP regulations. The database shall be designed to provide a reasonably comprehensive, up-to-date and clear compendium of material information about the PPPs that have been or are being implemented in [*host country*] at any one time.

1741 2. **Database Publicly Available.** The PPP database shall be publicly available, subject
1742 to any applicable confidentiality or non-disclosure restrictions permitted by the PPP
1743 regulations or applicable law.

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1745 **X. CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS**

1746 **Article 38. Entry into Force**

1747 1. **Effective Date.** This law shall enter into force on [] but shall not (save to the extent
1748 otherwise provided herein, including under paragraph 2 or in the PPP regulations) apply to
1749 any PPPs or equivalent or similar projects implemented, or tenders or similar procedures held
1750 and substantially completed for their award, or agreements or binding commitments entered
1751 into by the contracting authority in relation to them, before that date.

1752 2. **Monitoring Antecedent Projects.** The Government shall be entitled to require that
1753 any existing PPPs (or equivalent or similar projects) implemented before the date of entry
1754 into force of this law become subject to the monitoring and reporting requirements provided
1755 for in Article 36 (but without limiting any rights of cost recovery that the parties to any
1756 relevant agreements may have as a result of meeting any such requirements).

1757 **Article 39. Legislative Acts to be Invalidated upon Entry into Force of**
1758 **this Law**

1759 1. **Invalidation.** The following legislative Acts shall be invalidated upon entry into force
1760 of this law: [SPECIFY]

1761 2. **Conflict with Antecedent Laws.** In the event of any conflict or inconsistency
1762 between this law and any extant prior laws relating to or applying to PPPs in [*host country*],
1763 the provisions of this law shall prevail (unless specifically provided otherwise).

1764 **Article 40. Consequential Revisions to Existing Legislation**

1765 1. **Disapplication of Specific Laws.** The provisions of the following laws shall not apply
1766 to PPPs awarded or implemented after the date of entry into force of this law pursuant to
1767 Article 38 above, subject to the additional qualifications specified below:

1768 [SPECIFY]

1769 2. [Alternative 1]. **Specific Amendments to Existing Laws.** The following amendments
1770 shall be made or be deemed to have been made to the following existing laws and legislative
1771 acts in order to give effect to the provisions of this law: [SPECIFY]

1772 3. [Alternative 2] **Deadline for Consequential Revisions.** The Government shall,
1773 within a period of [] months from the date of entry into force of this law, amend, modify or
1774 repeal any other applicable laws relating to or affecting PPPs as necessary to bring the same
1775 into conformity with this law.

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1778 **[ENACTMENT FORMALITIES TO BE SET OUT BELOW]**

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Annex I

1788

Draft UNECE/EBRD People-first Model PPP Law

1789

Introduction and commentary

1790

I. Preface

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

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

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

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Many PPP laws have been adopted by different countries around the world in the past few years⁶. Others are now doing so or planning to do so. However, there is still a considerable disparity in the quality of those laws already in place around the world. Some constitute extremely well thought-out and structured ones, others rather less so. Moreover, most of these laws do not yet take into account the challenges that have arisen in attracting private business to infrastructure in connection with the adoption of the UN Sustainable Development Goals,

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

1822 and in particular their ‘People-first PPP Principles’.⁷ In the authors’ view, this reinforces the
1823 case for publishing a new PPP Model Law.

1824 In drawing up this Model Law, the authors have made extensive use of those existing laws
1825 which they believe represent leading precedents and international best practice in this field⁸.
1826 On the one hand, the availability of these documents has made the production of a Model
1827 Law based on them readily feasible; on the other, the number of countries still seeking to
1828 enact new or revised legislation of this kind provides a clear justification for publishing a
1829 model, in terms of offering further available guidance.

1830 Moreover, UNCITRAL have recently revised and finalised their own Legislative PPP Guide
1831 (with template clauses) on this subject, which has been a leading authoritative text in this
1832 field for the past 20 years⁹. The authors of the Model PPP Law have drawn heavily and
1833 fruitfully on both the existing published UNCITRAL clauses-and their recent revisions¹⁰ in
1834 structuring and wording its provisions, which cover a good deal of the same ground and are
1835 designed to be generally compatible with them. Many of the same concepts and much of the
1836 same phraseology has been used where possible. The documents are accordingly very similar
1837 and, we believe, wholly consistent. Any differences between them come down largely to the
1838 individual judgment and style of the different authors behind them, and the slightly different
1839 approaches taken to their production, in particular the fact that the Model PPP Law is a joint
1840 UNECE-EBRD exercise. It is also worth remembering (see further below) that there is no
1841 single perfect provision for any model law, especially one designed for use by governments
1842 all over the world. There can only ever be helpful suggestions, with various ways of crafting
1843 them.

1844 A great deal has also been published in recent years on the subject of PPPs and their explosive
1845 growth around the globe over the past few decades. A list of some of the best known and
1846 most highly regarded sources of guidance and information is attached as Appendix 3. Readers
1847 should please note that it would be well beyond the scope of this commentary to introduce,
1848 explain or discuss PPPs in general terms or at an abstract level. The authors have assumed
1849 that readers will have considerable knowledge of them, the issues associated with them and
1850 the practical arrangements involved. Where this is not the case, readers should turn to these
1851 other published sources for a fuller explanation.

1852 Readers should also be aware that, in May 2019, a new vision or paradigm for PPPs was
1853 formerly adopted by the UNECE. Referred to under the rubric ‘**People-first PPP**’, this has
1854 been conceived specifically with a view to encouraging governments to design and structure
1855 their PPPs in ways which are likely to foster and achieve the UN Sustainable Development
1856 Goals (‘SDGs’), and to stimulate and attract private-sector involvement on this basis. Above
1857 all, it aims to prompt governments to focus on the tangible and vital human aspects of PPPs,
1858 rather than simply approaching them as economic or financial constructs. It invites them to
1859 think hard about the impact of PPPs and their implementation at a social, environmental,
1860 ethical and human rights level, in ways which are fully compatible with the SDGs, and to
1861 ensure that PPPs genuinely advance those objectives. Hence the title ‘People-first PPP’. The
1862 principles behind the concept have been discussed and explained in a paper published by the
1863 UNECE in 2019¹¹. They aim to ensure that PPPs are accessible, affordable, sustainable and

⁷ See further below.

⁸ Please see the list set out in Appendix 2.

⁹ [Insert precise cross-reference and title once published].

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

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

1864 resilient; and that they are implemented in ways which discharge environmental
1865 responsibilities, ensure proper stakeholder consultation and involvement, avoid corruption
1866 and help to promote social justice.

1867 For some governments, especially those that are already strongly committed to the SDGs,
1868 these aims will already be part of their PPP agenda. After all, PPPs are a tool of infrastructure
1869 development. To that extent, they will be contributing to economic growth and therefore the
1870 benefit of society in any case. Nevertheless, the record shows that PPPs can sometimes be
1871 poorly conceived, structured and/or implemented, whilst many governments are still
1872 exploring and refining their commitments to the SDGs. And at these levels, the People-first
1873 PPP concept can provide invaluable guidance and focus, even if this is just a matter of
1874 emphasis. By highlighting the human, social, environmental and ethical aspects of PPPs, it
1875 should contribute to better designed PPPs in ways that are intrinsic to the United Nations'
1876 wider mission.

1877 The People-first PPP concept has now been formally supported, and its use recommended,
1878 by four United Nations Regional Commissions, namely UNECE, ECA, ESCWA and
1879 ESCAP¹², which in May 2019 announced their decision to collaborate and work together to
1880 make PPPs 'fit for purpose' for the 2030 Agenda for Sustainable Development. The Model
1881 Law has been drawn up specifically with the People-first PPP objectives in mind and makes
1882 them intrinsic to its provisions, many of which have been crafted to give effect to them. The
1883 five core principles behind them are cited in the Preamble. Article 4.2 requires all PPPs
1884 implemented under its terms to be compatible with them and designed to reflect them. Other
1885 Articles contain a number of cross-references to them. The People-first PPP Principles are
1886 accordingly referenced in the document's title.

1887 The Model Law is not, of course, a template piece of legislation which can simply be pulled
1888 down and enacted by any country introducing a law of this kind¹³. It is designed to offer
1889 guidance, not 'cut-and-paste' clauses. Careful thought will always be needed in making use
1890 of it. In the end, there are many different ways of approaching laws of this kind and the
1891 various provisions they contain. They give rise to questions and issues to which different
1892 countries will offer different answers and reach different conclusions. Furthermore, any PPP
1893 law adopted by a country must be fully compatible with its wider legal system, jurisprudence
1894 and legislative traditions, as well as the idiosyncrasies of its PPP system. Taken together,
1895 these factors may call for extensive modification to the Model Law where it is being used as
1896 a precedent.

1897 The Model Law represents the type of PPP law which aims to be relatively comprehensive
1898 in scope, setting out a robust framework governing all the fundamentals of a PPP system, the
1899 basic elements of PPP projects, and the procedures and regulatory mechanisms that apply to
1900 their preparation, award and implementation. It may not always be technically necessary at a
1901 legal level to do this. Some of the relevant legal concepts and arrangements may already be
1902 in place. The country's existing procurement regime may be adequate for PPP purposes, for
1903 example, and it may already have a long history of successfully using PPPs. In that case, a
1904 much shorter, more focused law may be appropriate, if one is needed at all. That is something
1905 each country must decide for itself. The advantage of the approach reflected in the Model
1906 Law-and the reason that approach is often taken-is that the new PPP law then becomes a
1907 comprehensive enabling statute, offering clarity and certainty across the board, so to speak,
1908 about what is feasible in the PPP context and how individual projects should be approached
1909 and implemented. This can work to the advantage of all.

¹² [Full titles to be inserted]

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

1910 It should also be noted that the Model Law is not directed primarily or even at all at member
 1911 countries of the European Union (EU) or accession countries in the process of joining it. The
 1912 EU already has a wide-ranging body of laws and requirements applicable (directly or
 1913 indirectly) to PPPs and their procurement. Because these reflect the complexities and
 1914 idiosyncrasies of EU-based law as it stands, which are not necessarily compatible with the
 1915 legal systems of other countries around the world, we thought it better not to try to make the
 1916 Model Law fully consistent with the former¹⁴. It seemed to us unnecessary to do so. Any EU
 1917 accession countries (or even member states) that do seek to draw on its provisions, then,
 1918 should also think carefully about the need to harmonize their PPP laws with the EU *acquis*
 1919 and adapt the clauses from the Model Law accordingly.

1920 The Model Law assumes a relatively low level of general regulatory control by government
 1921 over the PPPs implemented under its terms (at least outside the scope of the contractual
 1922 powers vested in each contracting authority¹⁵) and a correspondingly high degree of freedom
 1923 of contract for the parties to the relevant PPP contracts. Some countries may prefer to include
 1924 additional tiers of approval and control over a PPP's elements, terms and implementation.
 1925 The degree of regulatory control that any country seeks to establish is a matter about which
 1926 it must, again, make its own decisions, in light of its political and jurisprudential traditions
 1927 and socio-economic system.

1928 Striking an appropriate balance between rigour and transparency, on the one hand, and
 1929 flexibility and innovation, on the other, is never easy. And one important factor which needs
 1930 to be weighed in the balance (there are many others) is fighting corruption. Countries
 1931 concerned about rising levels of corruption may wish to emphasize the former at the expense
 1932 of the latter.

1933 The Model Law and this commentary are the work of a team of distinguished legal (and some
 1934 non-legal) experts in this field, who have been collaborating on this exercise for over 18
 1935 months, under the aegis of the UNECE and the EBRD. The names of the participants are
 1936 listed in Appendix 1. They comprise a wider group of some 60 professionals from around the
 1937 world, who have contributed thoughts and suggestions from the outset, and a drafting sub-
 1938 group of about 15, who were closely in the document's contents and wording. Grateful thanks
 1939 are due to both the members of the team for all their efforts, as well as to these two eminent
 1940 international institutions for their unfailing confidence and support.

1941 November 2019.

1942 II. Textual Commentary

1943 Preamble

1944 The Preamble is designed as a simple introduction to the Law. It allows the host country to
 1945 summarise the purpose of the law and to capture some of its main policy objectives and
 1946 priorities in making use of PPPs. It may be more appropriate to do this in a Preamble, which

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

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

1947 can be written in non-legal language, than in the more precise and binding legislative
 1948 language of the statute's provisions¹⁶. The text uses a short-form preamble, keeping the key
 1949 messages brief and simple. Some countries may prefer to discuss the background justification
 1950 for PPPs at greater length.

1951 It is also common these days for governments to put a detailed policy statement in place
 1952 before the PPP law is enacted. If so, the policy statement can set out all the relevant policy
 1953 priorities and objectives that are thought to be important or relevant, leaving the law to set
 1954 forth the PPP system's legally binding provisions. Either way, guidance notes or explanatory
 1955 documents of some kind are likely to be invaluable to all those working under the new system.

1956 The Preamble mentions that the Law is limited to the PPPs defined in its terms, and not to
 1957 other types of commercial or contractual arrangements between public and private sectors.
 1958 There may be many of these other arrangements in the relevant jurisdiction which should not
 1959 be governed by the PPP law (such as simple out-sourcing contracts, design and construction
 1960 contracts under traditional procurements mechanisms, certain types of franchise, consulting
 1961 contracts, other standard commercial agreements and perhaps even natural resource
 1962 concessions where these are carved out of the PPP regime (see further below)). Care needs
 1963 to be taken to ensure that they are not inadvertently caught by the language of the PPP law
 1964 in ways that may give rise to confusion.

1965 As explained in the Foreword, the Preamble also highlights the importance of the 'People-
 1966 first' values and objectives for PPPs set out in the United Nations Sustainable Development
 1967 Goals and subsequent documents (the '**People-first Principles**'). These are now accorded
 1968 the highest priority by the UNECE. They are also being promoted by the EBRD through
 1969 some of the obligatory environmental and social requirements for the projects it is funding,
 1970 and in the Green Economy Transition ('GET') policy and dialogue it has adopted in its
 1971 countries of operation. The Preamble proclaims that the Model Law enshrines those
 1972 principles and sets out a brief summary of them. Various references to them are also
 1973 embedded in the text of the Model Law. Many of its provisions have been crafted with them
 1974 specifically in mind. They are therefore intrinsic to the document and cited in its title. Each
 1975 host country should carefully consider how and to what extent it wishes to refer to these
 1976 principles. The hope and expectation of the UNECE, under whose aegis this Model Law is
 1977 being published, is that every Member State will adopt and underwrite them fully and
 1978 wholeheartedly in their PPP laws.

1979 **CHAPTER 1. GENERAL PROVISIONS**

1980 This Chapter deals with the more general aspects of PPPs and the new PPP system that may
 1981 need to be addressed for the law to be understood and applied clearly, such as definitions, the
 1982 use of regulations and guidelines, preliminary criteria and requirements, the authority to
 1983 award PPPs, applicable sectors and some of the fundamentals of a PPP contract (such as its
 1984 parties and term).

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1986 **Article 1. Scope**

1987 This article summarises the scope of the Law. Some countries may prefer to leave this largely
 1988 or even entirely to the Preamble¹⁷. The authors felt on balance that, notwithstanding the
 1989 repetition, it was appropriate to make some of the same statements legally binding in an
 1990 article, to assist the interpretation and application of the Law.

¹⁶ A country's jurisprudential traditions will also be important here. It may nevertheless be necessary to set out every 'object' and rule in the law itself.

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

1991 In particular, the article makes it clear that the Law applies to all forms of PPP, as defined by
 1992 its terms, regardless of the labels that may be attached to them. Note that some countries
 1993 distinguish formally and as a matter of jurisprudence between different types of PPP, in
 1994 particular between ‘concession’ and ‘non-concession’ PPPs, not infrequently limiting the
 1995 latter to structures involving government revenue streams and the former to those based on
 1996 direct user charges¹⁸. This can sometimes lead to the adoption of two different laws dealing
 1997 respectively with each (as in China and Serbia, for example, and in some ways France). EU
 1998 law also makes a formal distinction along these lines. Most countries, however (including
 1999 common law ones), tend to prefer to lump them all together conceptually, so to speak, and
 2000 subject them to essentially the same statutory provisions and principles. That is the approach
 2001 we have taken in this Model Law. It offers the advantages of simplicity, consistency and
 2002 comprehensiveness. It will usually be more straightforward, both conceptually and
 2003 practically, to treat all types of PPP as essentially the same, as points on a spectrum, as it
 2004 were, unless there is a clear and compelling reason to make formal legal distinctions between
 2005 different varieties.

2006 The Article, following UNCITRAL, mentions the fundamental general principles underlying
 2007 its terms, but also includes a reference to the People-first Principles.

2008 **Article 2. Key Terms and Definitions.**

2009 It is generally desirable to try not to use too many defined terms, so that each provision can
 2010 be readily understood on its own terms. Most of the terms defined in the Model Law should
 2011 be self-explanatory. A few calls for specific comment below:

- 2012 • ‘**applicable law**’ is simply a generic term for all of the host country’s domestic laws
 2013 which may be relevant to PPPs one way or another. Where those laws give effect to
 2014 its international obligations (e.g. under public international law), those too may need
 2015 to be taken into account in interpreting the Articles. Laws which are particularly
 2016 relevant to the SDGs and the People-first PPP Principles, such as laws relating to the
 2017 environmental, human rights, health and safety, indigenous peoples and citizens’
 2018 rights should be carefully thought about.
- 2019 • The expression ‘**Government**’ is intended to be understood widely, as referring to
 2020 any part of the administrative or executive branches of government legally entitled to
 2021 exercise powers or perform functions under the Law. Some of these will arise by
 2022 virtue of the Law’s provisions. Others will already be vested in the Government under
 2023 the country’s wider legal system (including its constitution). Careful thought needs to
 2024 be given to the inter-relationship between these two categories, and any possible
 2025 conflict between them.

2026 Each host country may wish to be more specific about which Government bodies are being
 2027 referred to in certain articles than we have been in the Model Law. If so, the necessary
 2028 amendments can easily be made. We have also allowed for this possibility with the generic
 2029 term ‘competent body’ which is used in a number of places in the text. There can also be
 2030 uncertainties about the extent to which local or regional bodies are being empowered under
 2031 the Law, especially where combinations of different Government bodies are involved
 2032 simultaneously in the exercise of certain functions (as contracting authorities under the same
 2033 project, for example); this, too, may need to be addressed expressly in the host country’s PPP
 2034 law.

¹⁸ At least these days. Common ‘business speak’ today often reflects this distinction. Historically, however, other factors were at least as important, such as scope and sector. In many countries in the past, the term ‘concession’ was synonymous with ‘PPP’ (or pre-dated it).

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- **‘Institutional Private Partner’/ ‘Institutional PPP’**. A PPP law may or may not include provisions dealing with Institutional Private Partners and Institutional PPPs, as a distinct, defined concept¹⁹. EU law does so, for example, as do the laws of a number of countries around the world. Many others do not. That is why we have included the expression in square-brackets. Host countries may or may not wish to do so.

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In essence, Institutional PPPs are PPPs where the contracting authority (or perhaps another public body, such as its affiliate or an SOE) and the private partner form a joint entity (‘Institutional Private Partner’) to perform some or all of the tasks under the PPP contract. It remains critical, however, that the private-sector participant should retain a majority and controlling interest in structures of this kind. For the project to be a PPP in any meaningful sense, the private sector must still assume the main responsibility for implementing it. The definition of Institutional Private Partner in the Model Law makes that clear. (The further requirements of Article 4 would also lead almost inevitably to that result). It should be borne in mind, however, that is far from uncommon for contracting authorities to take minority shareholdings in PPP companies in any event. In many jurisdictions, that will make these defined terms otiose. A separate formal category may simply be unnecessary.

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- **‘PPP guidelines’/ ‘PPP regulations’**. The host country should decide whether it wishes to allow for both of these concepts in its PPP law. (There may also be formal legal requirements under local law determining whether it should do so). The text assumes that both will be used, with the regulations containing legally binding secondary legislation filling out the details of many of the articles, and the guidelines consisting of non-binding guidance documents designed to facilitate an understanding of the workings of the PPP law and regime. Some countries may prefer to allow for only one or the other, or even to combine them in a looser, joint term (e.g. ‘PPP enabling framework’).

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- **‘public authority’**. Note that this term is not intended to refer simply to contracting authorities. It has a wider scope, designed to take in any public authority whose powers may affect or impact PPPs (including their initiation, selection, appraisal, procurement or implementation).

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- **‘public infrastructure’**. Host countries should give thought to the breadth and scope of this definition, to tailor it to its expectations for the range of PPPs it plans to use. The Model Law defines the term very broadly, to avoid any potentially awkward or unintentional restrictions on their scope and make the Model Law compatible with future developments. It includes intangible assets (such as intellectual property) and other types of asset and their operation which may be only indirectly related to infrastructure service provision (such as IT systems).

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- **‘PPP’**. The term is not always as straightforward to define as one might think! It is perhaps best not to attempt to make a definition more accurate or perfect than it needs to be, however. The critical thing is to use a short, simple definition, which captures the essentials and is reasonably robust and workable at a practical level, and above all is fully consistent with the critical requirements set out in Article 4, rather than one that is conceptually flawless. It also needs to be designed to help clarify the distinction between the PPP law and other forms of public procurement for other purposes.

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- **‘Value for Money’/‘Value for People’**. The use of this term needs very careful consideration. The PPP world has been subject to years of difficult debate about how it should be defined and interpreted. The definition in the Model Law stresses the need

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

2082 for a wide perspective, looking at the value of a PPP in terms of its broad impact on
 2083 the economy, society, the environment and the government's finances over its life,
 2084 and the net benefits it stands to generate. As such, it is very much a 'value for people'
 2085 test as well as a 'value for money' test. The two terms are therefore treated as
 2086 interchangeable in the definitions. But host countries should reflect carefully on the
 2087 meaning they wish to give it, in terms of the key tests to be taken into account when
 2088 it is applied. The draft allows for a detailed methodology for those tests to be set out
 2089 in the PPP regulations. A narrow definition (e.g. lowest price) is *not* likely to be
 2090 appropriate.

2091 **Article 3. PPP Regulations and Guidelines**

2092 As explained above, the host country should decide whether it wants (or is legally obliged)
 2093 to refer formally to both PPP regulations and guidelines in the Law. The former will usually
 2094 be necessary to complete the PPP legal regime, and so are made an obligatory feature of the
 2095 draft. The latter may or may not be, at least at a formal level, and so are mentioned in more
 2096 permissive language. The text allows the Government to designate one or more 'competent
 2097 bodies' to issue them on its behalf. Allowance is made in para. 3 for revisions to each over
 2098 time, to create the necessary flexibility for the long term. Paragraph 4 makes it clear that,
 2099 where regulations re in place, the relevant provisions of the law to which they relate should
 2100 be read and interpreted in conjunction with (and sometimes subject to) them.

2101 **Article 4. PPP Criteria and Fundamental Requirements**

2102 This article seeks to define the essential features and characteristics ('criteria') of any PPP.
 2103 It makes it clear that a PPP which complies with them is to be undertaken in accordance with
 2104 all the law's requirements. This is necessary to create clarity about which type of project
 2105 properly falls into this category, and so is subject to its provisions and procedures.

2106 Para. 1 sets out these base criteria for judging whether a particular project is indeed a PPP.
 2107 The tests are cumulative, not alternative-i.e. all of them should be met. The following should
 2108 be noted:

- 2109 • Sub-para a. Reminds legislators that PPPs need to be long-term in nature (with a
 2110 minimum term established in accordance with article 8 (if included)) and implemented
 2111 on the basis of a PPP contract that accords with chapter v.
- 2112 • Allowance is made in sub-para. B. Made for a possible minimum or threshold
 2113 (estimated) value for PPPs, but in square brackets. In essence, this is because of the
 2114 complex nature of PPPs and the time and resource necessary to make them work. Host
 2115 countries may or may not want to do this, however. If not, the sub-para. Should be
 2116 deleted. Because it can be difficult to establish what exactly any minimum value
 2117 should be, and how it should be calculated, as a matter of law, the draft assumes this
 2118 will be dealt with in the PPP regulations, rather than being firmly set out in the main
 2119 body of the law. That also introduces some flexibility to modify the threshold test over
 2120 time without amending the primary legislation.
- 2121 • Sub-para. C. Is designed to allow an appropriate degree of flexibility in terms of the
 2122 combination of physical activities which a PPP may comprise. The long-term, risk-
 2123 exposed nature of these activities should always be kept in mind. A PPP is not the
 2124 same as a construction contract or simple contract for services. It needs to contain an
 2125 appropriate element of long-term responsibility for the public infrastructure and/or
 2126 public services;
- 2127 • Sub-para d. Highlights the all-important element of risk allocation between the parties
 2128 throughout the life of the PPP project. There should be a clear element of risk-sharing
 2129 between them from beginning to end of any PPP;

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

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

Paragraph 3 is designed to create some flexibility in the treatment of smaller projects falling below the threshold value for PPPs referred to in sub-para b. *Prima facie*, these would be outside the scope of the law. However, legislators may wish to make special provision of some kind for at least some of them in the regulations, perhaps by way of abbreviated and simplified procedures²⁰. In particular, they may decide to allow for the ‘bundling’ together of such smaller projects and their implementation in a group as a PPP subject to the law’s requirements. If no threshold value is specified, the paragraph may be redundant, and so best deleted, although some countries may find it helpful to recognise the possibility of bundling projects in any case.

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

Article 5. Authority to award and enter into PPPs

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

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

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

2176 alternative, it allows the enacting state simply to list in the Law those public authorities that
 2177 are allowed to award and implement PPPs²¹. Countries should decide which provision they
 2178 prefer.

2179 The article also gives the government the specific power (in para 2) to vest the necessary
 2180 authority in individual bodies where necessary (and subsequently revoke it). This is intended
 2181 to function as a helpful fall-back provision.

2182 **Article 6. Applicable Sectors and Activities for PPPs**

2183 This article defines the range of sectors and economic/commercial activity to which PPPs
 2184 can apply in the host country. It is usually desirable to make any such provision broad and
 2185 flexible, and any list it contains inexhaustive, since formal legal restrictions or exclusions are
 2186 often, in the end, simply unnecessary. (Governments can always then make *ad hoc* decisions
 2187 about whether or not to use of a PPP in a particular area). The draft therefore allows PPPs to
 2188 be used in any sector or area not specifically excluded by this or any other law, provided, of
 2189 course, that they are compatible with the People-first PPP Principles. The list set out below
 2190 is essentially illustrative rather than prescriptive and can be expanded or reduced by the host
 2191 country as appropriate. If the host country prefers to be specific rather than general about the
 2192 sectors to which PPPs can apply, the article should be modified accordingly. (The draft allows
 2193 for this in square brackets).

2194 Paragraph 2 then allows for certain specific sectors or areas to be excluded from the
 2195 application of PPPs, if that is what is considered appropriate and necessary. Some countries
 2196 prefer to exclude certain areas of defence activity and contracting, for example. Many PPP
 2197 laws contain no such exclusion, however, which is why the paragraph has been left in square
 2198 brackets. Countries which do not need it can delete it.

2199 One sector which sometimes proves problematic in this context is the natural resource/
 2200 extractive industries sector, which is often distinguished and excluded from the scope of PPPs
 2201 and a PPP Laws, although ‘concessions’ may already have been in use in the sector for many
 2202 years. That is because (a) the sector is often already the subject of well-developed laws and
 2203 procedures which have been in place for a long period, representing a self-standing and
 2204 comprehensive body of applicable rules and regulations; and (b) PPPs are essentially about
 2205 or related to public services and public infrastructure, which many extractive industries are
 2206 obviously not (at least not directly)²². In that case, it may be better to carve out the relevant
 2207 sector and industry from the scope of the new PPP Law, even though the ‘concessions’ in
 2208 use there may be conceptually very similar to PPPs, and subject to many of the same
 2209 principles. This is an analysis each host country should carry out. Appropriate exclusions can
 2210 be set out in this article and/or in the definitions of PPPs and scope provisions in Articles 1
 2211 and 2. It should be kept in mind, however, that the power sector, which is obviously closely
 2212 related to public services and public infrastructure, may need to be addressed specifically and
 2213 treated differently to other energy or natural resource concessions of which the same cannot
 2214 be said. The former is more susceptible to categorisation with other types of PPP²³. For all
 2215 these reasons, we have put the reference to ‘energy’ at the top of the list in square brackets.

²¹ This is the approach taken by UNCITRAL

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

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

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Article 7. Parties to a PPP Contract2217
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There will often be only two parties to a typical PPP contract—the contracting authority and the private partner (as we call them). The article acknowledges, however, that, on the one hand, there may occasionally be more than one public authority participating as contracting authority²⁴, such as where several municipalities are involved, for example, or a SOE (state-owned enterprise) teams up with a line ministry, whilst, on the other, the private partner will often consist of a consortium of companies which become shareholders in the SPV (special purpose vehicle) company incorporated to fulfil this role under the contract. The two principal parties may also agree to bring in additional third parties to the PPP contract, where the project’s particular circumstances or needs call for it.

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Article 8. PPP Term2227
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The article envisages a statutory minimum term for all PPPs. Host countries should think carefully about what this should be and how it should be calculated. The period can be inserted (in years) if they wish to specify one. (Some countries may not). A term of at least 5 years is likely to make sense, given that PPPs are inherently long-term structures, with all their complexity and the importance of long-term risk-sharing between the parties. Because there is no commonly recognised basis for establishing a minimum term, however, the draft leaves the details to be set out in the regulations (if at all). These details should be consistent with any minimum value (if any) specified under Article 4.

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A maximum term is also envisaged for PPP contracts in paragraph 2. This is because it is important not to allow such contracts to ‘lock up’ assets and activities for too long, potentially creating long-term, anti-competitive monopolies, but also to mitigate the risk of corrupt practices. Again, no figure is specified in the text, as there is much debate about what an appropriate term should be. Some take the view that very few PPPs need be longer than 25 or 30 years, as this should always be sufficient to make a project financeable and investible. Others believe that significantly longer periods can make sense; there are indeed not a few examples of them in practice.

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For that reason, a specific figure is not suggested in the Model Law. Instead, the article assumes that an appropriate basis for calculating one will be available to the contracting authorities (and perhaps again developed or set out in the regulations²⁵), and that the maximum term will simply be specified in each PPP contract. This is also the approach taken by UNCITRAL. The basic principles to be taken into account in framing any maximum term are set out in paragraph 2. Host countries should add any further criteria that they regard as fundamental.

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Notwithstanding the principles reflected in paragraph 2, PPP contracts usually contain mechanisms which allow their term to be extended in exceptional circumstances described in their provisions²⁶. This may occur, for example, where events of *force majeure* seriously delay progress or interrupt operations, or a change in law necessitates major changes to aspects of the design and construction works. For the contracting authority, an extension of the term to compensate the private partner for its resulting losses (by allowing it to earn revenues for longer) may be a preferable remedy to paying it cash compensation. Paragraph

²⁴ Where this happens, it may still be helpful to give one of these authorities a clear leading role in interfacing with the private partner under the PPP contract, to promote a ‘one-stop shop’ effect.

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

²⁶ These are not discretionary remedies available at the private partner’s option. They typically represent objective grounds for modifying the contract in the specified circumstances, in a way which is arbitrable and legally enforceable.

2257 3 allows for this, together with the possibility of further conditions being specified in the
2258 regulations (*inter alia* to prevent the extension mechanism being abused).

2259 The expiry of the PPP contract should not, of course, affect the private partner's title to any
2260 assets comprised in the PPP of which it is entitled to retain ownership²⁷. This is made clear
2261 by para. 4.

2262 **CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES**

2263 It may be necessary in a PPP law to include provisions dealing with the inter-relationship
2264 between different government bodies and ministries in the PPP context, and the ways in
2265 which their respective powers and functions may affect or impinge on each other. (Indeed,
2266 there seems to be an increasing expectation on the part of IFI²⁸ experts in this field that such
2267 provisions *should* be included). The decision-making processes behind the different stages
2268 of a PPP's preparation, approval, award and implementation certainly need to be properly
2269 accountable. The wider aim here is to achieve the necessary administrative clarity in relation
2270 to the implementation of PPPs.

2271 With the exception of the PPP Unit, we have not provided for this with any specificity in the
2272 Model Law, however. This is because (a) there is no general rule about what exactly such
2273 provisions should cover or address, as this will depend on the particular administrative
2274 structures and procedures in operation in each country; and (b) the authors are aware of few
2275 if any examples of such provisions in PPP laws actually in force.

2276 There are many possibilities, which the 'placeholder' in the draft touches on. Cross-referring
2277 to the wider public investment process is one, integration with long-term infrastructure
2278 development planning another (including its SDG strategy), the application of budgetary and
2279 fiscal rules and procedures a third, the powers of sector regulators a fourth. Other examples
2280 might include the role of a PPP Commission, the role of the Ministry of Finance or Economy
2281 and its Risk Management Unit²⁹, and additional tiers of approval or control where the
2282 exceptions to normal procedures come into play under the Law (as in the case of unsolicited
2283 proposals or direct negotiations).

2284 The long-term fiscal impact of PPPs may need to be specifically addressed. Flow-charts
2285 drawing together the relevant strands of decision-making may be helpful. The authors' view,
2286 however, is that the processes and constraints relevant to these areas will often already be in
2287 place within the existing administrative and constitutional structures and rules. To that extent,
2288 it may be unnecessary or inappropriate to reproduce them in a PPP Law. Where they are not,
2289 it may make sense to address them in the Law. In any case, careful thought should always be
2290 given by host countries to this question, and any provisions thought to be necessary included
2291 in this Chapter by way of an additional article or articles.

2292 **Article 9. PPP Unit and Administrative Coordination**

2293 Article 9 deals with the establishment of a PPP Unit. Many governments create PPP Units as
2294 part of their new PPP systems. These are essentially administrative support functions,
2295 designed to help with the implementation and refinement of the new system and to
2296 disseminate a proper understanding of it, within both the public and private sectors. However,
2297 their structure, responsibilities and powers vary widely from country to country, depending

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

²⁸ International Financial Institutions. See note 29 below.

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

2298 on governmental preferences and the evolutionary stage reached by the country's PPP
 2299 system. In some cases, they have a limited advisory role. In others, they can have a much
 2300 more central and executive role, with extensive powers to help shape the new PPP system,
 2301 including wide rights of approval over aspects of the implementation of individual projects.

2302 Each host country should think carefully about how it wants to structure, organize, staff and
 2303 empower its PPP Unit, and amend the article as necessary accordingly. The draft requires it
 2304 to be adequately staffed, on the basis of a spread of skills and backgrounds (including a grasp
 2305 of the People-first PPP Principles). It allows for a controlling ministry and director to be
 2306 specified in the law, without prescribing solutions (even though the Ministry/ Minister of
 2307 Finance or Economy are frequently specified).

2308 The list of functions and responsibilities in para 3 is a broad 'wish list', containing the full
 2309 range of matters which are often allocated to such units. It should be amended by host
 2310 countries as necessary. Few, if any, real PPP Units around the world would have such a wide
 2311 array of responsibilities. Functions should be chosen and allocated in ways which avoid
 2312 potential conflicts of interest with respective ministerial duties or conflicts between different
 2313 responsibilities within the PPP Unit (para. 4).

2314 Para. 5 allows mechanisms to be put in place designed to coordinate the issue of relevant
 2315 licences and permits for PPPs between the different ministries and public authorities likely
 2316 to be responsible for them. This 'one stop shop' arrangement is often referred to in
 2317 discussions of institutional arrangements, as it self-evidently seems a helpful step to take,
 2318 especially in light of the large number of permits that can sometimes be required³⁰.

2319 **Article 10. Information about PPPs**

2320 The transparency of a PPP system will be critical to its success (as the SDGs recognise). The
 2321 more fully understood are all its technical, procedural, commercial and operational aspects,
 2322 by both public and private sectors, the better. PPPs are complex, sophisticated vehicles,
 2323 which often take years to be fully comprehended. A steady flow of helpful, accurate
 2324 information about them in any country seeking to implement them systematically will
 2325 therefore be vital. Article 10 thus imposes wide-ranging duties on Government to prepare,
 2326 collate, develop, maintain and publish the relevant information. This extends to information
 2327 to be supplied by contracting authorities about individual projects they have implemented or
 2328 are about to implement, including information which local communities may need to exercise
 2329 the rights of protection they may enjoy under applicable law.

2330 The need to publish relevant information about competitive PPP tenders and their results, on
 2331 web sites and/or official publications, is also addressed. Host countries should consider any
 2332 other specific requirements of this kind which they would like to see included in its PPP Law,
 2333 such as mechanisms for independent audits of aspects of the published information, and
 2334 procedures for public reviews or hearings where appropriate³¹.

2335 **CHAPTER III. INITIATION AND PREPARATION OF PPPs**

2336 This and the next Chapter are perhaps the most 'central' chapters of the Model Law, dealing
 2337 with the all-important subject of the selection, preparation and award of individual PPP
 2338 projects. These are often a principal focus of laws of this kind. The Model Law aims to set
 2339 out a clear, robust framework for the procedures and principles involved, leaving much of

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

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

2340 the relevant detail (such as timescales, deadlines, precise formalities, definitive rules and
 2341 methodologies) to be addressed in the regulations and tender documents. Chapter III deals
 2342 with the early stages of a project's initiation, preparation and approval, Chapter IV with its
 2343 award and implementation.

2344 **Article 11. Initiating and Preparing PPPs**

2345 This Article describes the steps and procedures that must be followed as a PPP is defined,
 2346 initiated, appraised and approved. Under para.2, PPPs can be initiated by either the relevant
 2347 contracting authority, or a private initiator in the case of unsolicited proposals. However, the
 2348 article assumes that the detailed work of preparation of any PPP will usually be carried out,
 2349 or at least managed, by the contracting authority, since this will allow it to retain an
 2350 appropriate degree of control over its contents. (In some jurisdictions, including ones with
 2351 limited relevant experience of PPPs or relatively constrained government resources, it may
 2352 nevertheless be necessary to delegate at least some of this work to the private sector. The
 2353 article therefore allows for exceptions to the general rule to be identified³²). Para. 4 gives an
 2354 idea of what the preparation work should aim to cover and achieve.

2355 The preparation work needs to include a comprehensive feasibility study (para 5), showing
 2356 how the applicable appraisal criteria will be met, together with (or covering) a strategic
 2357 impact assessment (reviewing its social and environmental impact) and reports on various
 2358 other fundamental matters that should be examined and confirmed before the PPP can go
 2359 ahead. These are identified in para. 6, and include an initial risk allocation pattern, an
 2360 assessment of the contracting authority's capacity to launch and carry through a PPP and
 2361 proposals for the most appropriate basis for awarding it. All these reports should then be
 2362 reviewed and approved (perhaps certified) as compliant with the requisite standards and
 2363 procedures, by whichever competent body is empowered to do this (para 7).

2364 The draft assumes that host countries will in time want to reduce the processes involved to a
 2365 more detailed set of procedures in the PPP regulations, allowing for differing requirements
 2366 to be met at different stages of a project's preparation (para 8). The preparation work must
 2367 allow for any public consultations and hearings, structured to allow issues to be properly
 2368 aired and ideas for improvements to be put forward (para 9). It must be possible to make
 2369 changes and adjustments to any set of PPP proposals during their preparation to ensure they
 2370 are fully compliant with all the law's requirements; this is mentioned in para 10.

2371 **Article 12. Appraisal and Approval Procedures**

2372 Once a PPP project has been prepared, it will need to undergo a process of appraisal and
 2373 formal approval before it can be implemented, and the private partner for it chosen, in
 2374 accordance with the applicable procedures. Article 12 lays down this basic requirement,
 2375 cross-referring to the PPP regulations, where the relevant details can be precisely specified.

2376 Paragraph 2 summarises the powers and responsibilities of the competent body given the task
 2377 of reviewing the PPP preparation work submitted to it by the relevant contracting authority,
 2378 to make sure it has been carried out in accordance with the procedures and criteria. The
 2379 requirements are comprehensive and tight (as they are in UNCITRAL). Enacting states
 2380 should decide whether they want such a rigorous supervisory role over the actions of
 2381 contracting authorities in preparing and awarding PPPs, and whether it should include formal
 2382 powers of approval (as opposed to simple review). Some states may wish to split the review
 2383 and approval functions, perhaps giving the first to an administrative body (such as the PPP

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

2384 Unit) and the latter to a higher level one (such as a PPP commission). Some may want it to
 2385 extend to approval of PPP tender documents; others may regard this as unnecessary.
 2386 Allowance may also need to be made for the fact that, over time, these functions may have
 2387 to be loosened somewhat as the PPP system becomes larger and more evolved. Eventually,
 2388 many contracting authorities may be capable of at least an element of ‘self-regulation’ in this
 2389 context.

2390 Para 3 then sets out a broad, suggested ‘wish-list’ for the relevant appraisal criteria
 2391 themselves. Compliance with the requirements of Article 4 and the People-first PPP
 2392 Principles is placed at the head of this list (although the Principles are also built into several
 2393 of the other specific criteria listed). Host countries should consider which ones to include in
 2394 any definitive list(s) of their own, either in the main PPP law or the regulations. Whilst most
 2395 of the criteria suggested are likely to be relevant to any PPP assessment, they will not
 2396 necessarily all be, at least not in all circumstances. Their relative importance or weighting
 2397 will also vary from context to context. The PPP law should therefore retain an element of
 2398 flexibility about them, as they are likely to differ depending on the type of project being
 2399 considered³³. Allowance is made for other criteria to be used and included in future.

2400 For these reasons, we have used the words ‘as appropriate for [the] purpose’ of appraising
 2401 the relevant PPP. Careful thought should be given to the question of which criteria will
 2402 always be applicable-mandatory-and which will only sometimes come into play. The answers
 2403 are likely to be reflected in detailed mechanisms and procedures linked to a specific context,
 2404 which the regulations rather than the law would provide for. This is acknowledged by para
 2405 5. The criteria and procedures are also likely to evolve and need refinement over time. Para.
 2406 6 places responsibility for their determination and revision, and for publishing their contents,
 2407 on the government.

2408 **Article 13. PPP Implementation Resolutions**

2409 Once a PPP project has been prepared, appraised and selected, it will be important to confirm
 2410 this in a public document with an appropriate degree of formality and transparency. Article
 2411 13 provides for this in the form of a published ‘Implementation Resolution’. This should
 2412 summarise all those critical aspects of the project which need to be described in its contents,
 2413 to ensure they are publicly available and readily understood, and demonstrate the project’s
 2414 compliance with the law’s essential requirements (such as the People-first PPP Principles)
 2415 and the applicable approval criteria. A summary of the results of the public consultation
 2416 process should also be included, together with an indication of how objections or grievances
 2417 can be addressed. Host countries may wish to make the publication of an Implementation
 2418 Resolution the start of a formal tendering process. If so, the PPP law should make it clear
 2419 that this is the case.

2420 **Article 14. Unsolicited Proposals**

2421 This article deals with the initial stages of an unsolicited proposal. Unsolicited proposals can
 2422 be controversial, with many commentators regarding them as unnecessary and wide open to
 2423 abuse. Others see them as essential in emerging-market countries with little experience of
 2424 PPPs. The host country needs to decide whether and to what extent to permit them. The
 2425 provisions in the Model Law assume that they will be used and seeks to make the procedures

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

2426 applicable to their use, and the award of the resulting PPPs, as transparent, fair and
2427 competitive as possible, as well as consistent with those applied to PPPs initiated by
2428 contracting authorities.

2429 Under the article, the private initiator must submit its preliminary proposal for the proposed
2430 project, in the required form, to the relevant contracting authority (and any other competent
2431 body authorised to receive it. Host countries may wish to provide for this to reduce the risk
2432 of any system abuse). The latter has a discretion but not an obligation to review it and make
2433 a preliminary decision about moving to the next stage. The rationale for this discretion is that
2434 the potential contracting authority may have neither the time, resources nor inclination to
2435 review every unsolicited proposal presented to it, especially if many of them are coming
2436 forward or they are clearly incompatible with its wider strategic or policy priorities. (The host
2437 country may still prefer to turn this into an obligation to review them, together with a duty to
2438 give reasons for the conclusion reached).

2439 Only proposals which do not relate to projects which have already been officially ‘lined up’
2440 should be considered. The contracting authority can require the private initiator to provide as
2441 much of the relevant information as is needed to make its preliminary assessment, including
2442 impact studies (e.g. technical and commercial feasibility) and information as to its own
2443 qualifications for the task. Any exclusive rights of the private initiator in relation to the
2444 project (such as IP) are protected under para. 5. If the contracting authority decides formally
2445 to review the PPP and move forward, the provisions of articles 11 and 12 then come into
2446 play, covering the project’s detailed preparation, appraisal and formal approval. If an
2447 implementation resolution is then passed to proceed with it, the provisions of article 21 will
2448 govern the next stage.

2449 ***CHAPTER IV. SELECTION OF PRIVATE PARTNER***

2450 **Article 15. Procedures for Selection of Private Partner**

2451 Para.1 of the Article requires competitive tendering to be used to select the private partner,
2452 save only where exceptions are expressly permitted, including in the case of direct
2453 negotiations under article 22. It is widely recognized today that competitive tendering is
2454 generally much the most efficient, effective, transparent and fair basis for awarding major
2455 contracts, and the best way of mitigating any risk of local corruption. It is also often an
2456 explicit requirement of International Financial Institutions (IFIs)³⁴, such as the EBRD, and
2457 a condition of their financing for particular projects (albeit not an invariable one). The Model
2458 law therefore assumes that, as a general rule, it will be used.

2459 The question always arises with PPP laws to what extent a country’s existing procurement
2460 regime should apply to the award of PPP projects? This is something each country needs to
2461 consider carefully. Most countries will already have such a regime in place. It may be a
2462 sophisticated one which already caters specifically for PPPs (as in the EU, for example).
2463 Where it has been drawn up before the country has started to make use of PPPs, extensively
2464 or at all, however, it will often not be readily applicable to the very large, complex, high-
2465 value structures that PPPs typically represent.

2466 It may be possible to amend or modify the existing procurement regime to accommodate
2467 PPPs. On the other hand, this may be difficult to do and may also give rise to considerable
2468 confusion about how exactly the revised provisions will apply in the context of the new PPP
2469 law. For that reason, host countries often prefer to create a comprehensive, self-standing

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

2470 procurement regime under the PPP law which will apply specifically to all PPP projects, and
 2471 to disapply the existing regime substantially or completely from their award³⁵. This is the
 2472 approach reflected in many PPP laws and the one suggested by the Model Law. Para. 2 is
 2473 drafted accordingly. If the host country decides to amend its existing procurement regime, or
 2474 concludes that it can be used without amendment, the provisions of Chapter IV (or
 2475 equivalent) of its PPP Law may differ significantly from the Model Law, as they will either
 2476 need to cross-refer explicitly to the relevant requirements of the former, or invoke them as a
 2477 whole, disapplying specific provisions that do not work in this context. The draft also allows
 2478 for this possibility (as does UNCITRAL).

2479 Para. 3 again makes it clear that the more detailed aspects of the applicable tendering
 2480 procedures will be set out in the regulations but shall be governed by the principles set out in
 2481 that paragraph, which are almost universally recognized today as appropriate governing tests
 2482 for such processes. The host country should decide whether to include the word
 2483 ‘proportionality’ with these principles. It may or may not wish to. The term does not have a
 2484 universally recognised meaning in this context but is often understood to refer to the efficient
 2485 use of available tendering resources, at a level appropriate to the project concerned.

2486 The exact criteria and evaluation methodology for the pre-qualification and selection of
 2487 successful bidders, appropriate for the relevant PPP and the tender structure being used, will
 2488 then have to be chosen (by the contracting authority) and set out in the relevant tender
 2489 documents. Para. 4 contains a further wide-ranging wish list of possible tests which can be
 2490 used. These would have to be refined and made more precise in the tender documents. They
 2491 must always be consistent with the criteria used to approve the PPP at preparation stage and
 2492 the implementation resolution for it. Para. 5 places a standard non-discrimination duty on the
 2493 contracting authority in relation to the award and implementation of PPPs.

2494 **Article 16. Tender Structures and Procedures: General**

2495 Article 16 deals with an assortment of general matters that will apply to any tender structure
 2496 adopted. The tender structure for the award of any PPP will be determined by the contracting
 2497 authority, in accordance with the requirements of the PPP law and regulations. Its detailed
 2498 aspects will be set out in the tender documents.

2499 Para. 2 provides that an open public tender shall normally be used (where potentially any
 2500 interested bidders can respond to the published invitation), with flexibility as to the use of
 2501 pre-qualification and a one- or two-stage process. Closed tenders-where bidders are
 2502 specifically selected by the contracting authority without a public advertisement-are only
 2503 permitted in the very limited circumstances described. Each host country should decide on
 2504 the scope of these exceptions. Specifying them with precision in the law is recommended and
 2505 considered common best practice.³⁶Where closed tenders are used, the contracting authority
 2506 should still try to maximise the element of competition involved, as required by para. 3. There
 2507 are many recognised methods of doing this.

2508 Para. 4 provides that any person, or groups of persons, with legal capacity can participate in
 2509 a tender, subject to any applicable legal restrictions. These restrictions are intended to refer
 2510 in particular to rules excluding persons who may have been convicted of relevant offences,
 2511 such as corruption, illicit employment practices (e.g. using child or slave labour) or similar

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

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

2512 prohibited acts. National security considerations may also come into play in this context.
2513 Where consortia are involved (as they usually will be), their joint qualifications to perform
2514 their responsibilities, as well as those of individual members, must be assessed (para. 5).

2515 Under para. 6 all decisions during the tender process, concerning pre-qualification, selection
2516 (short-listing), rejection and final contract award must be made only on the basis of the
2517 criteria, requirements and procedures set out in the tender documents. This guarantees the
2518 integrity and transparency of the process, and its efficiency for bidders (so that they know
2519 what they are dealing with).

2520 The need for transparent communication processes and methods with bidders is spelt out in
2521 para. 7, allowing for suitable bidder in-put into the tender documents and discussion of
2522 critical aspects of the project. The use of tender security (such as bid bonds) is allowed for in
2523 para. 8; where it is used, the security must only be forfeited where the tender documents so
2524 provide. Other specific aspects of a tender process which can sometimes prove problematic
2525 or uncertain are also addressed in the article, such as restrictions on multiple or joint bids
2526 (paras. 9 and 11) and the consequences of receiving only one tender (para 11). Bids can be
2527 changed or revoked before the final deadlines (para 9). The scope for a final clarification or
2528 negotiation stage is specifically addressed (para.10), since this represents a potentially
2529 awkward area, which should be carefully handled in the regulations and tender documents.

2530 Tenders are generally governed by the confidentiality restrictions set out in paragraph 12, as
2531 between competing bidders, although these are in turn subject to the transparency
2532 requirements of Article 10. The contracting authority has to keep appropriate records of
2533 tender proceedings under para. 13, in accordance with the requirements set out in the PPP
2534 regulations.

2535 **Article 17. Tender Documents and Criteria**

2536 This article lays down the general requirements for the contents of any set of tender
2537 documents to be drawn up by the contracting authority. They are designed to ensure the
2538 documents are sufficiently complete and transparent to enable bidders to participate
2539 effectively on the basis of a 'level playing field'³⁷. The underlying principle is to maintain an
2540 adequate, 'healthy' (but not excessive³⁸) level of competition throughout the process.
2541 Paragraph 1 summarises the typical essential components of the documents, which should be
2542 drawn on as appropriate.

2543 Paragraph 2 obliges the contracting authority to provide all such information in its possession
2544 about the proposed PPP as may be necessary to promote the efficacy of the tender, either in
2545 the tender documents themselves or in a data room. This is designed to impart an additional
2546 element of rigour and transparency to the process.

2547 The article makes it clear in para. 3 that tender documents can be amended during a tender,
2548 before the applicable deadline(s), either on the contracting authority's initiative or in response
2549 to bidders' comments (but subject of course to the usual transparency principles). Deadlines
2550 must be extended as necessary to allow for this, and appropriate records kept of the
2551 justification for the changes.

2552 Para 4 allows (in square brackets) for the possibility of tender documents, as well as the
2553 preparatory work for a PPP, being reviewed and approved by another competent body, if that
2554 is what the enacting state has decided to do³⁹.

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

³⁸ Which may lead to 'dumping'.

³⁹ See comments under para. 2 of Article 12.

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Article 18. Tender Committee

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

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

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Article 19. Tender Stages

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This article provides a framework for the various stages of a PPP tender, depending on which structure (open or closed, one- or two-stage, with or without pre-qualification) is used. Paragraph 1 summarises them. Certain provisions are then set out in the ensuing paragraphs in relation to each. Note, though, that these do not amount to a complete picture, a comprehensive set of procedures. It will be for the PPP regulations to contain the complete story, including all the necessary details required (such as formalities, timescales and deadlines, applicable criteria and methodologies) for each tender structure. (Even then, many precise details will only be set out in the tender documents themselves). The aim of the PPP law-in the case of this Article as well as others-is to define the main ‘pillars’ of the system, its over-arching framework. These paragraphs therefore set out only a few statements about each tender stage, in terms very similar to those used by UNCITRAL⁴⁰.

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

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

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

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⁴⁰ UNCITRAL does not cross-refer to PPP regulations, but to a country’s existing procurement rules and laws, in many of its provisions. The equivalent UNCITRAL clauses are also somewhat more detailed.

2600 specify a PPP project at all in sufficient detail for a routine tender process to be followed. In
2601 essence, it allows the definitive aspects of the project to emerge from a constructive dialogue
2602 with a group of bidders, so that a straightforward competitive tender can then be deployed in
2603 the concluding phase. As the provision makes clear, only certain aspects of the tender should
2604 be opened to dialogue in this way-i.e. those that require greater clarity and specificity which
2605 can only properly be achieved with in-put from bidders. The process should not be used to
2606 throw open the whole tender to speculative discussion. Once all the details have been settled,
2607 the short-listed bidders are invited to submit their ‘best and final offers’, from which a winner
2608 is selected. The idea here is usually to avoid any final negotiation.

2609 Conceptually, the competitive dialogue is similar to a two-stage tender. The main difference
2610 lies in the level of uncertainty about fundamental project features, which can only be defined
2611 in dialogue with bidders. The two-stage procedure in para. 8 is more about simply refining,
2612 or fine-tuning, certain aspects of a project. In practice, the use of the competitive dialogue
2613 procedure is relatively limited, as it calls for a certain level of capacity, competence and
2614 sophistication on the part of contracting authorities and bidders for it to work, which may
2615 only be found in the more established PPP markets⁴¹. It can also carry a risk of collusion or
2616 corruption if not properly handled; its use may therefore also need to be sanctioned by
2617 appropriate approvals from a separate competent body (such as the PPP Unit following
2618 presentation of a report), which the PPP regulations can provide for.

2619 **Article 20. Conclusion of the PPP Contract**

2620 This provides for the conclusion of a PPP contract with the winning bidder identified by the
2621 tender committee on the basis of the relevant evaluation criteria and methodology, or (more
2622 usually) with a special purpose vehicle (SPV) incorporated by it. Requirements for the
2623 capitalisation of the SPV and subsequent changes to its structure are allowed for. A formal
2624 notice of contract award must then be posted on the contracting authority’s web-site and
2625 published through the official channels. The draft also allows for the public disclosure of PPP
2626 contracts (subject to applicable confidentiality restrictions) where the law requires this. It is
2627 assumed that governments may be slightly hesitant about publishing all their contracts as
2628 their new PPP systems are taking shape, but that this may in time come to be perceived as
2629 advantageous to all, and so provided for in the PPP regulations or elsewhere. (The same
2630 provisions apply to PPP contracts entered into under Articles 21 and 22).

2631 **Article 21. Conclusion of PPP Contract for Unsolicited Proposals**

2632 This article provides for the final stages of the award of a PPP project based on an unsolicited
2633 proposal. One of its main objectives is to seek to bring competitive pressures to bear,
2634 notwithstanding the project’s initiation by a single private sector source, who may hope to be
2635 awarded it without the need for a tender. The caveat to this requirement, however, is that the
2636 PPP is not based on IP or other exclusive rights of the private initiator, and its concept and
2637 technology are not truly unique or new. Subject to this caveat, once a final decision to proceed
2638 with the unsolicited proposal has been made under article 14, an implementation resolution
2639 has to be passed and published on the contracting authority’s web site and the relevant official
2640 channels, inviting third parties to compete for the project. If no third parties come forward,
2641 or if the caveat referred to above applies, the contracting authority can go ahead and award
2642 the project to the private initiator (subject to any direct negotiations permitted under Article
2643 22 and the PPP regulations), provided it is satisfied that reasonable steps have been taken to
2644 attract competing proposals. (Further amendments to the documents can be made and the
2645 process repeated if it is not so satisfied).

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

2646 If third party expressions of interest are put forward, tender proceedings must then be
 2647 organized in accordance with this Chapter. Para. 4 provides for incentives or compensation
 2648 to be offered to the private initiator in these circumstances, in view of the effort and resources
 2649 already invested by it in the project. Host countries should think carefully about whether they
 2650 wish to include such a mechanism and how exactly it would work. The article suggests a
 2651 couple of options. Compensation for pre-tender costs incurred (up to a maximum amount)
 2652 should be relatively straightforward. Finding a suitable basis for adjusting tender evaluation
 2653 scores can be much more difficult. Some countries prefer not to provide for this at all; others
 2654 may already address them in other regulations.

2655 **Article 22. Direct Negotiations**

2656 This article addresses the somewhat contentious subject of awarding a PPP project on the
 2657 basis of direct negotiations without holding a competitive tender. Host countries should think
 2658 carefully about the exact circumstances in which they wish to permit this and define them
 2659 closely in the PPP law. The reason for caution is that these situations are widely recognized
 2660 as being vulnerable to corruption, as well as creating ‘log jams’ in a country’s pipeline of
 2661 potential PPP projects.

2662 The Model Law treats only a few, specific classes of project as being viable in this regard
 2663 (several of which are also listed in UNCITRAL): (a) where only a single compliant bidder
 2664 has surfaced in the context of a tender process (subject to the relevant qualifications); (b)
 2665 where the unsolicited proposal provisions allow it; (c) perhaps, where there is an urgent need
 2666 to maintain public services and holding a tender would be impractical. (This exception is in
 2667 square brackets, as some experts counsel against it); (d) in the case of small, short-lived
 2668 projects that do not meet the usual statutory thresholds; (e) where the state’s vital security
 2669 interests do not permit tendering; and lastly (f) where it has been clearly established, based
 2670 on an independent expert report, that there is only one source actually capable of
 2671 implementing the project (e.g. in the case of unique patented technology or IP).

2672 The detailed procedures governing any such direct negotiation will be set out in the
 2673 regulations. Close monitoring of the PPP implemented as a result, including its standards of
 2674 performance, is encouraged by paragraph 2. Paragraph 3 obliges the contracting authority
 2675 even then to try to introduce an element of competition into at least aspects of the procedure
 2676 if it believes it can.

2677 **Article 23. Review and Challenge Procedures**

2678 This confirms that bidders who feel they have suffered (or may suffer) loss or injury as a
 2679 result of a contravention of the law by a government body in connection with a PPP’s award
 2680 or implementation can bring proceedings through any available legal channels in the host
 2681 country. The article does not provide specifically for any such channels or proceedings, as
 2682 these can vary widely from jurisdiction to jurisdiction. Many countries have established
 2683 grounds for bringing ‘judicial review’ and similar challenges to government decisions
 2684 improperly taken. The host country should consider whether the established channels are
 2685 adequate for this purpose.

2686 The article acknowledges that these established channels and mechanisms may need to be
 2687 reinforced or supplemented in the regulations⁴². Careful thought should also be given to the
 2688 question of the speed and efficiency, as well as efficacy, of any such channels, and the
 2689 availability of suitable interim measures. It is much better to solve a problem caused by an

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

2690 abuse of process at an early stage, than to have to wait until it has done damage to the project
2691 at a later or more advanced one; ‘prevention is better than cure’.

2692 Where the PPP regulations make provision for such procedures, the Article therefore requires
2693 them to operate quickly and efficiently, using interim or interlocutory measures and powers,
2694 so that defective or unlawful decisions and actions can be challenged and overturned at speed,
2695 ideally before they are actually implemented in the context of a PPP project. Broad powers
2696 to open up, review and revise decisions and documents, and to suspend or overturn actions
2697 being taken, are allowed for, together with a power to award compensation for losses incurred
2698 and even to cancel an entire project in appropriate circumstances. Because any such powers
2699 would be invasive and sweeping, however, and may well overlap with similar powers and
2700 mechanisms under other branches of law (such as procurement laws, judicial review, or the
2701 laws of tort or contract), great care should be taken by host countries in framing them.

2702 ***CHAPTER V. PPP CONTRACTS***

2703 ***Article 24. Main Terms and Conditions of PPP Contracts***

2704 This makes it clear that, under the Model Law, the drafting and negotiation of the contents
2705 of a PPP contract shall be governed by an overriding principle of freedom of contract. The
2706 parties can agree essentially whatever provisions they choose, subject to any requirements or
2707 constraints in the wider legal system. Host countries should give careful consideration to
2708 what these constraints might be. There will always be some, ranging from unfair contract
2709 terms, for example, to unenforceable provisions (such as the exclusion of certain forms of
2710 liability), to terms required or implied in certain circumstances, sectors or industries
2711 (especially extensively regulated ones).

2712 Within those constraints, the Model Law envisages that it will usually be most productive to
2713 allow the parties to a PPP contract to have wide latitude in settling its terms and contents, to
2714 reduce the risk of clauses which seem to them to be appropriate being treated as unavailable
2715 or challenged as illegal. PPP contracts are long, complex documents, often heavily negotiated
2716 by the parties to them. The parties usually need the help of sophisticated professional advisers
2717 to get them right. Where those advisers are available, it tends to make most sense for the law
2718 to trust the parties, so to speak, to reach appropriate conclusions about their terms, with the
2719 freedom to agree the clauses they consider appropriate. Even where they are not, it can be
2720 unduly restrictive or unhelpful for a PPP law to attempt to prescribe individual clauses, and
2721 very challenging even to word them.

2722 The Model Law sets out a lengthy ‘wish list’ of provisions typically found in agreements of
2723 this kind, to help focus minds on the relevant ones and remove possible doubts about their
2724 legitimacy but leaves it to the parties to make the final decisions about which to use and how
2725 to word them. Many other types of clause are also possible in a PPP contract. The list touches
2726 on the People-first PPP Principles in a number of places where they are likely to be highly
2727 relevant to the contract terms, including key performance indicators (KPIs), most obviously,
2728 but also in areas where novel clauses may have to be thought through and structured in ways
2729 that are perhaps less obvious or familiar. These include providing for adequate dialogue with
2730 stakeholders and exercising step-in rights or rights of early termination in a manner which
2731 maintains public services and minimises potential harm to end users.

2732 The underlying assumption behind this approach is of course that the host country will
2733 welcome and accommodate it. Countries which take a more prescriptive approach to
2734 commercial agreements with government, or which see a need for a higher degree of
2735 regulation of the whole PPP sector, may wish to include tighter controls over the contents of
2736 PPP contracts. That is their prerogative. Great care does need to be taken, though, in the way
2737 such clauses are worded in the Law, as deficient wording may make the provision
2738 unworkable or ‘un-bankable’.

2739 The Model Law's approach is also consistent with the drawing up and publication of model
 2740 clauses for PPP contracts. Most countries find it helpful to do this, as it sets standards,
 2741 promotes an understanding of the system and reduces the scope for unnecessary negotiation
 2742 and wasted resource. Model clauses should usually not be made legally binding or
 2743 compulsory, however. Their role is to furnish constructive guidance, not to remove or
 2744 constrict the valuable freedom of contract discussed above. They may otherwise prove
 2745 counter-productive and an obstruction to the rapid evolution of the system.

2746 Para. 2 contains a reference to the wide range of possible PPP structures that the industry has
 2747 evolved over the past few decades, with the many familiar acronyms used to describe them
 2748 (e.g. BOT, BOOT, BOO, DBFO, BLT⁴³ etc. etc.). It is again designed to reinforce the sense
 2749 that the parties will have maximum freedom to use the structure which seems to them most
 2750 appropriate for the project in question. If host countries have any serious reservations about
 2751 any of them, they should modify the provision accordingly.

2752 **Article 25. Conclusion, Amendment and Termination of PPP Contracts**

2753 The article makes it clear that the PPP contract is to be entered into by the contracting
 2754 authority and the private partner selected in accordance with the previous Chapter (and any
 2755 other persons whom they agree should be parties). It will terminate on the expiry of its term,
 2756 which may be extended in accordance with its provisions (see comments under article 8
 2757 above). It can be amended or terminated by mutual agreement, but subject to any relevant
 2758 restrictions in the contract, the regulations or otherwise at law (para.3). Some countries may
 2759 wish to specify applicable conditions and criteria for contract amendments with precision in
 2760 the PPP regulations. Others-particularly those from a common law tradition-may prefer to
 2761 leave a wide discretion on the subject to the parties. It generally goes without saying, though,
 2762 that any elements of the PPP contract which require the initial approval of any competent
 2763 bodies or relevant authorities besides the contracting authority will need further such
 2764 approval before they can be amended.

2765 The next paragraphs address the subject of constraints to the parties' freedom to agree on
 2766 contract amendments, if that is the course the enacting state wishes to follow. One suggested
 2767 possible approach is set out, in square brackets, in 'alternative 1', providing for a separate
 2768 tier of approval of any amendments to the 'essential' or 'fundamental' aspects of a PPP,
 2769 especially ones which weighed heavily in the application of the original approval criteria or
 2770 the competitive tendering process for selection of the private partner. Some countries may
 2771 wish to translate these (somewhat imprecise) terms into percentage figures or monetary
 2772 amounts. Others may wish to specify the applicable approval mechanisms in considerably
 2773 more detail (as some laws do).

2774 Alternative 2 is an example of how to do this (based closely on the UNCITRAL approach).
 2775 It contains tighter and more detailed definitions of what amounts to a material amendment,
 2776 requiring further approvals, or even (as in the UNCITRAL original) subject to outright
 2777 prohibition. These clauses may be considered too long and elaborate by some host countries
 2778 (hence the square brackets). It should also be remembered that most PPPs will be subject to
 2779 a large number of amendments during their life -as will any major project-and putting
 2780 ponderous obstacles in the way of the parties' freedom to agree them may be pointless or
 2781 counter-productive. The underlying commercial and political reality is that, if major changes
 2782 need to be made to a PPP, let alone any fundamental re-structuring, other government bodies
 2783 will almost certainly be drawn into the process.

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

2784 Early termination of the PPP contract can also happen unilaterally in the circumstances
2785 specified in the agreement, subject again to the relevant conditions and procedures, such as
2786 the lapse of time or (where the law requires it) the confirmatory decision of a court or tribunal.
2787 The article (para. 5) also provides in some detail for the payment of compensation on an early
2788 termination of a PPP contract. This is because the subject almost invariably proves highly
2789 challenging and contentious when these contracts are being negotiated, with the potential
2790 payment of very large amounts ‘on the table’.

2791 The article makes it clear that either party may be entitled to compensation on an early
2792 termination of the contract *for any reason*, in accordance with its terms (and those of any
2793 direct agreement). The notion that a defaulting party may be entitled to compensation where
2794 it is itself at fault can often meet with great scepticism on the part of government bodies
2795 attempting PPPs for the first time. The article therefore spells out that this may, indeed, be
2796 the case, since the assets transferred to the contracting authority on an early termination will
2797 usually have a long-term value far in excess of the amount of any losses suffered by it as a
2798 result of any default. Moreover, they will usually have been funded largely or wholly by the
2799 private partner. All that funding will be lost and written off in the absence of any
2800 compensation.

2801 Best international practice therefore usually entails the payment of at least some
2802 compensation for those assets and costs, an approach reinforced by the fact that project
2803 finance lenders will nearly always insist on being paid down in these circumstances. This is
2804 also consistent with the relevant legal principles of many jurisdictions (e.g. rules against
2805 unjust enrichment). The article does not specifically *require* such compensation to be payable
2806 as a matter of law, however. The final decision about that question is again left to the parties
2807 negotiating the PPP contract. It simply obliges them to give due consideration to the
2808 principles governing any such compensation when they are concluding it, listing several
2809 likely to be relevant in para. 5. The applicable details will have to be worked out and specified
2810 in the contract.

2811 Paragraph 6 then lists some of the other matters that may need to be specifically addressed
2812 or provided for in connection with a termination of the agreement, such as transfer or
2813 purchase of certain assets (e.g. technology), training of government personnel, residual
2814 support services (e.g. spare parts) and decommissioning. These should be covered as
2815 appropriate in the PPP contract.

2816 **Article 26. Property and Related Matters**

2817 This article addresses some of the main property (real estate) issues likely to arise as a PPP
2818 is being structured and negotiated. The contracting authority is given general responsibility
2819 in para. 1 for ensuring that the physical property (typically, the site) and associated rights
2820 (such as easements) and assets needed for the PPP are provided to the private partner, in
2821 accordance with the terms of the PPP contract (where all the relevant details will be set out).
2822 Para. 2 makes it clear that this must extend to the crucial but sensitive subject of rights of
2823 access to and from, and rights to fix installations on, third party property. Under para. 3, these
2824 rights can apply to any real property in the contracting authority’s use, occupation or control
2825 which it is entitled to transfer to the private partner, including public infrastructure. If such
2826 property belongs to third parties, the contracting authority is obliged under para. 5 to acquire
2827 it (using any available compulsory purchase powers as necessary), together with the
2828 necessary legal rights and interests.

2829 The underlying rationale for these provisions is that the contracting authority will typically
2830 be in a position to take on these responsibilities, and so should bear the risk of discharging
2831 them effectively for the project’s benefit. Investors and bidders for projects will expect them
2832 to. Any doubts or uncertainties about these matters can be fatal to the success of a PPP.

2833 The law of many countries might require competitive tenders to be held in relation to any
2834 such property transfers, and so para. 4 makes it clear that an additional tender on top of the
2835 wider tendering process governing the award of the PPP will not be necessary.

2836 Para 7 makes it clear that the parties to the PPP contract can grant each other whatever
2837 property-related rights or interests are needed for the purposes of the project, in accordance
2838 with its terms. These may include outright ownership, leases, licences, rights of use and so
2839 on. The private partner is in turn entitled under para. 6 to grant ‘back-to-back’ rights and
2840 interests to its third-party contractors. Para. 8 acknowledges that the parties may decide in
2841 the PPP contract to identify and list different classes of asset, depending on their treatment
2842 on termination; namely assets which are to be transferred or sold to the contracting authority,
2843 and others which the private partner may freely dispose of or retain. It is worth noting, though,
2844 that a complete categorisation of this kind in the initial terms of the contract may be
2845 impracticable and so relatively unusual.

2846 **Article 27. Types of Payment under PPP Contracts.**

2847 This article confirms that the PPP contract may contain such forms, conditions and amounts
2848 of payment for the proper performance of the private partner’s responsibilities as the parties
2849 may agree. Local law may impose certain constraints in this area-such as regulatory
2850 requirements-which are allowed for. The article contains a broad, illustrative list of the types
2851 of payment that may be used, including direct user charges (typical of a ‘concession’
2852 structure) and payment streams from the contracting authority, making it clear that any
2853 available form of permissible payment may be used. Payments to the contracting authority
2854 from the private partner may also be included, such as PPP fees, royalty payments or profit
2855 shares. The article ‘casts a wide net’ on this subject with a view to eliminating any
2856 unnecessary restrictions or doubts on the forms and types of payment that can be made.

2857 **Article 28 Liability of Parties to the PPP Contract**

2858 This article contains some straightforward provisions relating to the liabilities and remedies
2859 of the parties for breach of the terms of a PPP contract. The terms of the contract and the
2860 rights provided by a country’s wider legal system will normally apply, without the need for
2861 further legislative detail. Host countries should consider whether the law contains any
2862 unusual or problematic restrictions in this context and add to the article as necessary
2863 accordingly.

2864 **Article 29. Step-in Rights and Substitution of Parties to the PPP Contract**

2865 ‘Step-in rights’ are a common feature of PPPs, especially those funded by project finance.
2866 They can either work in favour of the contracting authority, allowing it to take over temporary
2867 control and operation of a project in defined circumstances, such as where an emergency
2868 endangering the public or public services is occurring. Alternatively, they can operate in
2869 favour of the lenders, allowing them to pre-empt a threatened termination of a PPP contract
2870 by the contracting authority, temporarily take over control of the project, put right a default
2871 and perhaps restructure or replace the private partner, in order to keep the project functioning
2872 and its revenues flowing. Such rights can be surprising and contentious from the perspective
2873 of either party to a PPP contract. They can also be vitally important, however.

2874 Article 29 therefore expressly entitles the parties to include step-in rights in the PPP contract
2875 (and in a ‘direct agreement’ with the lenders), although without imposing any obligation to
2876 do so. The relevant details, procedures and conditions will have to be agreed and set out in
2877 the contracts. In line with the People-first PPP Principles, the Article requires those
2878 procedures and conditions to be drawn up with the aim of ensuring that step-in rights are
2879 exercised in a way which does not adversely affect the provision of public services to end

2880 users⁴⁴. Because the nature and effect of lenders' step-in rights can be particularly startling
 2881 to contracting authorities negotiating PPPs, para. 2 summarises the main powers they
 2882 typically bestow on those lenders. Para. 3 again makes it clear that it shall not be necessary
 2883 to hold any additional public tenders where step-in rights are properly exercised (since they
 2884 will have formed part of the contractual matrix at the time of the original PPP award).

2885 **CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES**

2886 The purpose of this Chapter is to confirm the viability of certain types of clause in PPP
 2887 contracts which can often prove problematic or uncertain when they are being structured or
 2888 negotiated, as well as to clarify certain general responsibilities.

2889 **Article 30. Protection of Parties' Interests Under the PPP Contract; Miscellaneous**

2890 Para. 1 confirms that exclusive rights can be granted in a PPP contract. This could well be in
 2891 the best interests of the project and the public, as well as (more obviously) the private partner.
 2892 Whether this is appropriate in individual cases, or will tie up competition unnecessarily, is
 2893 something the relevant contracting authorities will need to decide.

2894 Para. 2 gives the private partner primary responsibility for obtaining the permits and consents
 2895 needed for the project, whilst giving the contracting authority an obligation to provide all
 2896 appropriate assistance in this context, as well as granting any for which it is itself responsible.
 2897 This 'risk' is effectively a shared one, in other words, but with the private partner taking the
 2898 lead role, as permits and consents will have conditions attached to them which it will be
 2899 primarily responsible for satisfying.

2900 Para. 3 prohibits the contracting authority from taking steps which may unduly interfere with
 2901 or get in the way of the private partner's rights and obligations under the contract, including
 2902 its management autonomy, subject of course to any specific rights of intervention the former
 2903 may have under the contract (e.g. certain approval rights) or at law (e.g. step-in rights). This
 2904 is designed to overcome the temptation many contracting authorities often feel, at least in the
 2905 early days, to try to micro-manage PPP projects, and to help them make the cultural shift
 2906 from traditional procurement methods to the much more 'hands off' one needed in the case
 2907 of PPPs.

2908 Para. 4 again confirms that the parties are allowed to agree on such payments terms as may
 2909 offer the private partner and its lenders and investors adequate cost coverage and returns in
 2910 compensation for the proper performance of the private partner's obligations, even where
 2911 any regulated tariffs or prices in the host country may not otherwise ensure it.

2912 Para. 5 allows for 'exceptional' or 'special' event provisions to be included in a PPP contract,
 2913 offering protections against and compensation for the impact of certain major events beyond
 2914 a party's control, such as force majeure or material change of law, and includes an illustrative
 2915 list of the sort of consequences that may be specified in the contract. These clauses again tend
 2916 to feature amongst the more difficult and challenging ones in negotiation. The authors
 2917 thought it important to highlight their availability in principle.

⁴⁴ This is a novel requirement, reflecting the novel nature of some of the People-first PPP Principles. It is worded as simply a qualified aspiration, as it were, for the relevant contractual provisions ('aim to ensure...'), since step-in rights are often considered fundamental components of PPP contracts, by both contracting authorities and project-finance lenders. A more restrictive, unqualified obligation along these lines might be considered unacceptable by both. The Model PPP Law seeks to work with the grain of both government expectations and concepts of 'bankability' in the international finance markets, not against it.

2918 Paragraph 6 is designed to protect the position of the contracting authority by requiring its
 2919 consent to be obtained to any disposal of a controlling or 'essential' interest in the private
 2920 partner, at least for a certain period of time and subject to appropriate conditions.

2921 **Article 31. Forms of Public Support for PPPs**

2922 This article represents another 'avoidance of doubt' provision, stating that the full range of
 2923 the various forms of government support, assets or commitments which the host country
 2924 government is entitled to provide under applicable law shall also be available to PPPs. These
 2925 will of course also be subject to any relevant constraints under applicable law⁴⁵. Under para.
 2926 3, the Government can also provide for these specifically in the PPP regulations and explain
 2927 them in the guidelines. Examples of them are given in the article. The terms and conditions
 2928 applicable to them must be set out in the PPP contract (para.2). Host countries should add
 2929 references to any other specific forms which they think need to be included (if any) or qualify
 2930 or remove any they regard as inappropriate.

2931 **Article 32. Protection of Lenders' and Investors' Rights and Interests**

2932 This article-again to avoid doubt-allows the parties to a PPP contract to include such
 2933 protections in favour of lenders, either in the PPP contract or in the direct agreement, as they
 2934 may agree to be necessary to secure the successful financing of the PPP. These can include
 2935 step-in rights and their associated powers (see above). But it should also be remembered that
 2936 the credit agreements with lenders will also contain numerous clauses requiring the lenders'
 2937 approval to the exercise of specific rights and powers under the PPP contract, and preventing
 2938 the taking of certain steps without their consent. The article also confirms that the private
 2939 partner can grant the full range of financial security interests available at law over the assets
 2940 and rights comprised in a PPP with examples.

2941 The rationale for the article is that doubts and uncertainty are often voiced in countries first
 2942 attempting PPPs about the extent to which the rights and powers of commercial lenders can
 2943 or should be protected or prioritised, either contractually or through security interests, where
 2944 public infrastructure, publicly-owned assets and public services are involved. The article
 2945 acknowledges the possible need to do so, and the parties' rights to provide for them
 2946 appropriately. This can help remove doubt. Step-in rights, in particular, can prove
 2947 problematic. Where a host country does indeed wish (or is legally obliged) to qualify those
 2948 protections, it should modify the article accordingly. In that case, however, careful thought
 2949 should be given to the danger of applying principles or imposing restrictions which may
 2950 threaten the 'bankability' of PPP projects. If new principles need to be crafted and restrictions
 2951 disapplied, the PPP law may represent a vehicle for doing so. Existing law may have to be
 2952 modified or repealed as a result.

2953 Paragraph 4 starts from the assumption that the PPP can be subject to all forms of available
 2954 security in the host country over its assets, other than those public property assets that are
 2955 specifically designated as exempt from such security. Para. 5 confirms that the private
 2956 partner's shareholders can grant similar security over their ownership interests in the project
 2957 company. Para. 6, however, provides (following UNCITRAL) that any transfer of the private
 2958 partner's rights *and obligations* will require the consent of the contracting authority, as
 2959 provided for under the PPP contract. Care needs to be taken with this provision. It should not
 2960 stand in the way of what is known in common law countries as assignments by way of
 2961 security (i.e. lenders can enforce the private partner's rights under its contracts, without
 2962 having to perform its obligations). It is designed to prevent a full transfer of those *obligations*,
 2963 as well as rights, which would mean in effect substituting another party for the private

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

2964 partner. This should always need the contracting authority's consent, even where that consent
2965 is automatically provided for as in a direct agreement. Sub-contracts and sub-leases of part
2966 of those obligations are also of course allowed.

2967 **Article 33. Protection of End Users and the General Public**

2968 This is a simple, broad provision, designed to alert governments to the importance of ensuring
2969 adequate protection for the general public and end users of public services as PPPs are
2970 implemented. This might seem obvious, but in reality, is too often and easily forgotten or
2971 down-played. It is a fundamental aspect of the People-first PPP Principles. The Article
2972 obliges governments, in drawing up their detailed procedures for implementing PPPs, to be
2973 set out in the PPP regulations, to take due account of the needs and best interest of members
2974 of the general public and end users who stand to be affected by such implementation. It
2975 requires suitable mechanism to be put in place for lodging and addressing complaints,
2976 grievances and objections, including where appropriate a regulatory or parliamentary
2977 ombudsman. Any such procedures will always need careful thought, however. The legal
2978 systems of most countries will already contain a range of procedures, rights and remedies
2979 designed to achieve a similar objective. If so, there may still be no harm in creating additional
2980 mechanisms specifically directed at PPPs, in the procedures. Such mechanisms should never
2981 'oust' or limit other existing rights and remedies, however. The Article makes this clear.

2982 Para 3 allows the contracting authority to require the private partner to put in place an
2983 'operational-level grievance mechanism', which will be designed to facilitate the efficient
2984 handling of complaints and claims by the public. This would need to be provided for in the
2985 PPP contract. Where the PPP involves services to the public, para. 4 allows for the
2986 appropriate adjustment of those services over time as circumstances dictate, together with (if
2987 necessary) non-discriminatory third-party access to any related infrastructure network or
2988 system. Para. 5 allows the private partner to make rules governing the use of public
2989 infrastructure by third parties and the public.

2990 **CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION**

2991 **Article 34. Governing Law**

2992 Para.1 allows the parties to a PPP contract to choose and agree on the system of law which
2993 governs it. This may seem surprising to some. However, the authors felt that, on balance, it
2994 would be better for the law to bestow this freedom of contract than to impose local law
2995 automatically. Many legal systems do the latter in the case of government agreements.
2996 Occasionally, this can be problematic or even fatal to a PPP regime, however, if the
2997 perception of international investors and financial markets is that the host country's legal
2998 regime is not compatible with a project's 'bankability'. Sometimes very innovative
2999 contractual structures need to be deployed as a result.

3000 In addition, where the PPP project is a cross-border one, with assets straddling different
3001 jurisdictions, under the terms of a single unitary PPP contract, a 'neutral' system of law may
3002 have to be applied to the contract, by agreement between all the parties, which (by definition)
3003 is not that of one or more of the jurisdictions involved⁴⁶. It was therefore thought to be helpful
3004 and constructive to allow the parties at least the possibility of choosing a different system of
3005 governing law other than that of the host country.

3006 The choice of a foreign system of governing law is a somewhat theoretical possibility,
3007 nevertheless. PPP contracts are almost invariably governed by local law, for a range of cogent

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

3008 reasons (especially at the sub-sovereign level). All the underlying assets will be governed by
 3009 it anyway, for example, especially the real property involved. Public infrastructure and public
 3010 services will therefore be governed by local law, and it would be very difficult politically for
 3011 a government to accept the use of foreign law on a large-scale, high-profile infrastructure
 3012 project. Host countries should therefore keep in mind that local law will nearly always apply
 3013 to the PPP contract in practice in any case. The Article therefore builds in a ‘presumption’
 3014 that local law will be used, save in exceptional circumstances. Finally, if the contract does
 3015 not expressly provide otherwise, local law has to be applied.

3016 Other agreements and documents relating to the PPP (there will always be a plethora of them)
 3017 are unlikely to be subject to quite the same sensitivities as the PPP contract. Para.2 allows
 3018 the parties to choose the law governing them, subject to any applicable legal restrictions.
 3019 These are likely to be local law for the security documents and purely domestic commercial
 3020 sub-contracts, and an internationally recognised system of foreign law for the credit
 3021 agreements and the other major commercial contracts.

3022 **Article 35. Dispute Resolution**

3023 This article again applies the principle of freedom of contract to the agreement by the parties
 3024 of appropriate dispute resolution mechanisms in the PPP contract, explicitly mentioning a
 3025 wide range of possibilities. Some legal systems will prescribe specific procedures in this
 3026 context, as the article acknowledges. If they do so, in ways which are perceived as
 3027 problematic, the relevant legislation may have to be amended in accordance with Article 39.
 3028 International arbitration under a well-recognised system or set of rules (e.g. ICC/
 3029 UNCITRAL, ICSID or LCIA) is usually a ‘*sine qua non*’⁴⁷ of any bankable PPP contract.
 3030 Para. 3 confirms the efficacy of any waivers of sovereign immunity included in the contract;
 3031 these will usually be essential for legal proceedings to be successfully brought against the
 3032 contracting authority or other sovereign body.

3033 **CHAPTER VIII. IMPLEMENTATION AND MONITORING OF PPPs**

3034 This area is often somewhat neglected in PPP laws. The accurate compilation of full, detailed
 3035 information about the implementation and operation of PPPs, including the challenges they
 3036 face during their life, is essential to the successful development of the wider PPP system. PPP
 3037 systems need to be constantly reviewed and assessed by the governments advancing them.
 3038 The Model Law seeks to provide for that.

3039 **Article 36. Monitoring and Reporting on the Implementation of PPPs**

3040 Para. 1 confirms that the contracting authority is entitled to exercise such powers of
 3041 supervision and monitoring of its PPPs as may be necessary to satisfy itself that they are
 3042 being implemented in accordance with their terms. Reports, documentation and physical
 3043 access to the site are allowed for. The detailed requirements and procedures will all have to
 3044 be set out in the PPP contracts, as these powers must be exercised in ways which do not
 3045 interfere with the efficient implementation and management of the projects. But the article
 3046 encourages the parties to make proper provision for them.

3047 Para. 2 then obliges the contracting authority to provide regular reports about its PPPs to
 3048 central government, copies of which shall generally be publicly available, as well as any
 3049 specific information requested from time to time. This is designed to help promote that
 3050 central store of useful information mentioned above.

3051 Para. 3 requires contracting authorities to keep accurate and complete records of the decisions
 3052 made and procedures followed by them in connection with all aspects of PPP implementation

⁴⁷ An unavoidable condition.

3053 under the PPP law. This is considered important from the perspectives of both transparency
3054 and accountability (both of which constitute People-first PPP Principles).

3055 **Article 37. PPP Database**

3056 This article in turn mandates the creation and maintenance of a central database of PPPs in
3057 the host country, containing information that is reasonably comprehensive, up-to-date and
3058 clear, as well as generally publicly available. It aims to promote the transparency of the whole
3059 system, which is likely to be in the best interests of all involved. The detailed workings of
3060 the database can be set out in the regulations.

3061 ***CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS***

3062 The last three articles deal with the formalities of entry into force of the PPP law. They
3063 provide for the cancellation of certain existing laws (which can be listed), the disapplication
3064 to subsequent PPPs of provisions of existing laws which are not cancelled, and the
3065 consequential amendment as necessary of others (allowing for either a list in the Law itself,
3066 or a deadline for making the amendments, or both). As a backstop, Article 38 also provides
3067 for the primacy of the PPP law over other laws relevant to PPPs in the event of a conflict
3068 between them. Host countries should conform these articles to their legislative customs and
3069 style as appropriate.

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3084 **Appendix 2 [list of leading precedents used in drafting Model Law]**

3085 **CIS Model PPP Law**

3086 **PPP (or equivalent) Laws for the following countries**

- 3087 • France
- 3088 • Lithuania
- 3089 • Russia
- 3090 • Serbia
- 3091 • Mongolia
- 3092 • Croatia
- 3093 • Egypt
- 3094 • Georgia
- 3095 • Uzbekistan
- 3096 • Kenya
- 3097 • [others to come]

3098 **Relevant EU Legislation**

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3100 **Appendix 3. Some leading sources of reference and further reading**
 3101 **about PPPs and PPP Legislation. To include:**

- 3102 • **UNCITRAL Legislative Guide** on Privately Financed Infrastructure Projects, 2001
 3103 (hereinafter the "**PFI Guide**") or the "**Guide**" including the Legislative
 3104 Recommendations (hereinafter the 71 "Recommendations" or "**Rec**") and
 3105 **UNCITRAL Model Legislative Provisions** on Privately Financed Infrastructure
 3106 Projects, 2004 (hereinafter the "**MLP**")¹;
- 3107 • Note by the Secretariat to the UNCITRAL Commission for its 50th session, Vienna 3-
 3108 17 July 2017, Possible future work in procurement and infrastructure development
 3109 (A/CN.9/912); report of the "Third International Colloquium on Public-Private
 3110 Partnerships (PPPs) 23-24 October 2017, Vienna¹.
- 3111 • **European Commission Guidelines for Successful Public-Private Partnerships**
 3112 (2003); **Commission Interpretative Communication** Brussels, 05.02.2008. C
 3113 (2007)6661 on the application of Community law on Public Procurement, and
 3114 Concessions to Institutionalised Public-Private Partnerships (IPPP); **Directive**
 3115 **2014/23/EU** of the European Parliament and of the Council of 26 February 2014 on
 3116 the award of concession contracts, Official Journal L 94, 28.3.2014, p. 1; **Directive**
 3117 **2014/24/EU** of the European Parliament and of the Council of 26 February 2014 on
 3118 public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65;
 3119 **Directive 2014/25/EU** of the European Parliament and of the Council of 26 February
 3120 2014 on procurement by entities operating in the water, energy, transport and postal
 3121 services sectors and repealing Directive 2004/17/EC; OJ L 94, 28.3.2014, p. 243;
- 3122 • **EBRD Core Principles for a Modern Concessions Law – selection and**
 3123 **justification of principles Prepared by the EBRD Legal Transition Team, 2005¹;**
- 3124 • The **PPP Reference Guide** published by the **World Bank (IBRD)** in []
- 3125 • **UNIDO Guidelines for Infrastructure Development through Build Operate**
 3126 **Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines)¹;**
- 3127 • **UNECE Guidebook on Promoting Good Governance in Public-Private**
 3128 **Partnerships (2008)¹;**
- 3129 • **OECD Basic Elements of a Law on Concession Agreements, 1999-2000;**
- 3130 • **CIS PPP Model Law¹;**
- 3131 • **The EPEC PPP Guide to Guidance 2011¹; and**
- 3132 • **Policy Challenges in the Implementation of Performance-used Contracting for**
 3133 **Road Maintenance, EBRD 2016.**
- 3134 • **Graham Vinter-Project Finance ([4th] edition)**
- 3135