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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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I. PREAMBLE106
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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 model 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).

142 II. CHAPTER I GENERAL PROVISIONS

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

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

150 **2. All PPPs.** This law applies to all forms of PPP, as defined in this law, including those
151 referred to or described as “concessions”, “BOTs”, or “user charge” projects, those referred
152 to or described as “government pay” or “PFI”-type projects, other forms referred to by other
153 labels or acronyms, and those that involve a transfer of demand risk to the private partner as
154 well as those that do not. It also applies to all PPP projects implemented in [*host country*]
155 after the date this law comes into force, whether carried out at national, federal, sub-national,
156 regional or municipal level (except only in so far as the PPP regulations specifically provide
157 otherwise).

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

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

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

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

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

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

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

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

183 (g) “**Government**” means the government of [*enacting state*] and includes (where the
184 context so requires) any local, municipal or regional government and any other

- 185 public authority or competent body performing any function or exercising any
186 power under this law or the PPP regulations;
- 187 (h) **“Implementation resolution”** means a resolution referred to in article 13 confirming
188 a formal decision by a contracting authority to implement a PPP;
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- 190 (i) [**“Institutional private partner”** means, in the context of an institutional PPP, any
191 legal entity or person with which the contracting authority concludes a PPP contract
192 in accordance with this law, where such legal entity or person is a joint venture or
193 mixed public-private ownership company (a “jointly owned company”), constituted
194 between a contracting authority or its designated representative (on the one hand)
195 and another private-sector legal entity or person having majority ownership (on the
196 other), with governance arrangements in place which require that the private-sector
197 legal entity or person (and not the contracting authority or its representative) retains
198 control of the jointly owned company];
- 199 (j) [**“Institutional PPP”** or “iPPP” means a PPP where the private partner is an
200 institutional private partner;]
- 201 (k) **“Lender”** means any bank, financial institution or other form of lender that provides
202 or intends to provide debt financing (and/or any related commitments, such as
203 guarantees) to the private partner in connection with a PPP contract;
- 204 (l) **“Official channels”** means the official journal(s) or vehicle(s) of communication
205 used by the government (or any competent body) to publish certain information
206 which it wishes to draw formally to the public’s attention, including in connection
207 with tender proceedings it is organising (such as an official gazette or the official
208 government website);
- 209 (m) **“Open public tender”** means and refers to a tender or selection process where the
210 contracting authority pre-qualifies and/or selects the participating tenderers on the
211 basis of responses to one or more public advertisement(s) to which in principle any
212 legal entity or person meeting the specified criteria can respond;
- 213 (n) **“People-first PPP principles”** has the meaning given that expression in the
214 preamble;
- 215 (o) **“PPP contract”** means a mutually binding contract or contracts concluded between
216 the contracting authority and private partner that set(s) forth the terms and
217 conditions for implementing a PPP, in accordance with the requirements and
218 procedures provided by this law;
- 219 (p) **“PPP guidelines”** means any PPP-related guidelines, studies, recommendations or
220 explanatory or advisory papers (or similar documents) issued and published by the
221 government pursuant to article 3 from time to time, but not having binding legal
222 effect;
- 223 (q) **“PPP regulations”** means the regulations applicable to the selection, preparation,
224 appraisal, procurement and implementation of PPPs (and other related matters)
225 made pursuant to article 3 from time to time and having binding legal effect;
- 226 (r) **“Private initiator”** means any legal entity or person (or consortium thereof) that
227 submits an unsolicited proposal to implement a PPP in accordance with Article 14;
- 228 (s) **“Private partner”** means any legal entity or person [(including where applicable
229 an institutional private partner)] retained by the contracting authority to implement
230 a PPP under a PPP contract;

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

280 quality of services delivered and whole-life costs and benefits to the economy,
 281 including fiscal, environmental and social costs and benefits, in line with the People-
 282 first PPP principles. It may be precisely measured in accordance with any detailed
 283 methodology (if any) set out in the PPP regulations. The underlying concept is that
 284 the more fully a PPP gives effect to the People-first PPP principles, the higher the
 285 value for people; the higher the value for people, the higher the value for money.

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Article 3. PPP Regulations and Guidelines

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

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

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

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

Article 4. PPP Criteria and Fundamental Requirements.

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

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

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

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

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

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

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

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

330 4. **[Institutional PPPs.** The provisions of this law relating to PPPs shall also apply to
 331 Institutional PPPs, subject to any further specific conditions or requirements provided for the
 332 same in the PPP regulations. In particular, the provisions relating to the private partner and
 333 its selection by the contracting authority shall apply to the private-sector legal entity or person
 334 [owning and] controlling the institutional private partner, and those relating to the PPP
 335 contract shall apply to the contract concluded by the institutional private partner with the
 336 contracting authority.]

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

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

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

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

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

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

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

362 (b) Water (water supply, treatment and distribution, sanitation, wastewater
 363 collection and treatment and irrigation systems);

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

- 368 (d) Waste collection, processing, recycling and disposal; methanization plants;
- 369 (e) Municipal parking and other municipal services;
- 370 (f) Postal infrastructure and services;
- 371 (g) Telecommunications and digital infrastructure; smart cities, green cities and
372 green infrastructure;
- 373 (h) Health care-related infrastructure, including hospitals, clinics, emergency
374 centres and hospices; healthcare services and healthcare-related administrative and support
375 services;
- 376 (i) Education-related infrastructure, including schools, universities, student
377 accommodation, nursery schools and adult-education facilities; university and non-university
378 research centres;
- 379 (j) Tourism, culture and sport, including stadia, theatres, concert halls, opera
380 houses, other performing arts centres, public sports centres and training facilities;
- 381 (k) Social housing;
- 382 (l) Social support facilities, such as centres for the aged and infirm, centres for the
383 homeless or youth-care, and food banks; and
- 384 (m) Any other sectors and subsectors not specifically excluded by law as aforesaid,
385 subject to the prior approval of the responsible public authority or competent body].
- 386 2. **[Prohibited Sectors and Activities.** PPPs may not be undertaken in the following
387 sectors or areas of activity (except where and to the extent that PPP regulations may
388 provide otherwise):
- 389 • [list any excluded (if any)]

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

- 391 1. **Main Parties.** Subject to paragraphs 2 and 3 below, the parties to a PPP contract are
392 the contracting authority and the private partner.
- 393 2. **Acknowledgments.** It is acknowledged that, as parties to the PPP contract, the
394 contracting authority may represent or include more than one public authority and that the
395 private party may have more than one owner or stakeholder (including an owner or
396 stakeholder which may itself be government-owned).
- 397 3. **Additional Parties.** The parties to a PPP contract may agree to include other parties
398 to the contract where they deem it necessary to do so (subject to any relevant conditions in
399 the PPP regulations).

400 **Article 8. PPP Term**

- 401 1. **[Minimum Term.** Every PPP contract shall have a minimum term of [] years (or
402 such other minimum term (if any) as may be determined in accordance with the PPP
403 regulations)].
- 404 2. **Duration.** The PPP contract shall set forth its duration, which shall take into account
405 the following factors and be limited to the period of time necessary to give effect to them;

- 406 (a) The purposes and objectives of the PPP identified as part of its appraisal and
 407 approval process under Chapter III, taking into account all relevant factors (including public
 408 affordability);
- 409 (b) The contracting authority's needs and requirements in relation to the facilities
 410 or services concerned;
- 411 (c) The nature and amount of investment required to be made by the private
 412 partner, including the term of any debt and appropriate returns on equity investments;
- 413 (d) The normal depreciation period for the permanent physical assets comprised
 414 in the PPP.
- 415 (e) any relevant policies concerning the competition and market structures for the
 416 infrastructure or service sector concerned, as reflected in any applicable laws.
- 417 (f) The PPP regulations may set out methodology and criteria for applying these
 418 and any other relevant factors to the determination of the contract's duration.
- 419 3. **Extension of Term.** The duration of the PPP contract may, in exceptional
 420 circumstances specified in the PPP contract, be extended in accordance with its terms for any
 421 necessary time period(s), if any, provided for therein, but subject always to any relevant
 422 conditions or restrictions in the PPP regulations.
- 423 4. **Asset Ownership Unaffected.** Where the private partner is permitted by the terms of
 424 the PPP contract to own any assets comprised within the PPP outright and indefinitely, that
 425 right of ownership may continue beyond the end of the term of the PPP contract.
 426

427 III. CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES

428 *[Consider including provisions in the law dealing with the respective powers, roles and*
 429 *responsibilities of different ministries and government bodies (including where appropriate*
 430 *parliamentary bodies) relating to the selection, preparation, approval, procurement and*
 431 *implementation of PPPs. These provisions may need to provide for the interface between*
 432 *them and any relevant procedures and processes involved. The purpose of such provisions,*
 433 *where they are necessary, is to provide administrative clarity and to help ensure that PPPs*
 434 *(and any government programmes for them) are properly integrated with the wider public*
 435 *investment process and other relevant decision-making or regulatory mechanisms and plans.*
 436 *In particular, they should be fully integrated with the country's wider strategic vision for*
 437 *infrastructure development, its long-term planning and prioritization processes and*
 438 *associated budgeting arrangements. These should include the country's long-term*
 439 *sustainable development and SDG plans (such as nationally-determined contributions for*
 440 *carbon emissions under the Paris Climate-Change Agreement). Fiscal sustainability is*
 441 *always a critical aspects of these projects, and specific administrative or budgeting*
 442 *provisions may need to be included to provide for it.*

443 *Some countries choose to give a single public authority (such as a Commission or Cabinet*
 444 *of Ministers) overall responsibility for managing and running the entire PPP system. This*
 445 *may then become the 'supreme authority' for all its purposes. This can offer certain*
 446 *advantages in terms of coherence, coordination and 'single-point responsibility', which can*
 447 *facilitate decision-making processes and avoid conflicts or competition between different*
 448 *ministries or projects in the PPP area. Whether it is politically or constitutionally workable*
 449 *is another question. Line ministries may not be happy with the new tier of authority over their*
 450 *powers that it can represent.*

451 *The processes involved should be transparent and participatory. Accountability for decision-*
 452 *making at different stages and levels should always be clear, tied as appropriate to the*
 453 *challenge/ redress of grievance mechanisms. Budgeting mechanisms and procedures-both*
 454 *long and short term-need careful thought in this context; public sector undertakings and*
 455 *liabilities, including contingent liabilities, need to be properly accounted for and budgeted.*
 456 *A contingency fund may have to be put in place. This all tends to call for particular focus on*
 457 *the role of the Ministry of Finance (or other budget authority, such as a supreme audit*
 458 *institution) to safeguard public finances and the application of fiscal rules. The role of sector*
 459 *regulatory bodies may also need to be allowed for].*

460 **Article 9. Public-Private Partnership Unit and Administrative** 461 **Coordination**

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

464 **2. Structure.** The PPP Unit shall be deemed to form part of and be subordinate to the
 465 Ministry of [*The host country specifies the relevant ministry*]. The director of the PPP Unit
 466 shall be [*state position and ministry*], who shall be responsible for organising and
 467 coordinating its activities and day-to-day operations. The PPP Unit shall be appropriately
 468 staffed on the basis of a range of skills, expertise and experience (including a grasp of the
 469 People-first Principles), with a view to enabling it to perform its functions and responsibilities
 470 effectively and efficiently. A record of its composition and staffing shall be kept up-to-date
 471 at all times and publicly available.

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

474 (a) [*Propose methodologies, procedures and guidelines for structuring and*
 475 *implementing PPPs;*

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

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

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

482 (e) Prepare standard bidding and contract documents for use by contracting
 483 authorities;

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

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

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

- 494 (i) Review and confirm the proper completion of the feasibility study (and other
495 key reports and studies) for individual PPPs and the conformity of preparation work with the
496 law's requirements and procedures, as provided for in this law or the PPP regulations;
- 497 (j) Assist with the coordination and development of individual PPP projects and
498 PPP-related activities;
- 499 (k) Maintain an up-to-date registry of all PPP projects, containing relevant details
500 of their registration and that of the related PPP contracts;
- 501 (l) Act as a point of contact and source of information for parties implementing
502 or seeking to implement PPPs (whether public or private); provide guidance, advice,
503 consultations and/or clarifications to them as necessary (including as to its understanding of
504 the meaning and effect of provisions of this law);
- 505 (m) Organize and provide training for public sector staff involved in PPPs
506 (including educational sessions and workshops);
- 507 (n) Keep track of the monitoring and oversight by contracting authorities of the
508 implementation of PPPs for which they are responsible;
- 509 (o) Advise the Government on administrative procedures related to PPPs;
- 510 (p) Organise, collate and continually refine and develop a knowledge-base
511 (including an electronic database) of PPP-related know-how, information, guidelines,
512 assessments, research, studies, precedents, model clauses, opinions, methodologies and other
513 documentation to aid the regular progress of PPPs and the PPP sector in [*host country*];
- 514 (q) Ensure that elements of the documentation referred to in this Article are
515 publicly available and/or published as required or appropriate;
- 516 (r) Assist with the constructive resolution of problems and issues during the
517 implementation of PPPs ('trouble-shooting');
- 518 (s) Assist generally with the promotion of PPPs in [*host country*] and public
519 education on the subject;
- 520 (t) Such other functions (if any) as may be provided for in the PPP regulations
521 from time to time.]

522 4. **No Conflict.** Any such roles and responsibilities should, however, be defined and
523 allocated to the PPP Unit in ways which at all times avoid any potential conflicts of interest
524 between them.

525 5. **Administrative Coordination Mechanisms.** The Government shall also be
526 responsible for establishing institutional mechanisms to coordinate the activities of the public
527 authorities responsible for issuing approvals, licences, permits or authorisations required for
528 the implementation of PPPs in accordance with statutory or regulatory provisions under
529 applicable law on the construction and operation of infrastructure facilities of the type
530 concerned. Provision for any such mechanisms may be set out herein and/or in the PPP
531 regulations.

532 **Article 10. Information about PPPs**

533 1. **Comprehensive PPP System Information.** The Government shall be responsible for
534 preparing, collating, refining, maintaining and (subject to any confidentiality restrictions)
535 publishing up-to-date information about PPPs in such form as it may deem helpful and
536 informative to all stakeholders, other participants in the PPP industry and the general public,
537 and as may be reasonably required to promote the effective operation of the PPP system in

538 [host country] and the clarity and transparency of its workings, or as may otherwise be
 539 required by applicable law. All such information shall be subject to a presumption of
 540 transparency and disclosure to the general public.

541 2. **Matters Included.** Such information may include the contents of PPP policy papers,
 542 the PPP regulations, the PPP guidelines and practice notes, appraisal and evaluation criteria
 543 and procedures (including fiscal transparency considerations), the progress of PPPs being
 544 implemented, results of tenders, material contractual terms (subject to any confidentiality
 545 restrictions), recommended contractual terms and conditions, the ‘pipeline’ of future PPP
 546 projects being planned or considered, the conclusions reached in reviews, studies and reports,
 547 the strategic, environmental and social impact assessments for PPPs, and any other matters it
 548 considers appropriate. (Such information should where relevant be presented in the context
 549 of (or otherwise connected with) the wider information system relating to the [host country’s]
 550 procurement and strategic plans for infrastructure and economic development).

551 3. **Specific PPP Information.** Each contracting authority shall be responsible for
 552 collecting, making available and where necessary publishing, such information concerning
 553 any PPPs it is implementing or plans to implement as may be required from time to time by
 554 the Government or otherwise pursuant to the PPP regulations or applicable law, including
 555 information necessary to ensure that the stakeholders relevant to any such PPP (including
 556 local communities) are able to respond to the plans and proposals for it in a timely manner in
 557 accordance with their rights under applicable law.

558 4. **Tender Information.** Where tenders for PPPs take place in accordance with this law,
 559 such information containing such detail as the PPP regulations may specify concerning the
 560 relevant pre-qualification or tender requirements and results, the names and identities of any
 561 pre-qualified, short-listed, preferred or winning bidders, and (where applicable) the grounds
 562 on which they have been selected, shall be posted on the official web-site of the contracting
 563 authority and published as required through the official channels without delay, during or
 564 following the relevant stage(s) of the tender.

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

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

572 IV. CHAPTER III. INITIATION AND PREPARATION OF PPPS

573 Article 11. Initiating and Preparing PPPs

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

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

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

- 582 4. **Meaning and Scope of Initiation and Preparation.** In this law, the expression
583 ‘initiate a PPP’ refers to the action of starting the process of defining and preparing a PPP
584 and seeking any preliminary approvals and consents needed under this law to progress it
585 further, whilst the expression “prepare/preparation of a PPP” refers to and includes the
586 detailed early-stage work of documenting, describing and specifying it, and setting out its
587 principal scope, characteristics and features (including its Key Performance Indicators
588 (KPIs)), in sufficient detail for it to be appraised in accordance with this law, to form an
589 adequate basis for detailed proposals by bidders or a private initiator, and for the procedures
590 hereunder for approving and awarding it to be applied. The detailed aspects of such work
591 (including documentation requirements and applicable appraisal criteria used in accordance
592 with Article 12) and the steps and procedures applicable to them (including review and
593 approval requirements) shall be set out in the PPP regulations, and may differentiate between
594 different types or scale of PPP and different project characteristics. For the avoidance of
595 doubt, ‘preparation’ shall not typically involve the work of final and definitive design of a
596 PPP which accompanies its actual implementation, which is generally carried out by the
597 private partner).
- 598 5. **Feasibility Study.** Except to the extent the PPP regulations provide otherwise, the
599 work of preparing a PPP shall include a comprehensive (preliminary) feasibility study and
600 cost-benefit analysis, covering its material elements and aspects, including in particular those
601 referred to in the relevant appraisal criteria set out in Article 12 and showing how those
602 criteria will be satisfied.
- 603 6. **Studies to be included.** As part of or in addition to the (preliminary) feasibility study,
604 the work of preparing a PPP shall;
- 605 (a) Assess its anticipated social, economic and environmental impact, its “value
606 for people” and long-term sustainability (including the extent to which it gives effect to the
607 People-first PPP Principles);
- 608 (b) In particular, without limiting the generality of sub-para (a) above, assess its
609 affordability, long-term sustainability (including fiscal sustainability) and the extent to which
610 it will improve the quality and efficiency of the public services to which it relates;
- 611 (c) Identify the technical requirements and expected inputs and deliverables;
- 612 (d) If practicable at this stage, identify the anticipated key performance indicators
613 (“KPI”) and the indicative payment terms;
- 614 (e) Consider the extent to which the project activities can be performed by a
615 private partner under a contract with the contracting authority;
- 616 (f) Identify the licences, permits or authorisations that may be required in
617 connection with the approval or implementation of the PPP;
- 618 (g) Identify and assess the main project risks and describe the proposed risk
619 allocation under the PPP contract;
- 620 (h) Identify any proposed forms of Government support needed for the
621 implementation of the PPP, and their budgetary implications;
- 622 (i) Determine the capacity of the contracting authority to enforce the PPP contract
623 effectively, including the ability to monitor and regulate project implementation and the
624 performance of the private partner;
- 625 (j) Identify the appropriate procedures for contract award;
- 626 (k) Include any other relevant background studies, taking account where
627 appropriate of any other PPP, project or public service with which the proposed PPP is closely
628 associated or linked).

- 629 7. **Review and Approval.** The compliance of such feasibility study and other studies
 630 and reports with the relevant appraisal criteria and approval procedures referred to herein
 631 shall be subject to review and approval by the PPP Unit or other competent body (if any)
 632 authorised for this purpose pursuant to Article 12.2.
- 633 8. **Preliminary Studies.** The work of preparing a PPP may include reports prepared
 634 (such as pre-feasibility studies) and review procedures applied at earlier stages of preparation
 635 than the comprehensive feasibility study referred to in paragraph 5. The appraisal criteria to
 636 be applied at any such earlier stage shall be derived from the appraisal criteria set out in
 637 Article 12, adjusted as necessary and appropriate to suit the more preliminary nature of the
 638 information available at such stage.
- 639 9. **Consultations.** The work of preparing a PPP shall be subject at the relevant stages to
 640 all requirements for formal consultation with stakeholders, other relevant authorities and the
 641 general public, including public hearings where appropriate, as may be required pursuant to
 642 applicable law or the PPP regulations and/or as envisaged by the People-first PPP Principles.
 643 The consultation process shall be structured to enable a genuine dialogue to take place
 644 concerning all significant issues of concern to stakeholders, and available remedies to be
 645 pursued, and to allow suggestions from third parties for improving the PPP to be put forward.
 646 Key points raised by stakeholders shall be accurately recorded and responded to as
 647 appropriate.
- 648 10. **Changes during Preparation.** A proposed PPP may be re-designed, changed or
 649 revised as often and in as many ways as necessary during its preparation under this Chapter
 650 III in order to ensure that it is fully compliant with the requirements of this law, including in
 651 particular Article 4, this Article and the appraisal criteria and review and approval procedures
 652 set out in Article 12.

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

- 654 1. **PPP Compliance.** Any PPP implemented pursuant to this law (including pursuant to
 655 an unsolicited proposal) must comply with the requirements of Article 4 and the applicable
 656 appraisal criteria and approval procedures laid down for this purpose in this law and the PPP
 657 regulations.
- 658 2. **[Review and Approval.** The PPP Unit or other competent body authorised by this
 659 law or the PPP regulations for this purpose shall be responsible for reviewing [and approving]
 660 proposed PPPs (and the preparation work carried out for them) submitted to it by contracting
 661 authorities in accordance herewith, [and for advising [the relevant competent body] as to
 662 whether a proposed PPP meets the appraisal requirements set forth herein]. In particular, it
 663 shall be responsible for;
- 664 (a) Ascertaining whether a proposed PPP is worthwhile being carried out as a PPP;
 - 665 (b) Confirming that the PPP has been prepared in accordance with the
 666 requirements of Article 11;
 - 667 (c) Confirming that the PPP meets the specific appraisal criteria applicable to it;
 - 668 (d) Reviewing the contracting authority's capability for carrying out the proposed
 669 PPP and making appropriate recommendations;
 - 670 (e) [reviewing [and approving] the draft tender documents prepared by the
 671 contracting authority to ensure conformity with the approved proposal].]
- 672 3. **Appraisal Criteria.** The appraisal criteria applicable to any proposed PPP (and
 673 referred to in Article 11) shall include such of the following as may be appropriate for this
 674 purpose:

- 675 (a) [the PPP’s compliance with the criteria and requirements set out in Article 4;
- 676 (b) In particular, the PPP’s anticipated socio-economic and public-service net
677 benefits and “value for people” (including inclusivity and accessibility) and the extent to
678 which they satisfy and advance the People-first PPP Principles and the wider public good;
- 679 (c) The extent and urgency of the need and demand for the PPP;
- 680 (d) The PPP’s alignment with the Government’s wider sector objectives, plans and
681 strategies for infrastructure and economic development and achievement of the SDGs;
- 682 (e) Its commercial and financial viability;
- 683 (f) Its technical feasibility and strengths (including implementation timescales);
- 684 (g) Its legal, regulatory and institutional viability;
- 685 (h) Its environmental and social sustainability and impact manageability, taking
686 account of its long-term resilience and adaptability;
- 687 (i) The cost-effectiveness, acceptability and affordability of the PPP for both users
688 (including vulnerable groups), on the one hand, and the host country from a budgeting/fiscal
689 and sustainable debt perspective, on the other;
- 690 (j) The need and scope for any anticipated public sector payments, finance,
691 guarantees or other support for the PPP;
- 692 (k) The appropriateness of the PPP’s proposed (preliminary) risk-allocation and
693 incentive profile;
- 694 (l) The cost effectiveness and value-for-money/ value for people of implementing
695 the project on a PPP basis relative to other procurement methods;
- 696 (m) Generally, the extent to which the PPP is expected to meet the purposes and
697 objectives set out for it in the documents drawn up as part of its definition and preparation
698 under Article 11;
- 699 (n) Any other relevant requirements of applicable law relating to public
700 investments;
- 701 (o) [any other appropriate criteria (if any), consistent with the foregoing as may be
702 specified from time to time in the PPP regulations].]

703 4. **Matters included in Appraisals.** In appraising the PPP, due regard shall be had (inter
704 alia) to the contents of the feasibility study and any related reports prepared under Article 11
705 and the extent to which it/they demonstrate(s) compliance with the applicable appraisal
706 criteria, as reviewed and certified by the PPP unit or other competent body. Due regard shall
707 also be had to the results of all public consultations and/or public hearings which have taken
708 place at that stage of the appraisal process in relation to the PPP in accordance with Article
709 11.9.

710 5. **Detailed Procedures in PPP Regulations.** The detailed procedures applicable to the
711 proposed PPP during its initial definition, preparation, appraisal and approval under this
712 Chapter shall be set out in the PPP regulations and shall include (amongst other things)
713 relevant timescales, documentation and reporting requirements, notification and publicity
714 requirements, relevant formalities, the relative weightings and priority of applicable criteria
715 and tests, formal review and approval requirements and appeal procedures.

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

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Article 13. PPP Implementation Resolutions

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

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

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

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

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

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

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

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

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

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

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

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

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3. **Publication and Copies.** The implementation resolution shall (subject to any exceptions permitted by this law) be published on the official website of the contracting authority and in the official channels. In the case of an unsolicited proposal, it shall also be notified and copied to the private initiator. Where a competitive tender is being held pursuant to Chapter IV, a copy of the implementation resolution shall be included with the tender documents released to bidders.

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Article 14. Unsolicited Proposals

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1. **Initiation.** A private initiator seeking to implement an unsolicited proposal for a PPP may at any time define and submit its proposal in preliminary form to the relevant contracting authority (and any other competent body authorised by the PPP regulations to receive such

- 762 proposals), which shall have a discretionary power to consider and review it. An unsolicited
763 proposal shall only be deemed eligible for consideration and review if it does not already
764 appear in selection procedures that have been announced or a plan or pipeline of future PPPs
765 developed on behalf of the contracting authority or the Government.
- 766 2. **Preliminary.** The preliminary unsolicited proposal shall describe the proposed PPP
767 in sufficient detail to enable it to be given a preliminary review by the contracting authority
768 (and any such other competent body) and shall be accompanied by all documents necessary
769 for this purpose. The contracting authority (and any such other competent body) shall carry
770 out any preliminary review of the proposal that it decides to make, reach a preliminary
771 decision about whether or not it is considered to be potentially in the public interest and
772 intends to proceed further with it, and notify the private initiator accordingly.
- 773 3. **‘Open Door’.** The private initiator may enter into discussions and an exchange of
774 information at any time regarding the proposed PPP with the relevant contracting authority.
- 775 4. **Detailed Preparation.** Following a preliminary decision to proceed further with the
776 unsolicited proposal, the detailed work of preparation of the PPP shall then be carried out in
777 accordance with the requirements of Article 11, by either the contracting authority, the
778 private initiator, or both of them jointly (as the contracting authority may specify). To this
779 end, the contracting authority shall invite the private initiator to submit as much
780 information on the proposed PPP as is feasible at this stage to allow the contracting
781 authority (and any other relevant competent body) to make a proper evaluation of the
782 private initiator’s qualifications and the technical and commercial feasibility of the
783 PPP, and to determine whether the PPP is likely to be successfully implemented in the
784 manner proposed on terms acceptable to the contracting authority (and any other
785 relevant competent body). For this purpose, the private initiator shall, if and to the
786 extent reasonably required by the contracting authority, submit a technical and
787 commercial feasibility study, an environmental impact study and satisfactory
788 information regarding the concept or technology contemplated in the proposal.
- 789 5. **Protection of Private Initiator’s Rights.** In considering an unsolicited proposal, the
790 contracting authority shall respect the intellectual property, trade secrets or other exclusive
791 rights contained in, arising from or referred to in the unsolicited proposal. It shall therefore
792 not make use of information provided by or on behalf of the private initiator in connection
793 therewith other than for the evaluation of that proposal, except with the consent of the private
794 initiator, and shall, if the proposal is rejected, return to the private initiator all documents
795 prepared and submitted by it during the evaluation process.
- 796 6. **Review, Appraisal and Implementation Decision.** The contracting authority (and/or
797 any such other competent body) shall then arrange for a review and appraisal of the
798 unsolicited proposal to be carried out in accordance with Article 12 and shall reach a final
799 decision about whether or not the PPP should be implemented, either on the original terms
800 proposed or on other terms modified from the original (discussed as necessary with the
801 private initiator during the review and appraisal process), and shall notify the private initiator
802 accordingly. If a decision is made to implement it, an implementation resolution to that effect
803 shall be issued and published by the contracting authority in accordance with Article 13. The
804 provisions of Article 21 shall then apply.

805 V. CHAPTER IV. SELECTION OF PRIVATE PARTNER

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

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

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

815 3. **Detailed PPP Tendering Procedures.** The detailed procedures and requirements
 816 (including any specific approval powers) applicable to competitive tenders for PPPs, the
 817 nature of the processes involved (e.g. whether paper, electronic or otherwise), the contents of
 818 the procurement notices, the pre-qualification and selection of the private partner and the
 819 contents of the tender documents shall be as set out in the PPP regulations, shall be designed
 820 to promote effective and fair competition leading to sustainable long-term outcomes, and
 821 shall be governed by the fundamental principles of transparency, equal treatment, non-
 822 discrimination, [and] efficient use of resources (including the cost and expense of bidding)
 823 [and proportionality].

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

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

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

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

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

851 Article 16. Tender Structures and Procedures: General

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

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

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

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

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

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

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

891 8. **Tender Security.** The tender documents may require the provision of tender security,
892 such as bid bonds, by the bidders, in an amount and on terms which are reasonable in the
893 circumstances. In that event, the tender documents shall precisely specify the circumstances
894 in which any such tender security may be forfeited by bidders. A bidder shall not forfeit its
895 bid security in any circumstances other than those specified.

896 9. **Certain Procedural Aspects.** No bidder may participate in more than one pre-
897 qualification or tender submission, except where and to the extent that the tender documents
898 so permit (including, for example, in the case of sub-contractors). Pre-qualification or tender

899 submissions may be changed or revoked at any time before the relevant deadline for their
900 submission in accordance with the relevant tender procedures.

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

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

917 **12. Confidentiality.** Subject and without prejudice to Article 10, the contracting authority
918 and the tender committee shall treat all proposals submitted in tender procedures conducted
919 in accordance with this law in such a manner as to avoid the unnecessary disclosure of their
920 content to competing bidders or to any other person not authorized to have access to this type
921 of information. Any discussions, communications and negotiations between the contracting
922 authority and/or the tender committee and a bidder shall be confidential (subject as aforesaid).
923 Unless required by law or by a court order, during any such tender procedures no party thereto
924 shall disclose to any other person any technical, price or other confidential information in
925 relation to such discussions, communications and negotiations without the consent of the
926 other party.

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

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

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

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

937 (b) An indication of other essential elements of the PPP that need to be identified
938 at the relevant stage of the tender process, such as the services to be delivered by the private
939 partner, the financial and commercial arrangements envisaged by the contracting authority
940 (such as payment mechanisms and funding sources) and the nature and extent of any public
941 sector support to be provided to the PPP;

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

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

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

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

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

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

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

972 **Article 18. Tender Committee**

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

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

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

985 4. **Records.** The tender committee shall document the tender process and evaluation in
986 reasonable detail and give reasons for its selection and award decisions.

987 5. **Interpretation.** References in this Chapter IV to the contracting authority may be
988 construed as including references to the tender committee where the context so requires.

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Article 19. Tender Stages

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

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

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

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

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

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

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

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(g) Award and conclusion of the PPP contract.

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

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

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

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

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

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

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(c) Where the contracting authority has reserved the right in the invitation to participate to request proposals from only a limited number of bidders that best meet the pre-qualification criteria, it shall rate the bidders accordingly and draw up a short-list of bidders that will be invited to submit proposals, up to the maximum number specified (but at least three, if possible). Those bidders shall then be invited to submit proposals for the PPP in accordance with the tender procedures and requirements.

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6. **Contents of the Request for Proposals.** The contracting authority shall provide a set of the request for proposals and related documents to each bidder (or pre-qualified bidder, as the case may be) invited in accordance with this law to submit proposals for

1034 the PPP that pays the price, if any, charged for those documents. The request for
1035 proposals shall contain all such information as may be required by Article 17.1 and
1036 the PPP regulations to enable bidders to submit responsive proposals for the PPP in
1037 accordance with the tender procedures and requirements by the deadline for
1038 submission of the same.

1039 **7. Comparison and Evaluation of Offers or Proposals.** The contracting authority
1040 shall compare and evaluate each offer or proposal submitted for the relevant PPP in
1041 accordance with the evaluation criteria set forth in the tender documents, any relative
1042 weight accorded to each such criterion or the descending order of importance of the
1043 same. For this purpose, the contracting authority may establish thresholds with respect
1044 to the technical, financial, commercial and quality aspects of the offers or proposals.
1045 Offers or proposals that fail to achieve the thresholds shall be regarded as non-
1046 responsive and rejected from the procedure.

1047 **8. Two-Stage Request for Proposals.** The contracting authority may adopt a tender
1048 structure involving a two-stage request for proposals where it assesses that discussions with
1049 bidders are needed to refine aspects of the description of the subject-matter of the
1050 procurement and to formulate them with the requisite detail, in order to obtain the most
1051 satisfactory solution to its procurement needs. In that case, the following provisions shall
1052 apply (subject to the PPP regulations):

1053 (a) Prior to issuing its final request for proposals, the contracting authority shall
1054 issue an initial request calling upon the bidders to submit, in the first stage of the procedure,
1055 their initial proposals and comments relating to project specifications, performance
1056 indicators, financing requirements or other relevant characteristics of the PPP and the main
1057 contractual terms proposed by the contracting authority;

1058 (b) The contracting authority may convene meetings and hold discussions or
1059 dialogue with bidders whose initial proposals have not been formally and properly rejected
1060 as non-responsive or unacceptable. Discussions may concern any aspect of the initial request
1061 for proposals or the initial proposals and accompanying documents submitted by the bidders;

1062 (c) Following examination of the proposals received, the contracting authority
1063 may review and, as appropriate, revise the initial request for proposals by deleting, adding to
1064 or modifying any aspect of the initial project specifications, performance indicators,
1065 financing requirements or other characteristics of the PPP, including the main contractual
1066 terms, and any specified criteria for evaluating and comparing proposals and ascertaining the
1067 successful bidder. Any such deletion, modification or addition shall be communicated in the
1068 invitation to submit final proposals;

1069 (d) In the second stage of the proceedings, the contracting authority shall invite
1070 the bidders to submit final proposals with respect to a single set of project specifications,
1071 performance indicators or contractual terms in accordance with the tender procedure;

1072 (e) The contracting authority shall rank all responsive proposals on the basis of
1073 the evaluation criteria set out in the tender documents and invite the bidder that has attained
1074 the highest rating for final negotiation of the terms of the PPP contract (but excluding any
1075 terms, if any, that were stated to be non-negotiable in the final request for proposals);

1076 (f) If it becomes apparent to the contracting authority that the negotiations with
1077 the bidder invited will not result in a contract, the contracting authority shall inform the bidder
1078 of termination of the negotiations and give the bidder reasonable time to formulate its best
1079 and final offer. If the contracting authority does not find that offer acceptable, it shall reject
1080 that offer and invite for negotiations the other bidders in the order of their ranking until it
1081 arrives at a PPP contract or rejects all remaining proposals. The contracting authority shall

1082 not resume negotiations with a bidder with which negotiations have been terminated pursuant
1083 to this paragraph.

1084 9. **Competitive Dialogue.** The contracting authority may adopt a tender structure
1085 involving a request for proposals with dialogue (“competitive dialogue”) where it is not
1086 feasible for it to formulate a detailed description of the proposed PPP needed for the purposes
1087 of an open public tender in accordance herewith, and it assesses that dialogue with bidders is
1088 needed to achieve the most satisfactory solution to its procurement needs. In that case, the
1089 following provisions shall apply (subject to the PPP regulations):

1090 (a) The contracting authority shall invite each bidder that presented a responsive
1091 proposal in accordance with the initial tender invitation (subject to any applicable maximum)
1092 to participate in the dialogue. The contracting authority shall ensure that a sufficient number
1093 of bidders, and if possible, not less than three, is invited to participate in order to ensure
1094 effective competition;

1095 (b) The dialogue shall be conducted by the same representatives of the contracting
1096 authority concurrently;

1097 (c) The contracting authority shall clearly identify those aspects of the PPP and
1098 the tender documents and process that are to be the subject of the dialogue;

1099 (d) During the course of the dialogue, the contracting authority shall not modify
1100 any material aspect of the proposed PPP, any pre-qualification or evaluation criteria, any
1101 minimum requirements, any element of the description of the PPP contained in the request
1102 for proposals, or any term or condition of the procurement process that is not itself subject to
1103 the dialogue;

1104 (e) Any requirements, guidelines, documents, clarifications or other information
1105 generated during the dialogue that is communicated by the public authority to a bidder shall
1106 be communicated at the same time on an equal basis to all other bidders, save only to the
1107 extent it contains information which is exclusive to the relevant bidder and its disclosure
1108 would breach any applicable confidentiality restrictions;

1109 (f) Following the dialogue, the contracting authority shall request all bidders who
1110 have not withdrawn from the process to present their best and final offers with respect to all
1111 aspects of their proposals. The request shall be in writing and shall specify the manner, place
1112 and deadline for presenting best and final offers. Unless the PPP regulations and the tender
1113 documents otherwise permit, no negotiations shall take place between the contracting
1114 authority and the bidders with respect to their best and final offers;

1115 (g) The winning bidder shall be selected from amongst the best and final offers
1116 submitted in accordance with this procedure, on the basis of the offer that best meets the
1117 needs of the contracting authority as determined in accordance with the applicable tender
1118 evaluation and selection criteria set out in the tender documents.

1119 **Article 20. Conclusion of the PPP Contract**

1120 1. **Winning Bidder.** The winning bidder shall be the bidder which the contracting
1121 authority and/or the tender committee determine(s), at the conclusion of the tender process,
1122 has submitted the most favourable compliant bid according to the evaluation criteria and
1123 methodology laid down in the tender documents.

1124 2. **PPP Contract Signatories.** The PPP contract (once agreed) shall be entered into by
1125 the contracting authority with the winning bidder (or with another private legal entity
1126 established by it for this purpose), which shall become the private partner in the PPP for the
1127 purposes of this law. Any such other private legal entity established by the winning bidder

1128 shall meet any formal or substantive requirements for such entity specified by the tender
1129 documents or otherwise agreed with the contracting authority. The PPP contract may contain
1130 provisions relating to the establishment and capitalisation of any such legal entity and any
1131 approvals required from the contracting authority to its structure, ownership, corporate
1132 documentation (including its statute and by-laws) and material changes to them.

1133 3. **Publication of Contract Award.** The contracting authority shall cause a notice of the
1134 contract award to be posted on its official web-site and published through the official
1135 channels in accordance with the requirements of Article 10.4. The notice shall identify the
1136 private partner and include a summary of the essential terms of the PPP contract (subject to
1137 any applicable confidentiality restrictions).

1138 4. **Public Disclosure of PPP Contracts.** Each PPP contract entered into pursuant to this
1139 Article shall also be subject to such public disclosure (but subject always to any applicable
1140 confidentiality restrictions) as may be provided for pursuant to this law (including Article 10)
1141 or the PPP regulations.

1142 **Article 21. Conclusion of PPP Contract for Unsolicited Proposals**

1143 1. **Testing Competition.** Following a final decision by the contracting authority to
1144 implement an unsolicited proposal for a PPP pursuant to Article 14 (either on the original or
1145 on any modified terms permitted thereby), the contracting authority shall, except in the
1146 circumstances set forth in Article 22, promptly initiate a competitive tendering procedure for
1147 the proposed PPP in accordance with this law, provided always that it considers that (a) the
1148 proposed PPP can be implemented without the use of unique intellectual property, trade
1149 secrets or other exclusive rights owned or possessed by the private initiator; and (b) that the
1150 proposed concept or technology involved is not truly unique or new.

1151 2. **Requirements for Tendering Procedure.** If the contracting authority initiates a
1152 competitive tendering procedure in accordance with paragraph 1 above, it shall publish its
1153 implementation resolution for the PPP on its website and the official channels in accordance
1154 with Article 13, together with a summary and description of the proposed PPP and its
1155 principal objectives, and any relevant documentation, inviting any third parties to submit
1156 expressions of interest in implementing the PPP within a specified period of time.

1157 3. **Exceptions: Contract with Private Initiator.** If the contracting authority does not
1158 consider that conditions (a) and (b) in the proviso to paragraph 1 have been met, or if no third
1159 party submits an expression of interest by the specified time limit referred to in paragraph 2,
1160 in circumstances where the contracting authority is satisfied that all reasonable steps have
1161 been taken to attract competing proposals, the contracting authority and the private initiator
1162 may proceed with the award of the PPP and enter into a PPP contract for this purpose, subject
1163 to any direct negotiations permitted by Article 22 and the PPP regulations (and any specific
1164 procedure for this situation they may contain, including the need for further competent body
1165 approvals).

1166 4. **Re-Testing Competition.** If the contracting authority is not satisfied that all
1167 reasonable steps have been taken to attract competing proposals, it shall be entitled to extend
1168 the time period for submitting third party expressions of interest, modify the documentation
1169 summarising and describing the proposed PPP as appropriate, and invite further expressions
1170 of interest.

1171 5. **Tendering Proceedings.** If any third parties submit expressions of interest by the
1172 specified time limit(s) referred to above, the contracting authority shall organise tender
1173 proceedings for the PPP in accordance with this law.

1174 6. **Participation of Private Initiator in Tender.** The private initiator shall be invited to
1175 participate in any tender proceedings for the PPP organised by the contracting authority,
1176 which may offer the private initiator any appropriate incentive, benefit or compensation (if
1177 any) as may be provided for in the PPP regulations, in consideration of its development and
1178 submission of the proposal, including:

1179 (a) An adjustment to the evaluation score of the private initiator under the tender
1180 documentation (in an amount pre-determined before issue of the tender documents); and/or

1181 (b) Cash compensation (in a pre-agreed amount) for reasonable and documented
1182 costs and expenses incurred by it in connection with the development of the unsolicited
1183 proposal before the start of the tender proceedings, up to any specified maximum.

1184 7. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to
1185 this Article shall be subject to the publication and public disclosure provisions of Article 20.

1186 **Article 22. Direct Negotiations**

1187 1. **Exceptions to Tendering Procedures.** The contracting authority may enter into a
1188 PPP contract with the private partner without conducting a competitive tendering process in
1189 accordance with this law (fully or at all, as the case may be), on the basis of direct negotiations
1190 between them, in and only in the following exceptional circumstances:

1191 (a) Where only a single bidder has pre-qualified and/or submitted a compliant bid
1192 in a tender process organised under Article 19;

1193 (b) Where paragraph 3 of Article 21 so permits;

1194 (c) [when there is an urgent need for ensuring continuity in the provision of the
1195 service and engaging in the competitive tendering procedures set forth in this Chapter would
1196 be impractical, provided that the circumstances giving rise to the urgency were neither
1197 foreseeable by the contracting authority nor the result of dilatory conduct on its part];

1198 (d) Where the proposed PPP is of short duration (especially one below any
1199 minimum referred to in Article 8.1) and its anticipated initial investment value does not meet
1200 or exceed the figure (if any) referred to in Article 4.1(b);

1201 (e) Where the use of the competitive tendering procedures set forth in this law is
1202 not appropriate for the protection of the essential security interests of the state; or

1203 (f) Where it has been clearly established to the proper satisfaction of the
1204 contracting authority (and any competent body authorized by the PPP regulations for this
1205 purpose), following presentation of a thorough report to that effect by an independent expert,
1206 that there is only one source capable of implementing the PPP as the private partner (such as
1207 in the case of indispensable patented technology or unique intellectual property, trade secrets
1208 or know-how, or other exclusive rights owned or possessed by such source), such that a
1209 competitive tender would not be feasible.

1210 2. **Procedures Applicable to Direct Negotiation.** The detailed procedures,
1211 requirements and conditions applicable to any such direct negotiations, including in the case
1212 of unsolicited proposals under Article 21.2, shall be specified in the PPP regulations,
1213 including in relation to any approvals required by another competent body for the use of the
1214 same, the monitoring by and reporting back to Government of their progress and the terms
1215 and efficacy of any PPP implemented as a result.

1216 3. **Further Steps.** Where a PPP contract is negotiated on the basis of such direct
1217 negotiations, the contracting authority shall (except where a closed tender is necessarily
1218 required):

1219 (a) Cause a notice of its intention to commence negotiations in respect of a PPP
1220 contract to be published in accordance with the PPP regulations;

1221 (b) Engage in negotiations with as many persons as the contracting authority
1222 judges capable of carrying out the project as circumstances permit;

1223 (c) Establish appropriate evaluation criteria against which proposals shall be
1224 evaluated and ranked.

1225 4. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to
1226 this Article shall be subject to the publication and public disclosure provisions of Article 20.

1227 **Article 23. Review and Challenge Procedures**

1228 1. **Remedies for Public Authority Breach.** Any bidder or potential private partner that
1229 claims it has suffered or may suffer loss or injury as a result of any alleged breach or non-
1230 compliance of a decision or action of the contracting authority or other competent body or
1231 with the requirements of this law, the PPP regulations or any other relevant applicable law,
1232 in connection with the selection, preparation, appraisal, procurement or implementation of
1233 a PPP, may challenge the decision or action concerned and pursue any available remedies in
1234 accordance with the relevant review and appeal procedures provided by this law or otherwise
1235 under applicable law. The PPP regulations may provide specifically for such procedures.

1236 2. **Grievance Procedures to provide for Effective Challenge.** Any such procedures
1237 specifically provided by the PPP regulations shall aim to ensure (inter alia) that any such
1238 decision or action can be effectively challenged and reviewed without delay and, if possible,
1239 before it is carried into effect in relation to the relevant PPP, and that powers to take
1240 appropriate interim or interlocutory measures and steps are accordingly available, with a view
1241 to correcting the alleged breach or non-compliance and mitigating the loss or injury
1242 concerned at the earliest possible stage. Such measures and steps may (subject to their terms)
1243 include the power to open up, review, revise and/or annul any decision, certificate, approval,
1244 document, order or resolution made or given hereunder, and/or to suspend or cancel any
1245 procedure or course of action being followed under this law. Such procedures may also
1246 (subject as aforesaid) include the power to award compensation or damages to the person
1247 suffering loss or injury and even to cancel or set aside a PPP altogether in appropriate
1248 circumstances specified therein.

1249 3. **Other Procedures to allow for Interim Measures.** The PPP regulations shall aim to
1250 ensure that the detailed procedures drawn up under this law (including Article 12.5), for the
1251 purposes of selection, preparation, appraisal, procurement and implementation of PPPs, shall
1252 provide for sufficient time, following the taking of key decisions or the issue of key approvals
1253 or resolutions thereunder, to allow for the interim or interlocutory measures and steps referred
1254 to in paragraph 2 above to be taken.

1255 **VI. CHAPTER V. PPP CONTRACTS**

1256 **Article 24. Main Terms and Conditions of PPP Contracts**

1257 1. **Contract Terms as agreed by the Parties.** PPP contracts shall contain such terms,
1258 consistent with the implementation resolution and tender documents for the relevant PPP, as
1259 the parties to them may deem appropriate and agree between them, or as may otherwise be
1260 prescribed by law (expressly or by implication), including terms relating to the following:

1261 (a) The parties to the PPP contract;

- 1262 (b) The subject matter of the PPP contract, including the nature and scope of works
1263 to be performed and services to be supplied and the public infrastructure and/or the public
1264 services to which it relates;
- 1265 (c) The (relevant) technical and economic characteristics and requirements of the
1266 public infrastructure comprised in the PPP;
- 1267 (d) The specific rights and obligations of the parties in relation to the PPP's
1268 implementation, including the nature and extent of exclusivity, if any, of the private partner's
1269 rights;
- 1270 (e) Any conditions precedent to the parties' rights and obligations (in whole or
1271 part);
- 1272 (f) The duration of the PPP contract and any mechanism for extending it (subject
1273 to Article 8);
- 1274 (g) Applicable performance levels, volumes and/or standards for the works, good
1275 and/or services to be provided by the private partner, including Key Performance Indicators
1276 (KPIs) and guarantees, and any obligations of the private partner to modify public service
1277 levels to meet actual demand and ensure its continuity and provision under essentially the
1278 same conditions for all users;
- 1279 (h) Any performance penalties payable by the private partner for failing to meet
1280 the requisite performance levels, volumes and/or standards;
- 1281 (i) The private partner's rights (if any) to charge third parties (including end users)
1282 for its works, goods and/or services, any conditions applicable thereto (such as the amounts
1283 and methods of payment), any mechanisms for revising or modalities for varying them, and
1284 provision for any public subsidy where applicable;
- 1285 (j) Any payments (if any) to be made to the private partner by the contracting
1286 authority and/or any other public authority for its works, goods and/or services (such as
1287 availability payments, 'shadow tolls', output-based payments, other types of performance-
1288 based payment, off-take payments or otherwise), the methods and formulae for calculating
1289 them, any other conditions applicable thereto, any mechanisms for revising or modalities for
1290 varying them (including pursuant to any 're-opener' provisions), any relevant cost
1291 breakdowns and the applicable payment procedures;
- 1292 (k) Any payments to be made by the private partner to the contracting authority
1293 (or the Government) for the PPP (whether lump sum, regular, periodic or otherwise),
1294 including PPP fees and (where applicable) revenue sharing, and/or its obligations to collect
1295 tariffs on behalf of the Government;
- 1296 (l) Any requirements relating to the incorporation of the private partner (including
1297 a special-purpose vehicle formed in accordance with this law) and its corporate structure and
1298 capitalisation, and to subsequent changes to them;
- 1299 (m) The nature of and responsibility for funding and/or financing the PPP (whether
1300 by means of public support, private finance, debt, equity and/or other sources);
- 1301 (n) Responsibility for obtaining relevant licenses, permits and consents from other
1302 public authorities and/or assisting with the processes involved;
- 1303 (o) Coordination of activities comprised in the PPP with other public authorities;
- 1304 (p) Procedures for regular interfacing and co-operation between the parties, with
1305 a view to promoting collaboration and the amicable resolution of potential differences and
1306 disputes;

- 1307 (q) Applicable design and construction (or reconstruction/ rehabilitation)
1308 obligations, requirements and procedures (including where applicable for the expansion or
1309 extension of an existing facility);
- 1310 (r) Applicable operational and maintenance obligations, requirements and
1311 procedures;
- 1312 (s) Time periods for performance of specific obligations (and any mechanisms for
1313 extending them);
- 1314 (t) Procedures for determining or certifying completion of specific obligations;
- 1315 (u) Responsibilities for acquisition, transfer, use and maintenance of the site for
1316 the PPP and access to it, including any easements;
- 1317 (v) Responsibilities for protecting and securing the PPP and the site;
- 1318 (w) The nature and allocation of property rights and interests relating to the PPP,
1319 the site and the assets it comprises (including any assets which the private partner may be
1320 allowed to own outright or indefinitely);
- 1321 (x) The nature of any supporting infrastructure, transport linkages and/or utility
1322 supplies, and responsibility for their provisions and maintenance;
- 1323 (y) Development and use of facilities ancillary or incidental to the PPP and any
1324 revenues generated from them;
- 1325 (z) Employment and labour-related (including 'local content') requirements;
- 1326 (aa) Compliance with applicable laws;
- 1327 (bb) The monitoring, review, inspection and approval rights and powers of the
1328 contracting authority throughout the term of the PPP contract;
- 1329 (cc) Information-provision and reporting responsibilities and procedures;
- 1330 (dd) Obligations of each of the parties to engage with stakeholders and address their
1331 legitimate grievances through appropriate grievance mechanisms;
- 1332 (ee) Sub-contracting and the private partner's responsibility and liability for its sub-
1333 contractors;
- 1334 (ff) Any 'step-in rights' (as defined in Article 29) granted to the contracting
1335 authority;
- 1336 (gg) Any 'step-in rights' (defined as aforesaid) granted to the private partner's
1337 lenders;
- 1338 (hh) The private partner's rights to grant financial security interests in and over its
1339 PPP-related assets and rights;
- 1340 (ii) Ownership and use of intellectual property;
- 1341 (jj) Confidentiality;
- 1342 (kk) Mechanisms and procedures for exempting the parties from liability and/or
1343 providing appropriate protection and/or compensation (including by modifying the PPP
1344 contract) to allow for the impact of events beyond the control of the affected party, such as
1345 force majeure, change in law and other 'exceptional events';
- 1346 (ll) Any variation (and related cost adjustment or recovery) mechanisms and
1347 procedures for making of other amendments to the PPP contract;

- 1348 (mm) Termination of the agreement, including grounds for termination, procedures,
1349 the effect of lender step-in rights, and provision for any compensation payments;
- 1350 (nn) Appropriate steps to be taken with a view to minimizing the adverse impact of
1351 any early termination on the continuity of public service provision in connection with the
1352 PPP;
- 1353 (oo) Responsibilities relating to expiry of the term, including any hand-over of the
1354 PPP assets (except where the private partner owns them outright) and related training and
1355 transfer obligations, and where appropriate decommissioning and associated financing
1356 responsibilities;
- 1357 (pp) Insurance requirements (including if relevant insurance relating to climate-
1358 change events);
- 1359 (qq) Environmental and social obligations, including any specific requirements
1360 relating to the SDGs and the People-first PPP Principles, together with obligations to manage,
1361 monitor and report on relevant impacts and to implement corrective actions as necessary
1362 throughout the life of the project;
- 1363 (rr) Governing law and dispute-resolution mechanisms;
- 1364 (ss) Liability and indemnities;
- 1365 (tt) Waivers of sovereign immunity;
- 1366 (uu) Representations and warranties;
- 1367 (vv) Such other terms as the parties may agree.

1368 **2. Available Contract Structures.** The parties to a PPP contract shall be entitled to
1369 agree on such contractual and commercial forms and structures as seem to them most
1370 appropriate for the PPP concerned, and which they consider to be best suited to give effect
1371 to its principal characteristics and features, including any which are known and used as a
1372 matter of recognized international best practice.

1373 **Article 25. Conclusion, Amendment and Termination of PPP Contracts**

- 1374 **1. Conclusion of Contract.** The PPP contract for any PPP shall be concluded by the
1375 contracting authority with the private partner selected on the basis of Chapter IV of this law,
1376 together with any other person(s) whom they agree shall be a party to it.
- 1377 **2. Termination of Contract.** The PPP contract shall terminate upon the expiry of its
1378 term (subject to any provisions **expressed** to survive termination). An early termination may
1379 occur where the agreement so permits or in accordance with applicable law.
- 1380 **3. Amendments and Termination by Agreement.** The parties may amend or vary any
1381 terms of the PPP contract or terminate it by mutual consent at any time, but subject always
1382 to its provisions, the terms of any direct agreement and any conditions or restrictions under
1383 applicable law or the PPP regulations, including as to any further consents or authorisations
1384 required.
- 1385 (a) [*ALTERNATIVE 1*: In particular, any amendment or modification (other than
1386 one already provided for in clear and precise terms in the contract) which would materially
1387 alter any of the [fundamental or essential elements or aspects] of the PPP or its terms and
1388 conditions, and which played a significant part in either its appraisal and approval under
1389 Article 12 and/or the decision to award the project to the private partner pursuant to any
1390 competitive tendering process held under this law, shall require the approval or endorsement
1391 of the competent body designated for this purpose (if any) herein or in the PPP regulations

1392 before such amendment or modification becomes effective. Such approval or endorsement
1393 may be subject to further specific conditions (including in certain cases even the re-tendering
1394 of the PPP contract). The basis on which any such competent body may give or withhold its
1395 approval or endorsement, and specify further conditions, shall be set out or reflected in the
1396 PPP regulations.]

1397 (b) [ALTERNATIVE 2: In particular, any amendment or modification (other than
1398 one already provided for in clear and precise terms in the contract) which would render the
1399 contract substantially different in character from the one initially concluded shall require the
1400 approval or endorsement of the competent body designated for this purpose (if any) herein
1401 or in the PPP regulations before such amendment or modification becomes effective. An
1402 amendment or modification shall be deemed to be substantial where it meets one or more of
1403 the following conditions:

1404 (i.) The total value of the remuneration of the private partner resulting from the
1405 amendment would exceed [] per cent of the total value of all remuneration which
1406 the private partner is expected and entitled to receive from the PPP over its term,
1407 assessed on a comparable, present value basis. Where several successive
1408 amendments or modifications are made, such value shall be assessed on the basis
1409 of the net cumulative value of the successive modifications, over a period of []
1410 [[months/years];

1411 (ii.) The modification introduces conditions which, had they been part of the initial
1412 contract award procedure for the PPP, would have allowed for the admission of
1413 bidders other than those initially selected or for the acceptance of a proposal other
1414 than that originally accepted or would have attracted additional participants in the
1415 contract award procedure;

1416 (iii.) The modification extends the scope of the works to be carried out and/or services
1417 to be supplied by the private partner under the contract by more than [] per cent;

1418 (iv.) Where a new private partner replaces the one to which the contracting authority
1419 had initially awarded the contract in other cases than those provided for under this
1420 law].

1421 4. **Unilateral Termination.** Where it so provides, the PPP contract may also be
1422 terminated unilaterally, by written notice from one party to the other, upon the occurrence of
1423 certain specified events (such as material unremedied breach of contract, insolvency, certain
1424 types of change in law or prolonged force majeure) and subject to the satisfaction of any
1425 relevant specified conditions specified in the agreement, such as the lapse of certain time
1426 periods, compliance with applicable procedures or, where applicable law so requires, the
1427 decision of a competent court or tribunal.

1428 5. **Termination Compensation.** Where the PPP contract so provides, either party shall
1429 be entitled to compensation from the other upon its early termination for any reason
1430 (including following a default by the private partner), in an amount and on a basis calculated
1431 in accordance with its terms and, where relevant, the terms of any direct agreement. Due
1432 consideration shall be given by the parties concluding a PPP contract to the principles upon
1433 which any such compensation should be calculated, which may include or take account of
1434 (by way of illustration and without any double-counting) any of the following:

1435 (a) The fair value of any assets transferred to the contracting authority;

1436 (b) Appropriate compensation for the value of equity investments in the PPP
1437 and/or the returns expected by equity investors over the term of the agreement;

1438 (c) Amounts necessary to discharge outstanding debt obligations at the time of
1439 termination;

1440 (d) Compensation for costs and losses suffered by either party as a result of early
1441 termination, including lost profits;

1442 (e) The amount of any outstanding liabilities of either party at the time of its
1443 termination.

1444 The parties to the PPP contract shall be entitled to agree such terms for the payment of such
1445 compensation as seem to them most appropriate in all the circumstances, and which are
1446 consistent with applicable law and any relevant constraints it may impose, such as the need
1447 to avoid unjust or undue enrichment or any disproportionate penalties for breach of contract.

1448 6. **Other Termination Steps.** The PPP contract may provide, as appropriate, for
1449 any of the following upon or following its termination or expiry:

1450 (a) Mechanisms and procedures for the transfer of assets to the contracting
1451 authority;

1452 (b) The compensation to which the private partner may be entitled in respect of
1453 assets transferred to the contracting authority or to a new private partner or purchased by
1454 the contracting authority;

1455 (c) The transfer of technology required for the operation and maintenance of the
1456 PPP;

1457 (d) The training of the contracting authority's personnel or of a successor private
1458 partner in the operation and maintenance of the PPP;

1459 (e) The provision, by the private partner, of continuing support services and
1460 resources, including the supply of spare parts, if required, for a reasonable period after the
1461 transfer of the PPP to the contracting authority or to a successor private partner;

1462 (f) Mechanisms and procedures for the decommissioning of the PPP, including
1463 the preparation of a decommissioning plan, the parties' respective obligations for carrying
1464 it out and their financial obligations in that respect.

1465 **Article 26. Property and Related Matters**

1466 1. **Provision of Necessary Property.** The contracting authority shall be responsible for
1467 ensuring the effective provision to the private partner of any and all existing land, buildings,
1468 facilities, structures, parcels or plots of land, easements, rights of access and egress, and all
1469 other real property-related assets, which are needed by it for the purpose of implementing the
1470 PPP (whether or not owned or controlled by the contracting authority), in accordance with
1471 the requirements of the PPP contract, except where such assets have already been acquired
1472 by the private partner or the PPP contract provides otherwise.

1473 2. **Rights of Access.** The contracting authority shall also make available to the private
1474 partner, or, as appropriate, assist it to enjoy the right to enter upon, transit through, do work
1475 or fix installations upon property of third parties, as appropriate and required for the purpose
1476 of implementing the PPP in accordance with applicable law.

1477 3. **Transfer of Contracting Authority Property.** The contracting authority shall be
1478 entitled to transfer to the private partner the use and occupation (with or without ownership)
1479 of any available real property in its possession and/or under its control or operational
1480 management and which it is not precluded by law from transferring, including public
1481 infrastructure and any related land, buildings or similar property, which is needed for the
1482 purposes of the PPP, in accordance with the terms of the PPP contract and any related
1483 documents.

1484 4. **No Further Tenders.** It shall not be necessary to conduct a separate tender in
1485 connection with the provision of any property or assets referred to in this Article in
1486 accordance with the terms of a PPP contract.

1487 5. **Third Party Property.** Where any property or assets referred to above are in the
1488 ownership or possession of third parties, the contracting authority shall (or shall procure that
1489 any other relevant public authority shall) either:

1490 (a) Acquire or obtain the same by agreement with the relevant third parties;

1491 (b) Arrange for their compulsory acquisition or alienation in accordance with
1492 applicable law (and subject always to the requirements thereof, including as to appropriate
1493 planning, consultation, compensation, relocation and monitoring duties); and/or

1494 (c) Otherwise acquire or procure such other legal rights over and to such assets in
1495 accordance with applicable law

1496 as may be necessary for the purposes of the PPP and the discharge of its responsibilities under
1497 this Article 26.

1498 6. **Grant of Legal Interests and Rights.** The parties to the PPP contract shall be entitled
1499 to grant each other such legal interests and rights, consistent with applicable law and the
1500 terms of the PPP contract, in or related to any property the subject matter of the PPP, as may
1501 be necessary to implement the PPP. Such interests and rights may include (for example)
1502 outright ownership, leases, sub-leases, licenses, easements, rights of use and such other rights
1503 and interests as the parties may agree. All such rights and interests shall be provided or
1504 allowed for as appropriate under the terms of the PPP contract and/or any related agreements.

1505 7. **'Back-to-Back' Interests and Rights.** The private partner shall be entitled to grant
1506 third parties equivalent or similar interests and rights in or related to any property to in this
1507 Article to those granted to it hereunder (including sub-contracts, sub-leases, sub-licenses,
1508 etc.) as may be necessary to implement the PPP and permitted by the terms of the PPP
1509 contract and applicable law.

1510 8. **Identification of Assets.** The PPP contract may, if appropriate, identify which assets
1511 comprised in the PPP are or shall be public property and which are or shall be the property
1512 of the private partner, and provide for the specific treatment thereof during its term or upon
1513 its termination or expiry. In particular, it may identify which assets belong in the following
1514 categories: (a) assets, if any, that the private partner is required to return or transfer to the
1515 contracting authority or another entity; (b) assets, if any, that the contracting authority may,
1516 at its option, purchase from the private partner; and (c) assets, if any, that the private partner
1517 may retain or dispose of.

1518 **Article 27. Types of Payment under PPP Contracts**

1519 9. **Payments to Private Partner: General.** The PPP contract may provide for such
1520 payments to be made to and/or levied and retained by the private partner, for the performance
1521 of its responsibilities, in such form and amounts and subject to such conditions as may be
1522 agreed by the parties to the PPP contract and not prohibited by applicable law. These may
1523 include:

1524 (a) Payments from end users, such as tolls, tariffs, fees and other forms of usage
1525 or 'direct user' payments, subject to any applicable legal or regulatory restrictions;

1526 (b) Payments from the contracting authority to the private partner, such as
1527 availability payments, other performance-based payments, shadow tolls, capacity payments,
1528 off-take payments, subsidies and other forms of regular or periodic payment or 'revenue
1529 stream', subject to any applicable legal or regulatory restrictions;

1530 (c) Any other legally available and permissible forms and types of payment

1531 The PPP contract may provide as appropriate for the methods and formulas for the
1532 establishment and adjustment of any such payments.

1533 10. **Payments to Contracting Authority.** The PPP contract may also provide that the
1534 private partner shall make certain payments to the contracting authority, such as PPP fees,
1535 rents, royalty payments, revenue or profit shares, whether lump-sum or periodic, or such
1536 other form of payment consistent with applicable law as may be agreed by the parties to the
1537 PPP contract.

1538 11. **Combinations of Payment.** The PPP contract may provide for a combination of any
1539 of the types or forms of payment referred to above.

1540 **Article 28. Liability of Parties to the PPP Contract**

1541 1. **General.** The parties to the PPP contract shall have such liability for any breach of its
1542 provisions and be subject to such remedies (including damages and penalties) as may be
1543 provided for under its terms and/ or applicable law.

1544 2. **Specified Remedies.** Any remedies specifically provided for in the PPP contract shall
1545 not be deemed to be exclusive or exhaustive except to the extent that the agreement expressly
1546 provides otherwise.

1547 3. **Sub-Contracts etc.** The private partner shall be entitled to sub-contract, sub-lease or
1548 sub-license its rights and obligations under the PPP contract to third parties in accordance
1549 with the terms of the contract and shall have such liability for the acts and omissions of any
1550 such third parties as may be provided thereunder.

1551 **Article 29. Step-in Rights and Substitution of Parties to the PPP** 1552 **Contract**

1553 1. **Step-In Rights Permitted.** The parties to the PPP contract shall be entitled to include
1554 provisions in the contract and/or any related documents (including in a ‘direct agreement’
1555 with the lenders) which allow the contracting authority and/or the lenders, in specifically-
1556 defined circumstances and subject to applicable law, temporarily to take over and manage,
1557 in whole or part, the operation of the facility and/or provision of the services comprised in
1558 the PPP (‘step-in rights’) during the term of the PPP contract, to ensure their continued
1559 operation and/or provision, and the effective functioning of the PPP, subject to the agreed
1560 conditions and procedures. Such conditions and procedures may (inter alia) require the
1561 parties to take all reasonable care to exercise any step-in rights in such a way as to avoid or
1562 minimise any material adverse impact on the provision of any relevant public services to end
1563 users or their use of any relevant public infrastructure.

1564 2. **Lenders’ Associated Rights.** It is acknowledged that the lenders’ step-in rights under
1565 their direct agreement may include;

1566 (a) The right to prevent any threatened termination of the PPP contract by the
1567 contracting authority from proceeding for specified periods of time and subject to specified
1568 conditions;

1569 (b) The right to substitute the private partner, in whole or part, temporarily with
1570 another legal person, who shall be entitled to exercise the rights and obliged to perform the
1571 duties of the private partner under the PPP contract for a period of time, without transferring
1572 the PPP contract to another party;

1573 (c) The right to replace the private partner altogether with another private partner
1574 on behalf of the lenders for the duration of the PPP contract term, and to transfer the PPP
1575 contract (and all the rights and obligations thereunder) to it; and/or

1576 (d) The right to be paid termination compensation payments directly from the
1577 contracting authority in satisfaction of amounts owing to them in relation to the PPP.

1578 3. **No Further Tender.** It shall not be necessary for the contracting authority to hold any
1579 further public tender where any such step-in or substitution rights are exercised, provided
1580 that the relevant requirements and procedures are complied with.

1581 VII. CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES

1582 Article 30. Protection of Parties' Interests under the PPP Contract: 1583 Miscellaneous

1584 1. **Exclusivity.** The contracting authority may grant the private partner exclusive rights
1585 to perform the activities specified in the PPP contract (subject always to applicable law), in
1586 order to strengthen the technical and economic viability of the PPP and facilitate the
1587 achievement of its objectives, including the public benefits envisaged for it.

1588 2. **Licences and Permits.** The private partner shall have primary responsibility for
1589 obtaining and maintaining the necessary licences and permits for the PPP relating to its own
1590 activities, in accordance with applicable law. The contracting authority shall provide all
1591 appropriate assistance to the private partner in connection therewith, including assistance
1592 with coordinating and facilitating their application and grant, and shall obtain or provide any
1593 relevant licences or permits in accordance with their terms for which it is itself responsible.

1594 3. **No Undue Interference.** The contracting authority shall not take any steps or
1595 measures which would have the effect of unduly interfering with, obstructing or prejudicing
1596 the private partner's freedom to control and manage the assets and activities comprised in the
1597 PPP and to exercise its rights and perform its obligations thereunder, including its rights to
1598 receive and enjoy the revenues and returns on investment properly derived therefrom, save
1599 only as permitted by the express terms of the PPP contract and/or applicable law.

1600 4. **Adequate Returns from Payments.** The parties to the PPP contract shall be entitled
1601 to agree on and include such payment terms, and such mechanisms for revising and adjusting
1602 them from time to time, as can be reasonably expected to provide adequate compensation
1603 and returns to the private partner (and its investors and lenders) for its (and their) costs,
1604 expenses, investments and commitments in connection with the implementation of the PPP,
1605 based upon the efficient performance of the private partner in accordance with the contract's
1606 terms [notwithstanding that any regulated tariffs or prices payable in [*host country*] for the
1607 works, goods or services comprised in the PPP may not otherwise ensure such adequate
1608 compensation].

1609 5. **Exceptional Events.** PPP contract may also contain such provisions as the parties
1610 thereto may agree identifying or listing certain types of 'special event', including changes in
1611 law, *force majeure* or other exceptional events, which may trigger certain consequences
1612 under the contract designed to protect the party affected by such event and compensate it for
1613 the costs or losses sustained as a result, including financial or economic costs or losses, such
1614 as:

1615 (a) Relief from liability of a party prevented from performing its obligations under
1616 the agreement;

1617 (b) Amendments to the terms of the PPP contract, including (by way of
1618 illustration) amendments changing the scope of work, the time for performance, applicable
1619 standards or the contract's duration;

1620 (c) Adjustments to charging and payment rates, amounts and levels;

1621 (d) Obligations to provide financial compensation;

1622 (e) Unilateral rights of early termination of the PPP contract and the payment of
1623 related compensation.

1624 **6. Essential Shareholders.** Except as otherwise provided in the PPP contract (but
1625 subject always to the PPP regulations), a controlling interest in the private partner or the
1626 interest of a shareholder whose participation therein is reasonably deemed to be essential for
1627 the successful implementation of the PPP, may not be transferred to third parties without the
1628 consent of the contracting authority. The PPP contract shall set forth the conditions under
1629 which the consent of the contracting authority may be given.

1630

1631 **Article 31. Government and Public Support for PPPs**

1632

1633 1. **General and Specific Forms of Support.** The contracting authority and/or the
1634 Government shall be entitled to provide, contribute or make available to or for the benefit of
1635 any PPP such forms and means of public support, assets and/or commercial or financial
1636 commitments, as may either be generally permitted or available under applicable law and/or
1637 as the PPP regulations may specifically provide for from time to time, such as:

1638 (a) Any of the forms of payment referred to in Article 27

1639 (b) Construction and/or operational grants;

1640 (c) Subsidies;

1641 (d) Contributions of physical assets and property;

1642 (e) Guarantees and incentives, including guarantees of PPP revenues, whether
1643 from end users, off-takers or otherwise;

1644 (f) Guarantees of minimum quantities of off-take or consumption by the
1645 contracting authority;

1646 (g) State or municipal financial guarantees;

1647 (h) Loans and other forms of funding or investment;

1648 (i) Compensation or direct responsibility for certain types of costs and risks;

1649 (j) Tax and customs benefits and exemptions;

1650 (k) Other guarantees and/or indemnities and/or incentives.

1651 2. **Support to be Compliant.** Any such support, assets and/or commitments must be
1652 consistent with the appraisal and approval criteria applied under Article 12, the
1653 implementation resolution and the tender documents for the PPP for which they are to be
1654 used. The terms and conditions applicable to any such support, assets and/or commitments
1655 shall be set out in the PPP contract (and/or in any related agreement).

1656 **Article 32. Protection of Lenders' and Investors' Rights and Interests**

1657 1. **General.** The PPP contract and/or any direct agreement may, for the avoidance of
1658 doubt, provide for such protections for and the rights and powers of the private partner's

1659 lenders and investors as the parties thereto may agree, consistent with applicable law, as may
1660 be necessary and appropriate to ensure the successful financing of the PPP.

1661 **2. Direct Agreements Permitted.** Such protections, rights and powers may (*inter alia*)
1662 set out the detailed procedures and conditions applicable to the exercise of any step-in rights
1663 and rights of substitution and/or replacement of the private partner (in accordance with
1664 Article 29), together with any other specific entitlements of the lenders permitted thereby
1665 (such as direct payment of termination compensation or insurance proceeds).

1666 **3. Permitted Security.** Subject to any restrictions that may be contained in the PPP
1667 contract, the private partner may grant or create any form of security interest over any of its
1668 assets, rights and interests comprised in or related to the PPP, which are available under
1669 applicable law, as may be required to secure any financing needed for the PPP. These may
1670 include (by way of illustration) property mortgages, security over movable and immovable
1671 property and over tangible and intangible assets, enterprise mortgages, fixed and floating
1672 charges, assignments, pledges of bank accounts, pledges of the proceeds of the PPP or of
1673 receivables owed to the private partner, and other available forms of security. No such
1674 security may be created over public property or any other property, asset or rights needed for
1675 the provision of a public service where and to the extent that such security is prohibited by
1676 applicable law.

1677 **4. Shareholder Security.** The private partner's shareholders and other owners may
1678 grant or create any form of security interest over their shares or ownership interests in the
1679 private partner that may be available under applicable law.

1680 **5. No Replacement of Private Partner without Consent.** Save as otherwise provided
1681 in paragraphs 3 and 4 above and in Article 29, the rights and obligations of the private partner
1682 under the PPP contract may not (subject to its terms) be assigned and transferred to any third
1683 party in place of the private partner without the contracting authority's consent. The PPP
1684 contract shall set forth the conditions under which the contracting authority may give its
1685 consent to any such assignment and transfer, including valid acceptance by the relevant third
1686 party of all obligations transferred to it, their enforceability against it and evidence of its
1687 technical, managerial and financial capability to perform them. Provided always that no such
1688 restriction shall prevent the private partner from sub-contracting or sub-leasing its rights and
1689 obligations under the PPP contract in accordance with its terms.

1690 **Article 33. Protection of End Users and the General Public**

1691 **1. Detailed PPP Procedures: End Users and the General Public.** Any detailed
1692 procedures specified in the PPP regulations relating to the selection, preparation, appraisal,
1693 procurement and implementation of PPPs shall take due and reasonable account as
1694 appropriate of the legitimate needs and best interests of members of the general public and
1695 end users of the public services to which the relevant PPPs relate and who stand to be affected
1696 by the same.

1697 **2. Grievance Procedures.** Such procedures shall provide as appropriate for the adoption
1698 of suitable mechanisms for lodging formal objections or other complaints or grievances by
1699 members of the general public and end users to or about any aspect of such implementation
1700 by which they may be materially adversely affected, including where appropriate a regulatory
1701 or parliamentary ombudsman procedure. No such mechanisms shall in any manner limit or
1702 prejudice any other rights and remedies available to such members of the general public or
1703 end users under applicable law in relation to any PPP or its selection, preparation, appraisal,
1704 procurement or implementation. Any such procedures shall take account as appropriate of
1705 such other rights and remedies.

1706 3. **Private Partner's Operational Grievance Mechanism.** Where the PPP involves
 1707 the provision by the private partner of services to the public or the operation of
 1708 infrastructure facilities accessible to the public, the contracting authority shall require
 1709 the private partner to establish simplified and efficient mechanisms for handling
 1710 claims submitted by the members of the public receiving the services or using the
 1711 infrastructure facility, as well as other parties affected by the PPP. The PPP contract
 1712 shall provide for any such requirements. The private partner shall maintain accurate
 1713 and complete records of the operation of any such mechanisms and the claims
 1714 submitted and handled thereunder.

1715 4. **Public Services: Specific Provisions.** Where the PPP involves or relates to the
 1716 provision by the private partner of services to the public, the PPP contract shall, if
 1717 necessary and as appropriate (in accordance *inter alia* with any applicable
 1718 requirements of the relevant regulatory body), set forth the nature and extent of any
 1719 obligations of the private partner, over the term of the contract, to ensure:

1720 (a) Any necessary modifications of or adjustments to the services so as to meet
 1721 changing demands for them;

1722 (b) The continuity of the services;

1723 (c) The provision of the services under essentially the same conditions for all
 1724 users;

1725 (d) The non-discriminatory access, as appropriate, of other service providers to
 1726 any public infrastructure network or system operated by the private partner in connection
 1727 therewith.

1728 5. **Rules for Use of Infrastructure Facility.** Where the PPP involves or relates to
 1729 the use by third parties or members of the public of an infrastructure facility, the private
 1730 partner shall have the right to issue and enforce rules governing such use of the facility,
 1731 which shall be subject to any requisite approvals of the contracting authority or other
 1732 relevant public authority (such as a regulatory body). The PPP contract may provide
 1733 for the making of any such rules and their enforcement.

1734 VIII. CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION

1735 Article 34. Governing Law

1736 1. **Governing Law of PPP Contract.** The PPP contract shall, subject to applicable law,
 1737 be governed by the system of law chosen by the parties, but subject to a presumption that,
 1738 save in exceptional circumstances, the law of [*host county*] shall apply. The law of [*host*
 1739 *country*] shall apply where the PPP contract does not provide otherwise.

1740 2. **Governing Law of Other Contracts.** Other contracts and documents entered into in
 1741 relation to the PPP (including any direct agreement) shall be governed by the systems of law
 1742 chosen by the parties to them, taking account of any applicable law requirements.

1743 Article 35. Dispute Resolution

1744 1. **Dispute Resolution Mechanisms as agreed.** Any differences or disputes arising out
 1745 of the contracts or documents relating to a PPP shall be resolved or settled through the
 1746 mechanisms, processes and procedures agreed by the parties thereto, but subject always to
 1747 any specific requirements relating thereto under applicable law.

- 1748 2. **Freedom of Choice.** The parties to such contracts and documents may (subject as
1749 aforesaid) freely choose the mechanisms, processes and procedures for resolving such
1750 differences or disputes, including mediation, binding or non-binding expert appraisal or
1751 determination, national or international commercial arbitration or investment arbitration, and
1752 the procedural rules relating to the same.
- 1753 3. **Waiver of Sovereign Immunity.** The contracting authority shall not to be entitled to
1754 any state or sovereign immunity in relation to any differences or disputes under any such
1755 contract or document which it has properly agreed to waive thereunder.

1756 IX. CHAPTER VIII. IMPLEMENTATION AND MONITORING OF 1757 PPPs

1758 Article 36. Monitoring and Reporting on the Implementation of PPPs

- 1759 1. **Supervision by Contracting Authority.** Subject to the terms of the relevant PPP
1760 contract, the contracting authority shall be entitled to exercise such powers of supervision
1761 and monitoring of any PPP as may be necessary to satisfy itself that it is being implemented
1762 in accordance with its terms, including by means of regular reports, reasonable access to the
1763 site and physical assets comprised in it, access to and copies of any documentation relating
1764 to it and independent audits.
- 1765 2. **Contracting Authority Reports.** Each contracting authority shall prepare regular
1766 reports on the implementation of the PPPs for which it is responsible, as required by the PPP
1767 regulations or otherwise by the Government from time to time, which shall be made available
1768 to the Government and copied where required to the PPP Unit. These shall include an impact
1769 assessment report which shall be prepared upon expiry or termination of each PPP. Copies
1770 of all such reports shall generally be publicly available.
- 1771 3. **Additional Information.** Each contracting authority shall also provide any additional
1772 specific information to the Government and/or the PPP Unit as it may reasonably require
1773 from time to time in relation to the implementation of any PPPs for which such contracting
1774 authority is responsible.
- 1775 4. **Contracting Authority Records.** Each contracting authority shall maintain accurate
1776 and complete records in reasonable detail of the procedures followed, decisions made, and
1777 conclusions reached by it in connection with the identification, selection, preparation,
1778 procurement and implementation of any PPP for which it is responsible.

1779 Article 37. PPP Database and Register

- 1780 1. **PPP System Database.** The Government or the PPP Unit shall maintain a detailed
1781 database covering all PPPs implemented in [*host country*] [after the date of this law],
1782 containing such information as may be required by the PPP regulations. The database shall
1783 be designed to provide a reasonably comprehensive, up-to-date and clear compendium of
1784 material information about the PPPs that have been or are being implemented in [*host*
1785 *country*] at any one time.
- 1786 2. **Database Publicly Available.** The PPP database shall be publicly available, subject
1787 to any applicable confidentiality or non-disclosure restrictions permitted by the PPP
1788 regulations or applicable law.

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1790 **X. CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS**

1791 **Article 38. Entry into Force**

1792 1. **Effective Date.** This law shall enter into force on [] but shall not (save to the extent
1793 otherwise provided herein, including under paragraph 2 or in the PPP regulations) apply to
1794 any PPPs or equivalent or similar projects implemented, or tenders or similar procedures held
1795 and substantially completed for their award, or agreements or binding commitments entered
1796 into by the contracting authority in relation to them, before that date.

1797 2. **Monitoring Antecedent Projects.** The Government shall be entitled to require that
1798 any existing PPPs (or equivalent or similar projects) implemented before the date of entry
1799 into force of this law become subject to the monitoring and reporting requirements provided
1800 for in Article 36 (but without limiting any rights of cost recovery that the parties to any
1801 relevant agreements may have as a result of meeting any such requirements).

1802 **Article 39. Legislative Acts to be Invalidated upon Entry into Force of**
1803 **this Law**

1804 1. **Invalidation.** The following legislative Acts shall be invalidated upon entry into force
1805 of this law: [SPECIFY]

1806 2. **Conflict with Antecedent Laws.** In the event of any conflict or inconsistency
1807 between this law and any extant prior laws relating to or applying to PPPs in [*host country*],
1808 the provisions of this law shall prevail (unless specifically provided otherwise).

1809 **Article 40. Consequential Revisions to Existing Legislation**

1810 1. **Disapplication of Specific Laws.** The provisions of the following laws shall not apply
1811 to PPPs awarded or implemented after the date of entry into force of this law pursuant to
1812 Article 38 above, subject to the additional qualifications specified below:

1813 [SPECIFY]

1814 2. [Alternative 1]. **Specific Amendments to Existing Laws.** The following amendments
1815 shall be made or be deemed to have been made to the following existing laws and legislative
1816 acts in order to give effect to the provisions of this law: [SPECIFY]

1817 3. [Alternative 2] **Deadline for Consequential Revisions.** The Government shall,
1818 within a period of [] months from the date of entry into force of this law, amend, modify or
1819 repeal any other applicable laws relating to or affecting PPPs as necessary to bring the same
1820 into conformity with this law.

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[ENACTMENT FORMALITIES TO BE SET OUT BELOW]

1832 **Annex I**

1833 **Draft UNECE/EBRD People-first Model PPP Law**

1834 **Introduction and commentary**

1835 **I. Preface**

1836 This document is a supporting commentary on the draft UNECE/EBRD People-first Model
1837 PPP Law (the ‘Model Law’). It contains short summaries of its articles and provisions,
1838 together with brief explanations of the thinking behind them and some discussion of the
1839 issues they typically give rise to in practice. The Model Law is designed to be read and
1840 understood on its own terms, however. Its provisions should be clear and largely self-
1841 explanatory. This commentary provides some additional elucidation of its text, where this
1842 might be helpful, written in non-legal language, but does not attempt to re-state every one of
1843 its provisions.

1844 The Model Law has been drawn up as part of the wide-ranging corpus of guidance
1845 documents, modules and studies on the subject of Public-Private Partnerships (‘PPPs’)
1846 currently being produced on behalf of both the United Nations Economic Commission for
1847 Europe (‘UNECE’) and the Legal Transition Programme within the European Bank for
1848 Reconstruction and Development (EBRD), to assist the governments seeking to create or
1849 develop PPP systems of their own, especially those doing so for the first time. These
1850 documents cover a wide range of subjects in the PPP area, with a view to promoting a deeper
1851 understanding of the structures and issues involved. They are directed primarily at emerging-
1852 market countries, which have a greater need of international guidance and precedent than
1853 some of their more developed cousins. Further information can be found on the UNECE and
1854 EBRD websites.

1855 This seems to be an eminently suitable time to prepare a Model PPP Law as part of those
1856 exercises. Governments seeking to launch or expand PPP systems often decide to put a PPP
1857 law in place, especially in countries based on civil-law systems and/or relatively highly
1858 regulated commercial activities, where a comprehensive and explicit set of rules applicable
1859 to PPPs may be considered helpful or necessary. Many common law countries, on the other
1860 hand, have done without one altogether, or with only very focused and limited new legislation
1861 in this area, since existing legal and contractual principles are often thought to constitute an
1862 adequate framework for them.

1863 Many PPP laws have been adopted by different countries around the world in the past few
1864 years⁶. Others are now doing so or planning to do so. However, there is still a considerable
1865 disparity in the quality of those laws already in place around the world. Some constitute
1866 extremely well thought-out and structured ones, others rather less so. Moreover, most of these
1867 laws do not yet take into account the challenges that have arisen in attracting private business
1868 to infrastructure in connection with the adoption of the UN Sustainable Development Goals,
1869 and in particular their ‘People-first PPP Principles’.⁷ In the authors’ view, this reinforces the
1870 case for publishing a new PPP Model Law.

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.

⁷ See further below.

1871 In drawing up this Model Law, the authors have made extensive use of those existing laws
1872 which they believe represent leading precedents and international best practice in this field⁸.
1873 On the one hand, the availability of these documents has made the production of a Model
1874 Law based on them readily feasible; on the other, the number of countries still seeking to
1875 enact new or revised legislation of this kind provides a clear justification for publishing a
1876 model, in terms of offering further available guidance.

1877 Moreover, UNCITRAL have recently revised and finalised their own Legislative PPP Guide
1878 (with template clauses) on this subject, which has been a leading authoritative text in this
1879 field for the past 20 years⁹. The authors of the Model PPP Law have drawn heavily and
1880 fruitfully on both the existing published UNCITRAL clauses-and their recent revisions¹⁰ in
1881 structuring and wording its provisions, which cover a good deal of the same ground and are
1882 designed to be generally compatible with them. Many of the same concepts and much of the
1883 same phraseology has been used where possible. The documents are accordingly very similar
1884 and, we believe, wholly consistent. Any differences between them come down largely to the
1885 individual judgment and style of the different authors behind them, and the slightly different
1886 approaches taken to their production, in particular the fact that the Model PPP Law is a joint
1887 UNECE-EBRD exercise. It is also worth remembering (see further below) that there is no
1888 single perfect provision for any model law, especially one designed for use by governments
1889 all over the world. There can only ever be helpful suggestions, with various ways of crafting
1890 them.

1891 A great deal has also been published in recent years on the subject of PPPs and their explosive
1892 growth around the globe over the past few decades. A list of some of the best known and
1893 most highly regarded sources of guidance and information is attached as Appendix 3. Readers
1894 should please note that it would be well beyond the scope of this commentary to introduce,
1895 explain or discuss PPPs in general terms or at an abstract level. The authors have assumed
1896 that readers will have considerable knowledge of them, the issues associated with them and
1897 the practical arrangements involved. Where this is not the case, readers should turn to these
1898 other published sources for a fuller explanation.

1899 Readers should also be aware that, in May 2019, a new model or paradigm for PPPs was
1900 formerly adopted by the UNECE. Referred to under the rubric '**People-first PPP**', this has
1901 been conceived specifically with a view to encouraging governments to design and structure
1902 their PPPs in ways which are likely to comply with and further the UN Sustainable
1903 Development Goals ('SDGs'), and to stimulate and attract private-sector involvement on this
1904 basis. Above all, it aims to prompt governments to focus on the tangible and vital human and
1905 environmental aspects of PPPs, rather than simply approaching them as economic or financial
1906 constructs. It invites them to think hard about the impact of PPPs and their implementation
1907 at a social, environmental, ethical and human rights level, in ways which are fully compatible
1908 with the SDGs, and to ensure that PPPs genuinely advance those objectives. It seeks to
1909 achieve "value for people and the planet" rather than just "value for money". Hence the title
1910 'People-first PPP'. The principles behind the concept have been discussed and explained in
1911 a paper published by the UNECE in 2019¹¹. They aim to ensure that PPPs are accessible,
1912 affordable, sustainable and resilient; and that they are implemented in ways which discharge

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.

1913 environmental responsibilities, ensure proper stakeholder consultation and involvement,
1914 avoid corruption and help to promote social justice.

1915 For some governments, especially those that are already strongly committed to the SDGs,
1916 these aims will already be part of their PPP agenda. After all, PPPs are a tool of infrastructure
1917 development. To that extent, they will be contributing to economic growth and therefore the
1918 benefit of society in any case. Nevertheless, the record shows that PPPs can sometimes be
1919 poorly conceived, structured and/or implemented, whilst many governments are still
1920 exploring and refining their commitments to the SDGs. And at these levels, the People-first
1921 PPP concept can provide invaluable guidance and focus, even if this is just a matter of
1922 emphasis. By highlighting the human, social, environmental and ethical aspects of PPPs, it
1923 should contribute to better designed PPPs in ways that are intrinsic to the United Nations'
1924 wider mission.

1925 As the UN explains in some of its concept papers on the subject, the People-first PPP
1926 Principles have been drawn up primarily with emerging-market countries in mind, especially
1927 the more fragile ones that may have recently emerged from conflict and have weaker
1928 institutions and legal systems, and are therefore more in need of guidance, helpful
1929 documentation and long-term capacity-building, as well as economic support. The more
1930 developed countries are likely to have well-developed PPP systems already in place, and not
1931 to need further precedents. We have been very conscious of this in drawing up the Model
1932 Law. Nevertheless, the People-first PPP Principles are in theory applicable to PPPs
1933 everywhere, as are the SDGs. The wider their acceptance around the world, the more benefit
1934 they will provide.

1935 The People-first PPP concept has now been formally supported, and its use recommended,
1936 by four United Nations Regional Commissions, namely UNECE, ECA, ESCWA and
1937 ESCAP¹², which in May 2019 announced their decision to collaborate and work together to
1938 make PPPs 'fit for purpose' for the 2030 Agenda for Sustainable Development. The Model
1939 Law has been drawn up specifically with the People-first PPP objectives in mind and makes
1940 them intrinsic to its provisions, many of which have been crafted to give effect to them. The
1941 five core principles behind them are cited in the Preamble. Article 4.2 requires all PPPs
1942 implemented under its terms to be compatible with them and designed to reflect them. Other
1943 Articles contain a number of cross-references to them. The People-first PPP Principles are
1944 accordingly referenced in the document's title.

1945 The Model Law is not, of course, a template piece of legislation which can simply be pulled
1946 down and enacted by any country introducing a law of this kind¹³. It is designed to offer
1947 guidance, not 'cut-and-paste' clauses. Careful thought will always be needed in making use
1948 of it. In the end, there are many different ways of approaching laws of this kind and the
1949 various provisions they contain. They give rise to questions and issues to which different
1950 countries will offer different answers and reach different conclusions. Furthermore, any PPP
1951 law adopted by a country must be fully compatible with its wider legal system, jurisprudence
1952 and legislative traditions, as well as the idiosyncrasies of its PPP system. Taken together,
1953 these factors may call for extensive modification to the Model Law where it is being used as
1954 a precedent.

1955 The Model Law represents the type of PPP law which aims to be relatively comprehensive
1956 in scope, setting out a robust framework governing all the fundamentals of a PPP system, the
1957 basic elements of PPP projects, and the procedures and regulatory mechanisms that apply to
1958 their preparation, award and implementation. It may not always be technically necessary at a
1959 legal level to do this. Some of the relevant legal concepts and arrangements may already be

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'.

1960 in place. The country's existing procurement regime may be adequate for PPP purposes, for
 1961 example, and it may already have a long history of successfully using PPPs. In that case, a
 1962 much shorter, more focused law may be appropriate, if one is needed at all. That is something
 1963 each country must decide for itself. The advantage of the approach reflected in the Model
 1964 Law-and the reason that approach is often taken-is that the new PPP law then becomes a
 1965 comprehensive enabling statute, offering clarity and certainty across the board, so to speak,
 1966 about what is feasible in the PPP context and how individual projects should be approached
 1967 and implemented. This can work to the advantage of all.

1968 It should also be noted that the Model Law is not directed primarily or even at all at member
 1969 countries of the European Union (EU) or accession countries in the process of joining it. The
 1970 EU already has a wide-ranging body of laws and requirements applicable (directly or
 1971 indirectly) to PPPs and their procurement. Because these reflect the complexities and
 1972 idiosyncrasies of EU-based law as it stands, which are not necessarily compatible with the
 1973 legal systems of other countries around the world, we thought it better not to try to make the
 1974 Model Law fully consistent with the former¹⁴. It seemed to us unnecessary to do so. Any EU
 1975 accession countries (or even member states) that do seek to draw on its provisions, then,
 1976 should also think carefully about the need to harmonize their PPP laws with the EU *acquis*
 1977 and adapt the clauses from the Model Law accordingly.

1978 The Model Law assumes a relatively low level of general regulatory control by government
 1979 over the PPPs implemented under its terms (at least outside the scope of the contractual
 1980 powers vested in each contracting authority¹⁵) and a correspondingly high degree of freedom
 1981 of contract for the parties to the relevant PPP contracts. Some countries may prefer to include
 1982 additional tiers of approval and control over a PPP's elements, terms and implementation.
 1983 The degree of regulatory control that any country seeks to establish is a matter about which
 1984 it must, again, make its own decisions, in light of its political and jurisprudential traditions
 1985 and socio-economic system.

1986 Striking an appropriate balance between rigour and transparency, on the one hand, and
 1987 flexibility and innovation, on the other, is never easy. And one important factor which needs
 1988 to be weighed in the balance (there are many others) is fighting corruption. Countries
 1989 concerned about rising levels of corruption may wish to emphasize the former at the expense
 1990 of the latter. We have been very conscious of the importance of fighting corruption in framing
 1991 the provisions of the Model Law. This is also a high-priority concern of the UN's and is
 1992 explicitly addressed in the People-first PPP Principles¹⁶.

1993 Finally, the limits of any legislation should also be kept firmly in mind in reviewing this
 1994 document. A new PPP law will never be a 'magic bullet' for a country, giving it all it needs
 1995 to structure, organise and implement a successful PPP system. There are only certain things
 1996 that laws can achieve or provide for. As mentioned above, PPPs are very complex and
 1997 sophisticated structures, calling for many skills, disciplines and areas of expertise to make
 1998 them work, as well as great depth of experience in the PPP field; these include design,
 1999 engineering, construction, project management, law, finance, accounting, social engagement,

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.

¹⁶ See too the Standard already published by it under the title Zero Tolerance of Corruption in PPPs.

2000 public relations and the environment, as well as the sector-specific expertise in the sectors in
 2001 which they are to be deployed; all of them with a PPP track record behind them. These skills
 2002 and specialisms are needed on both public and private sector sides. Governments need to hire
 2003 them in, at least in the early stages of a new PPP system, as there is no substitute for the best
 2004 available advice based on real experience of implementing these structures. They also need
 2005 to think very carefully about the ‘pipeline of projects’ comprised in their PPP systems, the
 2006 way in which it should be organised and implemented and its status and operation in the
 2007 context of the wider infrastructure development agenda. All of these things are beyond the
 2008 scope of a PPP law. Much practical help and guidance can be offered to assist governments
 2009 to make the right decisions in these areas. A piece of framework legislation will not be able to
 2010 to.

2011 The Model Law and this commentary are the work of a team of distinguished legal (and some
 2012 non-legal) experts in this field, who have been collaborating on this exercise for over 18
 2013 months, under the aegis of the UNECE and the EBRD. The names of the participants are
 2014 listed in Appendix 1. They comprise a wider group of some 60 professionals from around the
 2015 world, who have contributed thoughts and suggestions from the outset, and a drafting sub-
 2016 group of about 15, who were closely in the document’s contents and wording. Grateful thanks
 2017 are due to both the members of the team for all their efforts, as well as to these two eminent
 2018 international institutions for their unfailing confidence and support.

2019 November 2019.

2020 II. Textual Commentary

2021 Preamble

2022 The Preamble is designed as a simple introduction to the Law. It allows the host country to
 2023 summarise the purpose of the law and to capture some of its main policy objectives and
 2024 priorities in making use of PPPs. It may be more appropriate to do this in a Preamble, which
 2025 can be written in non-legal language, than in the more precise and binding legislative
 2026 language of the statute’s provisions¹⁷. The text uses a short-form preamble, keeping the key
 2027 messages brief and simple. Some countries may prefer to discuss the background justification
 2028 for PPPs at greater length.

2029 It is also common these days for governments to put a detailed policy statement in place
 2030 before the PPP law is enacted. If so, the policy statement can set out all the relevant policy
 2031 priorities and objectives that are thought to be important or relevant, leaving the law to set
 2032 forth the PPP system’s legally binding provisions. Either way, guidance notes or explanatory
 2033 documents of some kind are likely to be invaluable to all those working under the new system.

2034 The Preamble mentions that the Law is limited to the PPPs defined in its terms, and not to
 2035 other types of commercial or contractual arrangements between public and private sectors.
 2036 There may be many of these other arrangements in the relevant jurisdiction which should not
 2037 be governed by the PPP law (such as simple out-sourcing contracts, design and construction
 2038 contracts under traditional procurements mechanisms, certain types of franchise, consulting
 2039 contracts, other standard commercial agreements and perhaps even natural resource
 2040 concessions where these are carved out of the PPP regime (see further below)). Care needs
 2041 to be taken to ensure that they are not inadvertently caught by the language of the PPP law
 2042 in ways that may give rise to confusion.

¹⁷ 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.

2043 As explained in the Foreword, the Preamble also highlights the importance of the ‘People-
2044 first’ values and objectives for PPPs set out in the United Nations Sustainable Development
2045 Goals and subsequent documents (the ‘**People-first Principles**’). These are now accorded
2046 the highest priority by the UNECE. They are also being promoted by the EBRD through
2047 some of the obligatory environmental and social requirements for the projects it is funding,
2048 and in the Green Economy Transition (‘GET’) policy and dialogue it has adopted in its
2049 countries of operation. The Preamble proclaims that the Model Law enshrines those
2050 principles and sets out a brief summary of them. Various references to them are also
2051 embedded in the text of the Model Law. Many of its provisions have been crafted with them
2052 specifically in mind. They are therefore intrinsic to the document and cited in its title. Each
2053 host country should carefully consider how and to what extent it wishes to refer to these
2054 principles. The hope and expectation of the UNECE, under whose aegis this Model Law is
2055 being published, is that every Member State will adopt and underwrite them fully and
2056 wholeheartedly in their PPP laws.

2057 **CHAPTER 1. GENERAL PROVISIONS**

2058 This Chapter deals with the more general aspects of PPPs and the new PPP system that may
2059 need to be addressed for the law to be understood and applied clearly, such as definitions, the
2060 use of regulations and guidelines, preliminary criteria and requirements, the authority to
2061 award PPPs, applicable sectors and some of the fundamentals of a PPP contract (such as its
2062 parties and term).

2063

2064 **Article 1. Scope**

2065 This article summarises the scope of the Law. Some countries may prefer to leave this largely
2066 or even entirely to the Preamble¹⁸. The authors felt on balance that, notwithstanding the
2067 repetition, it was appropriate to make some of the same statements legally binding in an
2068 article, to assist the interpretation and application of the Law.

2069 In particular, the article makes it clear that the Law applies to all forms of PPP, as defined by
2070 its terms, regardless of the labels or acronyms (there are many!) that may be attached to them.
2071 Note that some countries distinguish formally and as a matter of jurisprudence between
2072 different types of PPP, in particular between ‘concession’ and ‘non-concession’ PPPs, not
2073 infrequently limiting the latter to structures involving government revenue streams and the
2074 former to those based on direct user charges¹⁹. This can sometimes lead to the adoption of
2075 two different laws dealing respectively with each (as in China and Serbia, for example, and
2076 in some ways France). EU law also makes a formal distinction along these lines. Most
2077 countries, however (including common law ones), tend to prefer to lump them all together
2078 conceptually, so to speak, and subject them to essentially the same statutory provisions and
2079 principles. That is the approach we have taken in this Model Law. It offers the advantages of
2080 simplicity, consistency and comprehensiveness. It will usually be more straightforward, both
2081 conceptually and practically, to treat all types of PPP as essentially the same, as points on a
2082 spectrum, as it were, unless there is a clear and compelling reason to make formal legal
2083 distinctions between different varieties. Accordingly, the Model Law is thought to be of equal
2084 use in dealing with any of these different forms of PPP. It is not designed to be more helpful
2085 to one than another. (It is ‘structure neutral’!). Any county which sees a need to draw up

¹⁸ Although the scope of the law will of course need to be clear for interpretative purposes.

¹⁹ 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).

2086 different rules or procedures for different types, as we have said, should amend the draft
2087 accordingly.

2088 The Article also makes it clear that it applies to all PPP projects implemented after the law's
2089 effective date, whether carried out at national, federal, regional or municipal level. It will
2090 usually make sense for a country to have a single legislative act governing all its PPPs, no
2091 matter which level of government or administrative structure is involved. This will help to
2092 achieve coherence, clarity and consistency, and avoid the pitfalls and surprises that can result
2093 from having to deal with several different laws. There may be exceptions, however. This is
2094 allowed for in brackets at the end of article 1.2. In a truly federal structure, it may be necessary
2095 for each member state to enact its own law on this subject. The most obvious instance of this
2096 is the USA.

2097 The Article, following UNCITRAL, mentions the fundamental general principles underlying
2098 its terms, but also includes a reference to the People-first Principles.

2099 **Article 2. Key Terms and Definitions.**

2100 It is generally desirable to try not to use too many defined terms, so that each provision can
2101 be readily understood on its own terms. Most of the terms defined in the Model Law should
2102 be self-explanatory. A few calls for specific comment below:

2103 • **'applicable law'** is simply a generic term for all of the host country's domestic laws
2104 which may be relevant to PPPs one way or another. Where those laws give effect to
2105 its international obligations (e.g. under public international law), those too may need
2106 to be taken into account in interpreting the Articles. Laws which are particularly
2107 relevant to the SDGs and the People-first PPP Principles, such as laws relating to the
2108 environmental, human rights, health and safety, indigenous peoples and citizens'
2109 rights should be carefully thought about.

2110 • The expression **'Government'** is intended to be understood widely, as referring to
2111 any part of the administrative or executive branches of government legally entitled to
2112 exercise powers or perform functions under the Law. Some of these will arise by
2113 virtue of the Law's provisions. Others will already be vested in the Government under
2114 the country's wider legal system (including its constitution). Careful thought needs to
2115 be given to the inter-relationship between these two categories, and any possible
2116 conflict between them. (See also comments above under Article 1).

2117 Each host country may wish to be more specific about which Government bodies are being
2118 referred to in certain articles than we have been in the Model Law. If so, the necessary
2119 amendments can easily be made. We have also allowed for this possibility with the generic
2120 term 'competent body' which is used in a number of places in the text. There can also be
2121 uncertainties about the extent to which local or regional bodies are being empowered under
2122 the Law, especially where combinations of different Government bodies are involved
2123 simultaneously in the exercise of certain functions (as contracting authorities under the same
2124 project, for example); this, too, may need to be addressed expressly in the host country's PPP
2125 law.

2126 • **'Institutional Private Partner'**/ **'Institutional PPP'**. A PPP law may or may not
2127 include provisions dealing with Institutional Private Partners and Institutional PPPs,
2128 as a distinct, defined concept²⁰. EU law does so, for example, as do the laws of a
2129 number of countries around the world. Many others do not. That is why we have

²⁰ The terminology, which derives from EU provisions, is somewhat unfortunate. There is nothing particularly or clearly 'institutional' about these arrangements.

2130 included the expression in square-brackets. Host countries may or may not wish to do
2131 so.

2132 In essence, Institutional PPPs are PPPs where the contracting authority (or perhaps another
2133 public body, such as its affiliate or an SOE) and the private partner form a joint entity
2134 ('Institutional Private Partner') to perform some or all of the tasks under the PPP contract. It
2135 remains critical, however, that the private-sector participant should retain a majority and
2136 controlling interest in structures of this kind. For the project to be a PPP in any meaningful
2137 sense, the private sector must still assume the main responsibility for implementing it. The
2138 definition of Institutional Private Partner in the Model Law makes that clear. (The further
2139 requirements of Article 4 would also lead almost inevitably to that result). It should be borne
2140 in mind, however, that is far from uncommon for contracting authorities to take minority
2141 shareholdings in PPP companies in any event. In many jurisdictions, that will make these
2142 defined terms otiose. A separate formal category may simply be unnecessary.

2143 • **'PPP guidelines'/ 'PPP regulations'**. The host country should decide whether it
2144 wishes to allow for both of these concepts in its PPP law. (There may also be formal
2145 legal requirements under local law determining whether it should do so). The text
2146 assumes that both will be used, with the regulations containing legally binding
2147 secondary legislation filling out the details of many of the articles, and the guidelines
2148 consisting of non-binding guidance documents designed to facilitate an understanding
2149 of the workings of the PPP law and regime. Some countries may prefer to allow for
2150 only one or the other, or even to combine them in a looser, joint term (e.g. 'PPP
2151 enabling framework').

2152 • **'public authority'**. Note that this term is not intended to refer simply to contracting
2153 authorities. It has a wider scope, designed to take in any public authority whose
2154 powers may affect or impact PPPs (including their initiation, selection, appraisal,
2155 procurement or implementation).

2156 • **'public infrastructure'**. Host countries should give thought to the breadth and scope
2157 of this definition, to tailor it to its expectations for the range of PPPs it plans to use.
2158 The Model Law defines the term very broadly, to avoid any potentially awkward or
2159 unintentional restrictions on their scope and make the Model Law compatible with
2160 future developments. It includes intangible assets (such as intellectual property) and
2161 other types of asset and their operation which may be only indirectly related to
2162 infrastructure service provision (such as IT systems).

2163 • **'PPP'**. The term is not always as straightforward to define as one might think! It is
2164 perhaps best not to attempt to make a definition more accurate or perfect than it needs
2165 to be, however. The critical thing is to use a short, simple definition, which captures
2166 the essentials and is reasonably robust and workable at a practical level, and above all
2167 is fully consistent with the critical requirements set out in Article 4, rather than one
2168 that is conceptually flawless. It also needs to be designed to help clarify the distinction
2169 between the PPP law and other forms of public procurement for other purposes.

2170 • **'Value for Money'/'Value for People'**. The use of this term needs very careful
2171 consideration. The PPP world has been subject to years of difficult debate about how
2172 it should be defined and interpreted. The definition in the Model Law stresses the need
2173 for a wide perspective, looking at the value of a PPP in terms of its broad impact on
2174 the economy, society, the environment and the government's finances over its life,
2175 and the net benefits it stands to generate. As such, it is very much a 'value for people'
2176 test as well as a 'value for money' test. The two terms are therefore treated as
2177 interchangeable in the definitions. But host countries should reflect carefully on the
2178 meaning they wish to give it, in terms of the key tests to be taken into account when
2179 it is applied. The draft allows for a detailed methodology for those tests to be set out

2180 in the PPP regulations. A narrow definition (e.g. lowest price) is *not* likely to be
2181 appropriate.

2182 **Article 3. PPP Regulations and Guidelines**

2183 As explained above, the host country should decide whether it wants (or is legally obliged)
2184 to refer formally to both PPP regulations and guidelines in the Law. The former will usually
2185 be necessary to complete the PPP legal regime, and so are made an obligatory feature of the
2186 draft. The latter may or may not be, at least at a formal level, and so are mentioned in more
2187 permissive language. The text allows the Government to designate one or more ‘competent
2188 bodies’ to issue them on its behalf. Allowance is made in para. 3 for revisions to each over
2189 time, to create the necessary flexibility for the long term. Paragraph 4 makes it clear that,
2190 where regulations re in place, the relevant provisions of the law to which they relate should
2191 be read and interpreted in conjunction with (and sometimes subject to) them.

2192 Note that many governments around the world prefer to put a single policy-making body in
2193 place for PPPs—often the Ministry of Finance or Economy—with authority to make and revise
2194 PPP policy and take charge of the overall implementation of the system. Any such body is
2195 likely to have ultimate responsibility for the regulations and guidelines issued. If so, this may
2196 also need to be addressed in Chapter III.

2197 In drawing up their regulations and guidelines, Governments should obviously consult and
2198 draw on existing precedents and guidance available from around the world in today’s PPP
2199 community, which reflects ‘best international practice’. There is a great deal. The UN and
2200 the EBRD have been working on guidance of this kind for many years and published a range
2201 of papers and standards which contain it. This Model Law is itself an example.

2202 **Article 4. PPP Criteria and Fundamental Requirements**

2203 This article seeks to define the essential features and characteristics (‘criteria’) of any PPP.
2204 It makes it clear that a PPP which complies with them is to be undertaken in accordance with
2205 all the law’s requirements. This is necessary to create clarity about which type of project
2206 properly falls into this category, and so is subject to its provisions and procedures.

2207 Para. 1 sets out these base criteria for judging whether a particular project is indeed a PPP.
2208 The tests are cumulative, not alternative—i.e. all of them should be met. The following should
2209 be noted:

- 2210 • Sub-para a. Reminds legislators that PPPs need to be long-term in nature (with a
2211 minimum term established in accordance with article 8 (if included)) and implemented
2212 on the basis of a PPP contract that accords with chapter v.
- 2213 • Allowance is made in sub-para. B. Made for a possible minimum or threshold
2214 (estimated) value for PPPs, but in square brackets. In essence, this is because of the
2215 complex nature of PPPs and the time and resource necessary to make them work. Host
2216 countries may or may not want to do this, however. If not, the sub-para. Should be
2217 deleted. Because it can be difficult to establish what exactly any minimum value
2218 should be as a matter of law, especially in the case of projects with little or no capex,
2219 and how it should be calculated, the draft assumes this will be dealt with in the PPP
2220 regulations, rather than being firmly set out in the main body of the law. That also
2221 introduces some flexibility to modify the threshold test over time without amending
2222 the primary legislation.
- 2223 • Sub-para. c is designed to allow an appropriate degree of flexibility in terms of the
2224 combination of physical activities which a PPP may comprise. The long-term, risk-
2225 exposed nature of these activities should always be kept in mind. A PPP is not the
2226 same as a construction contract or simple contract for services. It needs to contain an

2227 appropriate element of long-term responsibility for the public infrastructure and/or
2228 public services;

2229 • Sub-para d. Highlights the all-important element of risk allocation between the parties
2230 throughout the life of the PPP project. There should be a clear element of risk-sharing
2231 between them from beginning to end of any PPP;

2232 • A PPP usually includes the use of private finance, but-at least in theory-may not do.
2233 This is allowed for in sub-para. E., but in square brackets. Private finance may have
2234 to be used, or there may be a clear wish on the part of the contracting authority to see
2235 it used. But since the wording acknowledges that it may or not be, the rationale for
2236 including the provision is that, if it is, it becomes another one of the cumulative tests
2237 confirming that the project is indeed a PPP. Any host country that considers that it
2238 will always be necessary should delete the square brackets. Some countries may prefer
2239 not to include this test at all, however, and so should delete it.

2240 Paragraph 2 then makes it clear that, when a project which fits the PPP criteria set out in para
2241 1, it must be undertaken in accordance with the remaining requirements of the law applicable
2242 to it. (Most, but not necessarily all, of them will be applicable). There is then a link back to
2243 the public interest goals and objectives summarized in the Preamble. (If these have been
2244 carried over into the law itself, the cross-reference should be to the relevant article). Note,
2245 however, that if those goals and objectives are to be enshrined in law, controversy can arise
2246 about how exactly they are expressed and interpreted. That is why the authors preferred to
2247 set them out in the (non-binding) Preamble to the Model Law. Fundamentally, given their
2248 importance to the UNECE, these goals and objectives must also include the People-first PPP
2249 Principles, to which there is therefore a cross-reference in the Article. Each PPP project must
2250 be designed and structured to accomplish and give effect to them.

2251 Some Governments may choose to provide for an order of priority between the different
2252 criteria in their PPP laws (and to order them differently in the text). There is nothing to stop
2253 them doing so.

2254 Paragraph 3 is designed to create some flexibility in the treatment of smaller projects falling
2255 below the threshold value for PPPs referred to in sub-para b. *Prima facie*, these would be
2256 outside the scope of the law. However, legislators may wish to make special provision of
2257 some kind for at least some of them in the regulations, perhaps by way of abbreviated and
2258 simplified procedures²¹. In particular, they may decide to allow for the ‘bundling’ together
2259 of such smaller projects and their implementation in a group as a PPP subject to the law’s
2260 requirements. If no threshold value is specified, the paragraph may be redundant, and so best
2261 deleted, although some countries may find it helpful to recognise the possibility of bundling
2262 projects in any case.

2263 If the PPP Law allows formally for Institutional PPPs (see comments under article 2 above),
2264 it will need to ‘complete the picture’ by making it clear whether and to what extent its
2265 provisions apply to them. This is addressed in paragraph 4, but again in square brackets, as
2266 the PPP Law may not give them separate recognition at all. Our assumption is that all its
2267 provisions should apply to them. Any specific departures from those provisions should
2268 always be carefully thought through and closely identified.

2269 **Article 5. Authority to award and enter into PPPs**

2270 We have included this article because there is often considerable uncertainty in some
2271 countries about which government bodies actually have the legal power and authority to
2272 award PPPs. In others, there may be no doubt about this at all, in which case the article may

²¹ The Model Law also allows them to be the subject of direct negotiation under Article 22.

2273 be completely unnecessary. Many PPP laws do not contain it. If the article is thought to be
 2274 necessary and helpful, however, it should ideally be expressed in simple, clear terms, as we
 2275 have done in the text.

2276 The article states (in Alternative 1) that any public authority which already has the right to
 2277 develop projects involving assets and/or services of the kind comprised in PPPs (as most
 2278 ministries and many municipalities will usually do), together with the right to enter into
 2279 commercial contracts with the private sector, shall be deemed to have the right to award and
 2280 enter into PPPs—except where any specific law or regulation provides otherwise. As an
 2281 alternative, it allows the enacting state simply to list in the Law those public authorities that
 2282 are allowed to award and implement PPPs²². Countries should decide which provision they
 2283 prefer.

2284 The article also gives the government the specific power (in para 2) to vest the necessary
 2285 authority in individual bodies where necessary (and subsequently revoke it). This is intended
 2286 to function as a helpful fall-back provision.

2287 Some governments may find it necessary to include a specific prohibition against regulatory
 2288 bodies acting as contracting authorities, in view of the conflicts involved. That would be
 2289 unusual, however, and so we have not put it in the text. It is also true that occasionally public
 2290 authorities with regulatory powers do indeed have to act as PPP contracting authorities, at
 2291 least pending the creation of an independent national regulator; an example would be a local
 2292 municipality regulating water supply, which enters into a water supply and treatment PPP
 2293 with a private partner, or a port authority awarding a PPP to develop and operate a new port²³.

2294 **Article 6. Applicable Sectors and Activities for PPPs**

2295 This article defines the range of sectors and economic/commercial activity to which PPPs
 2296 can apply in the host country. It is usually desirable to make any such provision broad and
 2297 flexible, and any list it contains inexhaustive, since formal legal restrictions or exclusions are
 2298 often, in the end, simply unnecessary. (Governments can always then make *ad hoc* decisions
 2299 about whether or not to use of a PPP in a particular area). The draft therefore allows PPPs to
 2300 be used in any sector or area not specifically excluded by this or any other law, provided, of
 2301 course, that they are compatible with the People-first PPP Principles. The list set out below
 2302 is essentially illustrative rather than prescriptive and can be expanded or reduced by the host
 2303 country as appropriate. If the host country prefers to be specific rather than general about the
 2304 sectors to which PPPs can apply, the article should be modified accordingly. (The draft allows
 2305 for this in square brackets).

2306 Paragraph 2 then allows for certain specific sectors or areas to be excluded from the
 2307 application of PPPs, if that is what is considered appropriate and necessary. Some countries
 2308 prefer to exclude certain areas of defence activity and contracting, for example. Another
 2309 example might be certain types of agricultural activity which are controversial at an
 2310 environmental or health-protection level (such as certain forms of GM product). Many PPP
 2311 laws contain no such exclusion, however, which is why the paragraph has been left in square
 2312 brackets. Countries which do not need it can delete it.

2313 One sector which sometimes proves problematic in this context is the natural resource/
 2314 extractive industries sector, which is often distinguished and excluded from the scope of PPPs
 2315 and a PPP Laws, although ‘concessions’ may already have been in use in the sector for many
 2316 years. That is because (a) the sector is often already the subject of well-developed laws and
 2317 procedures which have been in place for a long period, representing a self-standing and

²² This is the approach taken by UNCITRAL

²³ Some of the members of our team have worked on PPPs of both kinds in the past.

2318 comprehensive body of applicable rules and regulations; and (b) PPPs are essentially about
 2319 or related to public services and public infrastructure, which many extractive industries are
 2320 obviously not (at least not directly)²⁴. In that case, it may be better to carve out the relevant
 2321 sector and industry from the scope of the new PPP Law, even though the ‘concessions’ in
 2322 use there may be conceptually very similar to PPPs, and subject to many of the same
 2323 principles. This is an analysis each host country should carry out.

2324 Appropriate exclusions can be set out in this article and/or in the definitions of PPPs and
 2325 scope provisions in Articles 1 and 2. It should be kept in mind, however, that the power
 2326 sector, which is obviously closely related to public services and public infrastructure, may
 2327 need to be addressed specifically and treated differently to other energy or natural resource
 2328 concessions of which the same cannot be said. The former is more susceptible to
 2329 categorisation with other types of PPP²⁵. For all these reasons, we have put the reference to
 2330 ‘energy’ at the top of the list in square brackets.

2331 **Article 7. Parties to a PPP Contract**

2332 There will often be only two parties to a typical PPP contract—the contracting authority and
 2333 the private partner (as we call them). The article acknowledges, however, that, on the one
 2334 hand, there may occasionally be more than one public authority participating as contracting
 2335 authority²⁶, such as where several municipalities are involved, for example, or a SOE (state-
 2336 owned enterprise) teams up with a line ministry, whilst, on the other, the private partner will
 2337 often consist of a consortium of companies which become shareholders in the SPV (special
 2338 purpose vehicle) company incorporated to fulfil this role under the contract. The two
 2339 principal parties may also agree to bring in additional third parties to the PPP contract, where
 2340 the project’s particular circumstances or needs call for it.

2341 **Article 8. PPP Term**

2342 The article envisages a statutory minimum term for all PPPs. Host countries should think
 2343 carefully about what this should be and how it should be calculated. The period can be
 2344 inserted (in years) if they wish to specify one. (Some countries may not). A term of at least 5
 2345 years is likely to make sense, given that PPPs are inherently long-term structures, with all
 2346 their complexity and the importance of long-term risk-sharing between the parties. Because
 2347 there is no commonly recognised basis for establishing a minimum term, however, the draft
 2348 leaves the details to be set out in the regulations (if at all). These details should be consistent
 2349 with any minimum value (if any) specified under Article 4.

2350 A maximum term is also envisaged for PPP contracts in paragraph 2. This is because it is
 2351 important not to allow such contracts to ‘lock up’ assets and activities for too long, potentially
 2352 creating long-term, anti-competitive monopolies, but also to mitigate the risk of corrupt
 2353 practices. Again, no figure is specified in the text, as there is much debate about what an
 2354 appropriate term should be. Some take the view that very few PPPs need be longer than 25
 2355 or 30 years, as this should always be sufficient to make a project financeable and investible.
 2356 Others believe that significantly longer periods can make sense; there are indeed not a few
 2357 examples of them in practice.

²⁴ In addition, some projects in this sector may not be able to satisfy the ‘People-first’ principles.

²⁵ 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.

²⁶ 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.

2358 For that reason, a specific figure is not suggested in the Model Law. Instead, the article
 2359 assumes that an appropriate basis for calculating one will be available to the contracting
 2360 authorities (and perhaps again developed or set out in the regulations²⁷), and that the
 2361 maximum term will simply be specified in each PPP contract. This is also the approach taken
 2362 by UNCITRAL. The basic principles to be taken into account in framing any maximum term
 2363 are set out in paragraph 2. Host countries should add any further criteria that they regard as
 2364 fundamental.

2365 Notwithstanding the principles reflected in paragraph 2, PPP contracts usually contain
 2366 mechanisms which allow their term to be extended in exceptional circumstances described
 2367 in their provisions²⁸. This may occur, for example, where events of *force majeure* seriously
 2368 delay progress or interrupt operations, or a change in law necessitates major changes to
 2369 aspects of the design and construction works. For the contracting authority, an extension of
 2370 the term to compensate the private partner for its resulting losses (by allowing it to earn
 2371 revenues for longer) may be a preferable remedy to paying it cash compensation. Paragraph
 2372 3 allows for this, together with the possibility of further conditions being specified in the
 2373 regulations (*inter alia* to prevent the extension mechanism being abused).

2374 The expiry of the PPP contract should not, of course, affect the private partner's title to any
 2375 assets comprised in the PPP of which it is entitled to retain ownership²⁹. This is made clear
 2376 by para. 4. Governments which do not want to permit BOO projects can delete the article.

2377 **CHAPTER II. INSTITUTIONAL ARRANGEMENTS AND ROLES**

2378 It may be necessary in a PPP law to include provisions dealing with the inter-relationship
 2379 between different government bodies and ministries in the PPP context, and the ways in
 2380 which their respective powers and functions may affect or impinge on each other. (Indeed,
 2381 there seems to be an increasing expectation on the part of IFI³⁰ experts in this field that such
 2382 provisions *should* be included). The decision-making processes behind the different stages
 2383 of a PPP's preparation, approval, award and implementation certainly need to be properly
 2384 accountable. The wider aim here is to achieve the necessary administrative clarity in relation
 2385 to the implementation of PPPs.

2386 With the exception of the PPP Unit, we have not provided for this with any specificity in the
 2387 Model Law, however. This is because (a) there is no general rule about what exactly such
 2388 provisions should cover or address, as this will depend on the particular administrative
 2389 structures and procedures in operation in each country; and (b) the authors are aware of few
 2390 if any examples of such provisions in PPP laws actually in force.

2391 There are many possibilities, which the 'placeholder' in the draft touches on³¹. Cross-
 2392 referring to the wider public investment process is one, integration with long-term
 2393 infrastructure development planning another (including its SDG strategy), the application of
 2394 budgetary and fiscal rules and procedures a third, the powers of sector regulators a fourth.
 2395 Other examples might include the role of a PPP Commission, the role of the Ministry of

²⁷ 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.

²⁸ 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.

²⁹ As in a BOO (Build-Own-Operate) structure, for example, and even perhaps a BOT (Build-Operate-Transfer).

³⁰ International Financial Institutions. See note 29 below.

³¹ All of the suggestions are taken from examples our team has seen in action in different countries.

2396 Finance or Economy and its Risk Management Unit³², a revolving fund to aid the use of PPPs
 2397 by local authorities, contingency funds to support some or all contracting authorities and their
 2398 potential liabilities, and additional tiers of approval or control where the exceptions to normal
 2399 procedures come into play under the Law (as in the case of unsolicited proposals or direct
 2400 negotiations).

2401 The long-term fiscal impact of PPPs may need to be specifically addressed (as the text
 2402 acknowledges). Flow-charts drawing together the relevant strands of decision-making may
 2403 be helpful. The authors' view, however, is that the processes and constraints relevant to these
 2404 areas will often already be in place within the existing administrative and constitutional
 2405 structures and rules. To that extent, it may be unnecessary or inappropriate to reproduce them
 2406 in a PPP Law. Where they are not, it may make sense to address them in the Law. In any
 2407 case, careful thought should always be given by host countries to this question, and any
 2408 provisions thought to be necessary included in this Chapter by way of an additional article or
 2409 articles.

2410 **Article 9. PPP Unit and Administrative Coordination**

2411 Article 9 deals with the establishment of a PPP Unit. Many governments create PPP Units as
 2412 part of their new PPP systems. These are essentially administrative support functions,
 2413 designed to help with the implementation and refinement of the new system and to
 2414 disseminate a proper understanding of it, within both the public and private sectors. However,
 2415 their structure, responsibilities and powers vary widely from country to country, depending
 2416 on governmental preferences and the evolutionary stage reached by the country's PPP
 2417 system. In some cases, they have a limited advisory role. In others, they can have a much
 2418 more central and executive role, with extensive powers to help shape the new PPP system,
 2419 including wide rights of approval over aspects of the implementation of individual projects.

2420 Each host country should think carefully about how it wants to structure, organize, staff and
 2421 empower its PPP Unit, and amend the article as necessary accordingly³³. The draft requires
 2422 it to be adequately staffed, on the basis of a spread of skills and backgrounds (including a
 2423 grasp of the People-first PPP Principles). It allows for a controlling ministry and director to
 2424 be specified in the law, without prescribing solutions (even though the Ministry/ Minister of
 2425 Finance or Economy are frequently specified). Many countries put in place a single,
 2426 centralised body of this kind, that provides technical assistance and capacity building to all
 2427 contracting authorities in PPP-related matters. Individual contracting authorities may then
 2428 wish to create their own specialist PPP "office" or department within their organisation, to
 2429 spearhead PPP activities going forward. We view this as a matter of choice for them,
 2430 however, rather than a requirement of the framework legislation.

2431 The list of functions and responsibilities in para 3 is a broad 'wish list', containing the full
 2432 range of matters which are often allocated to such units. It should be amended by host
 2433 countries as necessary. Few, if any, real PPP Units around the world would have such a wide
 2434 array of responsibilities. Functions should be chosen and allocated in ways which avoid
 2435 potential conflicts of interest with respective ministerial duties or conflicts between different
 2436 responsibilities within the PPP Unit (para. 4).

2437 Para. 5 allows mechanisms to be put in place designed to coordinate the issue of relevant
 2438 licences and permits for PPPs between the different ministries and public authorities likely

³² 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.

³³ There may also be certain concerns about potential corruption here, which should be kept in mind as the PPP Unit is being structured. (See also the UNECE ZTC Standard on this subject).

2439 to be responsible for them. This ‘one stop shop’ arrangement is often referred to in
 2440 discussions of institutional arrangements, as it self-evidently seems a helpful step to take,
 2441 especially in light of the large number of permits that can sometimes be required³⁴.

2442 **Article 10. Information about PPPs**

2443 The transparency of a PPP system will be critical to its success (as the SDGs recognise). The
 2444 more fully understood are all its technical, procedural, commercial and operational aspects,
 2445 by both public and private sectors, the better. PPPs are complex, sophisticated vehicles,
 2446 which often take years to be fully comprehended. A steady flow of helpful, accurate
 2447 information about them in any country seeking to implement them systematically will
 2448 therefore be vital. Article 10 thus imposes wide-ranging duties on Government to prepare,
 2449 collate, develop, maintain and publish the relevant information. This extends to information
 2450 to be supplied by contracting authorities about individual projects they have implemented or
 2451 are about to implement, including information which local communities may need to exercise
 2452 the rights of protection they may enjoy under applicable law. (It may also be helpful to times
 2453 to see any such information in the broader context of the Government’s plans for
 2454 infrastructure procurement and economic development. The last paragraph of Article 10.2
 2455 allows for this).

2456 The need to publish relevant information about competitive PPP tenders and their results, on
 2457 web sites and/or official publications, is also addressed. Host countries should consider any
 2458 other specific requirements of this kind which they would like to see included in its PPP Law,
 2459 such as mechanisms for independent audits of aspects of the published information, and
 2460 procedures for public reviews or hearings where appropriate³⁵.

2461 **CHAPTER III. INITIATION AND PREPARATION OF PPPs**

2462 This and the next Chapter are perhaps the most ‘central’ chapters of the Model Law, dealing
 2463 with the all-important subject of the selection, preparation and award of individual PPP
 2464 projects. These are often a principal focus of laws of this kind. The Model Law aims to set
 2465 out a clear, robust framework for the procedures and principles involved, leaving much of
 2466 the relevant detail (such as timescales, deadlines, precise formalities, definitive rules and
 2467 methodologies) to be addressed in the regulations and tender documents. Chapter III deals
 2468 with the early stages of a project’s initiation, preparation and approval, Chapter IV with its
 2469 award and implementation.

2470 **Article 11. Initiating and Preparing PPPs**

2471 This Article describes the steps and procedures that must be followed as a PPP is defined,
 2472 initiated, appraised and approved. Under para.2, PPPs can be initiated by either the relevant
 2473 contracting authority, or a private initiator in the case of unsolicited proposals. However, the
 2474 article assumes that the detailed work of preparation of any PPP will usually be carried out,
 2475 or at least managed, by the contracting authority, since this will allow it to retain an
 2476 appropriate degree of control over its contents. (In some jurisdictions, including ones with
 2477 limited relevant experience of PPPs or relatively constrained government resources, it may
 2478 nevertheless be necessary to delegate at least some of this work to the private sector. The

³⁴ 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.

³⁵ 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.

2479 article therefore allows for exceptions to the general rule to be identified³⁶). Para. 4 gives an
2480 idea of what the preparation work should aim to cover and achieve³⁷.³⁸

2481 The preparation work needs to include a comprehensive (preliminary) feasibility study and
2482 cost-benefit analysis (para 5), showing how the applicable appraisal criteria will be met,
2483 together with (or covering) a strategic impact assessment and “value for people” (reviewing
2484 its social and environmental impact) and reports on various other fundamental matters that
2485 should be examined and confirmed before the PPP can go ahead. These are identified in para.
2486 6, and include an initial risk allocation pattern, fiscal sustainability, compatibility with the
2487 People-first PPP Principles, an assessment of the contracting authority’s capacity to launch
2488 and carry through a PPP and proposals for the most appropriate basis for awarding it. Key
2489 Performance Indicators and at least indicative payment terms should also, if practicable, be
2490 identified at this stage. All these reports should then be reviewed and approved (perhaps
2491 certified) as compliant with the requisite standards and procedures, by whichever competent
2492 body is empowered to do this (para 7).

2493 The draft assumes that host countries will in time want to reduce the processes involved to a
2494 more detailed set of procedures in the PPP regulations, allowing for differing requirements
2495 to be met at different stages of a project’s preparation (para 8). The preparation work must
2496 allow for any public and stakeholder consultations and hearings, structured to allow issues to
2497 be properly aired and ideas for improvements to be put forward (para 9). This is an important
2498 aspect of the ‘Stakeholder Engagement’ outcome contained in the People-first PPP
2499 Principles, which are referred to in the text. The processes involved should be transparent
2500 and participatory (and ideally accord with the Aarhus Convention on the subject³⁹). It must
2501 also be possible to make changes and adjustments to any set of PPP proposals during their
2502 preparation to ensure they are fully compliant with all the law’s requirements; this is
2503 mentioned in para 10.

2504 The cost of all this preparation work can also prove a challenging issue, especially for
2505 governments in lower-income countries. This is something governments should consider in
2506 advance as they structure and define their PPP systems. A mechanism for re-charging some
2507 of these costs to the private sector as part of the award of the PPP contract may also make
2508 sense.

2509 **Article 12. Appraisal and Approval Procedures**

2510 Once a PPP project has been prepared, it will need to undergo a process of appraisal and
2511 formal approval before it can be implemented, and the private partner for it chosen, in
2512 accordance with the applicable procedures. Article 12 lays down this basic requirement,
2513 cross-referring to the PPP regulations, where the relevant details can be precisely specified.

2514 Paragraph 2 summarises the powers and responsibilities of the competent body given the task
2515 of reviewing the PPP preparation work submitted to it by the relevant contracting authority,
2516 to make sure it has been carried out in accordance with the procedures and criteria. The

³⁶ 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.

³⁷ Needless to say, a great deal of helpful information is also available from published sources about the process of preparing and structuring PPPs, including the UNECE Standards. Contracting authorities can consult it whenever they need to.

³⁸ The definition and specification work comprise in this ‘preparation’ of a PPP would not, of course, extend to the detailed engineering or final design work which the private partner carries out after award of a project to it. The text now mentions this.

³⁹ This may (or may not) have been incorporated into the host country’s legal system.

2517 requirements are comprehensive and tight (as they are in UNCITRAL). Enacting states
2518 should decide whether they want such a rigorous supervisory role over the actions of
2519 contracting authorities in preparing and awarding PPPs, and whether it should include formal
2520 powers of approval (as opposed to simple review). The inter-relationship between national
2521 and sub-national government bodies may complicate this process, requiring different bodies
2522 to give different approvals of various kinds, depending on the nature of the project and its
2523 fiscal implications (e.g. local or national). The problem of potential conflicts of interest
2524 should also be considered and addressed in the way approvals are structured.

2525 Some states may wish to split the review and approval functions, perhaps giving the first to
2526 an administrative body (such as the PPP Unit) and the latter to a higher level one (such as a
2527 PPP commission). Some may want it to extend to approval of PPP tender documents; others
2528 may regard this as unnecessary. Allowance may also need to be made for the fact that, over
2529 time, these functions may have to be loosened somewhat as the PPP system becomes larger
2530 and more evolved. Eventually, many contracting authorities may be capable of at least an
2531 element of 'self-regulation' in this context.

2532 Para 3 then sets out a broad, suggested 'wish-list' for the relevant appraisal criteria
2533 themselves. Compliance with the requirements of Article 4 and the People-first PPP
2534 Principles is placed at the head of this list (although the Principles are also built into several
2535 of the other specific criteria listed). Affordability, long-term sustainability and the project's
2536 potential for enhancing public services are also critical. Host countries should consider which
2537 ones to include in any definitive list(s) of their own, either in the main PPP law or the
2538 regulations. Whilst most of the criteria suggested are likely to be relevant to any PPP
2539 assessment, they will not necessarily all be, at least not in all circumstances. Their relative
2540 importance or weighting will also vary from context to context, although certain matters,
2541 such as affordability and public service efficiency will always count as a key criteria. The
2542 PPP law should therefore retain an element of flexibility about them, as they are likely to
2543 differ depending on the type of project being considered⁴⁰. Some governments may
2544 nevertheless wish to specify the relative priority or weighting of different criteria in the law
2545 or regulations (which our team decided not to do, in the interests of flexibility). Allowance
2546 is made for other criteria to be used and included in future.

2547 For these reasons, we have used the words 'as appropriate for [the] purpose' of appraising
2548 the relevant PPP. Careful thought should be given to the question of which criteria will
2549 always be applicable-mandatory-and which will only sometimes come into play. The answers
2550 are likely to be reflected in detailed mechanisms and procedures linked to a specific context,
2551 which the regulations rather than the law would provide for. This is acknowledged by para
2552 5. The criteria and procedures are also likely to evolve and need refinement over time. Para.
2553 6 places responsibility for their determination and revision, and for publishing their contents,
2554 on the government.

2555 Note that the Model Law does not attempt to provide with any specificity for PPP risk
2556 allocation, either here or elsewhere. Our team felt that this simply could not be treated as a
2557 matter of legal prescription, as it always comes down to detail and the exact details will vary
2558 so much from project to project. It is a matter for the contracts, not the legislation. As we all
2559 know, PPPs are about long-term risk sharing and allocation, and the famous 'mantra' is that
2560 risks should be borne by the parties best placed to manage them. That is simply a truism and

⁴⁰ 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.

2561 a conceptual starting-point, however. It would not be appropriate to say it in a law. Even a
2562 legal provision requiring an ‘appropriate’ allocation of risks between the parties would be
2563 dangerous and wide-open to abuse.

2564 **Article 13. PPP Implementation Resolutions**

2565 Once a PPP project has been prepared, appraised and selected, it will be important to confirm
2566 this in a public document with an appropriate degree of formality and transparency. Article
2567 13 provides for this in the form of a published ‘Implementation Resolution’. This should
2568 summarise all those critical aspects of the project which need to be described in its contents,
2569 to ensure they are publicly available and readily understood, and demonstrate the project’s
2570 compliance with the law’s essential requirements (such as the People-first PPP Principles)
2571 and the applicable approval criteria. A summary of the results of the public consultation
2572 process should also be included, together with an indication of how objections or grievances
2573 can be addressed. Host countries may wish to make the publication of an Implementation
2574 Resolution the start of a formal tendering process. If so, the PPP law should make it clear
2575 that this is the case.

2576 **Article 14. Unsolicited Proposals**

2577 This article deals with the initial stages of an unsolicited proposal. Unsolicited proposals can
2578 be controversial, with many commentators regarding them as unnecessary and wide open to
2579 abuse. Others see them as essential in emerging-market countries with little experience of
2580 PPPs. The host country needs to decide whether and to what extent to permit them. The
2581 provisions in the Model Law assume that they will be used and seeks to make the procedures
2582 applicable to their use, and the award of the resulting PPPs, as transparent, fair and
2583 competitive as possible, as well as consistent with those applied to PPPs initiated by
2584 contracting authorities.

2585 Under the article, the private initiator must submit its preliminary proposal for the proposed
2586 project, in the required form, to the relevant contracting authority (and any other competent
2587 body authorised to receive it. Host countries may wish to provide for this to reduce the risk
2588 of any system abuse). The latter has a discretion but not an obligation to review it and make
2589 a preliminary decision about moving to the next stage. The rationale for this discretion is that
2590 the potential contracting authority may have neither the time, resources nor inclination to
2591 review every unsolicited proposal presented to it, especially if many of them are coming
2592 forward or they are clearly incompatible with its wider strategic or policy priorities. (The host
2593 country may still prefer to turn this into an obligation to review them, together with a duty to
2594 give reasons for the conclusion reached).

2595 Only proposals which do not relate to projects which have already been officially ‘lined up’
2596 should be considered. The contracting authority can require the private initiator to provide as
2597 much of the relevant information as is needed to make its preliminary assessment, including
2598 impact studies (e.g. technical and commercial feasibility) and information as to its own
2599 qualifications for the task. Any exclusive rights of the private initiator in relation to the
2600 project (such as IP) are protected under para. 5. If the contracting authority decides formally
2601 to review the PPP and move forward, the provisions of articles 11 and 12 then come into
2602 play, covering the project’s detailed preparation, appraisal and formal approval. If an
2603 implementation resolution is then passed to proceed with it, the provisions of article 21 will
2604 govern the next stage.

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CHAPTER IV. SELECTION OF PRIVATE PARTNER

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Article 15. Procedures for Selection of Private Partner

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Para.1 of the Article requires competitive tendering to be used to select the private partner, save only where exceptions are expressly permitted, including in the case of direct negotiations under article 22. It is widely recognized today that competitive tendering is generally much the most efficient, effective, transparent and fair basis for awarding major contracts, and the best way of mitigating any risk of local corruption. It is also often an explicit requirement of International Financial Institutions (IFIs)⁴¹, such as the EBRD, and a condition of their financing for particular projects (albeit not an invariable one). The Model law therefore assumes that, as a general rule, it will be used.

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

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It may be possible to amend or modify the existing procurement regime to accommodate PPPs. On the other hand, this may be difficult to do and may also give rise to considerable confusion about how exactly the revised provisions will apply in the context of the new PPP law. For that reason, host countries often prefer to create a comprehensive, self-standing procurement regime under the PPP law which will apply specifically to all PPP projects, and to disapply the existing regime substantially or completely from their award⁴². This is the approach reflected in many PPP laws and the one suggested by the Model Law. Para. 2 is drafted accordingly. If the host country decides to amend its existing procurement regime, or concludes that it can be used without amendment, the provisions of Chapter IV (or equivalent) of its PPP Law may differ significantly from the Model Law, as they will either need to cross-refer explicitly to the relevant requirements of the former, or invoke them as a whole, disapplying specific provisions that do not work in this context. The draft also allows for this possibility (as does UNCITRAL).

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

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The exact criteria and evaluation methodology for the pre-qualification and selection of successful bidders, appropriate for the relevant PPP and the tender structure being used, will then have to be chosen (by the contracting authority) and set out in the relevant tender documents. Para. 4 contains a further wide-ranging wish list of possible tests which can be used. These would have to be refined and made more precise in the tender documents. They must always be consistent with the criteria used to approve the PPP at preparation stage and

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⁴¹ 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.

⁴² 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.

2648 the implementation resolution for it. Para. 5 places a standard non-discrimination duty on the
2649 contracting authority in relation to the award and implementation of PPPs.

2650 **Article 16. Tender Structures and Procedures: General**

2651 Article 16 deals with an assortment of general matters that will apply to any tender structure
2652 adopted. The tender structure for the award of any PPP will be determined by the contracting
2653 authority, in accordance with the requirements of the PPP law and regulations. Its detailed
2654 aspects will be set out in the tender documents.

2655 Para. 2 provides that an open public tender shall normally be used (where potentially any
2656 interested bidders can respond to the published invitation), with flexibility as to the use of
2657 pre-qualification and a one- or two-stage process. Closed tenders-where bidders are
2658 specifically selected by the contracting authority without a public advertisement-are only
2659 permitted in the very limited circumstances described. Each host country should decide on
2660 the scope of these exceptions. Specifying them with precision in the law is recommended and
2661 considered common best practice.⁴³Where closed tenders are used, the contracting authority
2662 should still try to maximise the element of competition involved, as required by para. 3. There
2663 are many recognised methods of doing this.

2664 Para. 4 provides that any person, or groups of persons, with legal capacity can participate in
2665 a tender, subject to any applicable legal restrictions. These restrictions are intended to refer
2666 in particular to rules excluding persons who may have been convicted of relevant offences,
2667 such as corruption, illicit employment practices (e.g. using child or slave labour) or similar
2668 prohibited acts. National security considerations may also come into play in this context.
2669 Where consortia are involved (as they usually will be), their joint qualifications to perform
2670 their responsibilities, as well as those of individual members, must be assessed (para. 5).

2671 Under para. 6 all decisions during the tender process, concerning pre-qualification, selection
2672 (short-listing), rejection and final contract award must be made only on the basis of the
2673 criteria, requirements and procedures set out in the tender documents. This guarantees the
2674 integrity and transparency of the process, and its efficiency for bidders (so that they know
2675 what they are dealing with).

2676 The need for transparent communication processes and methods with bidders is spelt out in
2677 para. 7, allowing for suitable bidder in-put into the tender documents and discussion of
2678 critical aspects of the project. The use of tender security (such as bid bonds) is allowed for in
2679 para. 8; where it is used, the security must only be forfeited where the tender documents so
2680 provide. Other specific aspects of a tender process which can sometimes prove problematic
2681 or uncertain are also addressed in the article, such as restrictions on multiple or joint bids
2682 (paras. 9 and 11) and the consequences of receiving only one tender (para 11). Bids can be
2683 changed or revoked before the final deadlines (para 9). The scope for a final clarification or
2684 negotiation stage is specifically addressed (para.10), since this represents a potentially
2685 awkward area, which should be carefully handled in the regulations and tender documents.

2686 Tenders are generally governed by the confidentiality restrictions set out in paragraph 12, as
2687 between competing bidders, although these are in turn subject to the transparency
2688 requirements of Article 10. The contracting authority has to keep appropriate records of
2689 tender proceedings under para. 13, in accordance with the requirements set out in the PPP
2690 regulations.

⁴³ 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.

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Article 17. Tender Documents and Criteria

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This article lays down the general requirements for the contents of any set of tender documents to be drawn up by the contracting authority. They are designed to ensure the documents are sufficiently complete and transparent to enable bidders to participate effectively on the basis of a ‘level playing field’⁴⁴. The underlying principle is to maintain an adequate, ‘healthy’ (but not excessive⁴⁵) level of competition throughout the process. Paragraph 1 summarises the typical essential components of the documents, which should be drawn on as appropriate.

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

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

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Para 4 allows (in square brackets) for the possibility of tender documents, as well as the preparatory work for a PPP, being reviewed and approved by another competent body, if that is what the enacting state has decided to do⁴⁶.

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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

⁴⁴ The article obviously needs to be read and interpreted in conjunction with all the other provisions of the Model Law governing the tender process.

⁴⁵ Which may lead to ‘dumping’.

⁴⁶ See comments under para. 2 of Article 12.

2733 law-in the case of this Article as well as others-is to define the main ‘pillars’ of the system,
 2734 its over-arching framework. These paragraphs therefore set out only a few statements about
 2735 each tender stage, in terms very similar to those used by UNCITRAL⁴⁷.

2736 Paragraph 2 references the tender announcement, para. 3 the possibility of a single-stage
 2737 tender, para. 4 the use of closed tenders (in the limited circumstances permitted by the law).
 2738 Para 5 covers the basic requirements of a pre-qualification process, para 6 of the subsequent
 2739 request for proposals, and para.7 of the contracting authority’s objective approach in
 2740 comparing and evaluating proposals.

2741 The next two paragraphs deal with areas that are sometimes not allowed for, adequately or at
 2742 all, in more general procurement regimes. They are particularly important for PPPs, which
 2743 typically need longer and more tiered procedures than smaller, simpler projects. The first, set
 2744 out in para. 8, is a so-called ‘two stage’ procedure (not to be confused-confusingly! -with a
 2745 pre-qualification step followed by a bid, which is very common). Here, the proposal
 2746 submission phase, following pre-qualification, is itself divided into two. It is used where the
 2747 contracting authority needs to refine certain aspects of the project so that proposals for it can
 2748 be finalised. It is often deployed in the PPP context. At the first stage, bidders are asked for
 2749 their preliminary proposals and comments on the main project elements-specs, KPIs,
 2750 financing needs, available contractual terms, etc. The contracting authority can then refine
 2751 and modify all these elements in discussion with bidders. At the second stage, bidders then
 2752 submit firm proposals, which can be negotiated, in order of their evaluated rankings, until a
 2753 conclusion is reached.

2754 The second, summarised in paragraph 9, is more unusual. Known as the ‘competitive
 2755 dialogue’ procedure, it can be used where it is not feasible for the contracting authority to
 2756 specify a PPP project at all in sufficient detail for a routine tender process to be followed. In
 2757 essence, it allows the definitive aspects of the project to emerge from a constructive dialogue
 2758 with a group of bidders, so that a straightforward competitive tender can then be deployed in
 2759 the concluding phase. As the provision makes clear, only certain aspects of the tender should
 2760 be opened to dialogue in this way-i.e. those that require greater clarity and specificity which
 2761 can only properly be achieved with in-put from bidders. The process should not be used to
 2762 throw open the whole tender to speculative discussion. Once all the details have been settled,
 2763 the short-listed bidders are invited to submit their ‘best and final offers’, from which a winner
 2764 is selected. The idea here is usually to avoid any final negotiation.

2765 Conceptually, the competitive dialogue is similar to a two-stage tender. The main difference
 2766 lies in the level of uncertainty about fundamental project features, which can only be defined
 2767 in dialogue with bidders. The two-stage procedure in para. 8 is more about simply refining,
 2768 or fine-tuning, certain aspects of a project. In practice, the use of the competitive dialogue
 2769 procedure is relatively limited, as it calls for a certain level of capacity, competence and
 2770 sophistication on the part of contracting authorities and bidders for it to work, which may
 2771 only be found in the more established PPP markets⁴⁸. It can also carry a risk of collusion or
 2772 corruption if not properly handled; its use may therefore also need to be sanctioned by
 2773 appropriate approvals from a separate competent body (such as the PPP Unit following
 2774 presentation of a report), which the PPP regulations can provide for.

2775 **Article 20. Conclusion of the PPP Contract**

2776 This provides for the conclusion of a PPP contract with the winning bidder identified by the
 2777 tender committee on the basis of the relevant evaluation criteria and methodology, or (more

⁴⁷ UNCITRAL does not cross-refer to PPP regulations, but to a country’s existing procurements rules and laws, in many of its provisions. The equivalent UNCITRAL clauses are also somewhat more detailed.

⁴⁸ In some of them-such as France-it has indeed become the norm.

2778 usually) with a special purpose vehicle (SPV) incorporated by it. Requirements for the
2779 capitalisation of the SPV and subsequent changes to its structure are allowed for. A formal
2780 notice of contract award must then be posted on the contracting authority's web-site and
2781 published through the official channels. The draft also allows for the public disclosure of PPP
2782 contracts (subject to applicable confidentiality restrictions) where the law requires this. It is
2783 assumed that governments may be slightly hesitant about publishing all their contracts as
2784 their new PPP systems are taking shape, but that this may in time come to be perceived as
2785 advantageous to all, and so provided for in the PPP regulations or elsewhere. (The same
2786 provisions apply to PPP contracts entered into under Articles 21 and 22).

2787 **Article 21. Conclusion of PPP Contract for Unsolicited Proposals**

2788 This article provides for the final stages of the award of a PPP project based on an unsolicited
2789 proposal. One of its main objectives is to seek to bring competitive pressures to bear,
2790 notwithstanding the project's initiation by a single private sector source, who may hope to be
2791 awarded it without the need for a tender. The caveat to this requirement, however, is that the
2792 PPP is not based on IP or other exclusive rights of the private initiator, and its concept and
2793 technology are not truly unique or new. Subject to this caveat, once a final decision to proceed
2794 with the unsolicited proposal has been made under article 14, an implementation resolution
2795 has to be passed and published on the contracting authority's web site and the relevant official
2796 channels, inviting third parties to compete for the project. If no third parties come forward,
2797 or if the caveat referred to above applies, the contracting authority can go ahead and award
2798 the project to the private initiator (subject to any direct negotiations permitted under Article
2799 22 and the PPP regulations), provided it is satisfied that reasonable steps have been taken to
2800 attract competing proposals. (Further amendments to the documents can be made and the
2801 process repeated if it is not so satisfied).

2802 If third party expressions of interest are put forward, tender proceedings must then be
2803 organized in accordance with this Chapter. Para. 4 provides for incentives or compensation
2804 to be offered to the private initiator in these circumstances, in view of the effort and resources
2805 already invested by it in the project. Host countries should think carefully about whether they
2806 wish to include such a mechanism and how exactly it would work. The article suggests a
2807 couple of options. Compensation for pre-tender costs incurred (up to a maximum amount)
2808 should be relatively straightforward. Finding a suitable basis for adjusting tender evaluation
2809 scores can be much more difficult. Some countries prefer not to provide for this at all; others
2810 may already address them in other regulations.

2811 **Article 22. Direct Negotiations**

2812 This article addresses the somewhat contentious subject of awarding a PPP project on the
2813 basis of direct negotiations without holding a competitive tender. Host countries should think
2814 carefully about the exact circumstances in which they wish to permit this and define them
2815 closely in the PPP law. The reason for caution is that these situations are widely recognized
2816 as being vulnerable to corruption, as well as creating 'log jams' in a country's pipeline of
2817 potential PPP projects.

2818 The Model Law treats only a few, specific classes of project as being viable in this regard
2819 (several of which are also listed in UNCITRAL): (a) where only a single compliant bidder
2820 has surfaced in the context of a tender process (subject to the relevant qualifications); (b)
2821 where the unsolicited proposal provisions allow it; (c) perhaps, where there is an urgent need
2822 to maintain public services and holding a tender would be impractical. (This exception is in
2823 square brackets, as some experts counsel against it); (d) in the case of small, short-lived
2824 projects that do not meet the usual statutory thresholds; (e) where the state's vital security
2825 interests do not permit tendering; and lastly (f) where it has been clearly established, based

2826 on an independent expert report, that there is only one source actually capable of
2827 implementing the project (e.g. in the case of unique patented technology or IP).

2828 The detailed procedures governing any such direct negotiation will be set out in the
2829 regulations. Close monitoring of the PPP implemented as a result, including its standards of
2830 performance, is encouraged by paragraph 2. Paragraph 3 obliges the contracting authority
2831 even then to try to introduce an element of competition into at least aspects of the procedure
2832 if it believes it can.

2833 **Article 23. Review and Challenge Procedures**

2834 This confirms that bidders who feel they have suffered (or may suffer) loss or injury as a
2835 result of a contravention of the law by a government body in connection with a PPP's award
2836 or implementation can bring proceedings through any available legal channels in the host
2837 country. The article does not provide specifically for any such channels or proceedings, as
2838 these can vary widely from jurisdiction to jurisdiction. Many countries have established
2839 grounds for bringing 'judicial review' and similar challenges to government decisions
2840 improperly taken. The host country should consider whether the established channels are
2841 adequate for this purpose.

2842 The article acknowledges that these established channels and mechanisms may need to be
2843 reinforced or supplemented in the regulations⁴⁹. Careful thought should also be given to the
2844 question of the speed and efficiency, as well as efficacy, of any such channels, and the
2845 availability of suitable interim measures. It is much better to solve a problem caused by an
2846 abuse of process at an early stage, than to have to wait until it has done damage to the project
2847 at a later or more advanced one; 'prevention is better than cure'.

2848 Where the PPP regulations make provision for such procedures, the Article therefore requires
2849 them to operate quickly and efficiently, using interim or interlocutory measures and powers,
2850 so that defective or unlawful decisions and actions can be challenged and overturned at speed,
2851 ideally before they are actually implemented in the context of a PPP project. Broad powers
2852 to open up, review and revise decisions and documents, and to suspend or overturn actions
2853 being taken, are allowed for, together with a power to award compensation for losses incurred
2854 and even to cancel an entire project in appropriate circumstances. Because any such powers
2855 would be invasive and sweeping, however, and may well overlap with similar powers and
2856 mechanisms under other branches of law (such as procurement laws, judicial review, or the
2857 laws of tort or contract), great care should be taken by host countries in framing them.

2858 ***CHAPTER V. PPP CONTRACTS***

2859 ***Article 24. Main Terms and Conditions of PPP Contracts***

2860 This makes it clear that, under the Model Law, the drafting and negotiation of the contents
2861 of a PPP contract shall be governed by an overriding principle of freedom of contract. The
2862 parties can agree essentially whatever provisions they choose, subject to any requirements or
2863 constraints in the wider legal system. Host countries should give careful consideration to
2864 what these constraints might be. There will always be some, ranging from unfair contract
2865 terms, for example, to unenforceable provisions (such as the exclusion of certain forms of
2866 liability), to terms required or implied in certain circumstances, sectors or industries
2867 (especially extensively regulated ones).

2868 Within those constraints, the Model Law envisages that it will usually be most productive to
2869 allow the parties to a PPP contract to have wide latitude in settling its terms and contents, to

⁴⁹ 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.

2870 reduce the risk of clauses which seem to them to be appropriate being treated as unavailable
 2871 or challenged as illegal. PPP contracts are long, complex documents, often heavily negotiated
 2872 by the parties to them. The parties usually need the help of sophisticated professional advisers
 2873 to get them right. Where those advisers are available, it tends to make most sense for the law
 2874 to trust the parties, so to speak, to reach appropriate conclusions about their terms, with the
 2875 freedom to agree the clauses they consider appropriate. Even where they are not, it can be
 2876 unduly restrictive or unhelpful for a PPP law to attempt to prescribe individual clauses, and
 2877 very challenging even to word them.

2878 The Model Law sets out a lengthy ‘wish list’ of provisions typically found in agreements of
 2879 this kind, to help focus minds on the relevant ones and remove possible doubts about their
 2880 legitimacy but leaves it to the parties to make the final decisions about which to use and how
 2881 to word them. Many other types of clause are also possible in a PPP contract. The list touches
 2882 on the People-first PPP Principles in a number of places where they are likely to be highly
 2883 relevant to the contract terms, including key performance indicators (KPIs), most obviously,
 2884 but also in areas where novel clauses may have to be thought through and structured in ways
 2885 that are perhaps less obvious or familiar. These include providing for adequate dialogue with
 2886 stakeholders and exercising step-in rights or rights of early termination in a manner which
 2887 maintains public services and minimises potential harm to end users.

2888 The underlying assumption behind this approach is of course that the host country will
 2889 welcome and accommodate it. Countries which take a more prescriptive approach to
 2890 commercial agreements with government, or which see a need for a higher degree of
 2891 regulation of the whole PPP sector, may wish to include tighter controls over the contents of
 2892 PPP contracts. That is their prerogative. Great care does need to be taken, though, in the way
 2893 such clauses are worded in the Law, as deficient wording may make the provision
 2894 unworkable or ‘un-bankable’.

2895 The Model Law’s approach is also consistent with the drawing up and publication of model
 2896 clauses for PPP contracts. Most countries find it helpful to do this, as it sets standards,
 2897 promotes an understanding of the system and reduces the scope for unnecessary negotiation
 2898 and wasted resource. Model clauses should usually not be made legally binding or
 2899 compulsory, however. Their role is to furnish constructive guidance, not to remove or
 2900 constrict the valuable freedom of contract discussed above. They may otherwise prove
 2901 counter-productive and an obstruction to the rapid evolution of the system.

2902 Para. 2 contains a reference to the wide range of possible PPP structures that the industry has
 2903 evolved over the past few decades, with the many familiar acronyms used to describe them
 2904 (e.g. BOT, BOOT, BOO, DBFO, BLT⁵⁰ etc. etc.). It is again designed to reinforce the sense
 2905 that the parties will have maximum freedom to use the structure which seems to them most
 2906 appropriate for the project in question. If host countries have any serious reservations about
 2907 any of them, they should modify the provision accordingly.

2908 **Article 25. Conclusion, Amendment and Termination of PPP Contracts**

2909 The article makes it clear that the PPP contract is to be entered into by the contracting
 2910 authority and the private partner selected in accordance with the previous Chapter (and any
 2911 other persons whom they agree should be parties). It will terminate on the expiry of its term,
 2912 which may be extended in accordance with its provisions (see comments under article 8
 2913 above). It can be amended or terminated by mutual agreement, but subject to any relevant
 2914 restrictions in the contract, the regulations or otherwise at law (para.3). Some countries may
 2915 wish to specify applicable conditions and criteria for contract amendments with precision in

⁵⁰ 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.

2916 the PPP regulations. Others-particularly those from a common law tradition-may prefer to
2917 leave a wide discretion on the subject to the parties. It generally goes without saying, though,
2918 that any elements of the PPP contract which require the initial approval of any competent
2919 bodies or relevant authorities besides the contracting authority will need further such
2920 approval before they can be amended.

2921 The next paragraphs address the subject of constraints to the parties' freedom to agree on
2922 contract amendments, if that is the course the enacting state wishes to follow. One suggested
2923 possible approach is set out, in square brackets, in 'alternative 1', providing for a separate
2924 tier of approval of any amendments to the 'essential' or 'fundamental' aspects of a PPP,
2925 especially ones which weighed heavily in the application of the original approval criteria or
2926 the competitive tendering process for selection of the private partner. Some countries may
2927 wish to translate these (somewhat imprecise) terms into percentage figures or monetary
2928 amounts. Others may wish to specify the applicable approval mechanisms in considerably
2929 more detail (as some laws do).

2930 Alternative 2 is an example of how to do this (based closely on the UNCITRAL approach).
2931 It contains tighter and more detailed definitions of what amounts to a material amendment,
2932 requiring further approvals, or even (as in the UNCITRAL original) subject to outright
2933 prohibition. These clauses may be considered too long and elaborate by some host countries
2934 (hence the square brackets). It should also be remembered that most PPPs will be subject to
2935 a large number of amendments during their life -as will any major project-and putting
2936 ponderous obstacles in the way of the parties' freedom to agree them may be pointless or
2937 counter-productive. The underlying commercial and political reality is that, if major changes
2938 need to be made to a PPP, let alone any fundamental re-structuring, other government bodies
2939 will almost certainly be drawn into the process.

2940 Early termination of the PPP contract can also happen unilaterally in the circumstances
2941 specified in the agreement, subject again to the relevant conditions and procedures, such as
2942 the lapse of time or (where the law requires it) the confirmatory decision of a court or tribunal.
2943 The article (para. 5) also provides in some detail for the payment of compensation on an early
2944 termination of a PPP contract. This is because the subject almost invariably proves highly
2945 challenging and contentious when these contracts are being negotiated, with the potential
2946 payment of very large amounts 'on the table'.

2947 The article makes it clear that either party may be entitled to compensation on an early
2948 termination of the contract *for any reason*, in accordance with its terms (and those of any
2949 direct agreement). The notion that a defaulting party may be entitled to compensation where
2950 it is itself at fault can often meet with great scepticism on the part of government bodies
2951 attempting PPPs for the first time. The article therefore spells out that this may, indeed, be
2952 the case, since the assets transferred to the contracting authority on an early termination will
2953 usually have a long-term value far in excess of the amount of any losses suffered by it as a
2954 result of any default. Moreover, they will usually have been funded largely or wholly by the
2955 private partner. All that funding will be lost and written off in the absence of any
2956 compensation.

2957 Best international practice therefore usually entails the payment of at least some
2958 compensation for those assets and costs, an approach reinforced by the fact that project
2959 finance lenders will nearly always insist on being paid down in these circumstances. This is
2960 also consistent with the relevant legal principles of many jurisdictions (e.g. rules against
2961 unjust enrichment). The article does not specifically *require* such compensation to be payable
2962 as a matter of law, however. The final decision about that question is again left to the parties
2963 negotiating the PPP contract. It simply obliges them to give due consideration to the
2964 principles governing any such compensation when they are concluding it, listing several
2965 likely to be relevant in para. 5. The applicable details will have to be worked out and specified
2966 in the contract.

2967 Paragraph 6 then lists some of the other matters that may need to be specifically addressed
2968 or provided for in connection with a termination of the agreement, such as transfer or
2969 purchase of certain assets (e.g. technology), training of government personnel, residual
2970 support services (e.g. spare parts) and decommissioning. These should be covered as
2971 appropriate in the PPP contract.

2972 **Article 26. Property and Related Matters**

2973 This article addresses some of the main property (real estate) issues likely to arise as a PPP
2974 is being structured and negotiated. The contracting authority is given general responsibility
2975 in para. 1 for ensuring that the physical property (typically, the site) and associated rights
2976 (such as easements) and assets needed for the PPP are provided to the private partner, in
2977 accordance with the terms of the PPP contract (where all the relevant details will be set out).
2978 Para. 2 makes it clear that this must extend to the crucial but sensitive subject of rights of
2979 access to and from, and rights to fix installations on, third party property. Under para. 3, these
2980 rights can apply to any real property in the contracting authority's use, occupation or control
2981 which it is entitled to transfer to the private partner, including public infrastructure. If such
2982 property belongs to third parties, the contracting authority is obliged under para. 5 to acquire
2983 it (using any available compulsory purchase powers as necessary), together with the
2984 necessary legal rights and interests.

2985 The underlying rationale for these provisions is that the contracting authority will typically
2986 be in a position to take on these responsibilities, and so should bear the risk of discharging
2987 them effectively for the project's benefit. Investors and bidders for projects will expect them
2988 to. Any doubts or uncertainties about these matters can be fatal to the success of a PPP.

2989 The law of many countries might require competitive tenders to be held in relation to any
2990 such property transfers, and so para. 4 makes it clear that an additional tender on top of the
2991 wider tendering process governing the award of the PPP will not be necessary.

2992 Para 7 makes it clear that the parties to the PPP contract can grant each other whatever
2993 property-related rights or interests are needed for the purposes of the project, in accordance
2994 with its terms. These may include outright ownership, leases, licences, rights of use and so
2995 on. The private partner is in turn entitled under para. 6 to grant 'back-to-back' rights and
2996 interests to its third-party contractors. Para. 8 acknowledges that the parties may decide in
2997 the PPP contract to identify and list different classes of asset, depending on their treatment
2998 on termination; namely assets which are to be transferred or sold to the contracting authority,
2999 and others which the private partner may freely dispose of or retain. It is worth noting, though,
3000 that a complete categorisation of this kind in the initial terms of the contract may be
3001 impracticable and so relatively unusual.

3002 **Article 27. Types of Payment under PPP Contracts.**

3003 This article confirms that the PPP contract may contain such forms, conditions and amounts
3004 of payment for the proper performance of the private partner's responsibilities as the parties
3005 may agree. Local law may impose certain constraints in this area-such as regulatory
3006 requirements-which are allowed for. The article contains a broad, illustrative list of the types
3007 of payment that may be used, including direct user charges (typical of a 'concession'
3008 structure) and payment streams from the contracting authority, making it clear that any
3009 available form of permissible payment may be used. Payments to the contracting authority
3010 from the private partner may also be included, such as PPP fees, royalty payments or profit
3011 shares. The article 'casts a wide net' on this subject with a view to eliminating any
3012 unnecessary restrictions or doubts on the forms and types of payment that can be made.

3013 **Article 28 Liability of Parties to the PPP Contract**

3014 This article contains some straightforward provisions relating to the liabilities and remedies
 3015 of the parties for breach of the terms of a PPP contract. The terms of the contract and the
 3016 rights provided by a country's wider legal system will normally apply, without the need for
 3017 further legislative detail. Host countries should consider whether the law contains any
 3018 unusual or problematic restrictions in this context and add to the article as necessary
 3019 accordingly.

3020 **Article 29. Step-in Rights and Substitution of Parties to the PPP Contract**

3021 'Step-in rights' are a common feature of PPPs, especially those funded by project finance.
 3022 They can either work in favour of the contracting authority, allowing it to take over temporary
 3023 control and operation of a project in defined circumstances, such as where an emergency
 3024 endangering the public or public services is occurring. Alternatively, they can operate in
 3025 favour of the lenders, allowing them to pre-empt a threatened termination of a PPP contract
 3026 by the contracting authority, temporarily take over control of the project, put right a default
 3027 and perhaps restructure or replace the private partner, in order to keep the project functioning
 3028 and its revenues flowing. Such rights can be surprising and contentious from the perspective
 3029 of either party to a PPP contract. They can also be vitally important, however.

3030 Article 29 therefore expressly entitles the parties to include step-in rights in the PPP contract
 3031 (and in a 'direct agreement' with the lenders), although without imposing any obligation to
 3032 do so. The relevant details, procedures and conditions will have to be agreed and set out in
 3033 the contracts. In line with the People-first PPP Principles, the Article requires those
 3034 procedures and conditions to be drawn up with the aim of ensuring that step-in rights are
 3035 exercised in a way which does not adversely affect the provision of public services to end
 3036 users⁵¹. Because the nature and effect of lenders' step-in rights can be particularly startling
 3037 to contracting authorities negotiating PPPs, para. 2 summarises the main powers they
 3038 typically bestow on those lenders. Para. 3 again makes it clear that it shall not be necessary
 3039 to hold any additional public tenders where step-in rights are properly exercised (since they
 3040 will have formed part of the contractual matrix at the time of the original PPP award).

3041 ***CHAPTER VI. SUPPORT, PROTECTIONS AND GUARANTEES***

3042 The purpose of this Chapter is to confirm the viability of certain types of clause in PPP
 3043 contracts which can often prove problematic or uncertain when they are being structured or
 3044 negotiated, as well as to clarify certain general responsibilities.

3045 **Article 30. Protection of Parties' Interests Under the PPP Contract; Miscellaneous**

3046 Para. 1 confirms that exclusive rights can be granted in a PPP contract. This could well be in
 3047 the best interests of the project and the public, as well as (more obviously) the private partner.
 3048 Whether this is appropriate in individual cases, or will tie up competition unnecessarily, is
 3049 something the relevant contracting authorities will need to decide.

3050 Para. 2 gives the private partner primary responsibility for obtaining the permits and consents
 3051 needed for the project, whilst giving the contracting authority an obligation to provide all

⁵¹ 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.

3052 appropriate assistance in this context, as well as granting any for which it is itself responsible.
3053 This 'risk' is effectively a shared one, in other words, but with the private partner taking the
3054 lead role, as permits and consents will have conditions attached to them which it will be
3055 primarily responsible for satisfying.

3056 Para. 3 prohibits the contracting authority from taking steps which may unduly interfere with
3057 or get in the way of the private partner's rights and obligations under the contract, including
3058 its management autonomy, subject of course to any specific rights of intervention the former
3059 may have under the contract (e.g. certain approval rights) or at law (e.g. step-in rights). This
3060 is designed to overcome the temptation many contracting authorities often feel, at least in the
3061 early days, to try to micro-manage PPP projects, and to help them make the cultural shift
3062 from traditional procurement methods to the much more 'hands off' one needed in the case
3063 of PPPs.

3064 Para. 4 again confirms that the parties are allowed to agree on such payments terms as may
3065 offer the private partner and its lenders and investors adequate cost coverage and returns in
3066 compensation for the proper performance of the private partner's obligations, even where
3067 any regulated tariffs or prices in the host country many not otherwise ensure it.

3068 Para. 5 allows for 'exceptional' or 'special' event provisions to be included in a PPP contract,
3069 offering protections against and compensation for the impact of certain major events beyond
3070 a party's control, such as force majeure or material change of law, and includes an illustrative
3071 list of the sort of consequences that may be specified in the contract. These clauses again tend
3072 to feature amongst the more difficult and challenging ones in negotiation. The authors
3073 thought it important to highlight their availability in principle.

3074 Paragraph 6 is designed to protect the position of the contracting authority by requiring its
3075 consent to be obtained to any disposal of a controlling or 'essential' interest in the private
3076 partner, at least for a certain period of time and subject to appropriate conditions.

3077 **Article 31. Forms of Public Support for PPPs**

3078 This article represents another 'avoidance of doubt' provision, stating that the full range of
3079 the various forms of government support, assets or commitments which the host country
3080 government is entitled to provide under applicable law shall also be available to PPPs. These
3081 will of course also be subject to any relevant constraints under applicable law⁵². Under para.
3082 3, the Government can also provide for these specifically in the PPP regulations and explain
3083 them in the guidelines. Examples of them are given in the article. The terms and conditions
3084 applicable to them must be set out in the PPP contract (para.2). Host countries should add
3085 references to any other specific forms which they think need to be included (if any) or qualify
3086 or remove any they regard as inappropriate.

3087 **Article 32. Protection of Lenders' and Investors' Rights and Interests**

3088 This article-again to avoid doubt-allows the parties to a PPP contract to include such
3089 protections in favour of lenders, either in the PPP contract or in the direct agreement, as they
3090 may agree to be necessary to secure the successful financing of the PPP. These can include
3091 step-in rights and their associated powers (see above). But it should also be remembered that
3092 the credit agreements with lenders will also contain numerous clauses requiring the lenders'
3093 approval to the exercise of specific rights and powers under the PPP contract, and preventing
3094 the taking of certain steps without their consent. The article also confirms that the private

⁵² For example, EU member states and accession countries will be subject to EU state aid rules. Many other countries will have equivalent restrictions.

3095 partner can grant the full range of financial security interests available at law over the assets
3096 and rights comprised in a PPP with examples.

3097 The rationale for the article is that doubts and uncertainty are often voiced in countries first
3098 attempting PPPs about the extent to which the rights and powers of commercial lenders can
3099 or should be protected or prioritised, either contractually or through security interests, where
3100 public infrastructure, publicly-owned assets and public services are involved. The article
3101 acknowledges the possible need to do so, and the parties' rights to provide for them
3102 appropriately. This can help remove doubt. Step-in rights, in particular, can prove
3103 problematic. Where a host country does indeed wish (or is legally obliged) to qualify those
3104 protections, it should modify the article accordingly. In that case, however, careful thought
3105 should be given to the danger of applying principles or imposing restrictions which may
3106 threaten the 'bankability' of PPP projects. If new principles need to be crafted and restrictions
3107 disapplied, the PPP law may represent a vehicle for doing so. Existing law may have to be
3108 modified or repealed as a result.

3109 Paragraph 4 starts from the assumption that the PPP can be subject to all forms of available
3110 security in the host country over its assets, other than those public property assets that are
3111 specifically designated as exempt from such security. Para. 5 confirms that the private
3112 partner's shareholders can grant similar security over their ownership interests in the project
3113 company. Para. 6, however, provides (following UNCITRAL) that any transfer of the private
3114 partner's rights *and obligations* will require the consent of the contracting authority, as
3115 provided for under the PPP contract. Care needs to be taken with this provision. It should not
3116 stand in the way of what is known in common law countries as assignments by way of
3117 security (i.e. lenders can enforce the private partner's rights under its contracts, without
3118 having to perform its obligations). It is designed to prevent a full transfer of those *obligations*,
3119 as well as rights, which would mean in effect substituting another party for the private
3120 partner. This should always need the contracting authority's consent, even where that consent
3121 is automatically provided for as in a direct agreement. Sub-contracts and sub-leases of part
3122 of those obligations are also of course allowed.

3123 **Article 33. Protection of End Users and the General Public**

3124 This is a simple, broad provision, designed to alert governments to the importance of ensuring
3125 adequate protection for the general public and end users of public services as PPPs are
3126 implemented. This might seem obvious, but in reality, is too often and easily forgotten or
3127 down-played. It is a fundamental aspect of the People-first PPP Principles. The Article
3128 obliges governments, in drawing up their detailed procedures for implementing PPPs, to be
3129 set out in the PPP regulations, to take due account of the needs and best interest of members
3130 of the general public and end users who stand to be affected by such implementation. It
3131 requires suitable mechanism to be put in place for lodging and addressing complaints,
3132 grievances and objections, including where appropriate a regulatory or parliamentary
3133 ombudsman. Any such procedures will always need careful thought, however. The legal
3134 systems of most countries will already contain a range of procedures, rights and remedies
3135 designed to achieve a similar objective. If so, there may still be no harm in creating additional
3136 mechanisms specifically directed at PPPs, in the procedures. Such mechanisms should never
3137 'oust' or limit other existing rights and remedies, however. The Article makes this clear.

3138 Para 3 allows the contracting authority to require the private partner to put in place an
3139 'operational-level grievance mechanism', which will be designed to facilitate the efficient
3140 handling of complaints and claims by the public. This would need to be provided for in the
3141 PPP contract. Where the PPP involves services to the public, para. 4 allows for the
3142 appropriate adjustment of those services over time as circumstances dictate, together with (if
3143 necessary) non-discriminatory third-party access to any related infrastructure network or

3144 system. Para. 5 allows the private partner to make rules governing the use of public
3145 infrastructure by third parties and the public.

3146 **CHAPTER VII. GOVERNING LAW AND DISPUTE RESOLUTION**

3147 **Article 34. Governing Law**

3148 Para.1 allows the parties to a PPP contract to choose and agree on the system of law which
3149 governs it. This may seem surprising to some. However, the authors felt that, on balance, it
3150 would be better for the law to bestow this freedom of contract than to impose local law
3151 automatically. Many legal systems do the latter in the case of government agreements.
3152 Occasionally, this can be problematic or even fatal to a PPP regime, however, if the
3153 perception of international investors and financial markets is that the host country's legal
3154 regime is not compatible with a project's 'bankability'. Sometimes very innovative
3155 contractual structures need to be deployed as a result.

3156 In addition, where the PPP project is a cross-border one, with assets straddling different
3157 jurisdictions, under the terms of a single unitary PPP contract, a 'neutral' system of law may
3158 have to be applied to the contract, by agreement between all the parties, which (by definition)
3159 is not that of one or more of the jurisdictions involved⁵³. It was therefore thought to be helpful
3160 and constructive to allow the parties at least the possibility of choosing a different system of
3161 governing law other than that of the host country.

3162 The choice of a foreign system of governing law is a somewhat theoretical possibility,
3163 nevertheless. PPP contracts are almost invariably governed by local law, for a range of cogent
3164 reasons (especially at the sub-sovereign level). All the underlying assets will be governed by
3165 it anyway, for example, especially the real property involved. Public infrastructure and public
3166 services will therefore be governed by local law, and it would be very difficult politically for
3167 a government to accept the use of foreign law on a large-scale, high-profile infrastructure
3168 project. Host countries should therefore keep in mind that local law will nearly always apply
3169 to the PPP contract in practice in any case. The Article therefore builds in a 'presumption'
3170 that local law will be used, save in exceptional circumstances. Finally, if the contract does
3171 not expressly provide otherwise, local law has to be applied.

3172 Other agreements and documents relating to the PPP (there will always be a plethora of them)
3173 are unlikely to be subject to quite the same sensitivities as the PPP contract. Para.2 allows
3174 the parties to choose the law governing them, subject to any applicable legal restrictions.
3175 These are likely to be local law for the security documents and purely domestic commercial
3176 sub-contracts, and an internationally recognised system of foreign law for the credit
3177 agreements and the other major commercial contracts.

3178 **Article 35. Dispute Resolution**

3179 This article again applies the principle of freedom of contract to the agreement by the parties
3180 of appropriate dispute resolution mechanisms in the PPP contract, explicitly mentioning a
3181 wide range of possibilities. Some legal systems will prescribe specific procedures in this
3182 context, as the article acknowledges. If they do so, in ways which are perceived as
3183 problematic, the relevant legislation may have to be amended in accordance with Article 39.
3184 International arbitration under a well-recognised system or set of rules (e.g. ICC/
3185 UNCITRAL, ICSID or LCIA) is usually a '*sine qua non*'⁵⁴ of any bankable PPP contract.
3186 Para. 3 confirms the efficacy of any waivers of sovereign immunity included in the contract;

⁵³ 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.

⁵⁴ An unavoidable condition.

3187 these will usually be essential for legal proceedings to be successfully brought against the
3188 contracting authority or other sovereign body.

3189 ***CHAPTER VIII. IMPLEMENTATION AND MONITORING OF PPPs***

3190 This area is often somewhat neglected in PPP laws. The accurate compilation of full, detailed
3191 information about the implementation and operation of PPPs, including the challenges they
3192 face during their life, is essential to the successful development of the wider PPP system. PPP
3193 systems need to be constantly reviewed and assessed by the governments advancing them.
3194 The Model Law seeks to provide for that.

3195 **Article 36. Monitoring and Reporting on the Implementation of PPPs**

3196 Para. 1 confirms that the contracting authority is entitled to exercise such powers of
3197 supervision and monitoring of its PPPs as may be necessary to satisfy itself that they are
3198 being implemented in accordance with their terms. Reports, documentation and physical
3199 access to the site are allowed for. The detailed requirements and procedures will all have to
3200 be set out in the PPP contracts, as these powers must be exercised in ways which do not
3201 interfere with the efficient implementation and management of the projects. But the article
3202 encourages the parties to make proper provision for them.

3203 Para. 2 then obliges the contracting authority to provide regular reports about its PPPs to
3204 central government, copies of which shall generally be publicly available, as well as any
3205 specific information requested from time to time. This is designed to help promote that
3206 central store of useful information mentioned above.

3207 Para. 3 requires contracting authorities to keep accurate and complete records of the decisions
3208 made and procedures followed by them in connection with all aspects of PPP implementation
3209 under the PPP law. This is considered important from the perspectives of both transparency
3210 and accountability (both of which constitute People-first PPP Principles).

3211 **Article 37. PPP Database**

3212 This article in turn mandates the creation and maintenance of a central database of PPPs in
3213 the host country, containing information that is reasonably comprehensive, up-to-date and
3214 clear, as well as generally publicly available. It aims to promote the transparency of the whole
3215 system, which is likely to be in the best interests of all involved. The detailed workings of
3216 the database can be set out in the regulations.

3217 ***CHAPTER IX. TRANSITIONAL AND FINAL PROVISIONS***

3218 The last three articles deal with the formalities of entry into force of the PPP law. They
3219 provide for the cancellation of certain existing laws (which can be listed), the disapplication
3220 to subsequent PPPs of provisions of existing laws which are not cancelled, and the
3221 consequential amendment as necessary of others (allowing for either a list in the Law itself,
3222 or a deadline for making the amendments, or both). As a backstop, Article 38 also provides
3223 for the primacy of the PPP law over other laws relevant to PPPs in the event of a conflict
3224 between them. Host countries should conform these articles to their legislative customs and
3225 style as appropriate.

3226

3227

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3237**B. List of Model PPP Law Group Members**

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3240 **Appendix 2 [list of leading precedents used in drafting Model Law]**

3241 **CIS Model PPP Law**

3242 **PPP (or equivalent) Laws for the following countries**

- 3243 • France
- 3244 • Lithuania
- 3245 • Russia
- 3246 • Serbia
- 3247 • Mongolia
- 3248 • Croatia
- 3249 • Egypt
- 3250 • Georgia
- 3251 • Uzbekistan
- 3252 • Kenya
- 3253 • [others to come]

3254 **Relevant EU Legislation**

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

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- **UNCITRAL Legislative Guide** on Privately Financed Infrastructure Projects, 2001 (hereinafter the "**PFI Guide**") or the "**Guide**" including the Legislative Recommendations (hereinafter the 71 "Recommendations" or "**Rec**") and **UNCITRAL Model Legislative Provisions** on Privately Financed Infrastructure Projects, 2004 (hereinafter the "**MLP**")¹;
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- Note by the Secretariat to the UNCITRAL Commission for its 50th session, Vienna 3-17 July 2017, Possible future work in procurement and infrastructure development (A/CN.9/912); report of the "Third International Colloquium on Public-Private Partnerships (PPPs) 23-24 October 2017, Vienna¹.
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- **European Commission Guidelines for Successful Public-Private Partnerships** (2003); **Commission Interpretative Communication** Brussels, 05.02.2008. C (2007)6661 on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP); **Directive 2014/23/EU** of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Official Journal L 94, 28.3.2014, p. 1; **Directive 2014/24/EU** of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65; **Directive 2014/25/EU** of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; OJ L 94, 28.3.2014, p. 243;
- 3278
3279
- **EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team, 2005¹;**
- 3280
- The **PPP Reference Guide** published by the **World Bank (IBRD)** in []
- 3281
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- **UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines)¹;**
- 3283
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- **UNECE Guidebook on Promoting Good Governance in Public-Private Partnerships (2008)¹;**
- 3285
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- **UNECE published papers relating to PPP Standards and the People-first PPP Principles**
- 3287
- **OECD Basic Elements of a Law on Concession Agreements, 1999-2000;**
- 3288
- **CIS PPP Model Law¹;**
- 3289
- **The EPEC PPP Guide to Guidance 2011¹; and**
- 3290
3291
- **Policy Challenges in the Implementation of Performance-ased Contracting for Road Maintenance, EBRD 2016.**
- 3292
- **Graham Vinter-Project Finance ([4th] edition)**
- 3293