



General Assembly

Distr.: General
6 April 2017

Original: English

United Nations Commission on International Trade Law

Fiftieth session

Vienna, 3-17 July 2017

Possible future work in procurement and infrastructure development

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Suspension and debarment in public procurement	2
III. Public-private partnerships (PPPs)	3
IV. Conclusions and next steps	7
Annex	
Proposed updated Chapter I, Sections A-D, of the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects	8



I. Introduction

1. This Note has been prepared to enable the Commission's consideration of possible future work in procurement and infrastructure development at this fiftieth session. It addresses two possible areas of legislative development: suspension and debarment in public procurement, and public-private partnerships.

II. Suspension and debarment in public procurement

2. At its forty-eighth session, the Commission agreed on the importance of suspension and debarment in supporting the effective implementation of a public procurement law and in fighting corruption, noting that UNCITRAL Model Law on Public Procurement¹ did not provide any procedural rules for the process.² In light of considerable variations among suspension and debarment systems in practice, as regards the objectives, procedures and outcomes, the Commission considered that legislative development in UNCITRAL in this area was not presently feasible, but that developments towards convergence were such that the item should be retained on its agenda.³

3. The Commission also instructed the Secretariat to continue to monitor developments on the topic and to report periodically thereon to the Commission.⁴

4. The Secretariat has reviewed materials and recent training and other knowledge dissemination activities, which indicate growing efforts to promote greater procedural consistency, transparency in practice, and fairness in suspension and debarment procedures, indicating ongoing progress towards convergence in some areas (as reported to the Commission in 2016).⁵

5. Nonetheless, there remain significant divergence in policy and practice on key parameters for a suspension and debarment system, including on the appropriateness of flexibility in sanctions. For example, some systems permit deferred prosecution or non-prosecution agreements, under which suppliers are permitted to make reparation for their sanctionable conduct without prosecution and formal sanction. The benefits of such systems, akin to some self-cleaning mechanisms, include that rehabilitation and improved conduct have long-term benefits for the system as a whole, avoid the potential negative impacts on overall market competition, and can also avoid some of the challenges involved in securing convictions and in cross-system recognition of sanctions. On the other hand, some commentators report that the deterrent effect of sanctions regimes and fight against corruption have been compromised, that transparency and fairness of the procedures to conclude the agreements may be lacking. It is also reported that some countries are motivated to protect large and influential domestic companies from convictions and reputational damage that could jeopardize their future bidding for international contracts and collateral economic and social consequences, without paying due regard to the governance implications.⁶

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 192 and annex I, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

² *A/70/17*, para. 362. See, also, *A/CN.9/889*, paras. 2-9.

³ *Ibid.*

⁴ *A/71/17*, para. 361.

⁵ *A/CN.9/889*, para. 6.

⁶ See, for example, Majtan, Roman. The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes. *Geo. Wash. Int'l L. Rev.* 45 (2013): 291; Grasso, Costantino. Peaks and Troughs of the UK Deferred Prosecution Agreement: The Lesson Learned from the First-Ever DPA between the SFO and ICBC SB PLC; (2016). Out of court, out of mind: do deferred prosecution agreements and corporate settlements fail to deter overseas corruption, Corruption Watch UK, available at <http://www.cw-uk.org/wp-content/uploads/2016/03/Corruption-Watch-Out-of-Court-Out-of-Mind.pdf>.

6. The Commission may therefore consider that the position remains as reported in 2016: legislative development in UNCITRAL in this area is not presently feasible, but the importance of the topic and moves towards indicate that the item should be retained on its agenda.

III. Public-private partnerships (PPPs)

7. At its forty-eighth session, and in light of the acknowledged importance of public-private partnerships (PPPs) for development and in the context of the Sustainable Development Goals, the Commission decided that the possibility of developing a legislative text on PPPs would be kept on the Commission's agenda, and instructed the Secretariat to follow the topic to advance preparations should the Commission decide to undertake work in this area.⁷

8. The Secretariat reported to the Commission in 2016 on areas of policymaking focus of other bodies active in PPPs, primarily the World Bank and regional development banks, the United Nations Economic Commission for Europe (UNECE) and the Organization for Economic Cooperation and Development and at the national level. The topics considered included procurement in PPPs, the terms of the project agreement, and post-award disputes.⁸

9. In light thereof, the Commission decided that the Secretariat should consider updating where necessary all or parts of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects,⁹ involving experts.¹⁰

Consideration of possible updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

10. In order to assess the likely extent of necessary updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the Secretariat has held consultations with experts in policy, law reform and practice in PPPs, on the provisions of the Legislative Guide and the accompanying Legislative Recommendations and Model Legislative Provisions (together, the PFIPs texts).¹¹ The review considered the main topics contained in those documents (Introduction; General legislative and institutional framework; Project Risks and Government Support; Selection of the concessionaire; Construction and operation of infrastructure — legislative framework and project agreement; Duration, extension and termination of the project agreement; Settlement of disputes and Other areas of law). The experts also took note of the conclusions held at two Colloquia considering the PFIPs texts held in May 2013 and March 2014 (both of which had recommended revisions to the PFIPs texts),¹² and the Commission's consideration thereof.¹³

11. The consultations starting in September 2016 were conducted through written exchanges, virtual meetings and two in-person meetings, one held in Washington, D.C., on 5-7 December 2016 (contemporaneously with the Global Forum on Law,

⁷ A/70/17, para. 363.

⁸ A/CN.9/889, paras. 10-19.

⁹ A/70/17, para. 362.

¹⁰ A/71/17, paras. 359, 360 and 362.

¹¹ The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

¹² Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013), A/CN.9/779, paras. 73-85, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html; and Possible future work in Public-Private Partnerships (PPPs) Report of the UNCITRAL colloquium on PPPs, A/CN.9/821, available at <http://www.uncitral.org/uncitral/commission/sessions/47th.html>.

¹³ See A/68/17, paras. 329-331; A/69/17, paras 255-260.

Justice and Development, which considered various aspects of PPPs),¹⁴ and one held in Vienna, on 6 and 7 March 2017.

12. The main conclusion of the experts is that most of the recommendations of the PFIPs texts reflect good policy and practices, and remain relevant. However, limited revisions to update the PFIPs texts are considered necessary, in order to take account of developments in practice since the existing Legislative Guide was issued in 2000. First, the term “public-private partnerships” has become the term generally used to describe the arrangements considered in the PFIPs texts, and should be used to replace “privately-financed infrastructure projects”. In addition, referring to PPPs would avoid confusion with the “Private Financing Initiative” in the United Kingdom of Great Britain and Northern Ireland and also allow the importance of service delivery through PPPs to be placed on a par with the infrastructure development that precedes service delivery.

13. Secondly, objectives and requirements of the United Nations Convention against Corruption¹⁵ should be fully reflected in the PFIPs texts, given the extent of ratification of that text.¹⁶ The requirements, contained in articles 9(1) and 9(2) on public procurement and public financial management respectively, are that systems be based on principles of transparency, competition and objectivity in decision-taking. It is recommended that the PFIPs texts should be expanded as regards good governance throughout the life cycle of PPPs, and recent developments should be considered, for example those encouraging greater transparency in PPPs through open contracting and open data as well as transparency in procurement procedures.

14. The experts also agreed that an earlier instruction from the Commission to the Secretariat to consolidate the PFIPs texts should be implemented as part of the updating process. The PFIPs texts, as and when updated, should therefore present commentary, legislative guidance, legislative recommendations and model legislative provisions, as appropriate, on each aspect of PPPs covered. Legislative recommendations should form the central scoping provisions (and could be integrated in laws governing PPPs at the national level), but commentary on issues of implementation and use would be necessary to ensure the legal framework functioned as intended, and so should be included (reflecting the approach of the existing PFIPs texts). Thus updated PFIPs texts would take the form of a single Legislative Guide containing all guidance, recommendations and model provisions.

15. The other key conclusions of the review are set out in the following paragraphs.

16. First, and noting that the main objective of an updated Legislative Guide would be to assist legislators to establish an enabling legislative framework for PPPs, the text should be expanded as regards the institutional requirements for the effective implementation of that framework (as provided in many modern PPPs laws).¹⁷ In this context, the review concluded that the assumption in the existing PFIPs texts that the enacting State has appropriate institutional structure and capacity should be removed, and guidance should be included on both structure and capacity.

17. More generally, the extent of implementation guidance should be considered on a topic-by-topic basis, should focus on the legal and policy recommendations, and should not seek to provide a comprehensive user manual. For example, if an updated Legislative Guide recommends that a central PPPs agency or body be required to carry out readiness assessments, it should explain what is understood by

¹⁴ See <http://www.globalforumljd.org/events/2016/law-justice-and-development-2016-law-climate-change-and-development>.

¹⁵ Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

¹⁶ See https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf.

¹⁷ See Comparison of Country PPP Laws with UNCITRAL PFIPs Instruments, report by Crown Agents, available at <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014-papers.html>.

readiness assessments. However, detailed practical advice on readiness assessments — a topic included by several organizations providing practical and capacity-building advice —¹⁸ would not be included.

18. Secondly, additional discussion of key terms such as “value for money” and “sustainability”, key features of the projects covered should be included. In this regard, the challenges of defining PPPs were noted, and the updated Legislative Guide should provide guidance on setting the scope of the projects for which the legal framework is designed, rather than seeking to define PPPs themselves.

19. Third, the review concluded, in light of practical experience and the requirements of the United Nations Convention against Corruption noted above, that more articulate recommendations for procedures and roles for project planning and preparation should be included. However, the review in this regard drew a distinction between infrastructure planning and administrative procedures to evaluate the quality of possible projects, identifying their intended and likely socioeconomic objectives and impact, and prioritization among projects, and PPPs planning and preparation.

20. While PPPs planning and preparation should be integrated into a national or regional infrastructure planning and public financial management processes, general administrative procedures will generally not feature in a law governing PPPs. Consequently, detailed commentary on such general administrative procedures should not be included in an updated Legislative Guide. Guidance on the importance of appropriate standards and linkages between these procedures and PPPs should, on the other hand, be provided.

21. The focus in an updated Legislative Guide should therefore be to address the steps to be taken once a PPP is a possible delivery model for a project (that is, the Guide would assume that the project is already identified as a worthwhile project). The guidance will focus on the steps involved to decide whether a proposed project would be viable as a PPP. The recommendations should focus on ensuring clarity in roles and responsibilities, and the criteria to be followed in taking the decisions involved. The approvals process is generally an iterative one involving, at a minimum, a public authority that would conduct the project and central authorities that provide the ultimate approvals. Methodologies to identify the suitability of a project as a PPP should be included, with requirements for a comparison with other delivery mechanisms at both the individual project level and at the level of government resource allocations, issues raised in the existing PFIPs texts but for which expanded guidance is recommended. In this regard, the review noted concerns that many existing systems in this area are not effective, and there is evidence of distortions in insufficiently rigorous processes designed to secure authorization for a PPP.

22. Other significant issues in the planning process include requirements for analyses of whether the long-term provision of services for which infrastructure is constructed can be assured; that is, can the services be provided at a price that will allow the private sector to develop and operate the project (whether with or without a subsidy); whether appropriate risk transfer is achievable; of the long-term financial implications of the project as PPP, including capital and operating financial requirements, fiscal and public debt implications, affordability, and appropriate accounting for liabilities. Some of these elements are addressed in the existing PFIPs texts, and the review concluded that the existing guidance be consolidated and expanded, in a new chapter to address project preparation.

23. Third, the review recommended that all revisions should be grounded in current practices from all regions, for example on the emerging use of market consultations, and planning tools, which can assist in enhancing project quality and in preventing unnecessary changes in contract terms (concerns were expressed about recent examples of contract renegotiations only 12-18 months after contract

¹⁸ Such as those identified in para. 6 above.

signature). On the other hand, new tools for accommodating necessary changes during the period of project operation have emerged and should be considered.

24. Fourth, the review concluded that the scope of the revised Legislative Guide should remain focused on infrastructure-based PPPs with a public service element; any new models of such PPPs introduced should be based on successful experiences, and novel forms of PPP such as project alliancing should not be addressed, because there is a lack of broad-based experience that would allow UNCITRAL to build consensus on universally-acceptable recommendations and guidance, and also reflecting the limited scope of the instructions from the Commission.

25. As regards drafting issues, the review recommended a simpler style and presentation, and simplifying references to the constituent elements of a legal framework. Unnecessary reference to sector-specific issues should be removed, though some general recommendations in the updated Legislative Guide might be adapted for or applicable to individual sectors.

26. The review is now looking at individual chapters of the existing PFIPS texts in detail, starting with Chapter I of the existing Legislative Guide and associated Legislative Recommendations and Model Legislative Provisions. This Chapter addresses the general enabling environment (including country- or region-wide planning), the functions of PPPs-related institutions and interaction with other branches of government. The initial sections of Chapter I, as proposed to be updated based on the above recommendations, are annexed to this Note, so as to provide an example of the format an updated Legislative Guide may take.

27. A table of concordance with the existing PFIPs texts for this extract appears below.

Legislative Guide on PFIPs (2000) Chapter and Main Topic Reference	Proposed Revised Legislative Guide on PPPs Chapter and Main Topic Reference
Chapter I — General legislative and institutional framework	Chapter I — General framework for PPPs
A. General Remarks	A. General remarks
B. Constitutional legislative and institutional framework <ol style="list-style-type: none"> 1. General guiding principles for a favourable constitutional and legislative framework <ol style="list-style-type: none"> a. Transparency b. Fairness c. Long-term sustainability 2. Constitutional law and privately financed infrastructure projects 3. General and sector specific legislation Includes: Legislative Recommendation 1 and Model Legislative Provision 2	B. Legal and institutional framework for PPPs <ol style="list-style-type: none"> 1. Objectives of a PPPs legal framework <ol style="list-style-type: none"> a. Sustainability b. Value for money c. Participation d. Competition e. Integrity f. Transparency g. Fairness and public confidence 2. The legal framework for PPPs <ol style="list-style-type: none"> a. General remarks b. Interaction with other areas of law c. Sector specific legislation Includes: Model Legislative Provision 1 (Preamble)

<p>C. Scope of authority to award concessions</p> <ol style="list-style-type: none"> 1. Authorized agencies and relevant fields of activity 2. Purpose and scope of concessions <p>Includes: Legislative Recommendations 2-5 and Model Legislative Provisions 3 and 4</p>	<p>C. Scope of the legal authority for PPPs</p> <ol style="list-style-type: none"> 1. PPP projects to be addressed 2. Definition of PPPs 3. Scope of authority to enter into PPPs <p>Includes: Model Legislative Provisions 2 and 3</p>
	<p>D. The institutional framework for PPPs</p>

IV. Conclusions and next steps

28. The review indicates that updating the PFIPs texts is both feasible and achievable within current resource constraints. The Secretariat proposes to hold a further Colloquium on PPPs in the autumn of 2017, in order to allow proposals to update the Chapters of the existing PFIPs texts to be considered in an open and inclusive forum.

29. A further report and recommendations will be presented to the Commission for its consideration in 2018.

Annex

Proposed updated Chapter I, Sections A-D, of the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects

Notes:

- 1 *This draft consolidates the Legislative Guide, Legislative Recommendations (LRs) and Model Legislative Provisions (MLPs);*
- 2 *Italicised text in square brackets refers to sources and may be excluded from the final text.*

CHAPTER I. General framework for PPPs

A. General Remarks

1. The establishment of an appropriate and effective legal framework is a prerequisite to creating an environment that fosters public-private partnerships for infrastructure development and the provision of services to the public. For countries where such a legal framework already exists, it is important to ensure that the law is sufficiently flexible and responsive to keep pace with developments. This chapter deals with general issues and objectives that domestic legislators are advised to consider when setting up or reviewing the legal framework for public-private partnerships for infrastructure development.

B. Legal and institutional framework for PPPs

1. Objectives of a PPPs legal framework

2. A statement of objectives sets out the policy objectives in a law and supporting elements of the PPPs legal framework, therefore provides useful orientation for users, and can also provide guidance in the interpretation and application of the law.
3. Ensuring that PPPs are concluded using a transparent, objective and competitive process, principles underlying article 9 of the United Nations Convention against Corruption (New York, 31 October 2003),¹⁹ will also ensure the integrity of the process and may also support the sustainability of a PPP (as projects may otherwise be vulnerable to cancellation when governments change).
4. It is recommended that such a statement be included in the form of a preamble to the law. In States in which it is not the practice to include preambles, a statement of objectives can be incorporated in the body of the provisions of the Law.
5. It should be noted that such a statement does not create substantive rights or obligations for the parties — these arise under procedures in the law itself.

¹⁹ United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed January 2011).

Model Legislative Provision 1

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate public-private partnerships so as to promote the following objectives in infrastructure development and the provision of associated services to the public:

- (a) Achieving long-term sustainability of infrastructure and security in the delivery of services to citizens;
- (b) Maximizing value for money;
- (c) Fostering and encouraging the participation of the private sector;
- (d) Promoting competition for public-private partnership contracts;
- (e) Promoting integrity, transparency, fairness and public confidence in the processes concerned.

Be it therefore enacted as follows:

[The objectives set out in the Model Legislative Provision are drawn from article 9 of the United Nations Convention against Corruption, the UNCITRAL Model Law on Public Procurement and the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects.]

Commentary on objectives of a PPPs legal framework

(a) Sustainability

6. Recalling the scope of this [Guide] and the context of infrastructure development [cross references], it is clear that an important objective of the PPPs legal framework is to ensure the long-term provision of public services, high quality in infrastructure, and economic, environmental and social sustainability. Inadequate arrangements for the operation and maintenance of public infrastructure severely compromise these objectives and can result directly in reduced service quality and increased costs for users.

7. This [Guide] addresses the role of the legislative framework in ensuring that the various public authorities involved in the governance and operation of PPPs have the legal authority and institutional capacity to undertake the various tasks entrusted to them throughout the planning and operational phases of PPPs.

[sources include PFIPs Legislative Guide]

(b) Value for money

8. Value for money means an objective assessment of the extent to which a PPP optimizes the use of resources to achieve the intended impact of the project concerned, and can include:

- (a) The optimal relationship between the cost, time and other resources, and the quality of the subject matter of the project;
- (b) Delivering the required level of services at a lower level of cost, time and other resources, without reducing the quality of those services, than would otherwise have been the case;
- (c) Delivering a better-than-required level of services or achieving a better return on investment in the project for the cost, time and other resources than would otherwise have been the case.

[Various sources, including P3s Legislative Resource Guide]

(c) Participation

9. As regards participation in the process of awarding PPPs contracts, private entities will take part where they are confident that their offers will be objectively assessed, and that the procedures are fair and transparent (both as regards the procurement process and the operation phase of the project, as reflected in the contractual arrangements therefor).

[To be completed regarding bankability and related issues]

[Drawn from Guide to Enactment of the Model Law on Public Procurement]

(d) Competition

10. Competition for PPPs contracts (meaning that potential investors and private entities engage in a rigorous contest for the opportunity to be awarded the PPPs contract) can reduce overall costs and other resource demands, can increase the productivity of infrastructure investment, can enhance responsiveness to the needs of the customers and thus obtain better quality of public services. Competition has the potential both to improve value for money in PPPs and to increase the likelihood of achieving the intended outcome of the project concerned. Competition is also one of the principles that the United Nations Convention against Corruption requires to be enshrined in a national system for procurement [references to be added].

11. Promoting potential investors' and private entity participation in PPPs is a key prerequisite for competition for the contracts concerned. The procurement procedures recommended in this [Guide] recognize, however, that in the context of the complex infrastructure projects at issue, competition is best assured by limiting the number of participants. This apparently paradoxical situation arises because the costs of participating in the procedure are high — unless the private entities assess their chances of winning the ultimate contract as reasonable, they will be unwilling to participate. Consequently the procurement procedures recommended in this [Guide] start with a process to identify a limited number of high-quality potential partners.

[To be completed regarding exclusivity]

[Various sources, including Guide to Enactment of the Model Law on Public Procurement]

(e) Integrity

12. Integrity involves both the avoidance of corruption and abuse and the notion of all participants in a PPPs project acting ethically and fairly, avoiding conflicts of interest. It requires the overall system for PPPs to be devoid of institutionalized discrimination or bias against any particular group of private entities or potential investors, and that the application of the rules of the legal framework on PPPs does not bring results contrary to the objectives of the system.

13. Officials in public authorities will exercise considerable commercial discretion in concluding and operating PPPs, and accordingly a code of conduct for their activities is recommended in this [Guide] [cross reference]. Integrity may be further enhanced by linking this code of conduct with applicable general standards of conduct for civil servants and any further provisions addressing integrity and prevention of corruption in other national laws and regulations.

[Drawn from Guide to Enactment of the Model Law on Public Procurement]

(f) Transparency

14. A transparent legal framework is characterized by clear and readily accessible rules and by efficient procedures for their application. Transparent laws and administrative procedures create predictability, enabling private entities and potential investors to estimate the costs and risks of their participation and thus to

offer their most advantageous terms. They also set out the rules regarding provision of services to citizens and the means by which public service providers and their customers may protect their rights.

15. Transparent laws and administrative procedures may also foster openness through provisions requiring the publication of administrative decisions, including, when appropriate, an obligation to state the grounds on which they are based and to disclose other information of public relevance. They also help to guard against arbitrary or improper actions or decisions by the public authority or its officials and thus help to promote confidence in a country's infrastructure development programme. Consequently, transparency is also one of the principles that the United Nations Convention against Corruption requires to be enshrined in a national system for procurement [references to be added].

16. Transparency of laws and administrative procedures is of particular importance where foreign investment is sought, since foreign companies may be unfamiliar with the country's practices for the award of infrastructure projects.

17. Transparency is a tool that allows the necessary exercise of discretion in the PPPs process in the operation of the infrastructure and in the delivery of services to citizens in changing circumstances, limits that discretion where appropriate, allows the exercise of discretion to be monitored and, where necessary, challenged. It is considered a key element of promoting accountability for the actions or decisions taken. It is thus a critical support for integrity and for public confidence in the system, as well as a tool to facilitate the evaluation of the system and projects against their desired outcomes.

18. This [Guide] recommends five key aspects of transparency in procurement of PPPs projects: the public disclosure of the legal framework; the publication of opportunities; the prior determination and publication of the key terms of the project against which offers are to be assessed; the visible conduct of the process according to the prescribed rules and procedures; and the existence of a system to monitor that these rules are being followed and to enforce them if necessary.

[To be completed regarding transparency regarding socioeconomic objectives, budgets, open contracts and open data in the operation phase]

[Drawn from PFIPs Legislative Guide and Guide to Enactment of the Model Law on Public Procurement]

(g) Fairness and public confidence

19. The PPPs legal framework is both the means by which Governments regulate and ensure the provision of public services to their citizens and the means by which public service providers and their customers may protect their rights. A fair legal framework takes into account the various (and sometimes possibly conflicting) interests of the Government, the public service providers and their customers and seeks to achieve an equitable balance between them. The private sector's business considerations, the users' right to adequate services, both in terms of quality and price, the Government's responsibility for ensuring the continuous provision of essential services and its role in promoting national infrastructure development are but a few of the interests that deserve appropriate recognition in the law.

20. Public confidence will also be enhanced where enforcement of the rules is clearly visible, and transgressions appropriately punished. This [Guide] therefore recommends procedures for such enforcement.

[Drawn from PFIPs Legislative Guide and Guide to Enactment of the Model Law on Public Procurement]

2. The legal framework for PPPs

(a) General remarks

21. The establishment of an appropriate and effective legal framework is a prerequisite to creating an environment that fosters the participation of the private sector in PPPs. A law governing PPPs typically embodies a political commitment, provides specific legal rights and may represent an important guarantee of stability of the legal and regulatory regime, all of which are needed to facilitate private investment in PPPs. [*To be completed regarding instability in practice*]

22. The provisions in this [Guide] are designed both to allow countries to draft a Law governing PPPs where none presently exists, or to assess an existing legal framework against a framework reflecting international good practice.

23. An effective law governing PPPs will establish general principles for the basic policy, institutional and regulatory framework under which PPPs will be concluded and operated. Such a law is designed to provide all the essential principles and procedures for the conclusion and operation of PPPs. It is not intended to be a comprehensive guide, either in terms of setting out all detailed rules and procedures necessary to regulate the contractual relationships concerned, or in terms of rules and procedures applicable to particular sectors of the economy.

24. The overall system enabling PPPs will generally comprise the primary law, secondary regulations or decrees, internal rules, and guidance, drawing on the policy choices made for the system overall. When drafting a law governing PPPs, countries will need to ensure that the primary law precisely defines the obligations imposed and rights conferred and is sufficiently adaptable to PPPs in practice, recalling that not all situations are foreseeable. The legal and administrative tradition in a country will have significant bearing on drafting style, but a balance should be struck between law that is sufficiently clear and unambiguous and law that is sufficiently adaptable. Excessive delegation of interpretation to practitioners or the judiciary is undesirable in that it will foster uncertainty and inconsistent outcomes. Consequently, this [Guide] contains Model Legislative Provisions for those aspects of PPPs in which there is clearly-established international good practice and consensus on appropriate standards of conduct, and in areas in which there is evidence that absence of rules may lead to attempts to circumvent the principles on which it is based, the provisions are relatively detailed.

25. More detailed rules that can avoid uncertainty and ambiguity in how the primary law may operate in practice can be set out in supporting regulations and internal rules, which have the significant advantage of possible amendment as experience is gained without requiring new Parliamentary approvals as amendments to primary laws require. This flexibility, however, is appropriate provided that the main principles and procedures are set out in the primary law, so that they cannot themselves be amended without public scrutiny.

26. Countries using this [Guide] to draft their general enabling legislation for PPPs will therefore need to supplement its provisions through additional rules and regulations, supported by guidance and other capacity-building tools, to ensure appropriate governance and to promote integrity in the system.

27. As a matter of good practice, countries wishing to engage in PPPs should also set a national PPP policy to provide direction on the use of PPPs. A PPPs policy should also be set in a manner consistent with national and other governmental infrastructure plans (discussed further in [cross reference]). These policies will themselves refer to or include processes for planning, prioritization and project preparation, discussed in [new Chapter II].

28. Such policies, along with rights and obligations expressed in rules (primary law, secondary or delegated legislation and other rules and regulations) will support transparency and accountability where they are publicly available. While a primary law generally comes into force only upon publication, other rules and policies are

not always subject to the same restriction. The law governing PPPs should therefore set out the authorities responsible for issuing rules, regulations and also national and any other statements of policy (see Model Legislative Provision number [...]).

29. Laws require institutions to implement the rules and procedures they contain; institutions are also required to implement the policies and practices supporting the legal framework. In the PPPs context, the institutions can take the form of a body (e.g. a PPP authority/PPP Unit) or combination of administrative functions. In either case, the body or function should be authorized to address PPPs throughout their life-cycle. Administrative functions include promoting PPP awareness, identifying opportunities for projects and liaising with central authorities, ensuring that PPPs are considered as possible forms of project deliver as and when appropriate. More detailed discussion of these and other functions and practical examples of structures in some existing systems, are found in [...] of this [Guide].

30. In some countries, the State has an explicit duty to ensure the provision of services to its citizens and residents, and there may be restrictions on the extent to which the duty can be delegated to the private sector especially as regards major services such as health, justice and policing. Any such restrictions should be accurately reflected in the law on PPPs. In some cases, a contractual solution such as specially-created public entities or special purpose vehicles may provide a solution, in which case, the general legal framework for PPPs should enable such a possibility. This situation is to be distinguished from decisions that some services — such as clinical services at hospitals, guarding services at prisons — should be retained by the public sector, either as a policy matter or because private companies do not have the capacity to provide those services. Again, the law governing PPPs should set out all relevant restrictions.

(b) Interaction with other areas of law

31. The general legal framework for PPPs will also interact with other areas of the legal framework in the country concerned.

32. Chapter VII of the existing PFIPs Legislative Guide will be included here, addressing:

- Promotion and protection of investment
- Property law
- Security interests
- Intellectual property law
- Rules and procedures on compulsory acquisition of private property
- Rules on government contracts and administrative law
- Private contract law
- Company law
- Tax law
- Accounting rules and practices
- Environmental protection
- Consumer protection laws
- Insolvency law
- Anti-corruption measures
- International agreements:
- Membership in international financial institutions
- General agreements on trade facilitation and promotion
- International agreements on specific industries

33. Other issues to be included: potential overlap with PPPs and other laws; restrictions through regulatory function; land ownership restrictions; the interaction of tariffs as provided in other laws and the PPP legal framework [notably, addressing the need for a MLP and guidance on coordination between the tariff regulator and the public entity letting the project is needed to ensure long-term sustainability.]

(c) Sector-specific legislation

34. Legal provisions to enable PPPs create a framework for providing uniform treatment of issues that are common to such partnerships in different infrastructure sectors but is normally not suitable to address all the particular requirements of different sectors. Even in countries that have adopted a general law governing PPPs addressing cross-sectoral issues, supplementary sector specific laws allow the legislator to formulate rules that take into account the market structure in each sector.

35. [Sector-specific laws should be expressly subordinate to a general law governing PPPs, so as to permit any inconsistencies to be clearly resolved in favour of the generally-applicable rule.]

36. Sector-specific laws may also establish a framework for the regulation of individual infrastructure sectors, thus allowing the development of national regulatory capacity. Effective laws will set parameters for the exercise of discretion by the regulator, but should not unnecessarily restrict the ability of parties to a PPP to determine their contractual relationship.

C. Scope of the legal authority for PPPs

37. The scope of the legal framework for PPPs should be clear both as regards which authorities may use the law to engage in PPPs and which projects are considered as PPPs under the law. The enabling provisions to such effect will require a definition of PPPs, and of the parties to PPPs projects to be concluded under the law — that is, of both the public authority and private entity. Model Legislative Provision 2 defines the scope of a law governing PPPs based on this Guide, as further explained in the following paragraphs.

1. PPP projects to be addressed

38. The recommendations in this [Guide] apply to PPPs for construction, maintenance, repair, refurbishment, modernization and/or expansion and operation of public infrastructure facilities and systems and the provision of services in connection therewith, through a contractual relationship (that is, with defined contractual obligations, shared risks and where payment is based on performance, as further explained below). While the infrastructure need not be physical infrastructure and may comprise, for example, communications systems, the scope of the provisions of this [Guide] does not extend to other forms of partnership between the public and private sectors, where the government does not have an interest in the provision of services, to concessions for oil and gas, mining or infrastructure, or to contractual arrangements as project alliancing or outsourcing. Nonetheless, many of the governance recommendations are transferable to such other projects and to projects in specific sectors.

39. The nature of the private participation includes investment in public infrastructure. The questions of ownership of the infrastructure and the nature of the public interest in that infrastructure are discussed in [cross reference — to cover direct and indirect public interest]. The nature of the services to be provided, including the public authority's responsibility for delivery of those services, is discussed in [cross reference].

40. Model Legislative Provision 2 limits the scope of the PPP projects in the legal framework to the infrastructure-based projects, as described. Governments wishing to expand the scope of a law governing PPPs may wish to expand the scope of the legal framework accordingly and revise the phrase “with respect to any infrastructure facilities and systems” when enacting this provision.

2. Definition of PPPs

41. An enabling provision for the conclusion of PPPs projects requires a definition of the projects covered. PPPs can be described as mutually beneficial contractual arrangements, in which resources are contributed by both the public and private partners (including provision of private finance, professional and other knowledge, expertise, and skills on the one hand, and granting of rights, such as rights over land and to exclusive operation of infrastructure on the other).

42. The contractual arrangements generally include:

(a) Obligations on the private entity to design, finance, build or rehabilitate infrastructure, to maintain and operate the infrastructure concerned and to provide defined services for a specified period;

(b) Obligations on the public authority to provide access to assets and the rights and permits necessary for the performance of the private party’s obligations;

(c) The allocation of risk among the parties (including financing and construction risks, and risks associated with ensuring of accessibility of or demand for the infrastructure and the associated services, among others); and

(d) A payment mechanism based on performance criteria for service provision and in some cases the satisfactory operation/quality of the infrastructure, with remuneration being provided by the public authority or by the end users (or a combination of both). Where the payment mechanism consists of the right to charge a price for the use of the facility or premises or for the service or goods it generates, the PPP is a concession; in other cases, it is a publicly-funded PPP. PPPs may be exclusively publicly-funded, or concessions alone, or include a combination of both payment mechanisms. A discussion of these project types is set out in [cross reference — to include commentary on the relative frequency of those types].

43. It is recommended that PPPs are permitted to be concluded only in accordance with the provisions of the law governing PPPs, which should include:

(a) A planning and preparation process as set out in the law governing PPPs, and in other relevant laws, which includes assessments of the social, economic and other impact of the proposed project, and comparative assessments of the available project delivery mechanisms;

(b) A contract planning process that addresses the contractual arrangements set out in the preceding paragraph, provides for the control and ownership of infrastructure throughout the life of the PPP, and includes commercial terms that appropriately balance the interests of both parties, taking into account the anticipated length of the contract, the time necessary for the private entity to amortize all costs and make a reasonable profit, an adjustment mechanism for changes in circumstances and [other];

(c) A default procurement method that is competitive, with limited exemptions as set out in the law; and

(d) Provisions for termination of the contract at the expiry of the term, such as that the infrastructure is transferred in good operating condition to the public authority, generally without compensation (unless the contract provides otherwise).

44. While some of the above features would also apply to public procurement of infrastructure, it is clear that PPPs are neither merely traditional procurement nor, on the other hand, a privatization mechanism. The interaction between PPPs and other laws in a country is discussed in [cross reference].

45. The definition of a PPP clearly cannot include all the above descriptive elements. It is recommended that the constituent elements of a PPP as set out in Model Legislative Provision 2 be included in the definition, referring to the necessary steps to conclude and operate a PPP under the law.

3. Scope of authority to enter into PPPs

46. Possible investors, private parties, investors and others will not participate in PPPs projects unless they are confident that they are dealing with persons with the authority to engage in PPPs and the procedures to conclude them. The phrase “engage in PPPs” refers to the entire life-cycle of a PPP.

47. It is therefore recommended that the PPPs legal framework should establish a general authority for any public authority to enter into a PPP, to avoid the practical difficulties of keeping a positive or negative list system up to date. Model Legislative Provision 2 includes an option for countries to exclude specific sectors or entities should they so choose. In some systems, this authority may exist outside the PPPs legal framework, in which case the provision when enacted should make appropriate cross-references.

48. The process to conclude a PPP and operate the project involves negotiations to conclude the terms, to enter into the PPPs contract, and amend the PPPs contract and associated contracts where modifications are needed. If any of these functions again exists outside the PPPs legal framework, which may be the case where some functions reside in a central body, appropriate cross-references will be needed, unless the PPPs legal framework is to supplement the general position (in which case additional provision may be needed).

49. Clearly, a definition of “public authority” for the purpose of a law governing PPPs is needed. The wording of the definition should be tailored to reflect the governmental structure in the country concerned and whether or not central authorities, sub-central authorities and others are to be permitted to engage in PPPs. If a positive list approach is taken, care is needed to ensure it is comprehensive, and the degree of centralization in a country should be reflected appropriately where PPPs are limited to central authorities.

50. The definition of a public authority in Model Legislative Provision 2 refers to authorities at any level of government, unless the bracketed language is included, in which case central government authorities may enter into PPPs (or national authorities in federal systems), but provincial, local or other sub-central government authorities will be excluded.

51. In addition, the definition of public authority can be extended to certain entities or state-owned enterprises that are not considered part of the government, if a country wishes to allow those bodies to engage in PPPs. Relevant considerations from this perspective include:

(a) [Whether the Government provides substantial public funds to the entity, or a guarantee or other security to secure payment or supports the entity’s obligations under the PPP contract;

(b) Whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity;

(c) Whether the Government grants to the entity an exclusive licence, monopoly or quasi-monopoly for its operations;

(d) Whether the entity is accountable to the Government or to the public treasury in respect of its profitability; and

(e) Whether the entity is engaged in projects in partnership with an international donor.]

[Source: *Guide to Enactment of the Model Law on Public Procurement*]

[To be completed regarding whether PPPs would be engaged in by SOEs or similar entities and possible conflicts of interest in vertical PPPs]

Model Legislative Provision 2

[A public authority [of the [national Government]] [save [a list of exceptions can be included]] may enter into a public-private partnership with respect to any infrastructure facilities and systems in this State in accordance with the provisions of this law.]

Related definitions

[An infrastructure public-private partnership is a contractual arrangement between a public authority and a private entity for the construction, maintenance, repair, refurbishment, modernization and/or expansion and operation of infrastructure facilities and systems in which the public authority has an interest, and the provision of services in connection therewith, under which the remuneration provided to the private entity is based on performance of the obligations undertaken by that private entity.]

[A public authority is any department, agency, organ or other unit, or any subdivision or multiplicity thereof [of the [national Government]]]

[A private entity is a body corporate organised under the laws of this or another State.]

[Various sources]

Exclusivity

52. Another important issue concerns the nature of the rights vested in the private partner, in particular whether the right to provide the service is exclusive or whether the private partner will face competition from other infrastructure facilities or service providers. Exclusivity may concern the right to provide a service in a particular geographical region or embrace the whole territory of the country; it may relate to the right to supply one particular type of goods or services to one particular customer or to a limited group of customers. *[Examples to be revised]*

53. The decision whether or not to grant exclusivity rights to a certain project or category of projects should be taken in the light of the scope for competition and whether there is a natural monopoly.

54. It is desirable therefore to deal with the issue of exclusivity in a flexible manner.

55. *[To be completed. Some experts recommend a default provision in favour of exclusivity, but others consider that exclusivity is not critical, and is subordinate to the policy priority of providing the best services to users. Location also to be reviewed.]*

56. *[Reflecting the overall approach to exclusivity, the guidance will address whether or not the law or standard or individual contracts or a combination thereof may restrict exclusivity; the cross-border context; how to link termination rights and compensation and exclusivity can be terminated only in the public interest; the nature of exclusivity (geographical, sectoral etc.); scope for competition in different sectors; the technical or commercial viability of a project without exclusivity.]*

57. *[Also to be completed as regards whether the contract or underlying legal principles should permit adaptation of the service to benefit the users without amounting to a renegotiation; whether exclusivity should give way to clauses or provisions addressing pacta sunt servanda vs. rebus sic stantibus, i.e. amounting to the restoration of an economic equilibrium.]*

[Model Legislative Provision 3

A public-private partnership shall grant an exclusive right to a private entity to operate infrastructure facilities and systems in all or a defined subdivision of this State [save ...].

D. The institutional framework for PPPs

58. *[This section will address the general institutional framework for PPPs, including the need for institutions to create an attractive, predictable and transparent environment; the linkages between PPPs planning and planning for infrastructure development in an economy; issuing policy and practical guidance on such matters as possible projects, infrastructure plans and priorities, addressing obstacles e.g. consultations on land use, standard procedures and documents; disseminating best practices, and capacity-building.*

59. *This section will contain explanations of roles and criteria for decision-taking, using examples of common solutions, giving suggestions but not mandatory requirements, reflecting the wide variation in PPPs authorities, PPPs Units and other bodies found in practice. For example, a Ministry of Finance is likely to have overall decision-taking authority, will give approval and set rules, and will check compliance; sectoral ministries will address sectoral and other technical issues.*

60. *This section will also address governance issues in institutions, such as avoiding conflicts of interest, administrative coordination and hierarchies.*

61. *Existing guidance on licences and permits, on sectoral regulators in this Chapter of the PFIPS Legislative Guide will be incorporated in a new Chapter II, to address the principles and procedures governing individual project planning and implementation].*
