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## **Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapters I and II)**

**Note by the Secretariat**

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## I. General legal and institutional framework

*[Paras. 2, 5 (old 4), and 8 (old 5) appeared in the existing chapter I, “General legislative and institutional framework”. Additions and amendments are indicated in the text.]*

### A. General remarks

1. PPPs are one of the options that Governments may use to develop infrastructure or procure facilities or systems required for the provision of public services or for use by a public entity. An appropriate legal framework is needed to attract private investment to those projects that the Government considers worthwhile to implement as PPP. Both countries considering the adoption of new laws, and countries where such a legal framework already exists should ensure that the relevant laws and regulations are drafted clearly, comply with fundamental principles of good governance and sustainable development, and are comprehensive yet sufficiently flexible to respond to the country’s infrastructure development goals and policies and to keep pace with the technology and market developments in various infrastructure sectors. This chapter deals with some general issues that domestic legislators should consider when setting up or reviewing the legal framework for PPPs in order to achieve these objectives. Section B (paras. ...) discusses the guiding principles and options for a legal framework for PPPs; section C (paras. ...) deals with the scope of authority to carry out projects as PPPs; and section D (paras. ...) offers an overview of institutional and procedural arrangements for the regulation of infrastructure sectors.

### B. Guiding principles and options for legal framework for PPPs

2. This section considers general guiding principles that should inspire the legal framework for PPPs. It further points out the possible implications that the constitutional law of the host country may have for the implementation of some of these projects. Lastly, this section deals briefly with available options regarding the level and type of instrument that a country may need to enact and their scope of application.

#### 1. General guiding principles for a legal framework for PPPs

3. The Sustainable Development Goals express the commitment of United Nations member States, inter alia, to “develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all.”<sup>1</sup> The legal framework for PPPs is one of the policy tools that a country may use to carry out its strategy for the development of public infrastructure and services, and should be formulated and implemented in a manner that is consistent with the country’s strategy and conducive to achieving its goals.

4. Therefore, when considering the enactment of laws and regulations to enable PPPs or in reviewing the adequacy of the existing legal framework, domestic legislators and regulators may wish to take into account some internationally recognized principles of good governance and sustainable development. The United Nations General Assembly, for instance has recognized “the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship”.<sup>2</sup> Similarly, in article 5, paragraph 1, of the nearly

<sup>1</sup> *Transforming our world: the 2030 Agenda for Sustainable Development* (United Nations General Assembly Resolution 70/1, of 25 September 2015), Goal 9.1.

<sup>2</sup> “We recognize the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship, and in this regard we commend the work of the

universally adopted United Nations Convention against Corruption,<sup>3</sup> the States Parties undertake to “develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability”. These and other principles more specifically aimed at deriving most benefit of PPPs, which have inspired legislative actions in various countries, are discussed briefly in the following paragraphs.

**(a) Public interest**

5. As PPPs are a tool for the implementation of a country’s strategies and policies for developing infrastructure and public services, the PPP legal framework must promote and protect the public interest. In the context of PPPs, public interest refers, on the one hand, to the interests of the Government as provider and regulator of infrastructure and public services, and, on the other hand, as purchaser, user and possibly owner or operator of the facilities or systems developed under the PPP, or party to the PPP contract. Each of these perspectives needs adequate consideration by the legislator. While the *Guide* focuses on the role of the contracting authority as party to the PPP contract (which is extensively discussed, in particular, in chap. IV, “PPP implementation: legal framework and PPP contract” and chap. V, “Duration, extension and termination of the PPP contract”), it also pays attention to the role of Government as infrastructure and public services regulator (see, in particular, this chapter, paras. ... and chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...) as well as manager and trustee of public property and resources (see, in particular, chap. III, “Contract award”).

6. Public interest in the context of PPPs also refers, on the other hand, to the interests of the country’s citizens and companies as users of the infrastructure, as consumers and users of the services or goods it generates or as ultimate beneficiaries of the public services which are provided with the support of the facilities or systems developed under the PPP. From this perspective, the legislative framework for PPPs must take into account, and be coordinated with, the specific regulatory regime for the particular infrastructure or service sector (see, in particular, this chapter, paras. ...; and chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...), and also general rules on consumer protection (see chap. VII, “Other relevant areas of law”).

**(b) Transparency**

7. A transparent legal framework is characterized by clear and readily accessible rules and by efficient procedures for their application. Transparent rules and administrative procedures create predictability, enabling the private sector to estimate the costs and risks of an investment and thus to offer the most advantageous terms. Transparent rules 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 contracting authority or its officials and thus help to promote confidence in a country’s PPP programme.

8. Transparent rules and procedures offer a framework for the exercise of discretion in the implementation of PPPs projects. Transparent rules and procedures limit the exercise of discretion, where appropriate, allowing it to be monitored and, where necessary, challenged. Transparent rules and administrative procedures are a

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United Nations Commission on International Trade Law in modernizing and harmonizing international trade law.” (Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, General Assembly resolution 67/1 of 24 September 2012).

<sup>3</sup> The Convention was adopted by the United Nations General Assembly resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005.

key element of promoting accountability for actions or decisions taken by Government, thus supporting integrity and public confidence. A transparent set of rules and administrative procedures governing the planning and implementation of PPP projects will facilitate the evaluation of a country's PPP programme and individual projects against their desired outcomes.

9. Transparency of rules and administrative procedures is needed throughout the lifecycle of PPP projects, from planning and project development to the operation of the infrastructure and the delivery of services to citizens. A transparent legal framework for PPPs may mandate, for instance, the publication of key decisions on project implementation, including the justification for choosing a PPP in the concrete case (see chap. II, "Project planning and preparation", paras. ...). Transparency is particularly important for the award of PPP contracts, for which the *Guide* stresses five key aspects: the public disclosure of the legal framework; the publication of project opportunities; the prior determination and publication of the key terms of the contract 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 the applicable rules are being followed and to enforce them if necessary (see chap. III, "Contract award", ...).

**(c) Fairness, stability and predictability**

10. Closely related to the principle of transparency is the requirement of a fair, stable and predictable legal framework for PPPs. Laws and regulations are the tools with which Governments regulate and ensure the provision of public services to their citizens. At the same time, they provide the means for public service providers and their customers to protect their rights. A fair legal framework takes into account the various (and sometimes 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.

11. A stable legal framework is particularly important for PPPs in view of the typically long duration of infrastructure projects. The private partners need to be able to forecast and evaluate risks and possible changes in the life of the project in order to mobilize the resources needed and take the necessary steps to mitigate the consequences of anticipated risks. The contracting authority and the public, too, should be able to rely on continuity of services and the conditions under which they are provided. Of course, the legal framework for PPPs must be capable of adaptation to meet changing needs (see ...). However, unjustified, untimely or arbitrary changes of laws and regulations destabilize performance by the private partner, undermine the mutual trust basis needed for a successful PPP and ultimately jeopardize the Government's infrastructure and public service development goals and policies.

12. A stable legal framework for PPPs would allow to predict the outcome of administrative or judicial decisions. This has positive effects for all parties involved. The private partner, for instance, will be able to plan and manage the project more efficiently if it is able to rely on a predictable outcome of various administrative procedures that are required during project implementation (construction and zoning permits, technical inspections or regulatory decisions). The contracting authority may itself be subject to the consequences of decisions by other authorities and will benefit likewise from a predictable process. The public, too, will find comfort in a system in which it could anticipate, for instance, that decisions concerning conditions for the provision of the public service, where this is the object of a PPP, will follow a predictable pattern, in accordance with the applicable laws and regulations, rather than being made out of extraneous considerations. Sound and clear rules are as much a condition to ensure predictability, as are the efficiency of the administrative

procedures and the qualification and training of those responsible for enforcing the legal framework.

**(d) Proper management, integrity and accountability**

13. Depending on the type of project or the nature of the relevant facility or system, a PPP could involve the management of public property, the disbursement of public funds or both. Therefore, it is essential that the applicable laws and regulations set forth appropriate safeguards to prevent mismanagement, misappropriation or other forms of improper management of public property or funds. Most provisions to this effect may be found in laws and regulations that govern public property or administrative procedures, budgetary and accounting controls as well as criminal laws (see chap. VII, “Other relevant areas of the law”, paras. ...). In any event, given the magnitude of some PPP projects, the Government should satisfy itself that the relevant administrative and criminal laws will extend to PPPs, and those PPPs will not be misused to escape applicable controls. As regards specific laws on PPPs or on infrastructure sectors in which PPPs may be entered into, it is important to ensure that provisions on PPP planning, contract award, contract content and the operation of the infrastructure facility or system will promote best practices in property management of public property and funds and will not contain loopholes that encourage improper conduct.

14. Closely linked to the need to avoid mismanagement of public property or funds is the requirement of ensuring integrity in the award and performance of PPP contracts. Here, too, it would normally be for other bodies of law to set forth the substantive rules to uphold integrity in the form of criminal provisions, administrative law standards and codes of conduct. A central concern in order to promote integrity is the need to prevent conflicts of interest throughout the main stages of PPPs: from planning through bidding all the way to the winding up of a project. The magnitude of many PPP projects, their typically long duration, and the need for constant interaction between Government officials, agents of the contracting authority and employees or agents of the private partner may encourage, and create innumerable opportunities for, bribery, extortion or other corrupt practices. It is imperative to ensure that officials of the contracting authority will not benefit directly or indirectly from the project or their dealings with the private partner. The private partner, too, should not exercise improper influence on any official involved in project design, selection, implementation or regulation. Appropriate safeguards should be provided during project design (see chap. II, “Project planning and preparation”, paras. ...), contract award (see chap. III, “Contract awards”, paras. ...) and operation (see chap. IV, “PPP Implementation: Legal framework and PPP contract”, paras. ...). Beyond economic and financial damage, corrupt practices in PPPs may have serious negative consequences for the public at large, in particular where the PPP involves the provision of a public service or the management of an infrastructure used by the public. Indeed, corrupt practices often result in improper lenience towards lowered safety, security or quality standards, which may be the cause of accidents or other hazards likely to cause damage to property or to endanger the health or lives of citizens.

15. An effective system to uphold integrity must be enforced through an effective accountability system. Here, too, the essential mechanisms are expected to be found in other areas of the law, in particular penal and administrative laws and rules governing the investigation and trial of criminal cases (see chap. VII, “Other relevant areas of the law”, paras. ...). Laws and regulations specific to PPPs can contribute to accountability by setting forth appropriate disclosure and reporting requirements, as well as the possibility for the contracting authority or other relevant Government body to audit the accounts or otherwise reasonably request relevant information from the private partner (see chap. IV, “PPP Implementation: Legal framework and PPP contract” paras. ...).

**(e) Economy and efficiency**

16. The legal and regulatory framework should set the conditions necessary to ensure that PPP projects offer economy and efficiency throughout their lifecycle. Prior to embarking in the selection of a project partner, the contracting authority should be required to conduct a rigorous planning and feasibility assessment, examining, in particular, the extent to which a PPP optimizes the use of resources to achieve the intended impact of the project concerned (or a “value for money” test). PPP projects should only move forward if those tests demonstrate, for instance: (a) that the project offers an optimal relationship between the cost, time and other resources, and the quality of the subject matter of the project; (b) that, if structured as a PPP, the project is expected to deliver 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; and (c) that a PPP will deliver 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 (see chap. II, “Project planning and preparation”...),

**(f) Long-term sustainability**

17. Important objectives of a country’s infrastructure development policy include ensuring the long-term provision of public services, continuously improving the quality of infrastructure, and achieving economic, environmental and social sustainability. PPP are one of the tools that a country may use to implement its policy, and therefore the laws and regulations dealing specifically with PPPs should help to promote those objectives. Proper planning and preparation are indispensable to ensure the sustainability of infrastructure projects, in particular when carried out as PPPs. Positive steps, from a general policy perspective, include the formulation of a master plan for infrastructure development, including public services, and the establishment of priority sectors, projects or types of project based on socioeconomic considerations, financial implications, effects on sustainable development, and other relevant factors.

18. Proper planning and preparation of individual projects requires careful choice of project type, based on financial and other capacity of the contracting authority (i.e. whether public procurement and operation or any particular type of PPP). Unrealistic assumptions about the advantages or costs of a PPP model are likely to nullify the expectations of infrastructure development through PPPs, and should be avoided as much as possible through careful planning and project assessment at the early stages (see chap. II, “Project assessment and risks”, paras. ...). Indeed, poor planning or ill-conceived rules or procedures may lead to inadequate contractual or regulatory arrangements for the operation and maintenance of public infrastructure, severely limit efficiency in all sectors of infrastructure, reduce service quality and increase costs for the Government or users (see chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...). From a legislative perspective, it is important to ensure that the host country has the institutional capacity to undertake the various tasks entrusted to public authorities authorized to enter into PPPs throughout their phases of implementation (see chap. II, “Project assessment and risks”, paras. ...). One way by which a Government can ascertain the readiness of its institutions to handle PPP projects is to conduct an assessment of its public investment capabilities including a review of institutions and procedures responsible for national and sectoral planning, investment budgeting, project appraisal and selection, and managing and monitoring of project implementation. The efficiency of a country’s overall institutional and administrative resources is essential to ensure the sustainability of PPP project and a country is well advised to follow best practices to assess them.<sup>4</sup>

<sup>4</sup> The International Monetary Fund, for instance, has developed a Public Investment Management Assessment (PIMA) to help countries evaluate the strength of the public investment management practices (see <http://www.imf.org/external/np/fad/publicinvestment/#5>).

**(g) Competition**

19. Another measure to enhance the long-term sustainability of PPPs within the context of a national infrastructure policy is to achieve a correct balance between competitive and monopolistic infrastructure operation and provision of public services. Competition may reduce overall costs and provide more back-up facilities for essential services. In certain sectors, competition has also helped to increase the productivity of infrastructure investment, to enhance responsiveness to the needs of the customers and to obtain better quality for public services, thus improving the business environment in all sectors of the economy. [*moved here from old para. 6 of chapter II, last three sentences*]

20. For laws and regulations directly related to PPPs, competition has two dimensions. On the one hand, the scope for competition in the sector or activity concerned is one of the elements that the contracting authority should be required to examine at the project planning stage (see chap. II, “Project planning and preparation”, paras. ...). The contracting authority’s assessment should serve as a basis for determining whether or not the private partner should have an exclusive right to operate the infrastructure or to provide the relevant services under the PPP, or whether the sector or market could benefit from competition (see “Introduction and background information on PPPs”, paras. ...; see further this chapter, paras. ...). On the other hand, competition is usually one of the structural elements of public procurement systems, and aims at maximizing economy (or “value for money”) for the public sector. Competition for PPPs contracts in the form of a rigorous contest among potential investors and private entities for the opportunity to be awarded the PPP contract can reduce overall costs and other resource demands, increase the productivity of infrastructure investment, 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 should guide domestic public procurement systems pursuant to article 9, paragraph 1, of the United Nations Convention against Corruption. The *Guide* therefore strongly recommends the use of competitive procedures for the award of PPP contracts (see chap. III, “Contract award”, paras. ...). Promoting potential investors’ and private entity participation in PPPs is a key prerequisite for competition for PPP contracts. The procurement procedures recommended in the *Guide* recognize, however, that in the context of complex infrastructure projects, competition is most effective by limiting the number of participants. Two reasons justify this apparent paradox: first, the technical, commercial and financial complexity of most PPP project would make it excessively cumbersome, time and resource consuming for the contracting authority to have to examine a potentially large number of proposals; second, the high costs of participating in the procedure discourage private entities from participating unless they assess their chances of winning the ultimate contract as reasonable. Consequently the procurement procedures recommended in the *Guide* start with a process to identify a limited number of high-quality potential partners (see chap. III, “Contract award”, paras. ...).

**2. Constitutional law and PPPs**

[*Paras. 19–34 (old 7–22) appeared in the existing chapter I, “General legislative and institutional framework”. Additions and amendments are indicated in the text.*]

21. The constitutional law of a number of countries refers to the duty of the State to ensure the provision of public services. Some of them list the infrastructure and service sectors that come under the responsibility of the State, while in others the task of identifying those sectors is delegated to the legislator. Some national constitutions reserve the provision of certain public services exclusively to the State or to specially created public entities. Other constitutions, however, authorize the State to engage private entities for the development and operation of infrastructure and the provision of public services. In some countries, there are limitations to the participation of

foreigners in certain sectors or requirements that the State should participate in the capital of the companies providing public services.

22. For countries wishing to use PPPs to develop public infrastructure and services, it is important to review existing constitutional rules to identify possible restrictions to their implementation. In some countries, Uncertainties regarding the legal basis for PPPs may delay their implementation. Sometimes, concerns that PPPs might contravene constitutional rules on State monopolies or on the provision of public services have led to judicial disputes, with a consequent negative impact on the implementation of the projects.

23. It is further important to take into account constitutional rules relating to the ownership of land or infrastructure facilities. The constitutional law of some countries contains limitations to private ownership of land and certain means of production. In other countries, private property is recognized, but the constitution declares all or certain types of infrastructure to be State property. Restrictions of this nature can be an obstacle to the execution of projects that entail private operation, or private operation and ownership, of the relevant infrastructure (see further chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...).

### **3. General and sector-specific legislation**

24. The law plays a central role in promoting confidence in PPPs. The legal framework for PPPs will generally comprise a primary law or set of laws, secondary regulations or decrees, internal rules, and guidance, drawing on the policy choices made by the legislator and the Government. The law typically embodies a political commitment, provides specific legal rights and may represent an important guarantee of stability of the legal and regulatory regime by setting forth the general rules under which those projects are awarded and implemented. Laws governing the award and implementation of PPP projects, including sector-specific legislation, are typically supplemented, and should be coordinated with, laws and regulations on various other matters, including international obligations of the country on taxation or investment protection (see chap. VII, “Other relevant areas of the law”).

25. As a matter of constitutional law or legislative practice, some countries may need to adopt specific legislation in respect of individual projects. In other countries with a well-established tradition of awarding concessions to the private sector for the provision of public services, the Government is authorized by general legislation to award to the private sector any activity carried out by the public sector having an economic value that makes such activity capable of being exploited by private entities. General legislation of this type creates a framework for providing a uniform treatment to issues that are common to PPP in different infrastructure sectors.

26. However, by its very nature, general legislation is normally not suitable to address all the particular requirements of different sectors. Even in countries that have adopted general legislation addressing cross-sectoral issues, it has been found that supplementary sector-specific legislation allows the legislator to formulate rules that take into account the market structure in each sector (see “Introduction and background information on PPPs”, paras. ...). It should be noted that in many countries sector-specific legislation was adopted at a time when a significant portion or even the entirety of the national infrastructure consisted of State monopolies. For countries interested in promoting private sector investment in infrastructure it is advisable to review existing sector-specific legislation so as to ascertain its suitability for PPPs. Countries that consider the adoption of a general law on PPPs may wish to use this opportunity to review and amend, as appropriate, existing sector-specific laws in order to ensure their consistency with the general PPP law, or otherwise clearly indicate which text prevails in case of conflict.

27. Sector-specific legislation may further play an important role in establishing a framework for the regulation of individual infrastructure sectors (see below, paras. ...). Legislative guidance is particularly useful in countries at the initial stages of setting up or developing national regulatory capacities. Such legislation represents



a useful assurance that the regulators do not have unlimited discretion in the exercise of their functions, but are bound by the parameters provided by the law. However, it is generally advisable to avoid rigid or excessively detailed legislative provisions dealing with contractual aspects of the implementation of PPPs, which in most cases would not be adequate to their long-term nature (see further chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...; and chap. V, “Duration, extension and termination of the PPP contract”, paras. ...).

28. Many countries have used legislation to establish the general principles for the organization of infrastructure sectors and the basic policy, institutional and regulatory framework. However, the law may not be the best instrument to set detailed technical and financial requirements. Many countries have preferred to enact regulations setting forth more detailed rules to implement the general provisions of domestic laws on PPPs. Regulations are found to be easier to adapt to a change in environment, whether the change results from the transition to market-based rules or from external developments, such as new technologies or changing economic or market conditions. As stressed earlier in the *Guide* (see above, paras. ...), stability of the legal framework is essential to promote confidence in a country’s PPP policy. Countries that choose to limit the enabling legislation to general principles and to use regulations for detail matters should avoid too frequent changes of regulations or inconsistencies between regulations and the laws on which they are based, as these are common sources of uncertainty and disputes in PPPs (see further chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...). Whatever the instrument used, clarity and predictability are of the essence.

### **C. Scope of authority to enter into PPPs**

29. The implementation of PPPs may require the enactment of special legislation or regulations expressly authorizing the State to entrust the development of infrastructure or the provision of public services to private entities. The existence of express legislative authorization may be an important measure to foster the confidence of potential investors, national or foreign, in a national policy to promote private sector investment in infrastructure through PPPs.

#### **1. Authorized agencies and relevant fields of activity**

30. In some legal systems, the Government’s responsibility for the development of infrastructure or the provision of public services may not be delegated without prior legislative authorization. For those countries that wish to develop public infrastructure or services through PPPs, it is particularly important to state clearly in the law the authority to entrust entities other than public authorities of the host country with the right to provide certain public services. Such a general provision may be particularly important in those countries where public services are governmental monopolies or where it is envisaged to engage private entities to provide certain services that used to be available to the public free of charge (see further chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...).

31. Where general legislation is adopted, it is also advisable to identify clearly the public authorities or levels of government competent to award infrastructure projects and to act as contracting authorities. In order to avoid unnecessary delay, it is particularly advisable to have rules in place that make it possible to ascertain the persons or offices that have the authority to enter into commitments on behalf of the contracting authority (and, as appropriate, of other public authorities) at different stages of negotiation and to sign the PPP contract. It is useful to consider the extent of powers that may be needed by authorities other than the central Government to carry out projects falling within their purview. For projects involving offices or agencies at different levels of government (for example, national, provincial or local), where it is not possible to identify in advance all the relevant offices and agencies involved, other measures may be needed to ensure appropriate coordination among them (see below, paras. ...).

32. For purposes of clarity, it is advisable to identify in such general legislation those sectors in which concessions may be awarded. Alternatively, where this is not deemed feasible or desirable, the law might identify those activities, which may not be the object of a concession (for example, activities related to national defence or security).

## **2. Purpose and scope of PPPs**

33. It may be useful for the law to define the nature and purpose of projects for which PPPs may be entered into in the country. One possible approach may be to define the various categories of projects according to the extent of the rights and obligations assumed by the private partner (for example, “build-operate-transfer”, “build-own-operate”, “built-transfer-operate” and “build-transfer”). However, given the wide variety of schemes that may come into play in connection with private investment in infrastructure (see “Introduction and background information on PPPs, paras. ...), this approach is not advisable. As an alternative, the law could generally provide that PPPs may be entered into for the development of any or specific types or public infrastructure or services. The law could clarify that PPPs may involve the direct provision of services to the public by the private partner pursuant to a concession issued by the competent authority, or the management and operation of an infrastructure used by the contracting authority or other Government body for the provision of public services or to house its own activities. The law could further clarify that the private partner’s remuneration may take the form of a right to charge a price for the use of the facility or premises or for the service or goods it generates, or of other payment or remuneration agreed to by the parties. Lastly, it may be useful for the law to further clarify that PPPs may be used for the construction and operation of a new infrastructure facility or system or for maintenance, repair, refurbishment, modernization, expansion and operation of existing infrastructure facilities and systems, or only for the management and delivery of a public service.

34. 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 (for example, a communal water distribution company) or embrace the whole territory of the country (for example, a national railway company); it may relate to the right to supply one particular type of goods or services to one particular customer (for example, a power generator being the exclusive regional supplier to a power transmitter and distributor) or to a limited group of customers (for example, a national long-distance telephone carrier providing connections to local telephone companies).

35. 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 host country’s policy for the sector concerned. As discussed earlier, the scope for competition varies considerably in different infrastructure sectors. While certain sectors, or segments thereof, have the characteristics of natural monopolies, in which case open competition is usually not an economically viable alternative, other infrastructure sectors have been successfully opened to free competition (see “Introduction and background information on PPPs”, paras. ...).

36. It is desirable therefore to deal with the issue of exclusivity in a flexible manner. Rather than excluding or prescribing exclusive PPPs, it may be preferable for the law to authorize the grant of exclusive rights when it is deemed to be in the public interest, such as in cases where the exclusivity is justified for ensuring the technical or economic viability of the project. The contracting authority should state the reasons for granting exclusivity in the assessment and studies that it is required to make prior to starting the procedure to select the private partner (see chap. II, “project planning and preparation”, ...). Sector-specific laws may also regulate the issue of exclusivity in a manner suitable for each particular sector.

## D. Administrative coordination

*[The Secretariat proposes to move section D, paras. 23–29 of chapter I to the draft revised chapter II, which appears in [A/CN.9/939/Add.2](#).]*

## E. Authority to regulate infrastructure services

*[Paras. 35–37 (old 30–32) appeared in the existing chapter I, “General legislative and institutional framework”. Additions and amendments are indicated in the text.]*

37. PPP projects that involve the direct provision of services or goods to the public by the private partner (“concession PPPs”) often relate to sectors or activities that are subject to special regulation. The applicable regulatory regime may consist of substantive rules, procedures, instruments and institutions. That framework represents an important instrument to implement the governmental policy for the sector concerned (see “Introduction and background information on PPPs”, paras. ...). Depending on the institutional structure of the country concerned and on the allocation of powers between different levels of government, provincial or local legislation may govern some infrastructure sectors, in full or concurrently with national legislation.

38. Regulation of infrastructure services involves a wide range of general and sector-specific issues, which may vary considerably according to the social, political, legal and economic reality of each host country. While occasionally discussing some of the main regulatory issues that are encountered in a similar context in different sectors (see, for instance, chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ... and ...), the *Guide* is not intended to exhaust the legal or policy issues arising out of the regulation of various infrastructure sectors. The term “regulatory agencies” refers to the institutional mechanisms required to implement and monitor the rules governing the activities of infrastructure operators. Because the rules applicable to infrastructure operation often allow for a degree of discretion, a body is required to interpret and apply them, monitor compliance, impose sanctions and settle disputes arising out of the implementation of the rules. The specific regulatory tasks and the amount of discretion they involve will be determined by the rules in question, which can vary widely.

39. The *Guide* assumes that a country that chooses to authorize PPPs in any of those sectors has satisfied itself that it has in place the proper institutional and bureaucratic structures and human resources necessary for the implementation of PPPs. Nevertheless, as a contribution to domestic legislatures considering the need for, and desirability of, establishing regulatory agencies for monitoring the provision of public services, this section discusses some of the main institutional and procedural issues that may arise in that connection. The discussion contained in this section is illustrative of different options that have been used in domestic legislative measures to set up a regulatory framework for PPPs, but the *Guide* does not thereby advocate the establishment of any particular model or administrative structure. Practical information and technical advice may be obtained from international financial institutions that carry out programmes to assist their member countries in setting up an adequate regulatory framework (such as the World Bank and the regional development banks).

*[The Secretariat proposes no substantive amendments to section E, paras. 33–51, of chapter I, as they appear in the Legislative Guide, except for the terminology changes explained in [A/CN.9/939](#), paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.]*

## General provisions

### Model provision 1. PPP Guiding Principles

#### *Option 1*

WHEREAS the [Government] [Parliament] of [...] wishes to enable the use of public-private partnerships in infrastructure development and the provision of associated services to the public;

WHEREAS, for those purposes, the [Government] [Parliament] considers it desirable to regulate public-private partnerships so as to enhance transparency, fairness, stability and predictability; promote proper management, integrity; competition and economy; and ensure and long-term sustainability;

*[Other objectives that the enacting State might wish to state];*

Be it therefore enacted as follows:

#### *Option 2*

This law establishes the procedures for the approval, award and implementation of public-private partnership projects, in accordance with the principles of transparency, fairness, stability, proper management, integrity, completion, economy, and long-term sustainability.

### Model provision 2. Definitions

For the purposes of this law:

(a) Public-private partnership (PPP) means an agreement between a contracting authority and a private entity for the implementation of an infrastructure project, against payments by the contracting authority or the users of facility;

(b) “Infrastructure facility” means physical facilities and systems that directly or indirectly provide services to the general public;

(c) “Infrastructure project” means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(d) “Contracting authority” means the public authority that has the power to enter into a PPP contract *[under the provisions of this law]*;<sup>1</sup>

(e) “Private Partner” means the private entity retained by the contracting authority to carry out a project under a PPP contract;

(f) “PPP contract” means the mutually binding agreement or agreements between the contracting authority and the private partner that set forth the terms and conditions for the implementation of a PPP;

(g) “Bidder” or “bidders” means persons, including groups thereof, that participate in selection proceedings for the award of the PPP contract;<sup>2</sup>

(h) “Unsolicited proposal” means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a

<sup>1</sup> It should be noted that this definition relates only to the power to enter into PPP contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as “regulatory agency” in subpara. (h), may have responsibility for issuing rules and regulations governing the provision of the relevant service.

<sup>2</sup> The term “bidder” or “bidders” encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority’s request for proposals.

request or solicitation issued by the contracting authority within the context of a selection procedure;

(i) “Regulatory agency” means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.<sup>3</sup>

### **Model provision 3. Authority to enter into PPP contracts**

The following public authorities have the power to enter into PPP contracts<sup>4</sup> for the implementation of infrastructure projects falling within their respective spheres of competence: *[the enacting State lists the relevant public authorities of the host country that may enter into PPP contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof]*.<sup>5</sup>

### **Model provision 4. Eligible infrastructure sectors**

PPP contracts may be entered into by the relevant authorities in the following sectors: *[the enacting State indicates the relevant sectors by way of an exhaustive or indicative list]*.<sup>6</sup>

<sup>3</sup> The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see paras. ...).

<sup>4</sup> It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing the approvals, licences, permits or authorizations required for the implementation of PPP in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see chap. II, “Project planning and preparation”, paras. ...). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or a regulation governing the activities of entities authorized to offer government support, to identify clearly which entities have the power to provide such support and what kind of support may be provided (see chap. II, “Project planning and preparation”, paras ...).

<sup>5</sup> Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming relevant public authorities. In a federal State, for example, such an enabling clause might refer to “the Union, the states [or provinces] and the municipalities”. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

<sup>6</sup> It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

## II. Project planning and preparation

### A. General remarks

1. PPPs are one of the means that Governments use to develop infrastructure or systems needed to provide a public service or support the functions of a Government entity. When properly designed and implemented, PPPs can create opportunities for reducing the commitment of public funds and other resources for infrastructure development or the provision of public services. They also make it possible to transfer to the private sector a number of risks that the private sector may be able to control or mitigate in more efficient or economical terms than the Government.

2. The extent to which those expected benefits would actually materialize depends on various factors. They include the adequacy and stability of the overall legal and regulatory framework (see chap. I, “General legal and institutional framework”, paras. ...), the selection of a qualified private partner (see chap. III, “Contract award”, paras. ...), the technical and commercial feasibility of the project, the soundness of the contractual arrangements and their fitness during the entire life of the project (see chap. IV, “PPP implementation: legal framework and PPP contract”, paras. ...). While some of the factors that compose this equation may be outside the control of the parties, an essential prerequisite for the success of a PPP is a comprehensive, rigorous and professionally conducted planning and preparation phase that tests the projects assumptions and anticipates risks and contingencies throughout the entire lifecycle of a PPP.

3. As discussed in section B, the legal framework for PPPs should therefore require, and provide the mechanisms for, a mandatory review of the project’s assumptions in order for the competent authorities to assess accurately whether a PPP is the adequate option for developing the infrastructure or service concerned, as compared to direct procurement, financing and management by the Government (paras. ...). These preliminary studies should also analyse the main risks encountered in PPPs, including common contractual solutions for risk allocation, and the degree of flexibility that will be needed to allocate project risks efficiently (see section C, paras. ...). Section D, paras. ..., discusses institutional and administrative aspects of project preparation and coordination. Section E (paras. ...) sets out policy considerations that the Government may wish to take into account when considering the level of direct governmental support that may be provided to infrastructure projects, such as the degree of public interest in the execution of any given project and the need to avoid the assumption by the Government of open-ended or excessive contingent liabilities. Lastly, sections F (paras. ...) and G (paras. ...) outline guarantees and support measures that may be provided by export credit agencies and investment promotion agencies.

4. Other chapters of this *Guide* deal with related aspects of the host Government’s legal regime that are of relevance to the credit and risk analysis of a project. The reader is referred in particular to chapters IV, “PPP implementation: legal framework and PPP contract”; V, “Duration, extension and termination of the PPP contract”; VI, “Settlement of disputes”; and VII, “Other relevant areas of law”. [old para. 7 of chapter II]

### B. Project assessment and options

5. One important measure to ensure the successful implementation of PPPs is to require the relevant public authority to conduct a preliminary assessment of the project’s feasibility, including economic and financial aspects, such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility, as well as the economic, social and environmental impact of the project. The studies prepared by the contracting authority should, in particular, identify clearly the expected output of the project, provide

sufficient justification for the investment, propose a modality for private sector participation and describe a particular solution to the output requirement. [*para. 5 moved here from para. 25, section D of chapter I, "General legislative and institutional framework"*]

## 1. Economy and efficiency ("value for money") assessment

6. One of the main objectives of any system for the award of public contracts, and a central concern of the UNCITRAL Model Law on Public Procurement, for instance, is to maximize economy and efficiency. The Guide to Enactment of the Model Law explains, in this connection, that "economy" (which is often termed "value for money" or "best value"), means an optimal relationship between the price paid and other factors, including the quality of the subject matter of the procurement, and pre-supposes that the public purchaser's needs are in fact met. "Efficiency" in procurement means that relationship between the transaction costs and administrative time of each procurement procedure and its value are proportionate. "Efficiency" also includes the notion that the costs of the procurement system as a whole are also proportionate to the value of all procurement conducted through that system.

7. Economy and efficiency are central concerns in all PPP projects. Some of them may fall under the scope of general public procurement law, in particular those where the contracting authority undertakes to make direct payments to the private partner. Other types of PPPs projects, however, do not involve the disbursement of public funds to pay the project partner, and the role of the contracting authority as an overall project manager may be quite different from the role of Government in traditional public procurement. This means that the notions of economy and efficiency (or "value for money") in PPP have a broader meaning than in a narrow public procurement context.

8. Indeed, in the context of PPPs, rather than focusing mainly on the price paid for works or services performed by the private partner, the Government needs to be able to demonstrate that carrying out the project as a PPP is not only more economical, but also a more efficient option than, for example, through public procurement of works or services or through public operation of the infrastructure or service system. Poorly conceived or ill-designed PPP projects may lead to project failure, public service disruption, cost overruns or fears of undue profit making by the private sector at the cost of the public interest. With a view to ensuring transparency and good governance, the contracting authority needs to show that carrying out the project as a PPP offers the best "value for money". Therefore, the law should require a thorough assessment of the project's economy and efficiency ("value for money") as a mandatory step in the approval process of any proposed project, and as a condition precedent in order for the contracting authority to proceed with preparations for the selection of the project partner.

9. Generally, the test should include a quantitative and qualitative analysis of the costs, benefits and quality of the project that conclusively shows that carrying out the project as a PPP is the best available option. A PPP project should be considered to offer "value for money" only if operating the project as a PPP would result in a better quality delivered at lower cost than using any other method or arrangement to carry out the project or deliver a comparable outcome. It may even be useful to repeat the test after the bidding process in order to ensure a full consistency in the calculation method and in the results (see chap. III, "Contract award", paras. ...).

10. The contracting authority may use various tools to conduct a value for money assessment. A common and widely used tool is the so-called "public sector comparator". This test consists of an estimate of the hypothetical cost of a public sector project throughout its lifecycle if were to be carried out by the Government. The public sector comparator uses the proposed output specification and the proposed risk allocation as a basis to compare the PPP option with a hypothetical model of the project costs if it were to be carried out under the most efficient modality for project delivery through the public sector offering the same level and quality of service

expected of the private sector, and taking into account the lifecycle risks of the project. The starting point is typically the best estimate of the capital cost and lifetime operations and maintenance cost of implementing the project if delivered by the public sector.

11. The methodology for conducting a “value for money” test and the exact matrix of factors to be taken into account may vary according to the nature of the project, and it may evolve over time. Where a central approving authority, coordinating or advising body exists (see section ...), the host country might consider setting up dedicated structures to review periodically or systematically the methodology used and set appropriate parameters therefor. It should be noted, however, that the usefulness and accuracy of a value for money assessment depends on the availability and reliability of public sectors comparators, which may be limited in countries with little experience in PPPs or in advanced Government accounting and management practices, as may be the case in some developing countries. Moreover, an accurate “value for money” analysis might be beyond the capacity of some public authorities, as there might be insufficient or incomplete data to undertake the assessment. Furthermore, the efficiency of the Government entity to be used as a public sector comparator would have a significant bearing on the project costs, and the contracting authority may not have the expertise to factor public sector performance adequately as part of a comparative analysis. These potential limitations underscore the importance of ensuring that the contracting authority or other bodies in charge of planning for PPPs have the required human and technical resources needed to conduct this assessment. The Government will also be well advised to keep abreast with current international standards and guidance for an adequate value for money assessment.<sup>5</sup>

12. The need for an accurate and realistic confirmation of the project’s business case is even more important in view of the financing structure of most PPP projects. In the past, debt financing for infrastructure development was obtained on the basis of credit support from project sponsors, multilateral and national export credit agencies, Governments and other third parties. Those traditional sources have not been able to meet the growing needs for infrastructure capital. Indeed, PPP projects have been increasingly funded on a project finance basis. [*old para. 2, chapter II*]

13. Project finance, as a method of financing, seeks to establish the creditworthiness of the project company on a “stand alone” basis, even before construction has begun or any revenues have been generated, and to borrow on the basis of that credit. Commentators have observed that project finance may hold the key to unlocking the vast pools of capital theoretically available in the capital markets for investment in infrastructure. However, project finance has distinctive and demanding characteristics from a financial point of view. Principal among these is that, in a project finance structure, financing parties must rely mainly upon the project company’s assets and cash flows for repayment. If the project fails they will have no recourse, or only limited recourse, to the financial resources of a sponsor company or other third party for repayment (see also “Introduction and background information on PPPs”, paras. 54 and 55). [*old para. 3, chapter II*]

14. The financial methodology of project financing requires a precise projection of the capital costs, revenues and projected costs, expenses, taxes and liabilities of the project. In order to predict these numbers precisely and with certainty and to create a

<sup>5</sup> To support Governments in early stage identification and selection of projects suitable to be delivered on a PPP basis, the UN Economic and Social Commission for Asia and the Pacific (UNESCAP) designed the PPP qualitative value-for-money toolkit, which is an online instrument allowing governments and public authorities to undertake the right PPP project selection, based on value for money. The toolkit is available at the following address: <https://ppp.unescap.org/>. See also World Bank. 2017. *Public-Private Partnerships: Reference Guide Version 3*, Section 3.2.4 Assessing Value for Money of the PPP. World Bank, Washington, D.C. © World Bank; World Bank Institute; Public-Private Infrastructure Advisory Facility. 2013. *Value-for-Money Analysis-Practices and Challenges: How Governments Choose When to Use PPP to Deliver Public Infrastructure and Services*. World Bank, Washington, D.C. © World Bank.



financial model for the project, it is typically necessary to project the “base case” amounts of revenues, costs and expenses of the project company over a long period — often 20 years or more — in order to determine the amounts of debt and equity the project can support. Central to this analysis is the identification and quantification of risks. For this reason, the identification, assessment, allocation and mitigation of risks is at the heart of project financing from a financial point of view. [old para. 4, chapter II] Indeed, risk allocation is at the core of every PPP, and a thorough understanding of the risk allocation arrangements is a precondition to drafting the PPP contract. The appropriate application of risk allocation principles is what determines whether a given PPP project will be capable of attracting financed and will be sustainable throughout its lifecycle. (A summary presentation of the most common risks in PPPs and general consideration on risk allocation is set out in section B, paras. ...).

## 2. Fiscal risk assessment

15. Another important reason for requiring an accurate and realistic confirmation of the project’s business case as a condition precedent for the project to move ahead as a PPP is the need to avoid unexpected cost for the public sector (“fiscal risk”). In many countries, investment projects have been carried out as PPPs not for efficiency reasons, but to circumvent budget constraints and postpone recording the fiscal costs of providing infrastructure services. Hence, some Governments ended up carrying out projects that either could not be funded within their budgetary means, or that exposed public finances to excessive fiscal risks. It is therefore advisable for the contracting authority or any central unit with overall responsibility for PPP-related policy (see below, para. ...) to assess at this early stage the potential fiscal costs and risks arising from a proposed PPP project, where this assessment was not already an integral party of the mandatory “value for money” test (see paras. ...). In order to fully estimate the expected outcomes and budgetary implications of the project throughout its life-cycle, the assessment should consider at least four main variables of PPP projects:

(a) *The initiator of a project*: The impact of main fiscal indicators (i.e. deficit and debt) varies depending on the public entity ultimately responsible for the project (e.g. central, local governments, state-owned enterprises, etc.);

(b) *Who controls the asset*: The likelihood and extent of fiscal risk level varies depending on the government’s ability to control the PPP-related asset — either through ownership, lease, right of use or other interest;

(c) *Who ultimately pays for the infrastructure*: The funding structure of the project (i.e. whether the government pays for the infrastructure facility or system using public funds; whether the private partner collects fees directly from users of the infrastructure facility or system; or whether there is a combination of both) is crucial to assess the project’s implication on main fiscal aggregates;

(d) *Whether the Government provides additional support to the project*. Governments can not only fund PPP projects directly but they can also support the project in a variety of ways, including providing guarantees, equity capital, or tax and customs benefits (see below, paras. ...). Such an early assessment of the fiscal impact of any Government support envisaged for a PPP project will be crucial to avoid exposure to open-ended liabilities and secure a long-term commitment of public resources that promotes the sustainability of the country’s infrastructure development strategy and policies.

16. Governments may use various methods and tools for conducting this assessment. The International Monetary Fund and the World Bank have developed an analytical tool to help Governments quantify the macro-fiscal implications of PPP projects. Designed to be used mostly by PPP units in ministries of finance, the PPP Fiscal Risk Assessment Model (P-FRAM) uses standard software to process project-specific and macroeconomic data and automatically generate standardized outcomes, including: (a) project cash flows; (b) fiscal tables and charts both on a cash and accrual basis; (c) debt sustainability analysis with and without the PPP project;

(d) sensitivity analysis of main fiscal aggregates to changes in macroeconomic and project-specific parameters; and (e) a summary risk matrix of the project.<sup>6</sup>

### 3. Welfare and social impact assessment

17. The purpose of the “value for money” test is to permit an informed preliminary decision as to whether PPP is at all an efficient and economically justifiable alternative to other forms of project development through public procurement. Failure of a proposed project to pass the value for money test does not necessarily mean that the project as such is not feasible, but should prompt the contracting authority to consider other options that are more affordable than a PPP. Likewise, the fact that a proposed project shows value for money does not necessarily mean that the project is worthwhile pursuing as a PPP. The Government must be satisfied that the project meets its overall infrastructure and public service development needs and strategies (see chap. I ...), as well as the Government’s broader economic and social policies, with due regard being paid to commitments undertaken to achieve its sustainable development goals.

18. Indeed, essential as it is, the value for money test emphasizes monetarily quantifiable parameters of good governance in infrastructure and public service development. In order to fully assess the benefits — but also potential risks of a PPP — the Government should consider conducting an alternative assessment of the project. Firstly, from a purely financial viewpoint, the authorities involved may wish to calculate the impact of the availability of the infrastructure concerned, the fiscal returns on the investment in addition to the cash-flow position. Secondly, as the PPPs projects are by nature of great importance for the public in terms of size and service rendered, the social impact of the project should be addressed by the public authority during the preparatory phase. Of particular importance is a consideration by the Government of the extent to which the project, whether or not carried as a PPP, is in line with relevant United Nations Sustainable Development Goals. In general, it is recommended to assess at the planning stages the sustainability of the project and its environmental, economic and social impact. From the viewpoint of good governance and transparency, it is further advisable at this stage to consider the interests of the non-commercial partners and stakeholders — possibly through an adequate consultation mechanism — in order to foster public support for the project and reduce the risk of challenges or even litigation at later stages.

### 4. The issue of the exclusivity

19. The contracting authority needs further to consider at the planning stages the extent to which the private partner should obtain exclusive rights for the operation of the infrastructure or provision of the relevant service, or whether the private partner might even need such exclusivity as a guarantee for the recovery of the original investment. This preliminary assessment should consider the geographic scope of the exclusivity — if any should be granted — and take into account the country’s policies for the sector concerned (see “Introduction and background information on PPPs”, paras. ... and chap. I, “General legal and institutional framework”, paras. ...). Not only will the issue of exclusivity play a central role in assessing the project’s financial and commercial viability and its economic and social impact, but, from a practical point of view, exclusivity will be one of the central contract provisions (see chap. IV, “PPP implementation: legal framework and PPP contract, paras. ...), but will impact the level of Government support that the private partner may require (see section D, Government Support, (f) Protection from competition).

20. The contracting authority should consider carefully the macroeconomic impact and policy disadvantages of granting exclusive rights to the private partner as well as the overall welfare costs of eliminating competition. As private partners may have a keen interest in exclusivity, the risk of collusion and corruption in this context may be particularly high. Laws and regulations may establish appropriate parameters for

<sup>6</sup> <http://www.imf.org/external/np/fad/publicinvestment/#5>.

granting exclusivity, and should generally require the contracting authority to provide a justification for its recommendation to grant exclusivity.

## C. Project risks and risk allocation

21. The precise allocation of risks among the various parties involved is typically defined after consideration of a number of factors, including the public interest in the development of the infrastructure in question and the level of risk faced by the project company, other investors and lenders (and the extent of their ability and readiness to absorb those risks at an acceptable cost). Adequate risk allocation is essential to reducing project costs and to ensuring the successful implementation of the project. Conversely, an inappropriate allocation of project risks may compromise the project's financial viability or hinder its efficient management, thus increasing the cost of the service. *[old para. 1, of chapter II]*

*[The Secretariat proposes no significant substantive amendments to section B, paras. 8–29 of chapter II, as they appear in the Legislative Guide, except for the terminology changes explained in A/CN.9/939, paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.]*

## D. Administrative coordination

*[Paras. 22–24 and 29–31 have been moved here from section D of chapter I, “General legislative and institutional framework”. Additions and amendments are indicated in the text.]*

22. Depending on the administrative structure of the host country, PPPs may require the involvement of several public authorities, at various levels of government. For instance, the competence to lay down regulations and rules for the activity concerned may rest in whole or in part with a public authority at a level different from the one that is responsible for providing the relevant service. It may also be that both the regulatory and the operational functions are combined in one entity, but that the authority to award government contracts is centralized in a different public authority. For projects involving foreign investment, it may also happen that certain specific competences fall within the mandate of an agency responsible for approving foreign investment proposals.

23. International experience has demonstrated the usefulness of entrusting a central unit within the host country's administration with the overall responsibility for formulating policy and providing practical guidance on PPPs. Such a central unit may also be responsible for coordinating the input of the main public authorities that interface with the project company. It is recognized, however, that such an arrangement may not be possible in some countries, owing to their particular administrative organization. Where it is not feasible to establish such a central unit, other measures may be considered to ensure an adequate level of coordination among the various public authorities involved, as discussed in the following paragraphs.

### 1. Coordination of preparatory measures

24. Following the identification of the future project, and a positive evaluation of the proposed PPP as the best option for implementing it, it is for the Government to establish the project's relative priority and to assign human and other resources for its implementation. At that point, it is desirable that the contracting authority review existing statutory or regulatory requirements relating to the operation of infrastructure facilities of the type proposed with a view to identifying the main public authorities whose input will be required for the implementation of the project. It is also important at this stage to consider the measures that may be required in order for the contracting authority and the other public authorities involved to perform the obligations they may reasonably anticipate in connection with the project. For instance, the

Government may need to make advance budgeting arrangements to enable the contracting authority or other public authorities to meet financial commitments that extend over several budgetary cycles, such as long-term commitments to purchase the project's output (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. ... and ...). Furthermore, a series of administrative measures may be needed to implement certain forms of support provided to the project, such as tax exemptions and customs facilitation (see chap. II, "Project planning and preparation", paras. ...), which may require considerable time.

## **2. Preparations for the selection of the private partner**

25. The choice of the best private partner capable of developing the project to the contracting authority's satisfaction is the central condition for the success of the project. This is why the contracting authority must turn its attention as early as possible to preparing a selection procedure appropriate to ensure that result (see chap. III, "Contract award"). As most modern laws on public procurement do, the UNCITRAL Model Procurement Law generally allows the procuring entity the flexibility to determine what will constitute value for money in each procurement and how to conduct the procurement procedure in a way that will achieve it. Specifically, the UNCITRAL Model Law on Public Procurement gives the procuring entity a broad discretion to decide what to purchase, and in determining what will be considered responsive to the procuring entity's needs (art. 10), who can participate and on what terms (arts. 9, 18 and 49) and the criteria that will be applied in selecting the winning submission (art. 11). This level of flexibility is also desirable for the selection of the private partner to carry out a PPP project.

26. Flexibility does not mean, however, that the contracting authority should be free to make those decisions at any time or alter the nature of the procedure without proper justification. To the contrary, it is already essential at the planning stage for the contracting authority to identify and study in detail the appropriate selection procedure from among those provided for in the country's general public procurement laws or any specific laws on PPPs (see chap. III, "Contract award", paras. ...). Indeed the choice of the appropriate procedure will depend on a number of practical aspects that the contracting authority needs to consider in conjunction at the project preparation phase. Indeed the choice of the PPP modality (see chap. I, "General legal and institutional framework", paras. ...), the ownership and maintenance arrangements envisaged for the facility (see chap. I, "General legal and institutional framework", paras. ...), the payment model (e.g. whether user fees or government payments) and other essential elements of project design will determine, for instance, the degree of interest of the contracting authority for the physical aspects of work and may, in turn, influence the extent to which the contracting authority wishes to control technical aspects by preparing a set of specifications, or prefers instead to allow bidders until the end to propose their own solutions to meet the expected output. Different selection processes may be available to meet the contracting authority's preferences (see chap. III, "Contract award", paras. ...).

27. The contracting authority will also need to consider important aspects of the contract award process already at this stage. The contracting authority will have to consider the need for, or desirability of, a pre-selection process, in light of the level of competition actually available in the market and the need for ensuring a robust and transparent selection process. The contracting authority will need to consider carefully the pre-selection criteria in light of both the desired output but also the nature of the PPP envisaged. The contracting authority will also need to prepare appropriate evaluation criteria to permit a ranking of proposals leading to the choice of the bidder offering the best value for money. From a practical point of view, the contracting authority will have to ensure that it will be able to avail itself of the required technical expertise to evaluate proposals, both in technical, as well as financial and commercial aspects.

28. Another crucial step in the preparatory process is for the contracting authority to refine the risk allocation assumptions considered when doing the "value for money"

test and determine the essential terms of the contract, including the non-negotiable ones, as this will constitute a central element of the selection process and one of the bases for comparing the proposals received (see chap. III, “Contract award”, paras. ...). The time needed for concluding the PPP contract after the selection of the private partner selected is often excessively long, adding to the overall project cost. The contracting authority can help shorten that time and make the final negotiations more structured and efficient by using as much as possible standards documents that, based on previous experience and practice, reflect the essential terms of the PPP (adapted, of course, to the circumstances of the project in question).

### **3. Arrangements for facilitating the issuance of licences and permits**

29. Legislation may play a useful role in facilitating the issuance of licences and permits that may be needed in the course of a project (such as licences under foreign exchange regulations; licences for the incorporation of the private partner; authorizations for the employment of foreigners; registration and stamp duties for the use or ownership of land; import licences for equipment and supplies; construction licences; licences for the installation of cables or pipelines; licences for bringing the facility into operation; and spectrum allocation for mobile communication). The required licences or permits may fall within the competence of various organs at different levels of the administration and the time required for their issuance may be significant, in particular when the approving organs or offices were not originally involved in conceiving the project or negotiating its terms. Delays in bringing an infrastructure project into operation because of missing licences or permits for reasons not attributable to the private partner is likely to result in an increase in the cost of the project and in the price paid by the users.

30. Thus, it is advisable to conduct an early assessment of licences and permits needed for a particular project in order to avoid delay in the implementation phase. A possible measure to enhance the coordination in the issuance of licences and permits might be to entrust one organ with the authority to receive the applications for licences and permits, to transmit them to the appropriate agencies and to monitor the issuance of all licences and permits listed in the request for proposals and other licences that might be introduced by subsequent regulations. The law may also authorize the relevant agencies to issue provisional licences and permits and set forth a period beyond which those licences and permits are deemed to be granted unless they are rejected in writing.

31. However, it should be noted that the distribution of administrative authority among various levels of government (for example, local, regional and central) often reflects fundamental principles of a country’s political organization. Therefore, there are instances where the central government would not be in a position to assume responsibility for the issuance of all licences and permits or to entrust one single body with such a coordinating function. In those cases, it is important to introduce measures to counter the possibility of delay that might result from such distribution of administrative authority, such as, for instance, agreements between the contracting authority and the other public authorities concerned to facilitate the procedures for a given project or other measures intended to ensure an adequate level of coordination among the various public authorities involved and to make the process of obtaining licences more transparent and efficient. Furthermore, the Government might consider providing some assurance that it will assist the private partner as much as possible in obtaining licences required by domestic law, for instance by providing information and assistance to bidders regarding the required licences, as well as the relevant procedures and conditions. From a practical point of view, in addition to coordination among various levels of government and various public authorities, there is a need to ensure consistency in the application of criteria for the issuance of licences and for the transparency of the administrative process.

## E. Government support

*[The Secretariat proposes no significant substantive amendments to section C, paras. 30–60 of chapter II, as they appear in the Legislative Guide, except for the terminology changes explained in [A/CN.9/939](#), paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.]*

## F. Guarantees provided by international financial institutions

*[The Secretariat proposes no significant substantive amendments to section C, paras. 61–71 of chapter II, as they appear in the Legislative Guide, except for the terminology changes explained in [A/CN.9/939](#), paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.]*

## G. Guarantees provided by export credit agencies and investment promotion agencies

*[The Secretariat proposes no significant substantive amendments to section C, paras. 72–74 of chapter II, as they appear in the Legislative Guide, except for the terminology changes explained in [A/CN.9/939](#), paras. 17–19 and 31, which, if approved by the Commission, the Secretariat will make in the final version of the Guide.]*

### Model legislative provisions

## II. Project planning and preparation

### Model provision 5. PPP project proposals

1. A contracting authority envisaging to develop infrastructure or services through a PPP shall carry out or procure a feasibility study to assess whether the project meet the conditions for approval set for in *[these provisions]*.
2. The feasibility study shall:
  - (a) Identify the public infrastructure or service needs to be met by the proposed PPP project and how the project meets relevant national or local priorities for the development of public infrastructure and services;
  - (b) Assess the various options available to the contracting authority to satisfy those needs and conclusively demonstrate the comparative advantage, strategic and operational benefits of implementation as PPP, in particular that the project:
    - (i) Offers a more economic and efficient solution as a PPP than if it were to be procured and carried out by the contracting authority or another public body (“value for money”); and
    - (ii) Will not lead to unexpected financial liabilities for the public sector (“fiscal risk”).
3. In addition to the feasibility study, the request for approval of a PPP project shall:
  - (a) Assess the project’s social, economic and environmental impact;
  - (b) Identify the technical requirements and expected inputs and deliverables;
  - (c) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority;

(d) Identify the licences, permits or authorizations that the contracting authority or any other any public authority may be required to issue in connection with the approval or implementation of the project;

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

(f) Identify any proposed form of Government support for the implementation of the project;

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

(h) Identify the appropriate procedure for contract award.

### **Model provision 6. Approval of PPP project proposals**

1. The [*the enacting State indicates the competent body*] shall be responsible for [approving proposed PPP projects submitted to it by contracting authorities] [advising the [*the enacting State indicates the competent body*] as to whether a proposed PPP project meets the approval conditions set forth in [*these provisions*].

2. The [*the enacting State indicates the competent body*] shall be responsible, in particular for:

(a) Reviewing PPP project proposals and feasibility studies submitted by contracting authorities for purposes of ascertaining whether a proposed project is worthwhile being carried out as a PPP and meets the requirements set forth in [*these provisions*];

(b) Reviewing the contracting authority's capability for carrying out the project and making appropriate recommendations;

(c) Reviewing the draft requests for proposal prepared by contract authorities to ensure conformity with the approved proposal and feasibility study;

(d) Advising the Government on administrative procedures relating to PPPs;

(e) Developing guidelines relating to PPPs;

(f) Advising contracting authorities on the methodology for conducting feasibility and other studies;

(g) Preparing standard bidding and contract documents for use by contracting authorities;

(h) Issuing advice in connection with the implementation of PPP projects;

(i) Assisting contracting authorities as required to ensure that PPPs are carried out in accordance with [*these provisions*]; and

(j) Performing any other functions in connection with PPPs that the [*the enacting States indicates the competent body to issue regulations implementing the model provisions*] may assign to it.

### **Model provision 7. Administrative coordination**

The [*the enacting State indicates the competent body*] shall [establish] [propose to the [*the enacting State indicates the competent body*] the establishment of] institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of PPP projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.