

# UNCITRAL Colloquium on the Law of International Trade for a Greener Future

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- Rhetoric and reality of low-carbon procurement in PPP projects and the case for UNCITRAL PPP law reform
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# Content

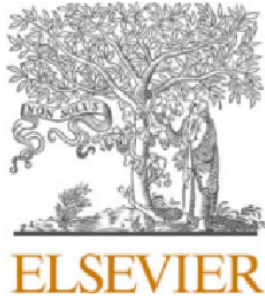
- A. Potential of Low-carbon procurement in PPP projects v.s. conventional procurement
- B. Reality of SPP implementation in PPP projects
- C. review of green and low-carbon procurement in the Model Legislative Provisions and the Guide
- D. Next step: the case for UNCITRAL PPP law reform-preliminary thoughts for discussion

# A. Potential of Low-carbon procurement in PPP projects v.s. conventional procurement

- Political, social, economic, environment **priorities**: Mostly involves national and local infrastructure, usually national or local priority, but The consequence of disruption is more severe
- Feasibility/VfM study
  - Comparative VfM test
    - risk analysis-climate risk allocation
    - Innovation-climate oriented innovation
    - Market competition-sufficient competition? But if we upgrade it to a low-carbon one
    - Government capacity,-design, procurement, management of long-term contract
- Private financing and bankability-climate finance
- Bundling of contracts
- Long-term contract
  - more likely affected by climate scenario;
  - contract change due to climate events

# B. Reality of SPP implementation in PPP projects

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## Rhetoric and reality of public-private partnerships in China: A sustainable public procurement perspective

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### 2.1.2. *Choosing PPP: value for money*

The legitimacy of PPP projects is built upon the foundation of VFM theory. Only projects that pass the VFM evaluation test are eligible for the PPP procurement model. However, VFM is a complex concept, and there is substantial debate on whether PPPs genuinely deliver VFM [40]. Among the pitfalls of a VFM assessment are conceptual issues involved in a public sector comparator (PSC) analysis of PPP versus a similar hypothetical public sector project. To assess the feasibility of PPP or private finance initiative (PFI), the PSC assesses the VFM involved, which evaluates the project's output under CPP. However, the public partner in a PPP may lack historical data and experience, making it challenging to implement PSC guidance. This, in turn, can result in unconscious bias or “optimism bias” [41]. Another pitfall of VFM, perhaps more relevant to this study, is the limitations of VFM assessments, particularly with respect to the “three Es”, that is, economy, efficiency, and effectiveness, which makes it challenging to account for the externalities of broader sustainability. In reality, a VFM assessment typically focuses on economic aspects and may not sufficiently address sustainability concerns [15]. Although sustainability is gradually being included in VFM theory and methodology [42], the inherent complexities of such assessments in practice create significant challenges in addressing the sustainability aspects of the analysis [16].

ed.

## *2.2. Opportunistic motivation behind PPPs*

PPPs, in theory, aims to add value to the public sector and deliver desirable services to the community [43] and the nature of PPP arrangements as a cooperative effort is expected to jointly create value for stakeholders [44,45]. However, the actual motives behind PPPs are often diverse and reflect opportunistic behaviours in both the public and private sectors. The government's motivation for pursuing PPPs may be driven by fiscal constraints [30], as well as the desire to have visible achievements to gain voter support [22] or for certain government officials to get promoted [23,24]. When the focus of a project shifts away from delivering high-quality public services to prioritizing the capital function of PPPs, strong externalities may emerge, potentially compromising sustainability in developing and implementing projects [45,46], ultimately risking the successful outcome of the project [47].

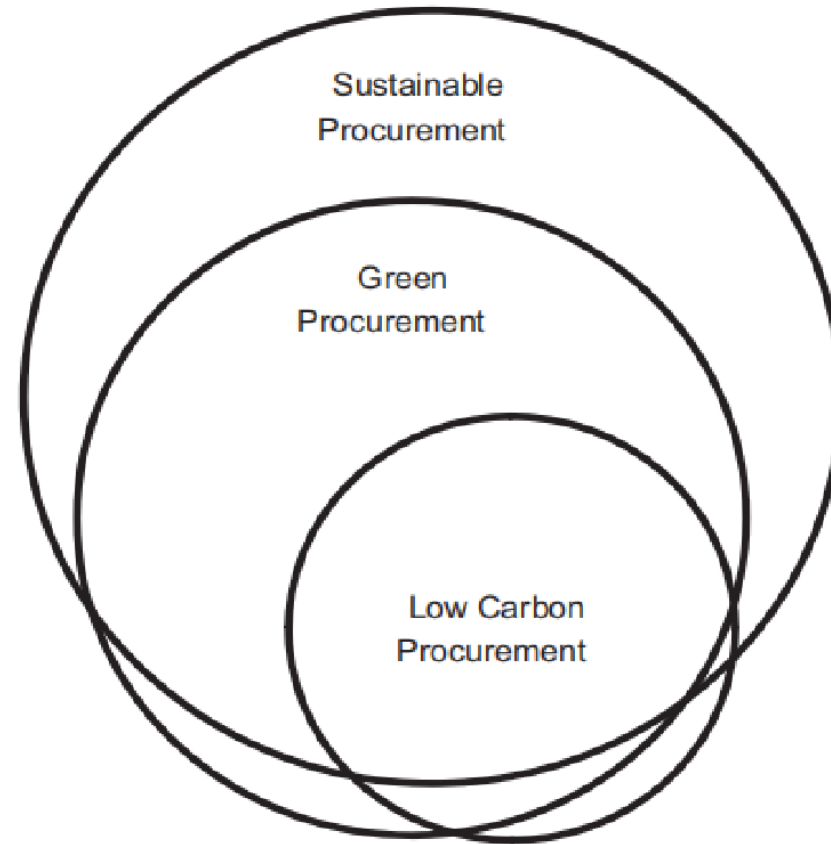
### *2.3. Distinctive bundling and private financing features*

A distinctive aspect of PPPs, compared to CPP, is **contract bundling**, whereby the private sector is entrusted with designing, building, financing, operating, and maintaining an asset as a single project. The choice between a PPP arrangement and CPP often hinges on the decision of whether or not to bundle these aspects [51]. The theoretical advantage of bundling in PPPs has been widely discussed (e.g., Ref. [32,51,52]). Bundling is considered a significant advantage of PPPs over CPP, and the extensive use of PPPs is attributed to the cost efficiency of such

Another significant feature of PPP procurement compared to CPP is access to **private financing**, which means that only large, creditworthy enterprises can meet the substantial private financing requirements (Wang, 2023). This may limit SMEs' participation in PPP projects, as it is

# Additionally, technical issues

Assessment of carbon footprint and compliance may be technically and practically more complex than the assessment of SPP



**Fig. 1.** Relationship between Sustainable, Green and Low Carbon Procurement.



# Implications for low carbon procurement rules--

- What we expect of PPP laws to adapt to climate change
  - Awareness
  - Empowering
  - Mandatory?利弊：市场成熟度，行业市场差异，发展水平
  - Clear rules and compliance
- Institutional capacity-should be part of the law
- Implementation and Compliance
  - Enabling and Compliance tools
    - Knowledge
    - Tools and guide
    - labels
-

## C. Review of green and low-carbon procurement in the Model Legislative Provisions *and the Guide*

- whether the UNCITRAL Model Legislative Provisions on PPP (2019) is adaptable to be interpreted and applied in promoting low-carbon and climate-resilient infrastructure

# Reference to climate policy under Current model PPP provision

- Five references to environments
- Almost no reference to climate policy

# references to environments

- Five references to environments
  - 1 related to project planning, in addition to feasibility study, requirement for Assessment of the project's social, economic and environmental impact
    - Model provision 5. PPP project proposals
  - 1 related to provision 10. Pre-selection criteria
  - 1 related to Model provision 14. Content of the request for proposals
  - 1 related to Model provision 19. Evaluation criteria
  - 1 Model provision 26. Procedures for determining the admissibility of unsolicited proposals
- NO reference to environment in drafting, performance and management of PPP contracts

# climate change?

- 2 references to Climate financing, VII. Other relevant areas of law-13. Environmental protection and PPPs, p49
  - Likewise, the development of **Climate Finance**, in the wake of the entry into force of the Paris Agreement, in 2016,<sup>22</sup> is considered as a way to meet the goals set up by each country in terms of mitigating global warming.
- Climate change-appearing in the footnote 22, on p.262, referring to the above Paris Agreement.

In details

## 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 meets the conditions for approval set for in [these provisions]. 可研通常包含经济社会环境影响评价。
- 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;
    - Opportunity for Possible Alignment with national or local climate commitment and goals

- (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**; 要特别关注PPP作为公共服务所特别致力的公共服务改善目标，并特别注意PPP的特性可能减损的价值。
  - (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 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; - **opportunity for possible reference to climate risk and allocation**
  - (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 [enacting State indicates the competent body] shall be responsible for [approving proposed PPP projects submitted to it by contracting authorities] [advising [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 [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 contracting 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 enacting States indicates the competent body to issue regulations implementing the model provisions] may assign to it.

# Model provision 9. Purpose and procedure of pre-selection

- the pre-selection documents shall include at least the following information:
  - (a) The pre-selection criteria in accordance with model provision 10;.

## Model provision 10. Pre-selection criteria

Interested bidders must meet such of the following criteria as the contracting authority considers appropriate<sup>12</sup> and relevant for the particular contract:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) That they have sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) That they meet **ethical** and other standards applicable in [*this State*];

(d) That they have the legal capacity to enter into the PPP contract;

(e) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing;

(f) That they have fulfilled their obligations to **pay taxes and social security** contributions in [*this State*];

(g) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of . . . years [*the enacting State specifies the period of time*] preceding the commencement of the contract award proceedings, or have not been otherwise **disqualified** pursuant to administrative suspension or debarment proceedings.

## **Model provision 13. Choice of selection procedure**

1. A contracting authority may select the private partner for a PPP project by means of a two-stage request for proposals in accordance with [*the enacting State*
2. A contracting authority may select the private partner for a PPP project by means of a request for proposals with dialogue in accordance with [*the enacting*

## Model provision 14. Content of the request for proposals

1. The contracting authority shall provide a set of the request for proposals and related documents to each bidder invited to submit proposals that pays the price, if any, charged for those documents.
2. In addition to any other information required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals*],<sup>14</sup> the request for proposals shall include the following information:
  - (a) General information as may be required by the bidders in order to prepare and submit their proposals;
  - (b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;
  - (c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;
  - (d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion or the descending order of importance of all evaluation criteria; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.



## **Model provision 26. Procedures for determining the admissibility of unsolicited proposals**

2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications<sup>26</sup> and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an **environmental** impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

## Model provision 19. Evaluation criteria

1. The criteria for the evaluation and comparison of the **technical elements of the proposals** shall include at least the following:

- (a) Technical soundness;
- (b) **Compliance with environmental standards;**
- (c) Operational feasibility;
- (d) Quality of services and measures to ensure their continuity.

2. The criteria for the evaluation and comparison of the **financial and commercial elements of the proposals** shall include, as appropriate:

## Model provision 20. Comparison and evaluation of proposals or offers

- 综合评价法

- 权重
- 削峰法还是鼓励更优法：  
低限额法还是更优法？

- 全生命周期成本

1. The contracting authority shall compare and evaluate each proposal or offer in accordance with the evaluation criteria, the relative **weight** accorded to each such criterion or the descending order of importance of **evaluation criteria** and the evaluation process set forth in the request for proposals.

2. For the purposes of paragraph 1, the contracting authority may establish **thresholds** with respect to quality, **technical**, financial and commercial aspects. Proposals or offers that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

## Model provision 33. Contents of the PPP contract

The PPP contract shall provide for such matters as the parties deem appropriate,<sup>29</sup> such as:

(a) The nature and scope of works to be performed and services to be provided by the private partner;

NO reference to  
environment  
,in particular in relation to  
environment compliance, KPI  
payment



### **Model provision 43. Operation of infrastructure**

1. The PPP contract shall set forth, as appropriate, the extent of the private partner's obligations to ensure:
  - (a) The modification of the service so as to meet the demand for the service;
  - (b) The continuity of the service;
  - (c) The provision of the service under essentially the same conditions for all users;
  - (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the private partner.
2. The private partner shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

## **Model provision 44. Compensation for specific changes in legislation**

The PPP contract shall set forth the extent to which the private partner is entitled to compensation in the event that the cost of the private partner's performance of the PPP contract has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

## **Model provision 45. Amendment of the PPP contract**

1. Without prejudice to model provision 44, the PPP contract shall further set forth the whether and to what extent the private partner is entitled to request the amendment of the PPP contract in the event that the cost of the private partner's performance of the PPP contract has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as

compared with the costs and the value of performance originally foreseen, as a result of:

(a) Changes in economic or financial conditions; or

(b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

- Occur after the conclusion of the contract;
- Are beyond the control of the private partner; and
- Are of such a nature that the private partner could not reasonably be expected to have taken them into account at the time the PPP contract was negotiated or to have avoided or overcome their consequences.



# D. Next step: the case for UNCITRAL PPP law reform- preliminary thoughts for discussion

- Preamble 序言中直接引用应对气候变化的公约
- I. General provisions
  - Model provision 1. PPP guiding principles: long-term sustainability
  - Art.2, definition
- Planning and preparation of the project
  - risk analysis-climate risk allocation
  - Innovation-climate oriented innovation
  - Market competition-climate-compliance market
  - Private financing and bankability-climate finance
  - Government capacity,-design, procurement, management of long-term contract
- Procurement
  - Specification
  - Pre-Selection criteria
  - Bidding document: Request for proposal
  - Awarding criteria

- Operation of PPP project and contract performance management
  - a well-structured plan for monitoring climate-related construction and operations including adaptation measures and GHG-reduction strategies.
  - Transparency, report and GHG emissions reduction information disclosure
  - Monitor and enforcement of climate-wise KPI linked to payment
  - Institutional capacity
  - Contract flexibility to adapt to climate-related phenomena impacting the availability of the infrastructure
  - Management of contract change in climate-related circumstances
  - Dispute resolution

- We should also be mindful of the negative impact of particular features of PPP on sustainable and low-carbon procurement
  - SMEs
  - Gender equality
  - Vulnerable groups
- that may be disproportionately affected in a climate change scenario

- Text or Guide?

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- Thank you for your attention!