Legal Analysis on Public-Private Partnerships regarding Model PPP Rules

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Contents

Introduction

I. Relevant PPPs Rules

A. UNCITRAL PFIP Guide & Model Provisions

B. WTO GPA

C. OECD Basic Elements of a Law on Concession Agreements

D. EPEC Guide to Guidance

E. EU Legislation

F. National Legislations

II. Approach for PPP Model Law

III. Subject Matter & Scope

A. Legal Definition of PPPs

B. Nature Resource Projects

C. Covering Wider Forms of PPPs

IV. Finding Public Interest

A. Public Interest in PPPs

B. Financial and Non-financial Factors

C. Evaluations on Financial Effects

V. Institutional Framework & Transparency

A. PPP Units

B. Oversight

C. Standardized Contracts

VI. Domestic Dispute Resolution Measures

A. Problems of ICSID

B. Case Studies

C. Elements for Domestic Dispute Resolution Measures

VII. Issues in Other Relevant Areas of Law

A. Model Procurement Law

B. Environmental Protection & Anti-Corruption Measures

VIII. Issues in PFIP Guide, not covered by Model Provisions

A. Scope of Authority to Award Concessions

B. Project Risks and Risk Allocation

C. Government Support

D. Transfer of Controlling Interest in the Concessionaire

E. Security Interests (to go after Change in Control)

F. Domestic Preference

G. Contribution towards Costs of Participation in the Selection Proceedings

H. Termination of the Concession Contract

I. Review Procedures

J. Governing Law

K. Sovereign Immunity

Introduction

The public-private partnerships (PPP) has played a significant role to boost the undergoing processes of national economic growth, and develop social infrastructures including roads, facilities, buildings, public services such as health, utilities, education, and sanitation, etc. It has normally been driven at the situation of the significant gap between available public funding and required expenditure, especially as in an era of rising national dept and budget deficits. In the context of the global financial turmoil we are facing, PPPs play the role of economic stimulant in developing countries and sustainable growth in global, although the difficult economic environment substantially affected the international project finance market.

The government also seeks it to increase the quality and efficiency of public infrastructure and services in general. Expanding the use of PPP would enable the government to provide needed public infrastructure while minimizing both short- and long-term expenditures, and also to capitalize on the private sector's management skills, expertise, experiences, innovation, and alternative methods of funding.[1] This can also have a significant impact on international commerce. Therefore, the PPP has a number of benefits to both in markets and countries.

Even though PPPs have a long history in many countries, a clear and comprehensive rule covering the use of PPPs is deficient in both international and domestic levels.[2] Except only a few countries and international bodies, most of them even do not recognize the need for a special PPP rule. The United Nations Commission on International Trade Law (UNCITRAL) adopted the *UNCITRAL Legislative Guide to Privately Financed Infrastructure Projects* (PFIP

[1] *See* David W. Gaffey, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States*, 39 Pub. Cont. L. J. 351, 352-53 (Winter, 2010).

[2] *See* id. at 359; UNECE Report to 3rd Session of the team of Specialists on Public-Private Partnerships 18-19 April 2011 regarding Model PPP Laws, p.2; HENRIK ANDERSEN ET AL., PUBLIC-PRIVATE PARTNERSHIPS 13, ASIA LINK (2010).

Guide) in 2001 and the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects* (Model Provisions) in 2003, which provide a legal framework to facilitate the accomplishment of PPP projects. However, they do not constitute a model law. The eleven years have elapsed since the PFIP Guide was published. It also appears acknowledged that a need for a common set of rules on PPPs has been increased. The lack of a uniform rule brings result in uncertainty and the transaction costs which will discourage the use of PPPs. Additionally, some countries have very limited experiences in PPP, and a need for information and clarification on the subject is high.[3] In regard to a gradual increase of the use of PPPs in a wide variety of types of public infrastructure in numerous countries, it is appropriate to consider development of a model PPP law.

Therefore, this research aims to provide a general overview and summary of key legal issues relating to the PPP and PFI, especially how UNCITRAL PFIP Guide and Model Provisions need updating, that is supposed to assist in submitting a proposal for future work to the Commission in 2012. This note focuses on presenting new issues relating to PPP, which are necessary to update PFIP Guide and PFIP Model Provisions rather than an analysis itself of them. It purports to support to draw upon the future development of them as a Model PPP Law.

I. Relevant PPPs Rules

A. UNCITRAL PFIP Guide & Model Provisions

In July 2003, the UNCITRAL adopted the Model Legislative Provisions on Privately Financed Infrastructure Projects as an addition to the Legislative Guide on Privately Financed Infrastructure Projects, which has been adopted two years earlier. The Model Provisions translate the advice given in the recommendations contained in the Legislative Guide into

[3] HENRIK ANDERSEN ET AL., *supra* note 2, at 14.

legislative language (51 provisions). The Legislative Guide contains 71 recommended legislative principles whose purpose is to assist in the establishment of a legislative framework. They are followed by explanatory notes that offer an analytical explanation of the financial, regulatory, legal, policy and other issues raised in the subject area. The reader is advised to read the legislative recommendations and the model provisions together with the notes.

The purpose of the Guide is to provide information for drafting national PPP laws, rather than contracts. The PFIP Guide and Model have primarily affected to consequent principles and guidelines drafted by other international communities, including the European Bank for Reconstruction and Development (EBRD)'s Core Principles (2006) and the OECD Basic Elements for a Law on Concession Agreements.[4]

B. WTO GPA

There is no specific legal definition of PPP under WTO. However, the significance of legal instruments in regard to encouraging PPP has been acknowledged by WTO Member States.[5] The WTO's General Agreement on Government Procurement (GPA) is legally binding agreement in related to the subject of government procurement. As the EU public procurement Directive, procurement of a PPP or other types of public contracts can be fulfilled under GPA rules and principles such as transparency and non-discrimination.

[4] Both texts are more concise than the UNCITRAL Guide and Model Legislatives. The EBRD undertook an analysis of concession laws and legal frameworks for PPPs in each of the EBRD member countries of operation in 2008.

[5] *e.g.*, Brazil, Trade Policy Review, WT/TPR/G/140 of 1st November, 2004, point 102; India, Trade Policy Review (revised), WT/TPR/S/182/rev. 1 of 24th July, 2007, point IV.5, 58, 132 and 179; Singapore, Trade Policy Review, WT/TPR/S/202 of 9th June, 2008, IV.25.; *See* also Report of the Working Group on Trade and Transfer of Technology to the General Council, WT/WGTTT/9, report of 12th December, 2007, point 9.

C. OECD Basic Elements of a Law on Concession Agreements

The Organization for Economic Co-operation and Development (OECD) published the set of Basic Elements for Concession Agreements for corporate law and foreign direct investment legislation, which is a result of a joint project between the Istanbul Stock Exchange, the OECD and a group of experts from NIS, Black Sea and South-East European Countries.[6] This study is a contribution to facilitating private sector investment in the infrastructure and natural resource of transition countries.[7] The study was implemented with the following three practical objectives, (a) to provide information to Eurasian legislators on the guiding legal principles and best international practices with respect to concession agreements; (b) to contribute to the harmonization of the relevant legislation in the Eurasian region; and (c) to elaborate on these principles and practices with a view to providing assistance to Eurasian Governments in the negotiation of actual concession agreements.

The Basic Elements provides a text that sets out in legislative language the 18 guiding principles of a modern law on concession agreements and comments on these principles in light of best international practices. The UNCITRAL Guide provided a point of departure for the preparation of the Basic Elements together with actual laws on concession agreements and pertinent EC legislation. It does not purport to qualify as a model law as if the UNCITRAL Guide. While UNCITRAL's Legislative Guide furthermore focuses on infrastructure projects alone, the Basic Elements apply to both infrastructure and natural resource projects.

D. EPEC Guide to Guidance

The European PPP Expertise Centre ("EPEC") is a joint initiative of the European Invest Bank ("EIB"), the European Commission, EU Member States and Candidate Countries. Its

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[6] In 1999 and 2000, a group of experts from eight Eurasian transition economy governments, UNCITRAL, the OECD, the EBRD, the British Export Credit Guarantee Agency and the Freshfields law offices prepared "Basic Elements of a Law on Concession Agreements".

[7] OECD Basic Elements of a Law on Concession Agreements <http://www.oecd.org/LongAbstract/0,3425,en_33816563_33816964_33959803_1_1_1_1,00.html>

primary mission is to strengthen the capacity of its public sector members to engage in PPP transactions, by allowing PPP taskforces in EU Member and Candidate countries to share experience and expertise, analysis and best practice relating to PPP transactions.[8] It has recently published version 2 of its "Guide to Guidance", which seeks to identify best of breed guidance currently available from PPP guidelines worldwide, and assists public officials in implementing PPP projects and facilitate their understanding of the key issues and procedures involved in the procurement of PPP arrangements. Its main purpose is not the legal frameworks for PPP, although it does include a short Annex on this subject.

E. EU Legislation

There is no specific EU legislation covering the formulation and operation of PPPs only, but EU public procurement rules including the Treaty on the Functioning of the EU, EU public procurement directives and relevant case law have currently been applied to PPPs. PPPs represent on method of public procurement, and as a typical example, the main procurement procedure so-called "competitive dialogue" covers some futures of PPPs. The EU has two procurement directives – the Public Sector Directive (2004/18/EC) and the Utilities Directive (2004/17/EC).

Even though PPPs share a number of common characteristics with EU procurement rules, PPPs take many different features. A PPP arrangement is generally involved in a long-term contract between a public contracting authority and a private sector firm, the transfer of certain project risks to the private sector, project financing, institutionalized co-operative structure, and payments to the private sector by users, by public authority or by a combination of both.[9] PPP arrangements are more complex than conventional public procurement. As such, the complexity of the coverage of PPPs by EU procurement directives has hindered legal certainty and the further promotion of PPPs. Meanwhile, EU decided that the creation of a separate

[8] *See* European PPP Expertise Centre at http://www.eib.org/epec/about/index.htm
[9] *See* EPEC, The Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects, 2011, at 5.

legal regime for PPPs from the public procurement directives was premature, but several member states considered that there was a need for a common set of EU rules on PPPs.[10]

F. National Legislations

Common law and civil law jurisdiction have different approaches to many issues relevant to PPPs. In many civil law countries, a separate administrative law governs PPP arrangements because the service in question is deemed to be a public service. Administrative law sets out fundamental principles which cannot be derogated from agreement of the parties.[11] The law stipulates a number of rights regarding PPPs, including the right of a contracting authority unilaterally to cancel a contract early, the right of an operator to compensation following an unexpected increase in the cost of operations, or the right of an authority to make unilateral changes to the contract due to public interest.[12]

By contrast, in common law jurisdictions such as UK, US, and Ireland, common law forms the fundamental basis of all commercial transactions and form which the principles underpinning the allocation of risk have developed. In general, civil law jurisdictions have a more prescriptive approach to the structuring of PPPs than common law jurisdictions.[13] The different features are also found at security, insolvency and transfer of concessions.

Specific PPP laws have been introduced in Belgium, Italy, Poland, Portugal, Republic of Korea, Brazil, and Spain, etc. These laws may focus on a specific sector (*e.g.*, rail, toll road, water) or may apply to PPP arrangements across sectors. Portugal enacted DL 96/2003 to

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[10] *See* Commission (EC), Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions (Green Paper), COM (2004) 327 final, 30th April 2004; The European Parliament in Parliament (EU), Resolution on Public-Private Partnerships and Community Law on Public Procurement and Concessions (2006/2043(INI)), 26 October 2006.

[11] *See* Legal Framework Assessment, PPP in Infrastructure Resource Center for Contracts, Laws and Regulation (PPPIRC) at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTINFRANDLAW/0,,contentMDK:21734392~menuPK:64860402~pagePK:4710368~piPK:64860384~theSitePK:4817374~isCURL:Y,00.html

[12] *See* EPEC, *supra* note 9, at 20-21.

[13] *Id*. at 21.

mandate Central PPP Unit within MdF, Parpublica, with responsibility for "conception of models for PPP, evaluation, definition and launching of tenders, risk allocation, and control of execution. In addition, a major purpose of a new DL 141/2006 is to reinforce PPP management, but it still falls short of need to create effective Central PPP Unit.[14] Republic of Korea enacted the *Act on Private Investment on Social Infrastructure* in 1994 to promote private investment in the construction and management of social infrastructure. A few amendments of the law have been made to provide flexible legal means, to strengthen the supervising system by the Congress and the participation of citizen, and to protect competition in overall process. Brazil enacted a PPP act in December 2004 designed to encourage investments for crucially needed infrastructure projects.[15]

No specific legislation is required to implement PPPs in some jurisdictions. For example, the United Kingdom (UK) provides one of the most notable examples of the widespread and successful implementation of PPPs with no comprehensive PPP law. UK introduced the private finance initiative (PFI) in 1992, and standardized the pioneer model through the implementation of numerous PFI projects.[16]

Australia has also widely used PPPs without developing specific legal or statutory framework. Most infrastructure development falls within the responsibility of State governments that have developed policies and guidelines on PPP procurement. Most States have legislation which is intended to facilitate delivery of complex projects by centralizing and streamlining planning approval and land use processes. The following examples of laws have been used for PPPs - The *Project Development and Constitution Management Act of 1994* (Victoria), and the *Mitcham-Frankston Project Act of 2004* (Victoria) which is project specific legislation related to the EastLink toll road PPP.[17]

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[14] *See* PPP in Portugal, MOPTC, 7 May 2008, at 10.

[15] C.V. Filho and J.B.Lee, *Brazil's New Public-Private Partnership Law: One Step forward, Two Step Back*, 22(5) Journal of International Arbitration 419426 (2005).

[16] UK instituted over 700 PFI projects between 1992 and 2008.

[17] *See* Minter Ellison, PFI / PPP Projects 2007, chapter 2 Australia, Global Legal Group, 2007, at 7. <http://www.iclg.co.uk/khadmin/Publications/pdf/1027.pdf>

The United States has no clear and comprehensive regulatory framework governing the PPPs, and its use of PPPs has been largely limited to federally funded projects.[18] The limits on the reach of federal power imposed by the U.S. Constitution preclude the creation of a standardized and centralized federal system for implementation of PPPs. Standards and provisions regarding PPPs, however, are found in some laws and regulations governing certain limited areas, such as the *Intermodal Surface Transportation Efficiency Act of 1991* (ISTEA), the *1998 Transportation Equity Act for the 21st Century* (TEA-21), the *Transportation Infrastructure Finance and Innovation Act of 1998*, and *Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005*.[19]

II. Approach for PPP Model Law

The PFIP Guide consists of 71 recommendations and the explanatory notes. The later provides extensive and detailed information through over 200 pages. The Model Provisions encompass 51 core provisions dealing with matters that deserve attention in legislation specifically concerned with PFIPs. As many of experts and references pointed out, the Guide with the Model Provisions does not constitute a model law. Although the notes cover most of complexity of PPPs, the Model Provisions seems not enough to become a PPP model law.

The approach regarding the Model Provisions is minimalist to avoid being prescriptive. However, the languages in the Model Provisions are not enough for legislature to implement a PPP law. As explained later in detail, some issues which are significant in commerce, are addressed in the note, but not incorporated in either or both of recommendations and model provisions. At the same view, the levels of specification in provisions should be considered in general.

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[18] *See* David Gaffey, *supra* note 1, at 356, 359.

[19] *See* Ahmed M. Abdel Aziz, *Successful Delivery of Public-Private Partnership for Infrastructure Development,* 133 J. Constr. Eng'g & Mgmt. 918, 919 (2007).

On the other hand, there is another suggestion that any review of the PFIP Guide and Model Provisions should include a mapping of its contents as against other relevant PPP and procurement guidances in a manner similar to that undertaken in the EPEC "Guide to Guidance". [20] The multiple PPP approaches and practices can be concerned because several PPP guidances made by international bodies currently exist and have been used in international communities. Besides UNCITRAL Guide, for example, the UNECE PPP Toolkit includes a PPP Readiness Assessment Tool that is based on a similar check-list of general policy and legislative areas. The OECD also provides a set of basic elements for concession agreements to enable infrastructure or natural resources project finance to become more viable in the Black Sea/South East Europe region. In addition, PPP regulations are generally conducted within the existing procurement framework, and so it should be harmonize the public procurement laws.

As a consequence, the choice of decision remains whether the objective of the PFIP Guide is to be a comprehensive Model rule, or to be a road-map of existing guidances with additional supplemental information as necessary. In regards to the fact that many of PPP practical guidances have been recently published, but no a clear and comprehensive rule is available, the PFIP Guide and Model Provisions should play a role as a model PPP law.

III. Subject Matter & Scope

A. Legal Definition of PPPs

PFIP Guide and Model Provisions do not have a precise legal definition of the PPP. PFIP Guide explains various forms of private sector participation in infrastructure projects such as public ownership and operation, public ownership and private operation, and private

[20] UNECE Report, *supra* note 2, at 13.

ownership and operation.[21] It should be considered that the PFIP Guide and Model Provisions set up a legal definition of PPP in order to enhance legal certainty.

Without proving a example of the best practice, the Guide also simply addresses that the appropriateness of a particular variant for a given type of infrastructure is a matter to be considered by the Government in view of the national needs for infrastructure development and an assessment of most efficient ways in which particular types of infrastructure facility may be developed and operated. Thus, it may suggests that the explanatory notes would draw on real-life examples best suitable for each form of PPPs so that a public authority improves its understanding and applies an appropriate form of PPPs to a particular type of infrastructure. It is also useful if the conditions for use to a specific form of private sector participation in a project should be offered in the Guide.

B. Natural Resource Projects

PFIP Guide focuses on infrastructure projects only. It does not address projects for the exploitation of natural resources. In addition, although projects are sometimes grouped with other transactions for the "privatization" of governmental functions or property, the PFIP Guide is not concerned with privatization transactions that do not relate to development and operation of public infrastructure.[22]

As mentioned above the OECD Basic Elements apply to both infrastructure and natural resource projects. In regard to the fact that concession agreements are used for myriad projects in various sectors with different parties, it needs to consider whether the scope of the Guide should be extended to Infrastructure as well as the exploration for/and exploitation of Natural Resources. The expression "public infrastructure" refers to physical facilities that provide services essential to the general public, while "natural resources" means reserves, reservoirs or deposits of whatever nature of oil, gas, gold, silver, coal or any other minerals, hydrocarbons or

[21] *See* paragraph 47 – 53, Introduction and Background Information on PFIP of the Guide.

[22] Introduction and background information on privately financed infrastructure projects of PFIP Guide, paragraph 8.

other resources and whether in their natural state or after any kind of treatment (OECD Basic Elements Article 2 (f)).

C. Covering Wider Forms of PPPs

PFIP Guide is a model PFI guidance involving the use of private finance to fund capital investment. At the time of the PFIP Guide's development in 2001, there was little consideration of the distinction between PFI and the broader family of PPPs. Although there are still many variants on the precise definition of a PPP, there is also a broad consensus as to the different types of procurement arrangements that lie within the PPP classification.[23] Historically, PPP guidance has focused on concession agreements and PFI has been unrepresentative of this broader category of PPPs.[24] It is also recognized that governments use PPPs to deliver public infrastructure for a variety of reasons, which are not exclusively restricted to finance.

Therefore, it may suggests that PFIP Guide needs to be expanded in relation to wider forms of PPP, to include both non-finance based and relational contracting approaches such as partnering[25], project alliancing[26] and derivatives thereof.[27] Although it discussed the partnering process at Part VI B(2)(b), this is done solely within the context of dispute

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[23] Policy Research Working Paper 5173 '*Understanding Options for Public-Private Partnerships in Infrastructure*' (2010) World Bank, Finance Economics & Urban Department, Finance and Guarantees Unit.

[24] UNECE Report, *supra* note 2, at 11.

[25] The purpose of the partnering process is to establish a project culture of good faith to deliver mutually shared objectives, and supported by mutual issues-identification and resolution processes.

[26] Alliancing is a method of procuring, and sometime managing, major capital assets. Under an alliance contract, a state agency (the owner) works collaboratively with private sector parties (non-owner participants) to deliver the project. Alliance contracting is characterised by a number of key features, which generally require the parties to work together in good faith, act with integrity and make best-for-project decisions. The alliance participants work as an integrated, collaborative team and make unanimous decisions on all key project delivery matters. Under alliance contracts, all risks of project delivery are jointly managed by the parties. http://www.dtf.vic.gov.au/project-alliancing; Department of Finance and Treasury, Victorian Government, Australia, Policy for Alliance Contracting (July 2010) & Project Alliancing Practitioner's Guide (2006).

[27] UNECE Report, *supra* note 2, at 12.

resolution. “PFI and concession agreements are relatively inflexible structures, with investors requiring predictable utility and/or service demand levels over the long-term so as to ensure the project’s bankability.” However, the types and levels of required usage or service in complex projects may be emergent and unpredictable. In such circumstances, different contractual structures are required that permit long-term and flexible collaboration through, for example, risk sharing and flexible output/payment specifications.[28]

IV. Finding Public Interest

A. Public Interest in PPPs

Undertaking the project should be in the public interest. PFIP Guide and Model Provision recognize a humanitarian objective of increasing the quality of life for citizen in the country.[29] However, they do not provide specific definition of public interest nor criteria for determining whether a project is in the public interest, as most countries do. The government should justify the use of a PPP in light of public interest by considering the factors such as the estimate of the cost of a project (or value of an asset) and the bids submitted by private investors, accountability, affected individuals, and communities, safety, etc. Therefore, PFIP Guide and Model Provision should address this issue of how to identify and evaluate national public interest.

B. Financial and Non-financial Factors

Finding public interest is a delicate and difficult issue to implement in practice without unduly restricting encouragement of private investment in infrastructure. To identify and protect public interests in the project, a government contracting authority should take not only

[28] *Id.*

[29] UNCITRAL Model Provisions on PFIP, Resolution adopted by the General Assembly (on the report of the Sixth Committee) (A/58/513) at ix.

project-specific financial evaluation, but also qualitative analyses based on non-pecuniary factors. For instance of the Australian states, New South Wales and state of Victoria employ a mandatory review of a proposed PPP project. The factors are (1) effectiveness (in meeting government objectives), (2) accountability and transparency, (3) community consultation (or affected individuals and communities), (4) consumer rights, (5) public access, (6) safety (health) and security, (7) value for money, (8) equity, and (9) privacy.[30]

C. Evaluations on Financial Effects

One of the primary measures to ensure "that the public receives the best value for each dollar spent either by the Government or by the public in user fees, is *the value-for-money test*." "This test reviews such aspects of the proposal as caps on revenue, projected user fees, restrictions on user fee increases, required equity-to-debt ratios, length of the concession period, limits on the rate of return, and the general risk allocation between parties." "Value-for-money tests in finance-based PPP projects generally tolerate higher rates of return for the private investor due to the higher risk levels involved."[31]

"In service-based PPPs, governments often use a different variation of the value-for-money test that not only focuses on the specific concession terms, but also considers whether the project would be most effectively performed by the public or private sector." "This comparison, called *a public sector comparator("PSC")*, weights the cost of the project over its lifetime under both PPP methods. PSCs generally consider two primary elements: the costs of a program if performed by each sector and the value of the risk transferred to the private sector as a result of the use of a PPP. The PSC also evaluates the types and degree of risk transfer that occur should the project proceed as a PPP." The private partner assumes numerous risks associated with construction, maintenance, and operation of an infrastructure –

[30] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-44, HIGHWAY PUBLIC-PRIVATE PARTNERSHIPS: MORE RIGOROUS UP-FRONT ANALYSIS COULD BETTER SECURE POTENTIAL BENEFITS AND PROTECT THE PUBLIC INTEREST 51 (2008).

[31] Abdel Aziz, *supra* note 19, at 924-25.

such as unavoidable construction delays, increased cost of materials, increased cost of energy or significantly a potential drop in demand.

"Although value-for-money test and PSCs are extremely useful in determining whether to use a PPP for a specific project, they contain potential weaknesses." For instance, both tests are based on numerous assumptions extending far into the future, and also each type of project has its own considerations that may not be accurately predicted using a single standard model.[32]

Some of legal regimes resolve these problems. "For example, New South Wales recognized the fact that, although long-term costs to the Government are a significant factor in determining the public interest, the impact on the public itself is an even greater factor when making decisions regarding the infrastructure and services that will affect daily life." "New South Wales altered its value-for-money tests in 2006 by beginning to conduct the test from the perspective of the taxpayer. British Columbia also instituted changes to its PSC, and the methodology of the tests is now reviewed by an independent auditor who suggests constant improvements that help the tests remain up to date and attuned to the needs of each project."[33] Hence, it is worth to consider whether the PFIP Guide should discuss various measures for evaluations on financial aspect of a project, including methods, at the same time, to ensure public interests.

V. Institutional Framework & Transparency

A. PPP Units

One of the most significant innovations in the PPP system is the creation of permanent government units tasked with overseeing and managing the use of PPPs. While the PPP unit manages the PPP process up to the signing of the contract, the individual government agencies

[32] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 30, at 54.
[33] *Id*. at 55-56.

entering into a PPP actually sign the concession agreement.

PFIP Guide (Recommendations 6 to 10) identifies the need for an independent, autonomous and empowered a central PPP unit within the host country's administration with the overall responsibility for formulating policy and providing practical guidance on privately financed infrastructure projects. However, at the time of the Guide development there was relatively little consideration of formalized PPP institutional structures such as PPP units.

The global trend towards such institutional structures could now be addressed in the PFIP Guide and Model Provision to further clarify operational issues : a) within which ministry or department the PPP unit be located, b) the composition of the PPP unit, c) what types of projects will be regulated by the PPP unit, d) the monitoring and/or control functions of the PPP unit, and the relationship between the PPP unit and any procurement authorities, and e) whether the PPP unit is cross-sector, and the relationship between the PPP unit and sector-specific departments.[34]

In 1999, the UK Government created the permanent, quasi-governmental organizations specializing in PPP projects called "Partnerships UK" and "the Office of Government Commerce (OGC)" after it experienced the inability of the public sector to efficiently implement and oversee PFI projects.[35] Partnerships UK was comprised of board members from both the public and private sectors, and assisted the government by consultation in developing and implementing PPPs and the private sector in negotiating and performing such projects. OGC is aimed to promote best value for money in procurement by working closely with departments including issuing guidance, providing advice and promulgating good practice, and developing the government's market place.[36]

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[34] UNECE Report, *supra* note 2, at 12.

[35] Kathy Sharp *et al*., *Public Private Partnerships: Evolutions in the U.S. Procurement System and Lessons Learned from the UK and the EU,* 2 INT'L GOV'T CONTRACTOR P15, Mar. 2005, at 3.

[36] In June 2010, OGC became a part of the new Efficiency and Reform Group within the Cabinet Office. http://www.cabinetoffice.gov.uk ; House of Commons Committee of Public Accounts, The impact of the Office of Government Commerce's initiative on the delivery of major IT–enabled projects, 27th Report of Session 2004-05 (2005) at 3.

Canada has a similar authority to Partnerships UK. In 2002, British Columbia vested a quasi-governmental agency called Partnerships BC with the authority to plan, deliver and oversee major infrastructure projects.[37] As a company registered under the Business Corporations Act, Partnerships BC is entirely owned by the Province of British Columbia and managed by a board of directors who report to its shareholder the Minister of Finance. It has three core functions. First, it provides specialized services, ranging from advice to project leadership/management, to government and its agencies with respect to identifying opportunities for maximizing the value of public capital assets and developing PPPs. Second, it foster a business and policy environment for successful PPPs by offering a centralized source of knowledge, understanding, expertise and practical experience in these areas. Finally, it manages an efficient and leading edge organization that meets or exceeds performance expectations.

B. Oversight

In addition to a governmental authority to act as a public procurement manager and advisor, the purely governmental agencies should be necessary for overseeing PPP projects. For instance, in UK, the National Audit Office (NAO) is the primary office responsible for overseeing the UK PFI program, while a Public Accounts Committee assists in the oversight and responds to reports issued by the NAO. [38] In Spain, the Ministry of Public Works is required to assign public engineering to oversee performance of PPP projects both during construction and throughout operation.[39]

The PFIP Guide acknowledges the need for measures including audit to enhance transparency at the procedures for the selection of the concessionaire. However, it does not much consider the concrete oversight mechanisms not only in the procedure of selection of the

[37] Partnerships BC at http://www.partnershipsbc.ca/index.php.

[38] Patricia Carrillo et al., *Participation Barriers, and Opportunities in PFI: The United Kingdom Experience*, 24 J. MGMT. ENG'G 138, 138 (2008).

[39] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 30, at 50.

party but also through the performance of the projects. The following examples of Australian states of Victoria and New South Wales provide a good model for legislative guide. These states require for projects to demonstrate "that the project has incorporated sufficient oversight mechanisms to ensure compliance with the terms of the contract, and also to ensure that the public is informed of the rights and responsibilities of both the private and public partners." "Some projects even create independent of oversight boards to review the construction and operation of PPP infrastructure, and many private entities meet regularly with the state Road and Traffic Authorities to review the performance of the projects and to address any issues or deficiencies." These states also require "that all PPP contracts be reviewed by the auditor general of the state. New South Wales even requires the publication of both the projects proposals and auditor general's review."[40]

C. Standardized Contracts

The standardized contracts make the implementation of PPP contract much effective and more transparent, which is not discussed in the PFIP Guide. The UK implemented standardized contracts[41] and supporting documents through a number of experiences of PFI projects. They are designed to simplify and ensure equity in the PPP implementation process. It promote a common understanding of the risks which are encountered in a standard PFI project, and also allow consistency of approach and pricing across a range of similar projects.[42] The standardized contracts reduce the time and costs of negotiation by enabling all parties concerned to agree a range of areas that can follow a standard approach without extended negotiations. The standardized contracts are not mandatory for PPP project, but a law may recommend to form standardized contracts and to make publicly available by the government, along with guidance notes for assisting PPP parties.

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[40] *Id*.

[41] HM Treasury, Standardisation of PFI Contracts, Version 4 (March 2007). This model has been adopted in many countries around world.

[42] Gaffey, *supra* note 1, at 364.

VI. Domestic Dispute Resolution Measures

A. Problems of ICSID

The issue on promoting domestic dispute resolution measure needs to be addressed in the UNCITRAL PFIPs instruments that mainly deal with using international dispute resolution bodies. With regard to infrastructure projects involving foreign investor, a framework for the settlement of disputes between foreign investors and the host country may be provided through adherence to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. However, there is enough uncertainty about the role of the International Center for the Settlement of Investment Disputes (ICSID) established by the Convention. It has applied inconsistent standards, and investor and commercial interests clearly dominate the decisions of ICSID tribunals.[43] This has resulted in detriment of local concerns.

A framework should be considered for developing successful dispute resolution design, especially in developing country contexts where there are other norms rather than laws that play a defining role, weak institutions, extreme poverty, or enforcement perceived not viable. The alternatives for dispute resolution must strike a balance between the interests of the local citizens and the interests of the private and public parties.[44] Some ADR practices in areas other than international investment in Cambodia and Indonesia provide interesting and effective models for domestic dispute resolution measures.

[43] Louis T. Wells & Rafiq Ahmed, Making Foreign Investment Safe: Property Rights and National Sovereignty, 288-89 (Oxford U. Press 2007); Virginia A. Greiman, The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships, 32 Whittier L. Rev. 395, 415-421 (Spring 2011).

[44] Virginia A. Greiman, *supra* note 43, 427.

B. Case Studies

The first case study is related to establishment of a labor arbitration council in Cambodia. In 1999, the U.S. and Cambodia reached a bilateral trade agreement which imposed quotas on a range of Cambodia's garment exports. However, due to request of international labour right groups, it conditioned on the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law.[45] The core problem was that enforcement mechanisms were perceived as not being viable, and there was the lack of credible institutions for dispute resolution. This question was answered by the establishment of ILO Project which adopted an independent monitoring system on working conditions, and developed the transparent, fair and expeditious dispute procedures.

The ILO's Chief Technical Advisor involved in judicial reform in Cambodia anticipated that "(a) the process of setting up a new labor court would be stalled or (b) the new institution would be immediately captured by powerful government and private sector interests." As a result, a new arbitration tribunal, called the Arbitration Council, was established.[46] To protect balance and independence, the arbitral panel is composed of members nominated by unions, employer organizations, and the government. The members are also not considered representatives of the stakeholder groups that nominated them, and are required to approach each case on its merits.

Though arbitration is a mandatory under Cambodian law, the parties are free to choose whether the decisions or awards of the Arbitration Council are binding or nonbinding. Most of

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[45] The agreement established a system whereby quotas would be increased by fourteen percent per year if the U.S. determined that working conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards. Daniel Adler, Caroline Sage & Michael Woolcock, *Interim Institutions and the Development Process: Opening Spaces for Reform in Cambodia and Indonesia*, 6 (Brooks World Poverty Institute, Univ. of Manchester 2009) http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-8609.pdf (visited July 2, 2012).

[46] Daniel Adler & Michael Woolcock, *Justice without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia*, 2 Just. and Dev. Working Paper Series 179 (The World Bank 2009) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445687 (visited July 2, 2012).

awards are non-binding, but parties can agree in writing or through collective agreement that awards will be binding. Then awards will be enforceable.[47] The Council's decisions are fully reasoned and published and circulated via the Internet. The Arbitration Council is a hybrid model linking an institution of the rule of law to a forum for social dialogue between organized labor and management. Although there is criticism on that it has a pro-worker bias and the awards are generally nonbinding, the Council continues to address hundreds of cases and the success rate (69%, 2008) has remained steady.

The second case study involves a model of community forums in Indonesia. The new Indonesian Government and World Bank embarked a new approach – the so-called "Kecamatan Development Project" (KDP) - to deliver resources and building the local communities, which present in 40% of villages across Indonesia. This approach focuses on using local representative community forums (kecamatan councils) wherein villagers, not government officials or external experts, determine the form and location of small-scale development projects via a competitive bidding process.[48] To prepare proposals for small-scale ventures, the groups of villagers (in this case, the rural poor) can access to both social facilitators and technical assistance. The facilitators who cooperate with the government at the national and sub-district levels was critical to the success of the project.

Using the local villagers most familiar with the environmental needs of the local population and the political and economic landscape, was a strategy which made sense from economic and cultural perspectives. The proposals are evaluated on the basis of their technical merit, cost-effectiveness, sustainability, likely poverty impact, and number of beneficiaries. The review meeting was fully accessed by journalists, and the outcomes of decision which proposals are funded are posted on community bulletin boards.[49]

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[47] Id, at 180.
[48] Daniel Adler, Caroline Sage & Michael Woolcock, *supra* note 45, at 11.
[49] Id, at 11-12.

According to a study on local conflict and development projects, the process like KDP increased knowledge of the rules, processes and aims of a program which tends to limit the number of conflicts.[50] It is significant that villagers have their own social institutions which enhanced the capacity of KDP participants including participants in other development projects, to manage constructively everyday disputes arising from the development process. Empirical research has demonstrated that roads built by KDP, for example, are of higher quality, are better placed, and built at lower cost than comparable ones constructed by government engineers.[51]

C. Elements for Domestic Dispute Resolution Measures

The two cases above show interim institutional approaches of hybrid models for sound national regime. This domestic dispute resolution measures are different from the international regime in that they addresses the concerns of local community of the developing countries, and at the same time promotes principles of rule-based, transparent and accountable decision making.

To develop the successful national system for dispute prevention and settlement in developing country, the following elements should be considered. First, creating an interim institution of a hybrid nature, second, complement the international investment treaty regime, third, utilizing a participatory process with interest as opposed to rights-based negotiation strategies, fourth, developing an independent and transparent process, fifth, designing explicit and accessible procedures for managing disputes, sixth, building capacity and provide necessary resources, seventh, considering culture in the national context, eighth, incorporating

[50] Patrick Barron, Rachael Diprose & Michael Woolcock, *Local Conflict and Development Projects in Indonesia: Part of the Problem or Part of a Solution?*, 21 (World Bank Policy Research Working Paper no. 4212 2007) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981303 (July 3, 2012)

[51] Alatas, V., *Economic analysis of KDP infrastructure*, Mimeo. Jakarta: World Bank Office (2005).

financial and social returns, ninth, providing for transparency and accountability and evaluation and reform; and tenth, requiring enforceable commitments from all stakeholders.[52]

VII. Issues in Other Relevant Areas of Law

A. Model Procurement Law

PPP regulations are generally conducted within the existing procurement framework. For example, the EU procurement regime allows some flexibility regarding the criteria that can be used to evaluate bids and select the preferred bidder in PPPs. Thus, it is worth to consider whether the PFIP Guide should harmonize with the UNCITRAL Model Law on Public Procurement. The 2011 Model Law replaces the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. While the 1994 text was recognized as an important international benchmark in procurement law reform, in 2004, the Commission agreed that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications and "request for proposals with dialogue" which covering some futures of PPPs in public procurement.

Therefore, it may wish to consider whether new features related to PPPs in the Revised Model Law should be encompassed in the PFIP Guide. In addition, some statements and all references on the 1994 Model Law in the Guide are ought to be updated. For example, the PFIP Guide states in relation to selection procedures for PFIP that "*no international legislative model has thus far been specifically devised for competitive selection procedures in privately financed infrastructure projects.*"(Chapter III of the PFIP Guide, para.19)

B. Environmental Protection & Anti-Corruption Measures

These issues are referred to in the Chapter IV of PFIP Guide although not covered by any specific Recommendation or Model Provision. Given the developments in legislation in these

[52] Virginia A. Greiman, *supra* note 43, 434.

areas over the last 10 years, it may be worth reviewing these sections of the guidance to reflect better current law and practice.

VIII. Issues in PFIP Guide, not covered by Model Provisions[53]

As referred above, some of important issues are discussed in the Guide note, but not incorporated in either or both of Recommendations and Model Provisions. The following examples of issues should be taken into account for updating them.

A. Scope of Authority to Award Concessions

Recommendation 5: "*The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction.*"

"The Guide correctly recognizes that PPP laws should permit a degree of flexibility in enabling a government to award exclusive concessions in those sectors where open competition is not economically viable, or is otherwise not in the public interest." "The sensitivity of PPP projects in particular to changes in demand that may be occasioned by the subsequent authorization of a rival public utility or service means that PPP financiers will require certainty as to the extent and nature of any exclusivity."

[53] This part includes a summary of analysis and suggestions in the UNECE Report (Report at 7-11) and additional relevant issues regarding the recommendations not covered in the Model Provisions.

B. Project Risks and Risk Allocation

Recommendation 12: "*No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project*".

"A number of relevant experts highlighted the difficulties that relatively inflexible concession laws had caused for government clients." "While rigidity is a necessary characteristic of concessions agreements and PFIs, governments should be free to select from the full range of different PPP contracting strategies (each with differing levels of risk allocation and flexibility), and to further customize these strategies as appropriate on a case-by-case basis." "This will ensure that the government client receives the best value for money, through the most effective and efficient allocation of project risk."

C. Government Support

Recommendation 13: "*The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide*."

A government support may take various forms for the purpose of enhancing the investment climate for infrastructure project, which include public loans, loan guarantees, equity participation, subsidies, sovereign guarantees, and tax and customs benefits, etc. It is widely recognized that certain government support measure is needed to enhance the attractiveness of private investment in infrastructure projects in the host country. It is appropriate that the recommendations as a legislative guide provide certain degree of concretion regarding forms of the government support. It enables legislature to consider the possible need for an explicit legislative authorization to provide certain forms of support.

D. Transfer of Controlling Interest in the Concessionaire

Model Provision 37: *"Except as otherwise provided in the concession contract, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which consent of the contracting authority shall be given."*

This provision set forts restrictions on the transferability of controlling interest (shares of companies) in the contractor without the consent of the contracting authority. However, it needs to strike a more balance between the contracting authority's concerns and the concessionaire's freedom to transfer their interest in a given project. The contracting authority is concerned that if the concessionaire's shareholders are entirely free to transfer their investment in a project, there will be no assurance as to expertise and delivery of the relevant services. In contract, most of the initial investors have finite resources, and need to recycle capital in order to be able to participate in new projects. Therefore, in the context of the long term nature of PPP contracts, the approach to restrictions on the transferability of investment should be cautious as the PFIP Guide recommends (Chapter IV of the Guide, paragraphs 64-68).

The Guide advised that the restrictions on the transfer of a controlling interest in the project company should be set out within a certain period of time, or should be justified by reasons of public interest. In addition, it should be made clear in the project agreement that any consent of the contracting authority should not be unreasonably withheld or unduly delayed. Thus, it may also be advisable to establish the grounds for withholding approval and to require the contracting authority to specify in each instance the reasons for any refusal.

E. Security Interests

Security arrangements are crucial for financing infrastructure projects. The financing documents for privately financed infrastructure projects typically include both security over

physical assets related to the project and security over intangible assets owned by the concessionaire.[54] The PFIP Model Provision 35 paragraph 1 states that the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project. However, in some jurisdictions, any security given to lenders that makes it possible for them to take over the project is only allowed und exceptional circumstances and conditions. For example, the creation of such security is subject to agreement of the contracting authority; the security should be granted for the specific purpose of facilitating the financing or operating of the project; and the security interests should not affect the obligations of the concessionaire.

The Model Provision 35 paragraph 3 states "[n]o security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [the enacting State]". The problem of this provision is that it just stipulates a general prohibition on the establishment of security, but does not set forth the exceptional circumstances or specific conditions under which such security can be allowed. A blanket prohibition on security arrangement can limit the project company's ability to raise funding, and derogate the facilitation of the project. Therefore, this provision needs clarification on the scope of prohibitions. It is also worth taking into account that the effectiveness of the rights to create security interests and the enforcement of those rights will also depend on the legal frameworks relating to insolvency and the enforcement of security interests.[55]

F. Domestic Preference

Many countries wish to provide some incentive to national suppliers, while at the same time to take advantage of international competition. The clarification on the margin of domestic preference is another sensitive point for PPPs, especially private sector investors. The law should authorize or required a margin of preference, and also provide clarification of

[54] Chapter IV of the PFIP Guide, paragraph 53.
[55] UNECE Report, *supra* note 2, at 11.

the degree to which foreign entities may be disadvantaged in PPP procurement. The 2011 UNCITRAL Model Procurement Law (article 11, paragraph 3(b)) provides the margin of preference technique which may be included in the evaluation criteria. Neither the PFIF Recommendations nor Model Provision addresses this issue that is discussed in the PFIP Guide (Chapter III of the Guide, paragraphs 43-44).

G. Contribution towards Costs of Participation in the Selection Proceedings

The high costs of preparing proposals for infrastructure projects and the relatively high risks that a selection procedure may not lead to a contract award may function as a deterrent for some companies to join in a consortium to submit a proposal. Some countries authorize the contacting authority to consider arrangements for compensating pre-selected bidders if the project cannot proceed for reasons outside their control or for contributing to the costs incurred by them after the pre-selection phase, when justified by the complexity involved and the prospect of significantly improving the quality of the competition. The law should clarify the circumstances in which bidders for PPP projects can be compensated. Neither the PFIF Recommendations nor Model Provision addresses this issue that is discussed in the PFIP Guide (Chapter III of the Guide, paragraphs 45-46).

H. Termination of the Concession Contract

PFIP Model Provisions 44(contract authority's right), 45(concessionaire's right) and 46(either party's right) are related to termination of concession contract. Model Provision 44 (b) provides for a right of termination for the contracting authority "for compelling reasons of public interest". A general and unqualified right to terminate the concession contract for reasons of public interest may represent an imponderable risk to the private sector without sufficient guarantees. In practice, the compensation due for termination for reasons of public

interest may cover items that are taken into account when calculating the compensation that is due for termination for serious breach by the contracting authority.[56] The guarantee of sufficient amount of compensation is significant point for the private party. At the same time, there may be possible reduction for compensation. The Guide should take into account for the relevant situations and the grounds for reduction of the amount.

Model Provision 45 sets forth the concessionaire's rights of termination which, unlike the contracting authority's right, are allowed under the limited grounds such as serious breach by the contract authority, the parties' failure to reach agreement on a revision of the contract, or the substantial increase of the contractor's costs or the substantial diminish of the value received for performance of the contract. With respect to the Provision 45 (b), there is a suggestion that if the procedure for resolving disputes under the contract ought to be capable of dealing with a failure to reach agreement, it may not be appropriate to allow the contractor a right of termination.[57]

Model Provision 46 provides the right to terminate the agreement by either party in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The language of this provision is broad, and the relevant circumstances should be defined in the project agreement. The Guide advises that if the exempting impediment persists for a certain period, or if the execution of the project is rendered impossible due to changes of laws, the agreement may be terminated by either party.

I. Review Procedures

The Chapter VIII of 2011 UNCITRAL Model Procurement Law provides a mechanism for establishing the appropriate challenge proceedings. It includes right to challenge and appeal (article 64), effect of a challenge (article 65), application for reconsideration before the procuring entity (article 66), Application for review before an independent body (article 67), rights of

[56] Chapter V of the PFIP Guide, paragraph 67.
[57] UNECE Report, *supra* note 2, at 10.

participants in challenge proceedings (article 68), and confidentiality in challenge proceedings (article 69). The Model Provision 27 simply addresses a need for review system for an unsuccessful bidder rather than stipulates the crucial elements for establishment of an adequate review system. Neither the PFIF Recommendations nor Model Provision addresses these issues that are discussed in the PFIP Guide (Chapter III of the Guide, paragraphs 127-131).

J. Governing Law

Recommendation 57: *"The concessionaire and its lenders, insurers and other contracting partners should feel free to choose the applicable law to govern their contractual relations, except where such a choice would violate the host country's public policy"*.

"Although this is implemented to a certain extent through Model Provision 29, this only relates to the law applicable to the concession contract itself, and not to the other contracts relating to the project." "In particular, in developing countries that may not have a robust legislative framework in accordance with the UNCITRAL Model Provisions, PPP contracting parties may wish to choose governing laws and jurisdictions from more mature PPP markets with similar legal systems." "In practice, it is our experience that this is often already done in the area of arbitration, where the contracting parties submit to the jurisdiction of a recognized neutral foreign body."

"Based upon the EBRD's 2008 assessment of concession laws for 29 Eastern European countries, a majority of these concession laws do not provide for the prevalence of PPP laws over relevant other national laws." "As such, PPP contracting parties are often subject to legislative regimes that may be spread over multiple instruments – and indeed the UNCITRAL Guide recommends that governments should seek to summarize these applicable statutory and regulatory texts." "In circumstances where this wider, over-riding legislative framework is also less mature, there may be a compelling case for PPP contracting parties to select the project's governing laws and/or jurisdiction from a national or state government with a more mature supporting legislative framework."

K. Sovereign Immunity

"The issue of sovereign immunity is critical to the effectiveness of any contract with a government client, and to the certainty of any contractors or investors in being able to enforce the terms of that agreement." "If there are circumstances in which the government client can claim sovereign immunity against a contracting party's claim, then these should be highlighted in the law." Neither the PFIF Recommendations nor Model Provision addresses this issue that is discussed in the PFIP Guide (Chapter VI of the Guide, paragraphs 33-35).