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Title/Comparison of Country PPP Laws with UNCITRAL PFIPs Instruments

CROWN AGENTS REF NO.
104342D

March 2014



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1. Approach

The objective of the country analysis was to identify to what extent country PPP laws reflect:

- The topics covered in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (PFIPs), including the recommendations included in the Legislative Guide; and
- The Model Legislative Provisions for PFIPs subsequently published by UNCITRAL

Together these constitute the UNCITRAL PFIPs Instruments.

The relevant law and associated regulations for a total of 58 countries were analysed by legal consultants appointed by UNCITRAL. The sample of country laws included in the research, which represents 30% of UN Member States, is set out in the table below.

Africa	Americas	Asia and Oceania	Europe
Angola	Argentina	Australia	Albania
Benin	Brazil	Cambodia	Bulgaria
Burkina Faso	Chile	Fiji	Croatia
Cameroon	Columbia	Jordan	Czech Republic
Central African Rep	Jamacia	Kazakhstan	France
Egypt	Mexico	Kyrgystan	Kosovo
Guinea	Paraguay	Malaysia	Latvia
Ivory Coast	Peru	Mongolia	Lithuania
Kenya	Puerto Rico	Philippines	Macedonia
Malawi	Uruguay	Singapore	Poland
Mauritius		South Korea	Romania
Morocco		Sri Lanka	Russia
Mozambique		Vietnam	Serbia
Niger			Spain
Nigeria			Ukraine
Senegal			
Tanzania			
Tunisia			
Uganda			
Zambia			

The sample is broadly in proportion to the distribution of UN Member states in these regional groupings, with Africa marginally over-represented and Oceania marginally under-represented.

The analysis undertaken in respect of each country was at a three levels.

- Is the main topic included in the Legislative Guide reflected in the country law (Yes/No);
- Are the Legislative Recommendations associated with the topic met (Yes/Partially/No);
- Are the Model Legislative Provisions met (Yes/Partially/No)?

An additional area of research was in relation to “gap elements” in the PFIPs instruments and, in relation to this, whether the country laws surveyed contained provisions in addition to those included in the PFIPs Instruments. Legal consultants were commissioned by UNCITRAL to undertake this analysis, the results of which are presented in the following sections.

2. Summary of findings

2.1 Reflection of PFIPs Instruments in sample PPP laws

As is reflected in the table below, there is a relatively high degree of reflection of the main topics of the Legislative Guide amongst the sample of country laws analysed. However, this reduces dramatically in respect of the proportion of the countries included in the sample meeting the Legislative Recommendations contained in the Legislative Guide. Though a significant number do partially meet the Legislative Recommendations a more significant proportion do not meet the Legislative Recommendations.

Legislative Guide Ref Chapter		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations		
		Yes	No	Yes	Partially	No	Met	Partially	Not Met
I	General legislative and institutional framework	77%	23%	44%	47%	9%	39%	33%	28%
II	Project risks and government support	38%	63%	69%	24%	6%	48%	17%	34%
III	Selection of the Private Party	63%	37%	54%	41%	5%	33%	27%	40%
IV	Construction and operation: legislative framework and project	66%	34%	45%	48%	7%	27%	34%	38%
V	Duration, extension and termination of the project agreement	63%	37%	62%	33%	5%	40%	20%	40%
VI	Settlement of disputes	33%	67%	66%	29%	5%	25%	7%	68%
Average %		57%	43%	57%	37%	6%	35%	23%	42%

In relation to reflection of the main topics contained in Chapters I-VI of the Legislative Guide:

- At a summary level, the main topics in Chapters I-VI of the Legislative Guide were reflected in country laws 57% of the time on average, ranging from 77% (Chapter I: General and institutional framework) to 33% (Chapter VI: Settlement of disputes);
- In relation to Chapter III: Selection of the Private Party and Chapter IV: Construction and operation: legislative framework and project agreement, which together account for 66% of the Legislative Recommendations, the main topics were reflected in country laws 63% and 66% on average.

In relation to reflection of the Legislative Recommendations:

- Where the main topics in the Chapter were reflected in the country law, on average 57% met the associated Legislative Recommendations whilst a further 37% partially met the associated Legislative Recommendations, with 6% of the sample who included the main topics failing to meet the Legislative Recommendations;

Taking the sample of 58 countries as a whole:

- 35% on average met the Legislative Recommendations;
- 23% partially met the Legislative Recommendations;
- 42% failed to meet Legislative Recommendations.

In respect of Chapter III: Selection of the Private Party Chapter IV: Construction and operation: legislative framework and project agreement, which together account for 66% of the Legislative Recommendations:

- Chapter III, 33% of the Legislative Recommendations were met and a further 27% were partially met but 40% of the sample did not fully meet the Legislative Recommendations,
- Chapter IV, 27% of the Legislative Recommendations were met and a further 34% were partially met but 38% of the sample did not fully meet the Legislative Recommendations.

In respect of Chapter VI: Settlement of disputes, whilst the sample met 25% of the Legislative Recommendations and a further 7% of the sample partially met the Legislative Recommendations, 68% of the sample did not meet the Legislative Recommendations. This was the highest proportion of failure to meet Legislative Recommendations of all the Chapters I-VI.

At the summary level, analysis in relation to regional variations amongst the country sample in reflecting the main topics in the Legislative Guide and in meeting the Legislative Recommendations is set out below.

Summary Region	Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations		
	Yes	No	Yes	Partially	No	Met	Partially	Not Met
Africa	54%	46%	57%	37%	7%	35%	20%	45%
Americas	55%	45%	62%	30%	7%	40%	16%	44%
Asia	59%	41%	61%	33%	6%	40%	22%	38%
Europe	59%	41%	50%	46%	5%	29%	32%	39%
Average %	57%	43%	57%	37%	6%	35%	23%	42%

There is no significant regional variation:

- Reflection of the main topics in each region varied between 54% and 59% against an average of 57%;
- Where main topics were reflected in country laws the regional variation in Legislative Recommendations not being met was in the range of 5% to 7%, with an average of 6%.
- Taking the sample as a whole, the proportion that failed to reflect Legislative Recommendations was on average 42% and the regional variation was 38% to 45%.

In relation to the Model Provisions, as is reflected in the table below, on average the Model Provisions are reflected in the country laws of the sample in broadly the same proportions as the Legislative Recommendations.

Model Provisions		Yes		Partially		No	
Ref	Chapter	No.	%	No.	%	No.	%
I	General legislative and institutional framework	33	56%	14	23%	12	21%
III	Selection of the Private Party	20	34%	18	32%	20	34%
IV	Construction and operation: legislative framework and project agreement	20	35%	11	19%	26	46%
V	Duration, extension and termination of the project agreement	23	39%	13	23%	22	38%
VI	Settlement of disputes	15	25%	3	5%	40	70%
Average			36%		25%		39%

Together, Model Provisions associated with Chapters III and IV of the Legislative Guide account for 75% of the Model Provisions. The proportion of the sample not meeting the Model Provisions in relation to these Chapters is 34% and 46% respectively.

The lowest level of reflection of Model Provisions is in relation to Chapter VI – Settlement of disputes, with on average 70% of the sample not reflecting the Model Provisions associated with this Chapter of the Legislative Guide. As is the case in relation to Legislative Recommendations, this is the highest proportion of failure to meet Model Provisions of all the Chapters I-VI.

More detailed analysis in relation to the extent to which the sample reflects the Legislative Recommendations and Model Provisions associated with each Chapter of the Legislative Guide is set out in more detail in discussion of each Chapter of the Legislative Guide in Sections 3 to 8 of this report.

2.2 Gap Elements in the PFIPs Instruments

The Legislative Guide on Privately Financed Infrastructure Projects, containing 71 Legislative Recommendations, was published in 2001. The Model Legislative Provisions on Privately Financed Infrastructure Projects was published in 2004 and contains 51 Model Provisions.

Gap elements in these two publications (collectively referred to as the PFIPs Instruments) essentially fall into the following categories:

- Legislative Recommendations which do not feature in a Model Provision
- Model Provisions which are not associated with a Legislative Recommendation or only partially reflect the associated Legislative Recommendation;
- Sub-topics or issues made reference to within main or sub-topics which do not feature in a Legislative Recommendation or Model Provision or where Legislative Recommendations or Model Provisions are limited in scope.

Gap elements and provisions in the legislation of the sample countries are discussed in detail in relation to each Chapter of the Legislative Guide in Sections 3 to 8 of this report. Relevant examples of legislative provisions drawn from the country sample are identified to illustrate how these gap elements have been addressed.

2.2.1 Gap elements between the Legislative Recommendations and Model Provisions

In summary, in relation to gap elements between the Legislative Recommendations and Model Provisions:

- 48 of the Model Provisions relate to 57 of the Legislative Recommendations in the Legislative Guide;
- 14 Legislative Recommendations do not feature in Model Provisions;
- 3 Model Provisions are not related to Legislative Recommendations;
- 1 Model Provision partially reflects the associated Legislative Recommendation.

The table below sets out the relationship between the Legislative Recommendations in the Legislative Guide and the Model Provisions.

Legislative Guide Chapter and Main Topic Reference	Legislative Recommendation	Model Provision
Chapter I – General legislative and institutional framework		
B. Constitutional legislative and institutional framework	1	1
C. Scope of authority to award PPP contracts	2	3
	3	-
	4	4
	5	-
	6	-
D. Administrative coordination	6	-
E. Authority to regulate infrastructure services	7	-
	8	-
	9	-
	10	-
	11	-
Chapter II – Project risks and government support		
B. Project risks and allocation	12	-
C. Government support	13	-
D. Guarantees provided by international financial institutions	-	-
E. Guarantees - export credit and investment promotion agencies	-	-

Note: Model Provision 2 refers to the Legislative Guide Introduction (paragraphs 9-20)

Legislative Guide Chapter and Main Topic Reference	Legislative Recommendation	Model Provision
Chapter III – Selection of the private party		
A. General remarks	14	5
B. Pre-selection of bidders	-	6
	15	7
Note: Model Provision 6 refers to the Legislative Guide Chapter III	16	8
B. Pre-selection of bidders in its entirety (paragraphs 34-50)	17	9
C. Procedures for requesting proposals	18/19	10
	20	11
Note: Model Provision 12 refers to the Legislative Guide Chapter III C.2 (ii) Information on bid securities (paragraph 62)	-	12
	21	13
	22/23	14
	24	15
	25	16
	26/27	17
D. Award without competitive procedures	28	18
	29	19
E. Unsolicited proposals	30	20
	31/32	21
	33	22
	34/35	23
F. Confidentiality	36	24
G. Notice of project award	37	25
H. Record of selection and award proceedings	38	26
I. Review procedures	39	27
Chapter IV – Construction and operation: legislative framework and project agreement		
A. General provisions of the project agreement	40	28
	41	29
B. Organisation of the private party	42/43	30
C. The project site, assets and easements	44	31
	45	32/33
D. Financial arrangements	46/47/48	34
E. Security interests	49	35
F. Assignment of the contract	50	36
G. Transfer of controlling interest in the project company	51	37
H. Construction works	52	-
I. Operation of infrastructure	53/55	38
	54	-
J. General contractual arrangements	56	-
	57	-
Note: Model Provisions 39 and 40 relate only to Legislative Recommendation 58 sub-paragraph (c)	58	39/40
	59	41
	60	42

Legislative Guide Chapter and Main Topic Reference	Legislative Recommendation	Model Provision
Chapter V – Duration, extension and termination of the project agreement		
B. Duration and C. Extension of the project agreement	61/62	43
D. Termination	63	44
	64	45
	65	46
E. Consequences of expiry or termination of the project agreement	66/68	48
	67	47
Chapter VI – Settlement of disputes		
B. Disputes between the contracting authority and the private party	69	49
C. Disputes between project promoters and between the private party and its lenders, contractors and suppliers	70	51
D. Disputes involving customers or users of the infrastructure facility	71	50

2.2.2 Key issues raised

In identifying and analysing the gap elements and reviewing provisions made in the legislation of the sample countries, a number of issues are raised. These issues, which are discussed in detail in the relevant Sections of this report relation to Chapters I-VI of the Legislative Guide, are:

- Chapter I: General legislative and institutional framework (Section 3 of this report):
 - Multi- jurisdictional PPPs,
 - Institutional framework and responsibilities,
 - Production of feasibility studies,
 - Focus on outputs,
 - Prioritisation of PPP projects,
 - Fiscal commitment, affordability and contingent liabilities;
- Chapter II: Project risks and government support (Section 4 of this report):
 - Project risks and risk allocation,
 - Government support;
- Chapter III: Selection of the private party (Section 5 of this report):
 - Feasibility studies, model projects and public sector comparators,
 - Corruption and conflicts of interest,
 - Pre-selection and domestic preference,
 - Unsolicited proposals;
- Chapter IV: Construction and operation: legislative framework and project agreement (Section 6 of this report):
 - Conclusion of the project agreement,
 - Refinancing
 - Operational health, safety and environmental standards,
 - Contract management.

In addition, further research was undertaken into dispute resolution provisions in PPP laws (Section 8 of this report).

3. Chapter I: General legislative and institutional framework

3.1 Reflection of PFIPs Instruments in sample PPP laws

The results of the analysis in relation to the main topics included in Chapter I: General legislative and institutional framework are set out in the table below together with the extent to which associated Legislative Recommendations were met. In terms of reflection of the main topics contained in the Chapter, this Chapter scored the highest average, with a very high degree of reflection of the main topics in the Chapter with the exception of E. Authority to regulate infrastructure services.

Legislative Guide		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
Ref	Chapter and Main Topic Titles		Yes	No	Yes	Partially	No	Met	Partially	Not Met
I	General legislative and institutional framework									
A	General remarks									
B	Constitutional, legislative and institutional framework	%	91%	9%	74%	17%	9%	67%	16%	17%
		No.	53	5	39	9	5	39	9	10
C	Scope of authority to award PPP contracts	%	98%	2%	39%	60%	2%	38%	59%	3%
		No.	57	1	22	34	1	22	34	2
D	Administrative coordination	%	83%	17%	58%	35%	6%	48%	29%	22%
		No.	48	10	28	17	3	28	17	13
E	Authority to regulate infrastructure services	%	36%	64%	5%	76%	19%	2%	28%	71%
		No.	21	37	1	16	4	1	16	41
Average		%	77%	23%	44%	47%	9%	39%	33%	28%

Where the main topics were reflected in country laws, a significant proportion of the sample either met (44%) or partially met (47%) the associated Legislative Recommendations, with 9% of the sample who reflected the main topics contained in this Chapter failing to meet the Legislative Recommendations.

Taking the sample as a whole, on average in relation to the 11 Legislative Recommendations contained in this Chapter:

- 39% met the Legislative Recommendations;
- 33% partially met the Legislative Recommendations;
- 28% failed to meet the Legislative Recommendations.

However, this is skewed by the high level number of the sample who failed to meet the Legislative Recommendations (71%) in relation to E. Authority to regulate infrastructure services, which accounts for 5 of the 11 Legislative Recommendations associated with this Chapter. Only 2% of the sample met the Legislative Recommendations relating to E. Authority to regulate infrastructure services with 28% partially meeting the Legislative Recommendations.

In relation to C. Scope of authority to award PPP contracts, which accounts for 4 of the 11 Legislative Recommendations in Chapter I, only 3% of the sample failed to meet the Legislative Recommendations, with 38% meeting the Legislative Recommendations and 59% partially meeting the Legislative Recommendations.

Analysis in relation to regional variations amongst the country sample in reflecting the main topics in Chapter I is set out below.

Chapter I: General legislative and institutional framework		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
Region		Yes	No	Yes	Partially	No	Met	Partially	Not Met	
Africa		73%	28%	55%	38%	6%	45%	24%	31%	
Americas		78%	23%	46%	46%	8%	43%	28%	30%	
Asia		79%	21%	40%	48%	12%	40%	31%	29%	
Europe		82%	18%	31%	58%	10%	30%	47%	23%	
Average		%	77%	23%	44%	47%	9%	39%	33%	28%

There is not significant regional variation in reflection of the main topics (ranging from 73% to 82% against an average of 77%). This is also true in relation to failure to meet the Legislative Recommendations (ranging from 23% to 31% against an average of 28%); though Europe scores best on both measures whilst Africa scores least well.

In respect of Model Provisions in relation to Chapter I the results of the analysis are set out below.

Model Provisions		Yes		Partially		No	
		No.	%	No.	%	No.	%
I	General legislative and institutional framework						
1	Preamble	33	57%	1	2%	24	41%
2	Definitions	37	64%	9	16%	12	21%
3	Authority to enter into PPP contracts	33	57%	22	38%	3	5%
4	Eligible infrastructure sectors	27	47%	22	38%	9	16%
Average		33	56%	14	23%	12	21%

In relation to the 4 Model Provisions that relate to this Chapter of the Legislative Guide:

- The proportion of Model Provisions met on average was 56%, with a range of 47% to 64%;
- The proportion of Model Provisions partially met on average was 23%, with a range of 2% to 38%;
- The proportion of Model Provisions not met on average was 21%, with a range of 5% to 41%.

3.2 Gap Elements in the PFIPs Instruments

Chapter I is the shortest of Chapters I-VI, accounting for 11 (15%) of the Legislative Recommendations and 3 (6%) of the Model Provisions; there are 8 Legislative Recommendations which are not featured in the Model Provisions, the majority of which (5) relate to E. Authority to regulate infrastructure services.

These 8 Legislative Recommendations are:

- C. Scope of authority to award PPP contracts
 - Legislative Recommendation 3 - Privately financed infrastructure projects may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems;
 - Legislative 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.
- D. Administrative Coordination
 - Legislative Recommendation 6 - Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.
- E. Authority to regulate infrastructure services
 - Legislative Recommendation 7 - The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services;

- Legislative Recommendation 8 - Regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers;
- Legislative Recommendation 9 - The rules governing regulatory procedures should be made public. Regulatory decisions should state the reasons on which they are based and should be accessible to interested parties through publication or other means;
- Legislative Recommendation 10 - The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based;
- Legislative Recommendation 11 - Where appropriate special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector.

In addition, there are a number of sub-topics in Chapter I which do not feature in either the Legislative Recommendations or in the Model Provisions:

- B. Constitutional legislative and institutional framework
 - B.3 General and sector specific legislation
- D. Administrative coordination
 - D.1 Coordination off preparatory measures
- E. Authority to regulate infrastructure services
 - E.1 Sectoral competence and mandate of regulatory agencies;
 - E.3 Powers of regulatory agencies;
 - E.4 Composition, staff and budget of regulatory agencies.

A number of issues are raised in Chapter I. These are discussed in more detail in the following sections, namely:

- Multi-jurisdictional PPPs (Section 3.3);
- Institutional framework and responsibilities (Section 3.4);
- Preparatory measures:
 - Focus on outputs (Section 3.5),
 - Prioritisation of PPP projects (Section 3.6),
 - Fiscal commitment, affordability and contingent liabilities (Section 3.7).

Note: Feasibility studies are first referred to in the Legislative Guide in Chapter I D.1 Coordination of preparatory measures (paragraphs 25-26). This issue considered in Section 5.3 of this report.

In discussing these issues, relevant examples of legislative provisions drawn from the country sample are identified to illustrate how these have been addressed.

3.3 Multi-jurisdictional PPPs

Legislative Recommendation 5, for which there is no associated Model Provision, relates to sub-topic C.2 Purpose and scope of concessions (paragraphs 19-22). Legislative Recommendation 5 states “Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction”. This concept is not referred to in the text of the Legislative Guide. Legislative Recommendation 5 does, therefore, raise a new issue in respect of projects which might be multi-

jurisdictional though the inference is that this is only in relation to such projects within national borders.

There is no inference in relation to projects which might be multi-jurisdictional in that they involve more than one nation (i.e. cross-border PPPs); discussion of which is omitted from the PFIPs Instruments.

In relation to multi-jurisdictional PPPs within a national border, Article 5 of the law in Kosovo provides that the PPP Committee decides which contracting authority is responsible for a project where the project covers responsibilities of more than one contracting authority. It also provides for the PPP Committee itself to enter into a PPP Contract on behalf of the Republic of Kosovo.

In Uruguay, Articles 11-12 of the law provides for the direct implementation of a project by the National Corporation for Development with the contracting authority, below a given threshold and subject to transfer to the private sector within a certain time period.

In relation to cross-border PPPs, there is specific provision in the laws of the countries surveyed; though given such projects might usually require some form of international treaty or agreement, it is noted that Article 38.1 (d) of the law in Mozambique does recognise international treaties and conventions in relation to PPPs and that Article 3 of the law in Latvia excludes international agreements from the provisions of the PPP Act.

3.4 Institutional framework and responsibilities

Legislative Recommendation 6, for which there is no associated Model Provision, relates to the opening 2 paragraphs of D. Administrative Coordination (paragraphs 23-24) and to D.2 Arrangements for facilitating the issuance of licences and permits (paragraphs 27-29).

The introduction to the Legislative Guide (paragraph 6) does state that “the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical expertise and appropriate human and financial resources”. In addition, Chapter I B.1 (c) in relation to long-term sustainability states “it is important to ensure that the host country has the institutional capacity to undertake the various tasks entrusted to public authorities involved in infrastructure projects throughout their phases of implementation”.

However, discussion in the Legislative Guide in relation to the institutional framework for PPP is very limited in scope though reference is made to the fact that “privately financed infrastructure projects may require the involvement of several public authorities, at various levels of government (paragraph 24) and “the usefulness of entrusting a central unit (i.e. a PPP Unit) within the host country’s administration with the overall responsibility for formulating policy and providing practical guidance on privately financed infrastructure projects” (paragraph 25).

An appropriate institutional framework (and related processes) is recognised as a vital component for the successful implementation of PPP. Institutional responsibilities set out which entity will play what role at each step of the PPP process. The World Bank’s Public-Private Partnerships Reference Guide recognises that “there is no “right” institutional architecture for PPP” but states “it is useful to consider generic responsibilities that some entity needs to have in any well-organized PPP system”.

Kenya’s Public Private Partnerships Act 2013, for example, contains comprehensive and very detailed provisions in relation to the institutional framework and institutional responsibilities for PPP. Part II of the Act establishes the Public Private Partnerships Committee, which is comprised of 5 Principal Secretaries, the Attorney General, the Director of the PPP Unit and 4 persons not being public officers who shall be appointed by the Cabinet Secretary. The functions of the PPP Committee, set out in the Act, are to:

- (a) Ensure that each project agreement is consistent with the provisions of this Act;
- (b) Formulate policy guidelines on public private partnerships;
- (c) Ensure that all projects are consistent with the national priorities specified in the relevant policy on public private partnerships;
- (d) Approve project proposals submitted to it by a contracting authority;
- (e) Approve project lists submitted to it in under section 24 of the Act;
- (f) Authorise allocations from the Public Private Partnership Project Facilitation Fund;
- (g) Formulate or approve standards, guidelines and procedures for awarding contracts and standardized, bid documents;
- (h) Examine and approve the feasibility study conducted by a contracting authority under this Act;
- (i) Review the legal, institutional and regulatory framework of public private partnerships;
- (j) Approve the organisational structure of the PPP Unit;
- (k) Oversee the monitoring and evaluation by contracting authorities, of a public private partnership from the commencement to the post completion stage;
- (l) Ensure approval of, and fiscal accountability in the management of, financial and any other form of support granted by the Government in the implementation of projects under this Act;
- (m) Ensure the efficient implementation of any project agreement entered into by contracting authorities;
- (n) Perform any other function as may be conferred on it by this Act or any other written law.

Part III of the Act establishes the PPP Unit. The PPP Unit's functions are to:

- (a) Serve as the secretariat and technical arm of the PPP Committee; and
- (b) Provide technical, financial and legal expertise to the Committee and any Node established under this Act.

These functions are further set out in detail in the Act.

- (a) Serve as a resource centre on matters relating to public private partnerships;
- (b) Conduct civic education to promote the awareness and understanding of the public private partnerships process amongst stakeholders;
- (c) Provide capacity building to, and advise contracting authorities or other parties involved in the planning, co-ordinating, undertaking or monitoring of projects under this Act;
- (d) Rate, compile and maintain an inventory of public private partnership projects that are highly rated and which are likely to attract private sector investment;
- (e) Develop an open, transparent, efficient and equitable process for managing the identification, screening, prioritisation, development, procurement, implementation and monitoring of projects, and ensure that the process is applied consistently to all projects;
- (f) Conduct research and gap analysis to ensure continuous performance improvement in the implementation of public private partnerships;
- (g) Collate, analyse and disseminate information including data on the contingent liabilities of the Government in relation to a project;

- (h) Make recommendations on the approval or rejection of projects prior to submission to the Committee for approval;
- (i) Assist contracting authorities, where the unit considers it necessary, to design, identify, select, prioritise, appraise, evaluate and negotiate projects;
- (j) Maintain a record of all project documentation;
- (k) Review and assess requests for Government support in relation to a project and advise the Committee on the support that should be accorded in relation to the project;
- (1) Assist the Committee in formulating guidelines and standard documentation required under this Act;
- (m) Liaise with and assist the contracting authorities in their roles in the various stages of a project cycle;
- (n) Ensure that the tendering process relating to a project conforms to this Act and to procurement best practices;
- (o) Put in place measures to eliminate constraints limiting the realisation of benefits expected from a public private partnership;
- (p) Monitor contingent liabilities and accounting and budgetary issues related to public private partnerships with the relevant offices within the State department responsible for finance;
- (q) Carry out such other functions as may be conferred on it by the Committee and this Act.

Section IV of Act establishes Public Private Partnership Nodes. The Act states that “a contracting authority that intends to enter into a public private partnership arrangement with a private party shall establish a public private partnership node”. A node is headed by the accounting officer of the contracting authority and shall consist of such financial, technical, procurement and legal personnel as that authority shall, in consultation with the PPP Unit, consider necessary for the performance of its functions in relation to a project under the law. The functions of a node, set out in the law, are to, on behalf of the contracting authority:

- (a) Identify, screen and prioritize projects based on guidelines issued by the PPP Committee;
- (b) Prepare and appraise each project agreement to ensure its legal, regulatory, social, economic and commercial viability;
- (c) Ensure that the parties to a project agreement comply with the provisions of this Act;
- (d) Undertake the tendering process in accordance with this Act and any other written law;
- (e) Monitor the implementation of a project agreement entered into with the contracting authority;
- (f) Liaise with all key stakeholders during the project cycle;
- (g) Oversee the management of a project in accordance with the project agreement entered into by the contracting authority;
- (h) Submit to the unit, annual or such other period reports on project agreements entered into by the contracting authority;
- (i) Maintain a record of all documentation and agreements entered into: by the contracting authority relating to a project under this Act;
- (j) Prepare projects in accordance with guidelines and standard documents issued by the Committee under this Act;

(k) Ensure that the transfer of assets at the expiry or early termination of a project agreement is consistent with the terms and conditions of the project agreement, where the project agreement involves a transfer of assets; and

(i) Carry out such other functions as may be assigned to it by the contracting authority.

A number of other countries have identified institutional responsibilities in legislation:

- In Croatia Section III of the PPP Act 2012 law the PPP Agency with a broad remit in relation to approvals, the power to repeal approvals in the case of significant modifications and the monitoring of projects;
- The law in Croatia also establishes the role of the Ministry of Finance in relation to PPP and the requirement for consent/opinion on project proposals and fiscal effects. The law in the Czech Republic similarly establishes the role of the Ministry of Finance in relation to PPP in relation to budgetary supervision and opinion on the conclusion and modification of contracts;
- The law in Peru (2008) defines the institutional framework for PPPs in infrastructure. This includes defining the role of the Ministry of Finance and the PPP promotion Agency PROINVERSION;
- The Tanzanian PPP Act 2010 requires that the contracting authority submits the final draft PPP contract for approval by the Attorney General before the contract is executed. The approval of the Attorney General is also required in Jamaica;
- The Federal PPP law in Brazil of 2004 assigns roles for the Ministry of Finance, the Ministry of Planning, and establishes the Federal PPP Management Council;
- Article 8 of the law in Vietnam states that an inter-sector working team shall be set up by the Minister of Planning and Investment to assist competent state agencies in formulating and implementing projects. The inter-sector working team is composed of representatives of the Ministries of Planning and Investment; Finance; Justice; Industry and Trade; Transport; and Construction, the State Bank of Vietnam and other relevant agencies. Members of the inter-sector working team shall assist their ministries, sectors or agencies in giving opinions on the projects in the sectors under the management of their ministries, sectors or agencies;
- In Kyrgyzstan, Article 1 of the law establishes the State Risk Management Unit, responsible for developing state policy for the management of risks associated with the implementation of projects;
- In Macedonia, Article 13 of the law establishes the Public Private Partnership Council with an advisory role to promote and propose PPPs and to promote initiatives for the amendments of regulations.

3.5 Focus on outputs

D.1 Coordination of preparatory measures (paragraph 24) also states “the studies prepared by the contracting authority should, in particular, identify clearly the expected output of the project”.

Reference is also made to outputs in Chapter III A.3 Special features of selection procedures for privately financed infrastructure projects. There are no Legislative Recommendations or Model Provisions related to this sub-topic. A.3 (b) Definition of project requirements states (paragraph 22) “having established a particular infrastructure need, the contracting authority may prefer to leave to the private sector the responsibility for proposing the best solution for meeting such a need”. It goes on to state (paragraph 22) “the selection procedure used by the contracting authority may thus give more emphasis to the output expected from the project (that is, the services or goods to be

provided) than to technical details of the works to be performed or means to be used to provide those services”.

Chapter III C.1 Phases of the Procedure makes reference to output specifications. C.1 (b) Two-stage procedure states (paragraph 55) “Where the selection procedure is divided into two stages, the initial request for proposals typically calls upon the bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms”. This is reflected in Legislative Recommendation 19 (a) in respect of use of a two-stage procedure.

The World Bank Reference Guide states that “a key feature of a PPP is that performance is specified in terms of required outputs (such as road surface quality), rather than inputs (such as road surfacing materials and design) wherever possible. This enables the private party to be innovative in responding to requirements”. Whilst a focus on outputs is raised in the Legislative Guide and the production of output specifications is acknowledged in Legislative Recommendation 19 (a) which states “the contracting authority should first call upon the pre-selected bidders to submit proposals relating to output specifications.....”, there is no Legislative Recommendation or Model provision that refers specifically to the development of output based specifications prior to the commencement of the process of selection of the private party.

3.6 Prioritisation of PPP projects

D.1 Coordination of preparatory measures (paragraph 26) states “following the identification of the future project, it is for the Government to establish its relative priority and to assign human and other resources for its implementation. There is no further reference in the Legislative Guide, Legislative Recommendations or Model Provisions to the issue of prioritisation of projects.

The World Bank’s Public-Private Partnerships Reference Guide recognises the importance of project prioritisation with the outcome a pipeline of PPP projects, set in the context of an overall infrastructure and sector strategic plan. It also states that “making this PPP pipeline public can be a good way to build private sector interest in investing in PPPs in a country”. The World Bank’s Reference Guide makes reference to the criteria used in the Philippines for prioritising projects, namely:

- Project readiness and stage of preparation—some projects have been further developed than others before being proposed as PPPs, reducing the remaining project development cost;
- Responsiveness to the sector’s needs—the order of implementation of PPP projects needs to be aligned with overall sector priorities within the strategic plan—in other words, PPPs should be central to the development of the sector, not peripheral projects whose benefits may turn out to be marginal, or which may distract from strategic priorities;
- High “implementability”—prioritising PPP projects with a high likelihood of success, that are considered most likely to attract private sector interest, and for which there is a precedent in the local or regional market.

Jamaica’s Policy Framework and Procedures Manual (2012) provides an example matrix as a tool for prioritizing potential projects, which considers factors such as the project’s cost, readiness, complexity, fiscal impact, investor interest, and priority in pursuing the government’s policy goals.

Kenya’s Public Private Partnerships Act 2013 identifies the development of an open, transparent, efficient and equitable process for managing the identification, screening and prioritisation of projects to be applied consistently to all projects as a function of the PPP Unit; whilst PPP Nodes are responsible for the identifying, screening and prioritising projects based on guidelines issued by the PPP Committee. The Act (section 38) states that “in conceptualizing, identifying and prioritizing potential projects under this Act, a contracting authority shall consider the strategic and operational

benefits of entering into a public private partnership arrangement compared to the development of the facility or provision of the service by the contracting authority”.

Prioritisation raises the complementary issue of identification of PPP projects, as is addressed in Kenya. The law in Kosovo states that only the PPP Committee, PPP Department or a contracting authority may identify, propose and initiate a PPP project.

3.7 Fiscal commitment, affordability and contingent liabilities

D.1 Coordination of preparatory measures states (paragraph 26) states “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”. Chapter II C.2 Forms of government support also makes reference to the long-term nature of the fiscal commitments in a PPP project stating (paragraph 36) “besides the administrative and budgetary measures that may be needed to ensure the fulfilment of governmental commitments throughout the duration of the project.....”.

Chapter III A.4 Preparations for the selection proceedings also makes reference to fiscal commitments. A.4 (b) Feasibility and other studies states (paragraph 31) states in relation to the formulation of model projects for reference purposes “the purpose of such model projects is to demonstrate the viability of the commercial operation of the infrastructure and the affordability of the project in terms of total investment cost and cost to the public”.

Reference to affordability is also made in Chapter III C.2 Content of the final request for proposals. C.2. (a) (i) Information on feasibility studies (paragraph 61 (c)) states, in relation to information requested from bidders in relation to financial viability “such information is intended to allow the contracting authority to consider the reasonableness and affordability of the proposed prices or fees to be charged”.

There is no further reference in the Legislative Guide to the issues of fiscal commitment and affordability nor any Legislative Recommendations or Model Provisions that refer specifically to these related issues.

A closely related issue to fiscal commitment and affordability is that of contingent liabilities; payment commitments whose occurrence, timing and magnitude depend on some uncertain future event, outside the control of government.

The Legislative Guide does make reference to contingent liabilities. Chapter II A General remarks makes reference (paragraph 6) to “the need to avoid the assumption by the Government of open-ended or excessive contingent liabilities”. Chapter III C Government support also makes reference to contingent liabilities:

- C.2 (a) Public loans and loan guarantees (paragraphs 38-39);
- C.2 (d) Sovereign guarantees (paragraph 45).

Chapter III Procedures for requesting proposals also makes reference to contingent liabilities. C.4 (b) Evaluation of financial and commercial aspects of the proposals states (paragraph 75 (d)) in relation to the extent of financial support from the Government “Government support measures expected or required by the bidders should be included among the evaluation criteria as they may entail significant immediate or contingent financial liability for the Government”.

There is no further reference in the Legislative Guide to the issue of contingent liabilities although discussion in Chapter IV D.3 Financial obligations of the contracting authority does consider one of the most problematic of contingent liabilities; contingent liabilities in relation to volume/demand. D.3 (a) states (paragraph 48) in relation to shadow tolls “Shadow toll schemes may be used to address risks that are specific to transportation projects, in particular the risk of lower-than-

expected traffic levels". There are no Legislative Recommendations or Model Provisions that relate specifically to contingent liabilities.

There is a very real connection here to the adequacy of feasibility studies in respect of predicted volume/demand (reference) since where the private party to a PPP project is not bearing traffic risk or other volume/demand risks, the incentive for rigorous analysis is weaker on the part of the private party; underlining the need for Government to have confidence in feasibility studies that relate to demand.

Fiscal commitment, affordability and contingent liabilities are recognised as significant issues in relation to the long-term sustainability of PPP by both the World Bank and by the International Monetary Fund. The World Bank's Public-Private Partnerships Reference Guide makes significant reference to the issues of fiscal commitment, affordability and contingent liabilities and states "lack of fiscal clarity can lead governments to over-estimate the extent to which PPPs are genuinely increasing the resources available to pay for infrastructure. It can also create a temptation to spend more now, in response to political and other pressures to deliver new and improved infrastructure. As a result, governments may accept higher commitments and greater fiscal risk under PPPs than would be consistent with prudent public financial management". This is an issue not only in relation to individual PPP projects but also in relation to the aggregation of commitments entered into where a Government pursues a programme of PPP projects.

Article 26 of Columbia's PPP Law (2012) provides that in relation to PPPs:

- The National Fiscal Council (CONFIS), which leads the national fiscal policy and coordinates the budgetary system, approves the future appropriations for PPP projects. Before reaching CONFIS the project must have the approval of the sector ministry, and the National Planning Department;
- The National Council for Economic and Social Policy (CONPES), which is the highest planning authority in Colombia, certifies the strategic importance of the project. Such certification is required for the project to be eligible to receive future appropriations.

Colombia has also developed a sophisticated system for managing contingent liabilities arising from guarantees offered to toll road concessions. This system includes assessing the fiscal impact of guarantees before these are granted, and setting aside funds to cover the expected payments from the guarantees. The Government Entities Contingent Liabilities Fund is funded by contributions by the government entities, contributions from the national budget, and the returns generated with its resources. The government entities carry out the contingent liabilities valuation which is then approved by the Public Credit Divisions of the Ministry of Finance. Once the PPP is approved and implemented, the division carries out ongoing assessments of the value of the associated contingent liabilities.

In Chile the Ministry of Finance has established a Contingent Liabilities Unit, which reviews all projects in detail prior to finance approval, and calculates the value of the government's liabilities initially and throughout the contract. Chile also publicly discloses its commitments to PPP projects in a detailed annual contingent liabilities report.

In Kenya, the 2013 Act requires (Article 33) that in undertaking feasibility study affordability must be considered. The law also requires (Section 35) the PPP Unit submits the feasibility report to the Debt Management Office for assessment and approval of the fiscal risk and contingent liabilities of the project. The Act also identifies the functions of the PPP Unit to include:

- Collating, analysing and disseminating information including data on the contingent liabilities of the Government in relation to a project;

- Monitoring contingent liabilities and accounting and budgetary issues related to public private partnerships with the relevant offices within the State department responsible for finance.

The same law states one of the functions of the PPP Committee is to “ensure approval of, and fiscal accountability in the management of, financial and any other form of support granted by the Government in the implementation of projects under this Act”. The Kenyan law also establishes (Section 68) the Public Private Partnership Project Facilitation Fund. One of the applications of the Public Private Partnership Project Fund is to provide a source of liquidity to meet any contingent liabilities arising from a project.

Other examples where these issues are addressed in law are:

- In Australia, the National Public-Private Partnership Guidelines (Volume 4) describes in detail different methodologies for valuing risk (and contingent liabilities) in PPPs;
- The Federal PPP Law in Brazil (2004) sets the limits of the government’s financial commitments;
- Article 13 of the Uruguayan law (2011) establishes the PPP Unit within the Ministry of Finance and defines its responsibilities including monitoring economic and financial aspects, verifying compliance with budgetary requirements, assessing related risks, and carrying out additional analyses required by the Ministry of Finance;
- Jamaica’s Policy Framework and Procedures Manual (2012) Describes in detail the criteria that all PPP projects must satisfy, including fiscal responsibility, and the analysis required to demonstrate compliance with those criteria at the business case stage;
- The law in Croatia establishes the role of the Ministry of Finance in relation to PPP and the requirement for consent/opinion on project proposals and fiscal effects;
- In Kyrgyzstan the law requires (Article 16) approval by the State Risk Management Unit where a project requires financial support.

The significant fiscal issues associated with PPP projects are closely related to other important issues that need to be addressed in demonstrating that PPP is the right approach to take in relation to a particular project. A vital element of feasibility studies (which are discussed in 5.3 below) is to demonstrate the financial viability of a project as a PPP in comparison with other options; that is, is the project affordable and is it the best option in comparison with other forms of public procurement. In relation to this, feasibility studies may also raise the issue of the extent of government support (discussed in 4.4 below) that might be necessary to support the viability of a project.

A number of countries in the sample require that comparison with other forms of public procurement is required as part of the process for demonstrating that PPP is the best approach to take. These are referred to in 5.3 below.

4. Chapter II: Project risks and government support

4.1 Reflection of PFIPs Instruments in sample PPP laws

The results of the analysis in relation to the main topics included in Chapter II – Project risks and government support are set out in the table below together with the extent to which the associated Legislative Recommendations were met.

Legislative Guide		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
Ref	Chapter and Main Topic Titles	Yes	No	Yes	Partially	No	Met	Partially	Not Met	
II	Project risks and government support									
A	General remarks									
B	Project risks and risk allocation	%	79%	21%	70%	26%	4%	55%	21%	24%
		No.	46	12	32	12	2	32	12	14
C	Government support	%	60%	40%	69%	23%	9%	41%	14%	45%
		No.	35	23	24	8	3	24	8	26
D	Guarantees provided by international financial institutions	%	5%	95%						
		No.	3	55						
E	Guarantees provided by export credit and investment promotion agencies	%	5%	95%						
		No.	3	55						
Average		%	38%	63%	69%	24%	6%	48%	17%	34%

In relation to B. Project risks and risk allocation and C. Government support, there was a high level of reflection of these main topics in the country laws that were analysed (79% and 60% respectively); and where countries reflected these main topics the extent to which the associated Legislative Recommendations were not met was low (4% and 9% respectively).

However, taking the sample as a whole:

- In relation to B. Project risks and risk allocation, 55% met the 1 Legislative Recommendation associated with this topic, 21% partially met the Legislative Recommendation and 24% failed to meet the Legislative Recommendation;
- In relation to C – Government support, 41% met the 1 Legislative Recommendation associated with this topic, 14% partially met the Legislative Recommendation and 45% failed to meet the Legislative Recommendation.

There are no Legislative Recommendations associated with D. Guarantees provided by international financial institutions or E. Guarantees provided by export credit and investment promotion agencies. Both scored a very low level of reflection of the topic in the country laws analysed (5%).

Analysis in relation to regional variations amongst the country sample in reflecting the main topics in Chapter II is set out below.

Chapter II: Project risks and government support		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
Region		Yes	No	Yes	Partially	No	Met	Partially	Not Met	
Africa		31%	69%	63%	23%	14%	38%	13%	50%	
Americas		48%	53%	82%	6%	12%	70%	5%	25%	
Asia		40%	60%	81%	19%	0%	65%	15%	19%	
Europe		37%	63%	52%	48%	0%	33%	33%	33%	
Average		%	38%	63%	69%	24%	6%	48%	17%	34%

There is a more marked regional variation in reflection of the main topics in Chapter II (ranging from 31% to 48% against an average of 38%). This is also reflected in the extent to which Legislative Recommendations were met; with Legislative Recommendations not met ranging from 19% to 50% against an average of 34%.

There are no Model Provisions in relation to this Chapter of the Legislative Guide.

4.2 Gap Elements in the PFIPs Instruments

Chapter II accounts for 2 (3%) of the Legislative Recommendations. There are no associated Model Provisions. These 2 Legislative Recommendations are:

- 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.
- 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.

There are no Legislative Recommendations or Model Provisions in relation to 2 main topics:

- D. Guarantees provided by international financial institutions;
- E. Guarantees provided by export credit agencies and investment promotion agencies.

In addition, there is no substantive reflection of sub-topic B.1 Overview of main categories of project risk in the Legislative Recommendations or Model Provisions.

A number of issues are raised in Chapter II. These are discussed in more detail in the following sections, namely:

- Project risks and risk allocation (Section 4.2);
- Government support (Section 4.4).

In discussing these issues, relevant examples of legislative provisions drawn from the country sample are identified to illustrate how these have been addressed.

4.3 Project risks and risk allocation

In Chapter II A. General remarks, the Legislative Guide states (paragraph 1) that privately financed infrastructure projects "make it possible to transfer to the private sector a number of risks that would otherwise be borne by the Government". Appropriate risk allocation is a central principle of PPP. The World Bank Reference Guide defines PPP as a "long-term contract between a private party and a government agency, for providing a public asset or service, in which the private party bears significant risk and management responsibility". It goes on to state that "allocating project risk well is one of the main ways that PPPs can achieve better value for money".

Whilst Legislative Recommendation 12 states "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" it is limited in scope in addressing the issues associated with risk and risk allocation. There is no Model Provision related to Legislative Recommendation 12 although:

- Footnote 15 to Model Provision 10 (3) (a) in respect of procedures for requesting proposals does state "it is important for the contracting authority, at this stage, to provide some indication of the key contractual terms of the concession contract, in particular the way in which the project risks should be allocated between the parties under the concession contract";
- Footnote 32 to Model Provision 21 in respect of unsolicited proposals does state "it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks".

There is no Legislative Recommendation or Model Provision associated with the sub-topic B.1 Overview of main categories of project risk which describes risks in relation to:

- (a) Project disruption caused by events outside the control of the parties;
- (b) Project disruption caused by adverse acts of Government (“political risk”);
- (c) Construction and operation risks;
- (d) Commercial risks;
- (e) Exchange rate and other financial risks.

In Australia, the national Public Private Partnership Guidelines describe in detail how risks and responsibilities will be allocated in social infrastructure projects (Volume 3: Commercial Principles for Social Infrastructure) and economic infrastructure projects (Volume 7: Commercial Principles for Economic Infrastructure). “The Roadmap for applying the Commercial Principles “describes how the principles should be used as a starting point for developing contracts for particular projects.

The Kenyan Public Private Partnerships Act 2012 requires the preparation and submission of a project and risk assessment report (Section 53) following negotiation with the successful bidder.

The Bulgarian law of 2012 (Article 6) in relation to risk allocation lists risks that necessarily need to be assumed by the private party (including for example construction risk and supply or demand risk; except where price is defined in law in which case risk is shared or borne by public party. Similarly the Croatian law of 2012 states (Article 2.2) that risk can be agreed upon but also list risks that necessarily need to be assumed by the private party (including public building availability risk and demand risk).

The law in Kyrgystan (2012) provides for the establishment (Article 1) of the State Risk Management Unit to develop state policy for the management of risks associated with the implementation of projects.

The issue of risk management is related to that of Government support (Chapter II C), specifically in relation to guarantees in relation to particular risks. A number of laws make reference to such measures:

- In Kenya the Act in relation to the provision of a guarantee or letter of comfort by the Government states (Section 27) that “the Cabinet Secretary may, in consultation with the Debt Management Office and the PPP Committee, where it considers it necessary to support a project and in order to reduce premiums factored for political risks, issue a guarantee, undertaking or binding letters of comfort in relation to a project;
- In Mozambique the PPP Act (2012) states (Article 15) the Government cannot allow legislative or political risks to affect the project for the term of the agreement (acts with negative or adverse effects on the implementation, operation and management of the project or its competitiveness, economic or financial feasibility). Article 16 provides for protection of the private party and compensation for harm.
- In Kyrgystan, the 2012 law provides (Article 14) against interference in the business/project company by the public partner; for protection from nationalisation and freedom of ownership; for freedom of convertibility of national and foreign currencies; for the right to recover losses caused by the unlawful action of officials and for early termination and redress for damage caused by regulatory acts;
- The law in Cambodia provides (Article 28) that “the Concessionaire is entitled to convert its income from the local currency into foreign currencies and to remit abroad those currencies in accordance with the laws of Cambodia”;

- In Ivory Coast Article (Article 23) there is a guarantee of the stability of the tax customs and financial regimes. Changes in law affecting the contract financial balance or the initial financial model are not allowed except with the proper compensation as provided by the contract.

4.4 Government support

As is the case in relation to B. Project risks and risk allocation there is only 1 Legislative Recommendation in relation to Government Support and no directly associated Model Provision. The Legislative Recommendation in relation to Government support is:

- 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.

C.2 Forms of government support discusses various forms of Government support, namely:

- (a) Public loans and loan guarantees;
- (b) Equity participation;
- (c) Subsidies;
- (d) Sovereign guarantees:
 - (i) Guarantees of performance by the contracting authority,
 - (ii) Guarantees against adverse acts of Government;
- (e) Tax and customs benefits;
- (f) Protection from competition;
- (g) Ancillary revenue sources.

Some of these forms of Government support and the provisions made in respect of them are referred to above (reference) in relation to B. Project risks and risk allocation.

4.4.1 Viability Gap Funding

Whilst C.2 (c) discusses subsidies this is in relation to revenue subsidies. There is no specific reference in the Legislative Guide to upfront “viability gap” payments. This is an up-front capital subsidy (which may be phased over construction). Viability Gap Funding (VGF) is a form of Government support that is used to ensure that a project which is economically desirable but not commercially viable can proceed.

The Kenya Public Private Partnership 2013 establishes (Section 68) the Public Private Partnership Project Facilitation Fund. This is funded from a combination of:

- (a) Grants and donations;
- (b) Such levies or tariffs as may be imposed on a project;
- (c) Success fees paid by a project company to the unit;
- (d) Appropriations-in-aid; and
- (e) Moneys from a source approved by the State department responsible for matters relating to finance.

One of the applications of Kenya’s Public Private Partnership Project Guarantee Fund is extend viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the Government.

4.4.2 Ancillary Revenue Sources

C.2 (g) relates to ancillary revenue sources. In Angola the law prohibits (Article 18) the project company from extracurricular activities outside of its project obligations. Similarly, in Romania (Articles 32-37) the project company cannot perform other activities (outside of its project obligations).

5. Chapter III: Selection of the private party

5.1 Reflection of PFIPs Instruments in sample PPP laws

The results of the analysis in relation to the main topics included in Chapter III: Selection of the private party is set out in the table below together with the extent to which the associated Legislative Recommendations were met.

Legislative Guide Ref Chapter and Main Topic Titles		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
		Yes	No	Yes	Partially	No	Met	Partially	Not Met	
III Selection of the Private Party										
A	General remarks	%	91%	9%	64%	34%	2%	59%	31%	10%
		No.	53	5	34	18	1	34	18	6
B	Pre-selection of bidders	%	78%	22%	29%	60%	11%	22%	47%	31%
		No.	45	13	13	27	5	13	27	18
C	Procedures for requesting proposals	%	90%	10%	37%	58%	6%	33%	52%	16%
		No.	52	6	19	30	3	19	30	9
D	PPP award without competitive procedures	%	53%	47%	35%	58%	6%	19%	31%	50%
		No.	31	27	11	18	2	11	18	29
E	Unsolicited proposals	%	57%	43%	48%	45%	6%	28%	26%	47%
		No.	33	25	16	15	2	16	15	27
F	Confidentiality	%	43%	57%	76%	24%	0%	33%	10%	57%
		No.	25	33	19	6	0	19	6	33
G	Notice of project award	%	62%	38%	72%	28%	0%	45%	17%	38%
		No.	36	22	26	10	0	26	10	22
H	Record of selection and award proceedings	%	43%	57%	64%	32%	4%	28%	14%	59%
		No.	25	33	16	8	1	16	8	34
I	Review procedures	%	47%	53%	63%	30%	7%	29%	14%	57%
		No.	27	31	17	8	2	17	8	33
Average		%	63%	37%	54%	41%	5%	33%	27%	40%

Overall, there was a high degree of reflection of the main topics in this Chapter in the country laws analysed (63%). On average, where the main topics were reflected in country laws, 54% of the associated Legislative Recommendations were met, 41% partially met and only 5% of the countries that reflected the main topics in their country laws did not meet the Legislative Recommendations.

Taking the sample as a whole, on average 33% of the sample met the Legislative Recommendations associated with the Chapter, 27% partially met the Legislative Recommendations and 40% did not meet the Legislative Recommendations.

There are 26 Legislative Recommendations associated with the main topics in this Chapter (37% of the total number of Legislative Recommendations). In relation to the main topics covered in this Chapter:

- C. Procedures for requesting proposals accounts for 10 of these 26 Legislative Recommendations. 33% of the total sample met the Legislative Recommendations associated with this main topic, 52% partially met the Legislative Recommendations and 16% did not meet the Legislative Recommendations;
- E. Unsolicited proposals accounts for 6 of these 26 Legislative Recommendations. 28% of the total sample met the Legislative Recommendations associated with this main topic, 26% partially met the Legislative Recommendations and 47% failed to meet the Legislative Recommendations;
- B. Pre-selection of bidders accounts for 3 of these 26 Legislative Recommendations. In respect of B, 22% of the total sample met the Legislative Recommendations associated with this main topic, 47% partially met the Legislative Recommendations and 31% did not meet the Legislative Recommendations;

- D. PPP award without competitive procedures accounts for 2 of these 26 Legislative Recommendations. 19% met the Legislative Recommendations associated with this main topic, 31% partially met the Legislative Recommendations and 50% did not meet the Legislative Recommendations;
- For the remaining Legislative Recommendations associated with the main topics in this Chapter, each main topic having 1 Legislative Recommendation associated with it, the proportion of the total sample failing to meet the Legislative Recommendation is:
 - A – General remarks – 10%,
 - F – Confidentiality – 57%,
 - G – Notice of project award – 38%,
 - H – Record of selection and award proceedings – 59%,
 - I – Review procedures – 57%.

Analysis in relation to regional variations amongst the country sample in reflecting the main topics in Chapter III is set out below.

Chapter III: Selection of the private party Region	Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations		
	Yes	No	Yes	Partially	No	Met	Partially	Not Met
Africa	61%	39%	57%	37%	6%	32%	25%	43%
Americas	59%	41%	69%	28%	3%	41%	17%	42%
Asia	58%	42%	49%	45%	6%	29%	24%	47%
Europe	71%	29%	45%	52%	3%	31%	39%	30%
Average %	63%	37%	54%	41%	5%	33%	27%	40%

Europe scores better in relation to both in reflection of the main topics and in Legislative Recommendations not being met. The scores for the other 3 regions in relation to reflection of the main topics and Legislative Recommendations not being met are broadly similar.

The results of the analysis of the reflection of the Model Provisions in relation to Chapter III are set out below.

Model Provisions		Yes		Partially		No	
III	Selection of the Private Party	No.	%	No.	%	No.	%
5	Rules governing the selection proceedings	35	60%	17	29%	6	10%
6	Purpose and procedure of pre-selection	17	29%	24	41%	17	29%
7	Pre-selection criteria	14	24%	25	43%	19	33%
8	Participation of consortia	17	29%	25	43%	16	28%
9	Decision on pre-selection	17	29%	25	43%	16	28%
10	Single-stage and two-stage procedures for requesting proposals	22	38%	25	43%	11	19%
11	Content of the request for proposals	23	40%	25	43%	10	17%
12	Bid securities	21	36%	25	43%	12	21%
13	Clarifications and modifications	21	36%	25	43%	12	21%
14	Evaluation criteria	22	38%	25	43%	11	19%
15	Comparison and evaluation of proposals	24	41%	25	43%	9	16%
16	Further demonstration of fulfilment of qualification criteria	20	34%	25	43%	13	22%
17	Final negotiations	23	40%	25	43%	10	17%
18	Circumstances authorising award without competitive procedures	12	21%	19	33%	27	47%
19	Procedures for negotiation of a PPP contract	10	17%	19	33%	29	50%
20	Admissibility of unsolicited proposals	20	34%	10	17%	28	48%
21	Procedures for determining the admissibility of unsolicited proposals	19	33%	10	17%	29	50%
22	Unsolicited proposals that do not involve intellectual property etc.	18	31%	10	17%	30	52%
23	Unsolicited proposals involving intellectual property etc.	18	31%	10	17%	30	52%
24	Confidentiality	19	33%	6	10%	33	57%
25	Notice of contract award	26	45%	10	17%	22	38%
26	Record of selection and award proceedings	18	31%	7	12%	33	57%
27	Review procedures	19	33%	7	12%	32	55%
Average		20	34%	18	32%	20	34%

This Chapter accounts for 23 of the 51 Model Provisions, 45% of the Model Provisions.

In relation to the 23 Model Provisions that relate to this Chapter of the Legislative Guide:

- The proportion of Model Provisions met on average was 34%, with a range of 17% to 60%;
- The proportion of Model Provisions partially met on average was 32%, with a range of 10% to 43%;
- The proportion of Model Provisions not met on average was 34%, with a range of 10% to 57%.

There are 7 instances where a high proportion (50% or more) did not meet the Model Provisions:

- Model Provision 19 - Procedure for negotiation of a PPP contract – 50%;
- Model Provision 21 – Procedures for determining the admissibility of unsolicited proposals -50%;
- Model Provision 22 – Unsolicited proposals that do not involve intellectual property etc. – 52%;
- Model Provision 23 – Unsolicited proposals involving intellectual property etc. – 52%;
- Model Provision 24 – Confidentiality – 57%;
- Model Provision 26 - Record of selection and award proceedings – 57%;
- Model Provision 27 – Review procedures – 55%.

This is a significant Chapter of the Legislative Guide and contains important Legislative Recommendations and associated Model Provisions which support a fair, transparent and competitive process for selection of the private party. The level of failure to meet the Legislative Recommendations included in the Legislative Guide and the related Model Provisions suggests these matters are not dealt with well in a high proportion of the country laws included in the sample.

5.2 Gap Elements in the PFIPs Instruments

Chapter III accounts for a significant proportion of the Legislative Guide (it is the 2nd longest of Chapters I-VI). It is also the Chapter of the Legislative Guide which accounts for the greatest number of Legislative Recommendations (26 or 37%) and Model Provisions (23 or 45%); indicating the emphasis placed on the procurement process in the PFIPs Instruments. All of the Legislative Recommendations relating to Chapter III are associated with Model Provisions.

However, there are a number of sub-topics and issues raised within sub-topics in Chapter III which do not feature in either the Legislative Recommendations or in the Model Provisions:

- A. General remarks:
 - A.1 Selection procedures covered by the Guide,
 - A.3 Special features of selection procedures for PFIPs,
 - A.4 Preparations for the selection proceedings:
- B. Pre-selection of bidders:
 - B. 4 Pre-selection and domestic preferences,
 - B.5 Contribution towards costs of participation in the selection proceedings;
- C. Procedures for requesting proposals:
 - C.2 (i) Information on feasibility studies,
 - C.5 Submission, opening, comparison and evaluation of proposals (in respect of submission and opening);
- D. Award without competitive procedures:

- D.2 (a) Approval (in relation to D.2 Measures to enhance transparency in the award of concessions without competitive procedures).

A number of issues are raised in Chapter III. These are discussed in more detail in the following sections, namely:

- Feasibility studies, model projects and public sector comparators (Section 5.3)
- Corruption and conflicts of interest (Section 5.4)
- Pre-selection and domestic preferences (Section 5.5)

In discussing these issues, relevant examples of legislative provisions drawn from the country sample are identified to illustrate how these have been addressed.

Whilst “unsolicited proposals” are not identified as a “gap-element” in the PFIPs Instruments, further comment on this topic is included below (Section 5.6).

5.3 Feasibility studies, model projects and public sector comparators

Feasibility studies are first referred to in the Legislative Guide in Chapter I D.1 Coordination of preparatory measures (paragraphs 25-26). This sub-topic (paragraph 24) states “One important measure to ensure the successful implementation of privately financed infrastructure projects is the requirement that the relevant public authority 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 and the environmental impact of the project”.

Further reference to feasibility studies is made in Chapter III A.4 Preparations for the selection proceedings. There are no Legislative Recommendations or Model Provisions related to this sub-topic. A.4 (b) Feasibility and other studies states (paragraph 30) “the option to develop infrastructure as a privately financed project requires a positive conclusion on the feasibility and financial viability of the project”. It also states (paragraph 31) that “prior to starting the proceedings leading to the selection of a prospective concessionaire, it is advisable for the contracting authority to review and, as required, expand those initial studies”.

In a different context, feasibility studies are also referenced in relation to Chapter III C.2 Content of the final request for proposals. C.2 (a) (i) Information on feasibility studies states (paragraph 61) states “it is advisable to include in the general information provided to bidders instructions for the preparation of feasibility studies they may be required to submit with their final proposals”.

Feasibility studies are equivalent to the concept of the business case, as is required in the UK where the Strategic Outline Case (SOC) scopes the project and the Outline Business Case (OBC) involves detailed planning prior to the commencement of the selection of the private party (the Full Business Case is produced following negotiations and prior to formal signing). Other countries have followed the UK business case model including, for example, Nigeria.

There is no Legislative Recommendation or Model Provision that is specifically associated with undertaking a feasibility study prior to the commencement of the selection of the private party.

A.4 (b) Feasibility and other studies also refers to the formulation of model projects for reference purposes stating (paragraph 31) “the purpose of such model projects is to demonstrate the viability of the commercial operation of the infrastructure and the affordability of the project in terms of total investment cost and cost to the public”. The concept of a model project is related to the concept of a Public Sector Comparator (PSC) which is not specifically referred to in the PFIPs Instruments.

Before the bidding process the PSC can be compared with a “shadow” or “reference” PPP; a model of the expected cost of the project under the PPP option. During the bidding process the PSC can also be compared with actual PPP bids received, to assess whether the bids provide value for money.

Under Tanzania’s PPP Law (2010), the contracting authority is responsible for facilitating project development, including a feasibility study and an environmental impact assessment. The law also requires (Section 11) an environmental impact study is undertaken by the private party if the proposed project triggers certain national Environmental Management laws. Anyone that contravenes this requirement is subject to fine, imprisonment up to two years, and further recovery for loss to the Government because of such activity.

In Kyrgyzstan’s law (Article 16) project identification by the public partner is subject to the completion of certain programmes and plans including feasibility studies.

In Uruguay’s law (Articles 16-18) there is a requirement for an evaluation study to include a feasibility study, impact study and comparison with other available forms of public procurement evidencing the technical, financial, legal or commercial advantage of the public private partnership scheme; which should provide the "best value for money".

In Angola (Article 11(1) (h)) a Ministry considering a PPP must articulate what environmental impact and therefore licensing may be required for the alongside financial analysis, policy justification, programmatic need and possible project approaches. Article 6(d) states that a Public Sector Comparator is required.

In Burkina Faso the law requires (Article 9) prior evaluation of the project with the assistance of the public entity in charge of PPP, comparison with other form of public procurement, social and environmental impact as well as assessment of the impact on public finances.

In Kenya, the 2013 Act requires (Article 32) that “a contracting authority shall constitute a project appraisal team for the purpose of overseeing the preparation phase of the project in -accordance with regulations made under this Act”. Further to this (Article 33) in undertaking a feasibility study the following aspects must be considered:

- (a) Technical requirements of the project;
- (b) Legal requirements to be met by the parties to the project;
- (c) Social, economic and environmental impact of the project; and
- (d) Affordability, value for money and public sector comparator for the project as prescribed in the regulations made under this Act.

The Kenyan law also requires (Section 35) that the feasibility report is submitted to the PPP Unit for review and evaluation and that the PPP Unit submits the feasibility report to the Debt Management Office for assessment and approval of the fiscal risk and contingent liabilities of the project. The PPP Unit is then required to submit the feasibility report together with its recommendations and the approval of the Debt Management Office to the PPP Committee for approval.

In France partnership contracts (Article 2) require a preliminary needs assessment, conducted with the assistance of one of the expert bodies created by decree, which states the economic, financial, legal and administrative grounds of the public body’s decision to launch an award procedure for such a contract. Partnership contracts may only be signed in those situations where the preliminary needs assessment conclusively shows that:

- Given the degree of complexity of the project, the public body is not objectively in a position to define unaided and in advance the technical means to meet its needs or to make the financial or legal arrangements for the project;

- Or that the project is a matter of urgency, involving making up for a delay, detrimental to the general interest, affecting the completion of public facilities or the performance of a public service mission, irrespective of the causes of the delay, or responding to an unforeseeable situation;
- Or that, given the project characteristics, the requirements of the public service for which the public body is responsible, or the inadequacies and difficulties observed in carrying out comparable projects, resorting to such a contract presents a more favourable balance of advantages versus disadvantages compared to other kinds of public procurement contracts. The criterion of deferred payment shall not alone constitute an advantage.

In Egypt the law requires (Article 25) the PPP Central Unit submits a confidential public sector comparator to the review committee for approval prior to tender. After approval, the public sector comparator is sealed and held confidential until tender and the technical bids are opened. In addition (Article 32) regulations must be enacted in order to allow a project to exceed the Public Sector Comparator.

In Australia Volume 4 of the National Guidance Provides detailed guidance on calculating the public sector comparator whilst Volume 1 requires a Procurement Options analysis as against other procurement options as the process for selecting a delivery model.

In Croatia (Article 2) a Public Sector Comparator is prescribed as a way to address the financial suitability of a project and is subject to the approval of the PPP Agency.

5.4 Corruption and conflicts of interest

A.2 (b) Promotion of the integrity of and confidence in the selection process makes reference to corruption and to conflicts of interest. It states (paragraph 12) “To guard against corruption by government officials, including employees of the contracting authorities, the host country should have in place an effective system of sanctions. These could include sanctions of a criminal nature that would apply to unlawful acts of officials conducting the selection process and of participating bidders. Conflicts of interest should also be avoided...” However there is no specific reference to either corruption or conflicts of interest in the Legislative Recommendations or Model Provisions.

A number of country laws refer to corruption and conflicts of interest.

- Articles 10-20 of the law in Malawi state that the PPP Commission and members are required to protect against and disclose conflicts of interest. Article 64 contains ethical provisions prohibiting the influencing of PPP Commission Members. Articles 67-68 state that the Commission may impose administrative and criminal penalties for violation of the PPP Act;
- Section 10 of the law in Mauritius provides that the PPP Tender Board has authority to fine/imprison Contracting Authority personnel. The PPP Tender Board can request information from, inspect documents and otherwise question employees of a contracting authority and can impose a monetary fine or imprison a person for failure to comply or gives false or misleading information;
- Section 24 of the law in Tanzania relates to Conflict of Interests and Offenses. Persons with interest in a Project must disclose their interest and take no part in the process of deliberation, award, or other administration. Violation of the Act carries a fine and/or imprisonment;
- Article 51 of the law in Burkina Faso relates to corrupt personnel of the contracting authority whilst Article 53 relates to the suspension or termination of a contract as a result of private party corruption.

5.5 Pre-selection and domestic preferences

B.4 Pre-selection and domestic preferences states “The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. Such preferential or special treatment is sometimes provided as a material qualification requirement (for example, a minimum percentage of national participation in the consortium) or as a condition for participating in the selection procedure (for example, to appoint a local partner as a leader of the bidding consortium). There is no Legislative Recommendation in relation to domestic preferences and no specific Model Provision though Footnote 12 to Model Provision 7 (a) in relation to Pre-selection criteria does make reference to domestic preferences and states “in any event, where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings”.

In Cameroon the law states (Section 5) in respect of Technology Transfer and Cameroon Labour and Training that the PPP agreement must have provisions related to the transfer of technology to Cameroon and obligations for the training and employment of Cameroonian labour.

In Morocco the law (Article 26) requires the private party to absorb all government staff currently staffed to the particular service/project at the time of execution of the concessionaire agreement. Any anticipated adjustments to this workforce must be handled in the contract terms and otherwise comply with applicable law. In Tunisia the law states (Section 32) if the concession is for a public service managed by the licensing governmental entity, the concessionaire may be required to take on the public service employees and maintain their vested rights.

In Kenya the law states (Section 59) that the project company must be domestic (established under the Companies Act) and may have a public partner as minority interest.

In Malawi the law requires (Section 21) that Minister of Finance and the Private Partner are to be sole shareholders in the Special Purpose Vehicle for the project and must enter into a shareholder agreement prescribed by the Minister. The law in Malawi (Section 69) also provides that Governmental concessions to private party regulations may be made in order to bring about local involvement.

5.6 Unsolicited proposals

Consideration of unsolicited proposals is set out in Chapter III E. Unsolicited Proposals of the Legislative Guide. There are a total of 6 Legislative Recommendations (Legislative Recommendations 30-35) and 4 Model Provisions (Model Provisions 20-23) in relation to unsolicited proposals contained in the PFIPs Instruments.

The topic of unsolicited proposals is contentious. Whilst it is recognised there can be advantage in unsolicited proposals in certain circumstances, the World Bank Reference Guide identifies substantial challenges in relation to unsolicited proposals including the absence of a transparent or competitive procurement process which “could result in poor value for money from the PPP project, given a lack of competitive tension. It could also provide opportunities for corruption. In the absence of corruption, it could nonetheless give rise to complaints about the fairness of the process, if a company is seen to benefit from a PPP without opening the opportunity to competitors. This lack of transparency can undermine the legitimacy and popular support for the PPP programme”.

There are a significant number of unsolicited proposals being made. Governments struggle with the tension between adopting an appropriate process to ensure value for money and the desire to implement a PPP project quickly. As was demonstrated in the comparison of country laws with the PFIPs Instruments, unsolicited proposals is a topic that is not dealt with well in a high proportion of the country laws included in the sample (see Section 5.1 above).

The challenge in relation to unsolicited proposals is illustrated by amendments to Tanzania's Public Private Partnership Act 2010 since it was enacted. Section 15 (2) of the Act stated that "all public private partnership projects under this Act shall be procured through an open and competitive bidding process in accordance with the Public Procurement Act".

Section 80(1) of the Public Procurement Act 2011 stated that an unsolicited private partnership proposal "shall be subjected to a formal competitive process set out in regulations made under this Act". It also provides in Section 80 (2) that the procuring entity may, upon consultation with the competent authority, acknowledge intellectual rights over the project idea of the original proponent and "recognise it in the tendering process".

However, both these acts have since been amended by the Finance Act 2013 to remove the requirement for competition in relation to unsolicited proposals:

- Section 40 of the Finance Act 2013 amends section 15 of the Public Private Partnership Act by insertion of (3) The provision of subsection (2) relating to competitive bidding process shall not apply to unsolicited public private partnership projects;
- Section 43 of the Finance Act 2013 amends section 80 of the Public Procurement Act by deleting subsection 1 (see above) and substituting it with the following: (1) The proposal of a party submitting an unsolicited private partnership proposal shall not be subjected to a competitive bidding process.

6. Chapter IV: Construction and operation: legislative framework and project agreement

6.1 Reflection of PFIPs Instruments in sample PPP laws

The results of the analysis in relation to the main topics included in Chapter IV: Construction and operation: legislative framework and project agreement are set out in the table below together with the extent to which the associated Legislative Recommendations were met.

Legislative Guide Ref Chapter and Main Topic Titles		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
		Yes	No	Yes	Partially	No	Met	Partially	Not Met	
IV Construction and operation: legislative framework and project agreement										
A	General provisions of the project agreement	%	79%	21%	41%	57%	2%	33%	45%	22%
		No.	46	12	19	26	1	19	26	13
B	Organisation of the Private Party	%	71%	29%	54%	39%	7%	38%	28%	34%
		No.	41	17	22	16	3	22	16	20
C	The project site, assets and easements	%	79%	21%	48%	43%	9%	38%	34%	28%
		No.	46	12	22	20	4	22	20	16
D	Financial arrangements	%	91%	9%	38%	57%	6%	34%	52%	14%
		No.	53	5	20	30	3	20	30	8
E	Security interests	%	52%	48%	57%	37%	7%	29%	19%	52%
		No.	30	28	17	11	2	17	11	30
F	Assignment	%	48%	52%	57%	39%	4%	28%	19%	53%
		No.	28	30	16	11	1	16	11	31
G	Transfer of controlling interest in the project company	%	29%	71%	76%	24%	0%	22%	7%	71%
		No.	17	41	13	4	0	13	4	41
H	Construction works	%	57%	43%	52%	33%	15%	29%	19%	52%
		No.	33	25	17	11	5	17	11	30
I	Operation of infrastructure	%	72%	28%	24%	62%	14%	17%	45%	38%
		No.	42	16	10	26	6	10	26	22
J	General contractual arrangements	%	83%	17%	4%	92%	4%	3%	76%	21%
		No.	48	10	2	44	2	2	44	12
Average		%	66%	34%	45%	48%	7%	27%	34%	38%

Overall, there was a high degree of reflection of the main topics in this Chapter in the country laws analysed (66%). On average, where the main topics were reflected in country laws, 45% met the associated Legislative Recommendations, 48% partially met the Legislative Recommendations and only 7% did not meet the Legislative Recommendations.

Taking the sample as a whole, on average 27% of the Legislative Recommendations associated with the Chapter were met, 34% were partially met and 38% were not met.

There are 21 Legislative Recommendations associated with the main topics in this Section (30% of the total number of Legislative Recommendations). These are fairly evenly distributed between the main topics in this Chapter. In relation to the main topics covered in this Chapter:

- J. General contractual arrangements accounts for 5 of the 21 Legislative Recommendations. 3% of the total sample met the Legislative Recommendations associated with this main topic though 76% partially met the Legislative Recommendations whilst 21% did not meet the Legislative Recommendations;
- Main topics where the associated Legislative Recommendations were not met by a significant proportion (greater than 50%) of the sample are:
 - E – Security interests – 52%,
 - F – Assignment – 53%,
 - G – Transfer of controlling interest in the project company – 71%,
 - H – Construction works – 52%.

Analysis in relation to regional variations amongst the country sample in reflecting the main topics in Chapter IV is set out below.

Chapter IV: Construction and operation		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations		
Region		Yes	No	Yes	Partially	No	Met	Partially	Not Met
Africa		60%	41%	52%	40%	8%	28%	27%	45%
Americas		61%	39%	62%	32%	6%	33%	24%	43%
Asia		74%	26%	42%	48%	10%	26%	40%	34%
Europe		72%	28%	31%	65%	4%	23%	46%	31%
Average %		66%	34%	45%	48%	7%	27%	34%	38%

Both Asia and Europe score better than average in relation to the reflection of the main topics and in relation to the extent to which Legislative Recommendations are met.

The results of the analysis of the reflection of the Model Provisions in relation to Chapter IV are set out below.

Model Provisions		Yes		Partially		No	
IV	Construction and operation: legislative framework and project agreement	No.	%	No.	%	No.	%
28	Contents and implementation of the PPP contract	29	50%	16	28%	13	22%
29	Governing law	24	41%	9	16%	25	43%
30	Organisation of the Private Party	26	45%	12	21%	20	34%
31	Ownership of assets	24	41%	15	26%	19	33%
32	Acquisition of rights related to the project site	23	40%	15	26%	20	34%
33	Easements	13	22%	10	17%	35	60%
34	Financial arrangements	27	47%	22	38%	9	16%
35	Security interests	17	29%	11	19%	30	52%
36	Assignment of the PPP contract	17	29%	11	19%	30	52%
37	Transfer of controlling interest	12	21%	4	7%	42	72%
38	Operation of infrastructure	16	28%	18	31%	24	41%
39	Compensation for specific changes in legislation	18	31%	4	7%	36	62%
40	Revision of the PPP contract	25	43%	13	22%	20	34%
41	Takeover of an infrastructure project by the contracting authority	22	38%	3	5%	33	57%
42	Substitution of the Private Party	14	24%	4	7%	40	69%
Average		20	35%	11	19%	26	46%

This Chapter accounts for 15 of the 51 Model Provisions, 29% of the Model Provisions.

In relation to the 15 Model Provisions that relate to this Chapter of the Legislative Guide:

- The proportion of Model Provisions met on average was 35%, with a range of 21% to 50%;
- The proportion of Model Provisions partially met on average was 19%, with a range of 5% to 38%;
- The proportion of Model Provisions not met on average was 46%, with a range of 16% to 72%.

There are 7 instances where a high proportion (50% or more) did not meet the Model Provisions:

- Model Provision 33 – Easements – 60%;
- Model Provision 35- Security interests – 52%;
- Model Provision 36 – Assignment of the PPP contract – 52%;
- Model Provision 37 – Transfer of controlling interest - 72%;
- Model Provision 39 - Compensation for specific changes in legislation – 62%;
- Model Provision 41 – Takeover of an infrastructure project by the contracting authority – 57%;
- Model Provision 42 – Substitution of the private party – 69%.

As was the case with Chapter III, there are significant topics in Chapter IV where a large proportion of the sample fail to meet the Legislative Recommendations of Model Provisions associated with the topic, which suggests these matters are not dealt with well in a high proportion of the country laws included in the sample.

6.2 Gap Elements in the PFIPs Instruments

This is the longest of Chapters I-VI of the Legislative Guide; accounting for 21 (30%) of the Legislative Recommendations and 15 (29%) of the Model Provisions; indicating the emphasis placed on contractual matters in the PFIPs Instruments. However, there are no Model Provisions associated with:

- H. Construction works
 - Legislative Recommendation 52 - The project agreement should set forth the procedures for the review and approval of construction plans and specifications by the contracting authority, the contracting authority's right to monitor the construction of, or improvements to, the infrastructure facility, the conditions under which the contracting authority may order variations in respect of construction specifications and the procedures for testing and final inspection, approval and acceptance of the facility, its equipment and appurtenances.
- I. Operation of infrastructure
 - Legislative Recommendation 54 - The project agreement should set forth:
 - (a) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory body, as appropriate, with reports and other information on its operations;
 - (b) The procedures for monitoring the concessionaire's performance and for taking such reasonable actions as the contracting authority or a regulatory body may find appropriate, to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements.
- J. General contractual arrangements
 - Legislative Recommendation 56 - The contracting authority may reserve the right to review and approve major contracts to be entered into by the concessionaire, in particular contracts with the concessionaire's own shareholders or related persons. The contracting authority's approval should not normally be withheld except where the contracts contain provisions inconsistent with the project agreement or manifestly contrary to the public interest or to mandatory rules of a public law nature.
 - Legislative Recommendation 57 - The concessionaire and its lenders, insurers and other contracting partners should be free to choose the applicable law to govern their contractual relations, except where such a choice would violate the host country's public policy.
 - Legislative Recommendation 58 - The project agreement should set forth:
 - (a) The forms, duration and amounts of the guarantees of performance that the concessionaire may be required to provide in connection with the construction and the operation of the facility;
 - (b) The insurance policies that the concessionaire may be required to maintain;
 - (d) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the project agreement owing to circumstances beyond their reasonable control;
 - (e) Remedies available to the contracting authority and the concessionaire in the event of default by the other party.

Note: Model Provisions 39 and 40 relate to Legislative Recommendation 58 (c).

There are a number of sub-topics in Chapter IV which do not feature in either the Legislative Recommendations or in the Model Provisions:

- A. General provisions of the project agreement
 - A.3 Conclusion of the project agreement
- H. Construction works
 - H.4 Guarantee period
- I. Operation of infrastructure
 - I.5 Interconnection and access to infrastructure networks
- J. General contractual arrangements
 - J.1 Subcontracting
 - J.2 Liability with respect to users and third parties

A number of issues are raised in Chapter IV. These are discussed in more detail in the following sections, namely:

- Conclusion of the project agreement (Section 6.3);
- Refinancing (Section 6.4);
- Operational health, safety and environmental standards (Section 6.5);
- Contract management (Section 6.6).

In discussing these issues, relevant examples of legislative provisions drawn from the country sample are identified to illustrate how these have been addressed.

6.3 Conclusion of the project agreement

A.3 Conclusion of the project agreement states (paragraph 9) “for projects as complex as infrastructure projects, it is not unusual for several months to elapse in the final negotiations before the parties are ready to sign the project agreement” and “given the cost entailed by delay in the implementation of the project agreement, it is advisable to find ways of expediting the final negotiations in order to avoid unnecessary delay in the conclusion of the project agreement”. As the Legislative Guide goes on to say (paragraph 10) “a number of factors have been found to cause delay in negotiations, such as inexperience of the parties, poor coordination between different public authorities, uncertainty as to the extent of governmental support and difficulties in establishing security arrangements acceptable to the lenders”. There are no Legislative Recommendations or Model Provisions that specifically relate to the conclusion of the project agreement.

The law in Tanzania provides (Section 16) for automatic approval by the Attorney General. Every PPP agreement must be approved by the appropriate Minister then submitted to the Attorney General’s Office for review not to exceed 14 days. If the opinion of the Attorney General is not given within 14 days the Attorney General is deemed to have agreed with the text of the Agreement. The law in Kyrgystan (Article 24) refers to time limits for concluding a PPP agreement. In Kyrgystan, if the winning bidder does not sign the project agreement the next bidder is announced as the winning bidder. Once the winning bidder is announced by the Commission, the public party cannot refuse to conclude the contract.

In Sri Lanka the law (Sections 275-277) provides for a letter of intent, the purpose of which is to grant to the bidder exclusivity in relation to the project for an agreed period to enable the sponsor to complete all activities and preparations leading up to signing of the final contracts and agreements.

6.4 Refinancing

G. Transfer of controlling interest in the project company does make reference (paragraph 66) to the issue of refinancing though this is focused on transfer of equity investment rather than refinancing of debt. There are no Legislative Recommendations or Model Provisions that relate to the refinancing of a PPP project.

The World Bank Reference Guide states “Refinancing can provide an opportunity for the project company and its sponsors, if more favourable terms become available. Because infrastructure projects have long durations, capital markets could change during the life of the project and offer better terms on the existing project debt. Lenders also tend to offer better financing terms to projects with demonstrated track records which have already moved past initial risks, such as construction”.

Several governments have introduced rules for how PPP refinancing benefits will be treated. For example as the World Bank Reference Guide states “in 2004 the United Kingdom’s Treasury introduced into its standard PFI contracts a 50:50 split of any refinancing gain between the investors and the government; this was subsequently revised to a 70:30 split in favour of the government. South Korea has also introduced a similar provision in its legislation governing PPPs. Since 2008, the United Kingdom’s government has also reserved the right to request refinancing of project debt to take advantage of more favourable capital market conditions”.

The law in Cameroon (Article 5) requires that the contract shall provide for the possibility to proceed through amendment, or failing an agreement unilaterally, to the change of some contract features including changes in the financing conditions obtained by the private party.

The French law (Article 11) provides that the contract shall fix the conditions under which, either by contract amendment or, in the absence of agreement, by unilateral decision by the public body, modifications may be introduced to certain aspects of the contract including in relation to changes in the financing terms obtained by the co-contracting party.

6.5 Operational health, safety and environmental standards

I.1 Performance standards states (paragraph 82) that “public service providers generally have to meet a set of technical and service standards” and “are often spelled out in great detail in the project agreement”. These include health, safety and environmental standards. There is no specific Legislative Recommendation or Model Provision relation to these particular standards though Model Provision 11 (b) does state that the request for proposals shall include “project specifications and performance indicators, as appropriate, including the contracting authority’s requirements regarding safety and security standards and environmental protection”.

The Legislative Guide states (paragraph 82) “such standards are in most cases too detailed to figure in legislation and may be included in implementing decrees, regulations or other instruments”.

The law in Egypt (Article 13) requires that the Project Company must warrant that environmental, health and safety conditions are met for the employees and the beneficiaries of the project. In Cambodia (Article 32) the law requires compliance with health and safety and environmental standards and the maintenance of contingency plans to counter accidents and emergencies which may lead to loss of lives or personal injuries, pollution or major damage to property.

6.6 Contract management

Recommendation 54 sets forth:

- (a) The extent of the concessionaire’s obligation to provide the contracting authority or a regulatory body, as appropriate, with reports and other information on its operations;

- (b) The procedures for monitoring the concessionaire’s performance and for taking such reasonable actions as the contracting authority or a regulatory body may find appropriate, to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements.

There is no Model provision which specifically relates to this Legislative Recommendation. Contract management is a vital element of the operational phase of a PPP project, spanning the lifetime of the PPP agreement, from the date of contract effectiveness to the end of the contract period. A number of countries have included contract management provisions in their laws:

- In Australia the National Guidance Volume 2 states “Contract management requires particular skills which need to be procured before the contract is executed. Timing may be critical, as both the public and government are looking forward to delivery of the service outputs from new infrastructure. For risk to be managed effectively the foundations for contract management must be incorporated into the RFP and the draft contract provided to bidders, then maintained through further development and finalisation of the contract”;
- In Cameroon (Article 36) the public and private party are obliged to undertake an annual evaluation of contract performance;
- In the Central African Republic the law requires (Article 81) submission of an annual report to the Granting Authority on contract performance encompassing technical, financial, social, administrative, accounting and environmental performance;
- In France (Article 12.1) the co-contracting party to the partnership contract is required to submit an annual report to the public body for contract implementation monitoring purposes;
- In Kyrgyzstan (Articles 32-33) the private party is required to submit regular reports and an annual financial report to be confirmed by an independent auditor.

7. Chapter V: Duration, extension and termination of the project agreement

7.1 Reflection of PFIPs Instruments in sample PPP laws

The results of the analysis in relation to the main topics included in Chapter V: Duration, extension and termination of the project agreement are set out in the table below together with the extent to which the associated Legislative Recommendations were met.

Legislative Guide		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
Ref	Chapter and Main Topic Titles	Yes	No	Yes	Partially	No	Met	Partially	Not Met	
V	Duration, extension and termination of the project agreement									
A	General remarks									
B	Duration of the project agreement	%	69%	31%	90%	8%	3%	62%	5%	33%
		No.	40	18	36	3	1	36	3	19
C	Extension of the project agreement	%	55%	45%	66%	28%	6%	36%	16%	48%
		No.	32	26	21	9	2	21	9	28
D	Termination of the project agreement	%	67%	33%	56%	41%	3%	38%	28%	34%
		No.	39	19	22	16	1	22	16	20
E	Consequences of expiry or termination of the project agreement	%	60%	40%	37%	54%	9%	22%	33%	45%
		No.	35	23	13	19	3	13	19	26
Average		%	63%	37%	62%	33%	5%	40%	20%	40%

Overall, there was a high degree of reflection on average of the main topics in this Chapter in the country laws analysed (63%). Where the main topics were reflected in country laws, 62% of the associated Legislative Recommendations were met, 33% partially met and only 5% were not met.

Taking the sample as a whole, on average 40% of the Legislative Recommendations associated with the Chapter were met, 20% were partially met and 40% were not met.

There are 8 Legislative Recommendations associated with the main topics in this Chapter:

- D. Termination of the project agreement accounts for 3 of these 8 Legislative Recommendations. The proportion of Legislative Recommendations not met in relation to this main topic was 34% on average across the total sample;
- E. Consequences of expiry or termination of the project agreement also accounts for 3 of these 8 Legislative Recommendations. The proportion of Legislative Recommendations not met in relation to this main topic was 45% on average across the total sample.

In respect of B – Duration of the project agreement and C – extension of the project agreement (which each account for 1 Legislative Recommendation) the proportion of Legislative Recommendations not met was 33% on average and 48% on average across the total sample.

Analysis in relation to regional variations amongst the country sample in reflecting the main topics in Chapter V is set out below.

Chapter V: Duration, extension and termination		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
Region		Yes	No	Yes	Partially	No	Met	Partially	Not Met	
Africa		63%	38%	66%	34%	0%	41%	21%	38%	
Americas		50%	50%	66%	26%	8%	35%	13%	53%	
Asia		71%	29%	69%	23%	8%	48%	17%	35%	
Europe		65%	35%	47%	45%	7%	33%	27%	40%	
Average		%	63%	37%	62%	33%	5%	40%	20%	40%

There is marked regional variation in reflection of the main topics and in the extent to which Legislative Recommendations are not met; with the Americas scoring the lowest on both counts.

The results of the analysis of the reflection of the Model Provisions in relation to Chapter V are set out below.

Model Provisions		Yes		Partially		No	
V	Duration, extension and termination of the project agreement	No.	%	No.	%	No.	%
43	Duration and extension of the PPP contract	34	59%	7	12%	17	29%
44	Termination of the PPP contract by the contracting authority	26	45%	13	22%	19	33%
45	Termination of the PPP contract by the Private Party	24	41%	13	22%	21	36%
46	Termination of the PPP contract by either party	24	41%	13	22%	21	36%
47	Compensation upon termination of the PPP contract	13	22%	17	29%	28	48%
48	Wind-up and transfer measures	14	24%	17	29%	27	47%
Average		23	39%	13	23%	22	38%

In relation to the 4 Model Provisions that relate to this Chapter of the Legislative Guide:

- The proportion of Model Provisions met on average was 39%, with a range of 22% to 59%;
- The proportion of Model Provisions partially met on average was 23%, with a range of 12% to 29%;
- The proportion of Model Provisions not met on average was 38%, with a range of 29% to 47%.

Reflecting the analysis of the Legislative Recommendations in relation to this Chapter, there is a significant and consistent proportion of the sample that fails to meet the Model Provisions related to Chapter V.

7.2 Gap Elements in the PFIPs Instruments

Chapter V accounts for 8 (11%) of the Legislative Recommendations. 6 (12%) Model Provisions reflect these Legislative Recommendations. There are no identified “gap elements”.

8. Chapter VI: Settlement of disputes

8.1 Reflection of PFIPs Instruments in sample PPP laws

The results of the analysis in relation to the main topics included in Chapter VI – Settlement of disputes are set out in the table below together with the extent to which the associated Legislative Recommendations were met.

Legislative Guide		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations			
Ref	Chapter and Main Topic Titles	Yes	No	Yes	Partially	No	Met	Partially	Not Met	
VI	Settlement of disputes									
A	General remarks									
B	Disputes between the Contracting Authority and the Private Party	%	74%	26%	77%	19%	5%	57%	14%	29%
		No.	43	15	33	8	2	33	8	17
C	Disputes between project promoters and between the Private Party and its lenders, contractors and suppliers	%	7%	93%	50%	50%	0%	3%	3%	93%
		No.	4	54	2	2	0	2	2	54
D	Disputes involving customers or users of the infrastructure facility	%	19%	81%	73%	18%	9%	14%	3%	83%
		No.	11	47	8	2	1	8	2	48
Average %			33%	67%	66%	29%	5%	25%	7%	68%

This Chapter was the most poorly reflected in the sample of country laws that were analysed, with only 33% of the sample reflecting the main topics in this Chapter on average. However, reflection of B. Disputes between the Contracting Authority and the Private Party was reflected by a significantly higher proportion of the sample (74%) than the other main topics.

Taking the sample as a whole, on average 25% of the Legislative Recommendations associated with the Chapter were met, 7% were partially met and 68% were not met. However:

- C. Disputes between the project promoters and the between the private party and its lenders, contractors and suppliers scored the highest proportion (93%) of the sample that did not meet related Legislative Recommendations of all the main topics in Chapters I-VI;
- D. Disputes involving customers or users of the where of the infrastructure facility scored the 2nd highest proportion (83%) of the sample that did not meet related Legislative Recommendations of all the main topics in Chapters I-VI;

Analysis in relation to regional variations amongst the country sample in reflecting the main topics in Chapter VI is set out below.

Chapter VI: Settlement of disputes		Topic Reflected		If Yes, recommendations met?			Total Sample Recommendations		
Region		Yes	No	Yes	Partially	No	Met	Partially	Not Met
Africa		38%	62%	45%	48%	7%	27%	10%	63%
Americas		33%	67%	50%	44%	6%	20%	10%	70%
Asia		33%	67%	85%	15%	0%	28%	5%	67%
Europe		27%	73%	91%	5%	5%	22%	2%	76%
Average %		33%	67%	66%	29%	5%	25%	7%	68%

The scores between regions are broadly consistent; consistently low in respect of reflection of the main topics in the Legislative Guide and consistently high in respect of not meeting the Legislative Recommendations.

The results of the analysis of the reflection of the Model Provisions in relation to Chapter are set out below.

Model Provisions		Yes		Partially		No	
VI	Settlement of disputes	No.	%	No.	%	No.	%
49	Disputes between the contracting authority and the Private Party	32	55%	7	12%	19	33%
50	Disputes involving customers or users of the infrastructure facility	9	16%	1	2%	48	83%
51	Other disputes	3	5%	1	2%	54	93%
Average		15	25%	3	5%	40	70%

In relation to the 4 Model Provisions that relate to this Chapter of the Legislative Guide:

- The proportion of Model Provisions met on average was 25%, with a range of 5% to 55%;
- The proportion of Model Provisions partially met on average was 5%, with a range of 2% to 12%;
- The proportion of Model Provisions not met on average was 70%, with a range of 33% to 93%.

These averages are skewed by the relatively high proportion (55%) of the sample meeting Model Provision 49, though 33% fail to meet this Model Provision.

In relation to Model Provisions 50 and 51 the proportion of the sample that does not reflect these Model Provisions is equal to the proportion not reflecting the related Model Provision (93% in relation to Model Provision 51 which is associated with Legislative Recommendation 70 and 83% in relation to Model Provision 50 which is associated with Legislative Recommendation 71).

This reflects the analysis of the Legislative Recommendations in relation to Chapter VI, the Model Provisions relating to this Chapter of the Legislative Guide being the most poorly reflected in the sample of country laws that were analysed.

8.2 Gap Elements in the PFIPs Instruments

Chapter VI: Settlement of disputes accounts for 3(4%) of the Legislative Recommendations. 3 Model Provisions reflect the Legislative Recommendations. Chapter VI B.2 describes commonly used methods for preventing and settling disputes though there is no articulation of these in either the Legislative Recommendations or in the Model Provisions.

8.3 Dispute resolution provisions in PPP laws

UNCITRAL commissioned a legal consultant to research dispute resolution provisions in PPP laws. The results of this research are set out below.

8.3.1 Summary Analysis

In the light of the laws of the Kyrgyzstan, Egypt, Kenya and Mongolia, the fourteen national PLC (Practical Law Company) sections on review procedures and remedies, the PPP Guidelines of Malaysia as well as the documents found relating to PPPs in Australia, India, Japan, Russia, Turkey and Morocco (where Article 9 of the law on Delegated management of public services of 14 February 2006 provides for arbitration as an alternative method of dispute resolution), the treatment of review procedures and remedies in the specific context of PPP contracts is limited but the rules applicable to public procurement aspects of PPP can be seen to generally apply.

In most of these countries, the review provisions appear to be those dealing with disputes relating to the selection of the private party in the context of public procurement (such as those described in Review Procedures, Chapter III, "Selection of the concessionaire, paragraphs 127 - 131 explaining Legislative Recommendation 39); but not disputes between service providers (such as those described in Settlement of disputes between public service providers, Chapter I, "General Legislative and institutional framework", paragraphs 30 - 33, explaining Legislative Recommendations 10 and 11); not what can be termed commercial disputes (such as those described in Settlement of Disputes, Chapter VI, Disputes between the contracting authorities and the private party, paragraphs 3 - 41, explaining Legislative Recommendation 69; not disputes between project promoters and between the private party and its lenders, contractors and suppliers, paragraph 42, explaining Legislative Recommendation 70; and not disputes involving customers or users of the infrastructure facility, paragraphs 43 - 45, explaining Legislative Recommendation 71).

In particular, the following 14 states do not appear to have specific review procedures and remedies to resolve PPP disputes but the relevant provisions relating to public procurement law breaches apply in most, making them consistent with Chapter III, paragraphs 127-131 of the UNCITRAL Legislative Guidance dealing with selection of private partners (procurement stage): Brazil, Canada (in addition, arbitration may be agreed as the form of dispute resolution), China (normally procurement law does not apply to PPP or concessions), Czech Republic, England, France, Germany, Italy, Netherlands, Poland, South Africa, Switzerland, Ukraine and the USA.

8.3.2 Kyrgyzstan

On the other hand, the provisions of the Kyrgyzstan PPP Law relevant to dispute resolution and remedies appear to take into account the UNCITRAL Legislative Guidance on PPPs:

- Article 34 specifically deals with dispute resolution in the three main areas covered by the UNCITRAL Legislative Guidance: selection of the private partners (procurement stage), Article 34(1); disputes relating to the PPP Agreement itself and its performance either before the Kyrgyz courts or arbitration tribunals with the choice of international arbitration in the PPP agreement permitted, Article 34(2); and disputes regarding the provision of infrastructure services to consumers by the private partner or the Project Company may be settled in the courts of the Kyrgyz Republic subject to simple and efficient pre-trial mechanisms to be agreed by the parties in the PPP agreement as a method of dispute resolution, Article 34(3);
- The mandatory provisions of the PPP Agreement laid down by Article 22 include requirements to provide for compensation for early termination and for the governing law and mechanisms of resolving disputes arising from the PPP Agreement and its implementation;
- Article 28 provides for the implications of termination of the PPP Agreement.

8.3.3 Egypt

The provisions in the Egyptian PPP Law dealing with, or relevant to, dispute resolution in Chapter IV on the Substantive Provisions of the PPP Contract are more difficult to classify, save to say that Article 39 provides for a form of administrative Review in UNCITRAL terms and Article 35 permits Alternative Dispute Resolution including arbitration to be stipulated in the PPP contract.

- Article 34 indirectly will impact on dispute resolution under the Egyptian law, which applies by virtue of Article 35. Article 34(g) requires the PPP contract to include provisions regarding amendment by the Administrative Authority of certain obligations of the Project Company and relevant compensation. Article 34(i) requires provisions on risk allocation in circumstances such as force majeure and the resultant compensation. Article 34(j) requires provisions dealing with PPP contract duration and early or partial termination and the party's rights thereon. Article 34(k) refers to unilateral termination by the Administrative Authority and related financial obligations. Article 34(l) covers regulation of the contract handover at expiry or various methods of termination;
- Article 35 permits the PPP contract to provide for Alternative Dispute Resolution, including arbitration, after approval by the Supreme Committee for PPP affairs;
- Article 39 requires a petition committee to be formed chaired by the Minister of Finance and with the membership of two deputies to the President of the State Council to be selected by the President of the State Council, and the Head of the PPP Central Unit, as well as a non-government member expert to be selected by the chairman of the committee. The petition committee is competent to consider all petitions and complaints submitted by investors during the procedure of tendering, entering into and executing PPP contracts. If the subject matter of the petition is an administrative decision, the petition must be made within thirty days from the date of its notification of the decision or of becoming aware of such decision.

8.3.4 Kenya

Two provisions of the latest draft (June 2013) of the Kenya PPP Regulations, implementing the PPP Act, illustrate the scope of the dispute resolution or review procedures which are both administrative in nature and limited to public procurement type issues in UNCITRAL PPP Legislative Guidance terms. The first, Article 36, deals with prequalification decision challenges to the “prequalification committee”. The second, Article 69, is broader in setting out the powers of the Petition Committee to deal with challenges following the tender decision and in particular a competitive dialogue procedure.

8.3.5 Mongolia

The relevant provisions on dispute settlement in the Law of Mongolia on Concessions may be summarised as follows:

- Article 34.1 provides for an administrative review process in relation to any complaint regarding the granting (or procurement) of the concession before the “authorized entity”. The complainant may request review of the decision of the authorized entity by the court if not satisfied with that decision. Article 3.1.7 defines “authorized entity” to mean, in the case of a state-owned property that is a concession item, the state administrative authority in charge of state property, and, in the case of a local property that is a concession item, the governor of the “aimag” (first-level administrative subdivision) or the capital city;
- Article 34.2 provides that any dispute between the parties to the concession agreement must be settled in the way prescribed in the agreement (in accordance with the requirements relating to the contents of the concession agreement in Article 21.1.23);
- Article 34.3 leaves disputes between other entities such as its shareholders and financiers and the concessionaire to be resolved in the manner agreed between them;
- Article 34.4 requires disputes between the concessionaire and its customers to be resolved by the courts and/or by the means specified in the relevant laws of Mongolia which apply by virtue of Article 2.

In addition Article 35 provides for the imposition of property liability on the parties to the agreement which are in breach of the relevant laws or the agreement and specifies various penalties to be imposed on administrators for breach of relevant legislation.



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