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Review of the Public-Private Partnerships work since the first session of the Working Party on Public-Private Partnerships on 21-22 November 2017

Involving reliable and independent experts to develop People-first Public-Private Partnerships projects in low and middle-income countries

Note by the Bureau¹

Background

The present document was prepared by an expert team at the International Specialist Centre of Excellence on Public-Private Partnerships Law, Policy and Institutions in France, led by Mr. Marc Frilet, and contains references about how to involve reliable and independent experts to develop People-first Public-Private Partnerships projects in low and middle-income countries.² The secretariat further edited the document and finalised it for submission to the Working Party at its second session.

¹ At its meeting on 8 May 2018, the Bureau of the Working Party on PPPs decided that policy documents from reputable sources, such as those submitted by the International PPP Specialist Centres of Excellence, could be submitted to the Working Party with a recommendation for their endorsement if the Bureau thought that these documents added value and benefited the member States in implementing people-first PPPs. Once endorsed, these documents will become an output of the ECE International PPP Centre of Excellence for use in its capacity building activities and policy advisory services in countries.

² The ECE PPP standards, guiding principles, best practices, declarations and recommendations are adopted by acclamation by the ECE intergovernmental bodies – the Working Party on PPPs and the



An earlier version of the document was circulated at the first session of the ECE Working Party on Public-Private Partnerships in November 2017. The document was edited by the secretariat and was reviewed by the Bureau with a recommendation for endorsement by the Working Party on Public-Private Partnerships at its second session on 20-21 November 2018.

The Working Party is also requested to endorse the proposal to set up a project team to elaborate a standard on the selection and employment of reliable and independent experts to develop pipelines of People-first PPPs in low and middle-income countries.

I. Introduction

The aim of this document is to provide guidance to governments for the selection of reliable and independent consultants and advisers to develop People-first³ Public-Private Partnerships (PPPs) in low and middle-income countries with poor regulations and limited capacity to develop projects.

People-first PPPs need good quality advisers, especially in low and middle-income countries where many challenges – poor legal and regulatory frameworks, limited capacity of governments to identify effective projects etc. – need to be overcome. For governments to address these challenges and have access to experts and consultancy services adapted to their needs, this document intends to:

- (i) Analyse the main issues at stake preventing the development of pipelines of People-first PPP in low and middle-income countries;
- (ii) Assess the needs of countries for advisory services; and
- (iii) Propose a road map and a standard for the hiring of consultants for the development of People-first PPPs in low and middle-income countries.

II. People-first Public-Private Partnerships in low and middle-income countries

Without a massive improvement of public infrastructure and related essential public services, the United Nations Sustainable Development Goals targets have little chances to be met. It is estimated that the public infrastructure shortfall corresponds to an average 2 per cent of gross domestic product (GDP) in most countries. In addition, the United Nations Conference on Trade and Development (UNCTAD) estimates that achieving the Sustainable Development Goals by 2030 will require \$3.9 trillion to be invested in developing countries each year. It also notes that with annual investment of only \$1.4 trillion, the annual investment gap is \$2.5 trillion.⁴

Committee on Innovation, Competitiveness and PPPs – and do not impose any obligations on member States as their implementation is entirely voluntary.

³ The “People-first PPPs” approach is designed to implement the United Nations 2030 Agenda for Sustainable Development and its Sustainable Development Goals so that PPPs would be made “fit for purpose” and oriented towards meeting the needs of “people-first”. The concept is made for delivering desirable and necessary outcomes from infrastructure investment that go beyond the narrow value for money criteria and focus PPPs on delivering “value for people”.

⁴ *World Investment Report 2014: Investing in the SDGs: An Action Plan*, UNCTAD, 2014.

People-first PPPs represent a way of potentially closing this funding gap and attract international financing even to low and middle-income countries. But the unfavourable regulatory environments and lack of experience and knowledge of local authorities are important obstacles preventing low and middle-income countries to develop pipelines of People-first PPPs.

One way governments in these countries can address these challenges is to involve reliable and independent consultants to advise on the:

- (i) Design or improvement of the regulatory framework for People-first PPPs; and
- (ii) Development of People-first PPP projects.

A. Challenges for the development of People-first Public-Private Partnership projects in low and middle-income countries

When developing pipelines of People-first PPP projects in low and middle-income countries,⁵ the perceived issues and risks are often different from the reality, especially when they are analyzed from the different perspective of people involved in PPP. For example:

- For a project finance practitioner, the main challenges are:
 - How to “divert” in a secured manner part of the income from the operation of the service for the repayment of loans; and
 - How to structure the project in a satisfactory manner by dealing with various uncertainties.
- For a public authority in charge of developing an infrastructure and a public service, the focus is on the risk of not being able to retain the infrastructure and service adapted to users’ needs after years of operation. The concern is how to be sure that the public service will always be delivered properly, under acceptable conditions and in compliance with the Sustainable Development Goals.
- For a PPP contractor, one of the concerns is the risk of interference from the public authority during the design and execution of the project for which it is liable for the achievement of performance indicators. PPP contractors also expect to be fully paid upon delivery of the infrastructure, provided that they meet the performance criteria.
- For a PPP operator, they may only accept to guarantee service performance if the infrastructure remains fit for purpose, easy to adapt and improve, and if the public authority does not interfere in an unjustifiable way in the provision of the service.

Box 1. Main issues to be addressed in developing People-first Public-Private Partnership projects⁶

⁵ A first synthesis of the issues at stake and ways forward for developing a legal framework in least developed countries was presented by the CICA/IFEJI working group to the World Bank in 2013: “Why so many failures? How to remedy with better appraisal of lessons learned and an innovative institutional and contractual framework of conditions for success?” (December 2013).

⁶ Source: Marc Frilet, International Specialist Centre of Excellence on Public-Private Partnerships Law, Policy and Institutions in France, 2017.

1. PPP Preparation

- (i). Planning and prioritization
- (ii). Socio-economic order of magnitude
- (iii). Prefeasibility
- (iv). Comprehensive economic and finance scenario
- (v). Decision to tender

2. PPP Procurement

- (i). Pre-selection or pre-qualification
- (ii). Request for proposal outcome oriented
- (iii). Primary evaluation
- (iv). Global evaluation and possible dialogue
- (v). Contract award

3. PPP Contract Conditions

- (i). Construction
- (ii). Reference business case
- (iii). Public service scope and operation
- (iv). Adaptation of the service to the needs
- (v). Partnering alternative dispute resolution

4. PPP legal principles governing public contracts

- (i). Economic equilibrium
- (ii). Public service priority
- (iii). Sovereign rights of the public authority
- (iv). Special rights of project company
- (v). Outside regulation

5. Legal Framework: Investment climate

- (i). Due process, fair trial and arbitration
- (ii). Expropriation and security of tenure
- (iii). Granting of permits and authorizations
- (iv). Tax and custom certainty
- (v). Stability of regulations

6. Institutional Framework (sovereign and sub sovereign)

- (i). Governance integrity efficiency
- (ii). Planning and prioritization authority
- (iii). Evaluation and selection authority
- (iv). Monitoring authority

(v). Choice of outside advisers

Many countries have developed PPP laws and programmes over the last decade, and PPP Units have been created to improve and concentrate skills in this area. But in low and middle-income countries themselves, the development of PPP projects faces many challenges, and, in many cases, the parties get embroiled into disputes and have to renegotiate their agreements (see Table 1).

Table 1
Percentage and average time of renegotiations for Concessions/PPPs⁷

	<i>Renegotiated concession contracts (in percentage)</i>	<i>Average time for renegotiation (in years)</i>
All sectors	61	1.8
Electricity	25	2.1
Transport	73	2.9
Water	87	1.3
Mega and Natural Resources Projects	53	2.0

This high percentage of renegotiation is often due to the fragile situation of States in low and middle-income countries as well as to political instability. However, in many cases, this is also due to the lack of reliable and independent experts, not always available nor sufficiently sensitive to what the government needs.

B. Improving the regulatory framework for People-first Public-Private Partnerships in low and middle-income countries

Overall, international organisations have always argued for the need for a comprehensive legal and regulatory framework to develop pipelines of PPP projects:

- The United Nations Industrial Development Organization (UNIDO) with the Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects (1996)
- The United Nations Commission on International Trade Law (UNCITRAL) through an extensive programme that led to the publication of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001). In 2004, UNCITRAL issued some legislative provisions to the Guide, but it has not been redrafted nor updated since then;
- The World Bank publication “Attracting Investors to African Public-Private Partnerships: a project preparation guide” (The World Bank; Infrastructure Consortium for Africa, Public-Private Infrastructure Advisory Facility, 2009); and
- The European PPP Expertise Centre (EPEC) in its publication “The Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects” (2012).

⁷ Source: Mark Moseley, Strategic Direction to the PPP in Infrastructure Resource Center for Contracts, Laws and regulations, based on World Bank statistics, 2015.

However, no guidance has been developed on analysing the need for advisers in low and middle-income countries to design or improve the regulatory framework to develop pipelines of People-first PPP projects in support of the Sustainable Development Goals.

Box 2. Recommendations for designing framework laws and key steps for drafting and implementing efficient and user-friendly regulations for concessions and other PPPs⁸

Set the main objectives: legal framework example

- That defines the common principles for the range of possible concessions and PPPs for public infrastructure services.
- Acceptable by the government, the administration officials and the implementing agencies.
- Law written in plain and clear language facilitating the planning and development of the projects and their successful implementation in full transparency.
- A framework law based on the methodical approach developed by the legislative drafting science.

Establish an appropriate methodology and engagement process, for example:

(i). First step.

Evaluation of the existing legislative and regulatory framework and practice

- General framework of public and private investments and infrastructures: analysis of the regulations, their implementation, procedures, etc.
- Analysis of the practical implementation including lessons learnt from the most significant projects.
- Review of legislative and regulation developments during the past 15 years as well as trends for the future.
- Analysis of international rules and best practices to be complied with, for long term investment projects in the public infrastructure and mining sectors.

(ii). Second step.

Identifying key issues, exchanges and roadmap

- Identification of existing gaps in investment protection, procedures.
- Review of the general requirements of private sector investors.
- Drafting "concept notes" on each relevant issue (e.g. taxation, public service definition, economic and financial equilibrium, and adaptation) based on an initial exchange resulting from a reliable engagement process with stakeholders in the country or region.

⁸ Source: Confederation of International Contractors' Associations (CICA), French Institute of international Legal Experts (IFEJI), 2013.

(iii). Third step.**Establish a process of structured exchanges with experts from key ministries**

- Identification of the different levels of experts in the various sectors impacted by the future law.
- Organization of an ad hoc drafting committee with strong political and inter-ministerial support.

(iv). Fourth step.**Initial findings of the drafting committee, roadmap and proceedings**

- Development of the roadmap, including a detailed plan of a framework law and guidelines for its drafting.
- Organization of exchanges between the drafting committee and the reference PPP expertise and practice (private and public) in the region and selected countries.
- Draft of inclusive templates and legal provisions.

(v). Fifth step.**Drafting of a complete framework law based on the roadmap**

- Analysis and evaluation of the draft by the committee.
- Amendment of the draft based on the comments and directions of the committee.
- Review of the draft by a high-level panel of national and international practitioners for concession and PPPs: legal practitioners, economists, financial and environmental experts.
- Final draft in consensus with the committee.

Considering the important transaction costs and the suboptimal results of developing People-first PPP projects in low and middle-income countries, the priority could be given to the development of an institutional and regulatory framework with features common to different countries, regions and sectors.

III. Selection and employment of experts in low and middle-income countries

A. Identifying reliable and independent experts

Identifying reliable and independent experts to advise on regulations or the development of a project is a particularly complex exercise.

Considering the level of international and local experience needed in an area where there is little practical experience of People-first PPPs in low and middle-income countries, an innovative and effective approach to tackle the challenges will be necessary.

Involving a lead adviser may be useful when considering large and complex programmes of reform and/or when there is little capacity within government to manage the process. This international expert should have a broad experience in drafting regulations and implementing projects in the country and have knowledge of the expert and consultancy market.

B. Drafting the terms of reference for the hiring of experts

The process of drafting the terms of reference for the hiring of experts is a complex exercise not only from a technical point of view but also from a governance standpoint, as it is critical to avoid a risk of conflict of interest or hint of corruption. It requires extensive practical experience in low and middle-income countries, since the role of experts and advisers for People-first PPPs are substantially different from their role in traditional public infrastructure projects, where there is a large supply of well-established experts and consultants.

Indeed, there is considerable expertise in traditional public infrastructure projects in low and middle-income countries. For over 20 years, the regulations and the institutional frameworks have been refined under the watchful eye of the multilateral agencies and various publications and documents have been developed and may be used for drafting the terms of reference, such as:

- “Guidelines: selection and employment of consultants under IBRD loans and IDA credits and grants by World Bank borrowers” (World Bank, 2014);⁹ and
- “FIDIC Guidelines for the Selection of Consultants, 2nd Edition” (International Federation of Consulting Engineers (FIDIC), 2013).

By contrast, there is little experience in low and middle-income countries and very few publications from international organisations in the PPP area, except the following:

- “Toolkit: A guide for hiring and managing advisers for private participation in infrastructure” (The Public Private Infrastructure Advisory Facility (PPIAF) Toolkit, 2001);¹⁰
- “Role and use of advisers in preparing and implementing PPP projects” (European PPP Expertise Centre (EPEC), 2014);¹¹
- “Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations” (OECD Development Policy Tools, 2017);
- The Public-Private Partnership Legal Resource Center of the World Bank Group offers guidance on drafting terms of reference as well as sample terms of reference;¹²
- “Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations” (G7 initiative on Strengthening Assistance for Complex Contract Negotiations¹³, 2017).¹⁴

Of course, drafting the terms of reference for the hiring of experts advising on the regulatory framework is different than drafting the terms of reference for experts advising on the development of a project. So it is important to make this distinction.

⁹ See https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/hiring_advisorys/fulltoolkit.pdf

¹⁰ See <http://documents.worldbank.org/curated/en/347941468766772652/How-to-select-and-manage-PPI-advisors>

¹¹ See http://www.eib.org/epec/resources/publications/role_and_use_of_advisers_en

¹² See <https://ppp.worldbank.org/public-private-partnership/overview/practical-tools/terms-of-reference-ppp-advisors>

¹³ This Initiative, launched at the G7 Brussels Summit in 2014, provides “developing countries with multidisciplinary and concrete expertise for negotiating complex commercial investment contracts, with an initial focus on the extractive sector”.

¹⁴ See <http://www.oecd.org/dev/guidance-to-assemble-and-manage-multidisciplinary-teams-for-extractives-contract-negotiations-9789264274914-en.htm>

1. Terms of reference for the hiring of experts to design or improve the regulatory framework

The terms of reference for consultants for People-first PPPs should be drawn up for the selection of the lead expert, focusing on the ability to organize and participate in meetings with senior officials and having knowledge of the country, its language and culture. The selection criteria should include experience in drafting concept notes, position papers and other documents in a simple and straightforward way easily understood by all stakeholders.

When drafting the terms of reference, it is also crucial to have a clear understanding of the supply of experts with different categories of required knowledge and skills. This should help in reaching a fairly accurate estimate of the budget for advisory services and a timeframe for drafting the institutional, regulatory, procedural and contractual frameworks to develop pipelines of People-first PPPs.

Unfortunately, experience shows that often the budget is not sufficient to meet all the demands. As the Public-Private Infrastructure Advisory Facility of the World Bank states:

“All too often, budgets for advisers are set during the public expenditure planning rounds or at the start of the financial year, well before there is a clear idea of the range, type and scale of the advisory services required. This approach can lead to problems if the resources allocated to paying for advisory services are insufficient.

This means that the budget should be defined after the draft terms of reference have been drawn up. In addition, the budget should take into account not just the time required, but also the type of advisers that are needed.”

2. Terms of Reference for the hiring of experts to advise on a project

It will be necessary to use specific criteria with appropriate weighting of each criteria when drawing up the terms of reference for choosing consultants to advise on a particular PPP project.

In drafting the terms of reference for the hiring of experts to advise on a project, governments have an estimate of the number of days an expert will be needed and the budget. For this purpose, it is useful to have a general idea of the amount of advisory services needed in a standard PPP project. In this regard, the European PPP Expertise Centre estimates the required advisory services for the development of a medium size PPP project, to be in the order of 1,000 man-days (see Table 2).

Table 2
Estimation of man-days of advisers for a medium size PPP project, by role of advisers and project stage¹⁵

<i>Stages of the project / Role of advisers</i>	<i>Project management</i>	<i>Technical, market/demand</i>	<i>Financial</i>	<i>Legal</i>	<i>Total inputs (days)</i>
1.1 Project selection and definition	0	150	10	5	165
1.2 Assessment of the PPP option	20	45	85	30	180
2.1 Getting organized	20	3	6	4	33
2.2 Before launching the tender	20	62	38	45	165
3.1 Bidding process	55	83	55	73	266
3.2 PPP contract and financial close	6	5	20	22	53

¹⁵ Source: European PPP Expertise Centre (EPEC), 2014.

<i>Stages of the project / Role of advisers</i>	<i>Project management</i>	<i>Technical, market/demand</i>	<i>Financial</i>	<i>Legal</i>	<i>Total inputs (days)</i>
4.1 Contract management	15	72	47	30	164
4.2 Ex post evaluation	2	20	20	5	47
Total inputs (days)	138	440	281	214	1073

IV. Towards a standard for the hiring of experts to develop People-first Public-Private Partnerships in low and middle-income countries

The elaboration of a standard based on lessons learned for the identification, selection and monitoring of a team of experts with the qualifications and experience required for the very complex nature of People-first PPP projects is needed for low and middle-income countries.

In fact, governments are often disappointed with the quality of the advice received from experts on PPP regulations and projects. This poor quality advice also impacts negatively on the investors willingness to bid for projects (as analysed by the Public-Private Infrastructure Advisory Facility of the World Bank).¹⁶

Due to the complexity of drafting PPP regulations or advising on a People-first PPP project, it is not only necessary to ensure compliance with a robust selection process, but also to adapt it to different countries and projects.

One of the most comprehensive guides on the selection and employment of consultants was developed by the World Bank in 2011 and updated in 2014.¹⁷ These guidelines have been developed from lessons learnt in numerous projects and refined over the years. They are based on principles and best practices and focus on the following:

- achievement of value for money;
- open, effective and adequate competition;
- fair and equitable treatment;
- integrity and transparency;
- accountability and due process; and
- non-discrimination.

Box 3. Guide for hiring and managing advisers for private participation in infrastructure, Public Private Partnership Toolkit¹⁸

Future private sector participation depends on investors' confidence in both the country and the government. The role of advisers will have an impact on whether potential investors decide to invest.

Appropriate selection and use of advisers builds confidence in the reform process by:

¹⁶ "Toolkit on hiring and managing advisors for Private Participation in Infrastructure", PPIAF, 2001.

¹⁷ "Guidelines: selection and employment of consultants under IBR loans and IDA credit & grants", World Bank, 2014.

¹⁸ "Toolkit on hiring and managing advisors for Private Participation in Infrastructure", Public Private Infrastructure Advisory Facility (PPIAF) and The World Bank, 2001.

- Demonstrating the existence of transparent and fair selection processes from an early stage. Potential future investors will judge the government by its past actions.
- Attracting advisers with a strong reputation. Their willingness to see their names attached to a project or piece of advice acts as a signal that they feel it is thorough and correct.
- Introduction of a well-designed reform program. Where the new industry and market structures, regulatory regime of contracts, and legal framework are comprehensive. Potential investors will be re-assured that the government and its advisers understand the process with which they are dealing.

Integrity, transparency and avoidance of conflicts of interest can be achieved by using a series of binding documents such as an “integrity charter”, a code of ethics, a code of conduct, or a contract clause. These documents contain different obligations on the stakeholders involved in the expert and consultancy services, either from the private or public sectors.

Additionally, it is important that the consultants selected have in their *Curriculum Vitae* proof that they have achieved the necessary quality and standard. Such recognitions¹⁹ are awarded to consultants and advisers by national or international institutions and organisations. These assurances offer some guarantee to governments that the consultants they are selecting comply with *inter alia* international standards or ethics, confidentiality, no conflict of interest etc.

Finally, a code of conduct addressing the requirement for integrity and transparency for consultants and advisers in complex contracts in low and middle-income countries was adopted by the G7 initiative on Strengthening Assistance for Complex Contract Negotiations.²⁰

Box 4. The Code of Conduct of the G7 initiative on Strengthening Assistance for Complex²¹ Contract Negotiations

The initiative on Strengthening Assistance for Complex Contract Negotiations was launched in 2014 at the G7 summit in Brussels, with the objective to provide developing countries with better advice to support their negotiation of complex commercial contracts.

As part of the second pillar of the initiative, “Independence and quality of advice”, the Code of Conduct of the G7 Initiative was established as a binding instrument to govern the conduct of advisors. It outlines duties and responsibilities for consultants providing advice to governments on negotiating contracts and details procedural rules and guidelines for the quality of the advice. The Code of Conduct seeks to:

- Reassure governments that the advice will be confidential and free of political influence and conflicts of interest;
- Ensure that advisors act in accordance with transparent conduct requirements and principles;

¹⁹ The IFEJI on its side, has promulgated after an extensive consultation with public and private stakeholders, the IFEJI Charter including, *inter alia*, criteria for claiming an expert status (the IFEJI expert status).

²⁰ See

https://www.bmz.de/g7/includes/Downloadarchiv/150505_CONNEX_Code_of_Conduct_final.pdf

²¹ Source: Code of Conduct of the G7 initiative on Strengthening Assistance for Complex Contract Negotiations, 2014.

- Safeguard the independence and provide firm ground for the advisors' mandate in a politically and legally sensitive environment;
- Ensure that the substance of the advice provided reflects international best practices;

It details rules that address, among others, the following: Standard of Conduct, Independence, Government's Interests, Role of Advisors, Quality of Advice, Professional Standards, Corrupt Practices, Conflicts of Interest, Confidentiality and Collusion.

V. Conclusion and next steps

Due to the challenges of undertaking People-first PPPs in low and middle-income countries, reliable and independent experts are critically needed. They will be hired to bring knowledge and advice to the development of pipelines of People-first PPP projects. This will require in turn a further review and development of best practices for the selection and recruitment of such experts and to explore ways to involve and attract the best qualified advisers.

These best practices should also reflect the need for building capacity within governments, including institutional capacity building and training of policy makers and legislators in People-first PPP approaches, as recommended by the Guiding Principles on People-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals (United Nations Economic Commission for Europe, 2018).²² Advisers should not only bring knowledge on a particular project but also increase the capacity of governments to deliver the right People-first PPP projects and transfer skills to public sector officials. This will ensure that the public interest is protected and that selected projects contribute to achieving the Sustainable Development Goals.²³

In this regard, advisers can play an important role in bringing forward the People-first agenda and promoting the Guiding Principles on People-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals in low and middle-income countries. Governments' needs for skills in identifying and delivering People-first PPP projects can be fulfilled by involving experts who adhere to the Guiding Principles and meet the special requirements of people-first projects. Accordingly, the International Specialist Centre of Excellence on Public-Private Partnerships Law, Policy and Institutions in France proposes that the Working Party could consider the setting up of a project team to elaborate a standard for this purpose, namely the selection and employment of reliable and independent experts to develop pipelines of People-first PPPs in low and middle-income countries. This approach would be in line with the recommendation of developing best practices and standards to help governments accelerate the development of pipelines of People-first PPP projects while saving time and money.

²² *Guiding Principles on People-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals* (ECE/CECI/WP/PPP/2018/3), United Nations Economic Commission for Europe, 2018. See http://www.unece.org/fileadmin/DAM/ceci/documents/2018/PPP/WP/ECE_CECI_WP_PPP_2018_03.pdf

²³ As recommended in Principle 3 of the *Guiding Principles*: "Improve the skills at all levels and make sure that women are empowered by People-first projects".