Consolidated comments received during public consultations on the draft update of the

Report on Recommended PPP Contractual Provisions, 2015 edition

The below table presents a consolidation of all feedback received (without attribution to the submitting person, organization or entity) during the public consultations held on the draft update of the Report on Recommended PPP Contractual Provisions, 2015 edition (the Report) from November 2016 to February 2017. It also entails the responses given by the PPP team tasked with further amending the Report before its publication during early summer 2017.

Please note that for the purposes of conciseness and comprehensibility, the respective inputs and recommendations were, where appropriate, abridged, and that mere editorial comments are not included in the table.

	Comment	Response by PPP Team
1.	Perhaps more examples of actual practice in different countries around the world could be introduced – and in particular how practice varies. This would be instructive to people who need to use it and provide some context for them. For instance, a number of PPPs in China have no real private sector participant and accordingly different risk transfer positions. A number of early PPPs are of existing operational contracts with no build phase. In the USA, PPPs often seem a mixture of PPP and real estate development deals. Other examples are fragile countries in which a number of PPPs are more like glorified service contracts with real risk transfer to private sector underwritten or insured in various ways (or not transferred at all). South-East Asia on the other hand has been more successful in using more recognizable PPP structures. Alternatively, the team may want to consider a few more flags as to the need to adapt the wording to local conditions – or at least to adopting a phased transfer approach. Going the whole way in one go is often too hard. This is currently flagged at the beginning of the Report but it may need more flagging at drafting level for people to get the message.	The PPP team agrees with the points raised, to the extent consistent with the aim of promoting recommended and typically agreed contractual positions. Where appropriate the PPP team has included more examples of actual practice in different countries and has flagged the need to adapt the respective drafting to local conditions throughout the Report.

2.	There are many different forms of PPP and understandably the Report chooses a core model (which much resembles the UK draft "Standardisation of PF2 Contracts"). This is sensible (and too difficult to do much else) but perhaps it is worth flagging a little more that there are many different models and perhaps what the implicit assumptions are depending whether project is (i) project financed, balance sheet financed, bond financed or hybrid; (ii) concession or availability; (iii) central or local government (iv) including front line services or not or soft services or not; (v) building or equipment; (vi) SPV or not etc. In particular, it may be worth flagging that the drafting assumes a project finance approach – while in many countries the initial finance is / structures are often more based on a balance sheet finance approach. The approach taken e.g. to risk transfer, due diligence, step-in, collateral, refinancing, subordination, termination calculations, insurance etc. can all change quite significantly.	Many of these valid points are already mentioned in the introductory part "PPP Contracts in Context" and throughout the Report. In particular, it will be flagged that the sample drafting assumes a project finance approach. Also, two additional chapters to the Report are currently being worked on and which address how its sample drafting might have to be altered in the context of bond financing and corporate finance. Against this backdrop, further changes have been made to the Report.
3.	The chapter on Lenders' Step-in Rights really works on a project finance approach. The UK e.g., does not provide it on a balance sheet finance and it effectively breaks down where debt is underpinned.	Agreed. As mentioned above, the PPP team has flagged that the presented sample drafting assumes a project finance approach. Also, two additional chapters address how it relates to bond financing and corporate finance.
4.	It may be worth flagging that the reason why the draft standard clauses developed for the UK ("Standardisation of PF2 Contracts") do not allow adjustment to operating costs on a change of law is because there is normally indexation to cover that (or some countries have periodic benchmarking or market testing of soft service costs which means that every e.g. 5 years any change of law will be taken into account in the benchmark). The new PF2 model developed for the UK is hard service only so all this has come out. The reason why the draft standard clauses developed for the UK do not allow change of law protection in the construction phase is that most of the PPP builds in the UK are no more than two years long. For extended build phases however (big projects or where e.g. on waste there may be planning delays) the approach discussed in the UK does allow some protection.	Thank you for this comment – the PPP team reviewed the respective Section 3 of the Report along these lines.

5.	Much of the additional complexity of the UK drafting ("Standardisation of PF2 Contracts") stems from trying to avoid underwriting changes to finance agreements (e.g. extra finance where project is failing) on compensation on termination. The Report rightly avoided this matter but it may be worth flagging it as a difficult area to watch (i.e. risk of government picking up the bill for amendments to loan agreements). This is especially important where senior debt is underwritten on a contractor default. This revolves around the definition of Senior Finance Documents – and whether changes to these are taken into account. This could therefore be flagged for drafting.	This point is well taken and has been reflected in the Report.
6.	Refinancing is an area where the UK plans to make significant changes (and I suspect much of Europe might too) as a result of Eurostat. Also worth saying that it is a very technical area and that, if not carefully drafted, sophisticated lenders may attempt to circumvent the gain sharing provisions through elaborate structuring.	The PPP team had flagged these points in the Refinancing section of the Report.
7.	It may be worth to also say a bit more about the unpopularity of concepts such as "the courts restoring the economic equilibrium of the contract" in civil law jurisdictions, with the lending community – due to unpredictability of outcome – and increasing preference to spell out consequences of changes in detail in the contract (following the common law approach).	Thank you – this is already covered generally but has now also been more specifically incorporated.
8.	There is no need to plug the word "Report" in the title: Report on Recommended Public-Private Partnership (PPP) Contractual Provisions.	Agreed – the title of the document has been changed/simplified to read "Guidance on PPP Contractual Provisions".
9.	It is worth noting that many governments resort to PPPs because of "accounting arbitrage" as they treat availability and project-related payment expenditures as off-balance sheet financing. While this should not ultimately be a reason for choosing a PPP structure, this is nonetheless a reality.	This valid point is mentioned is already discussed the introductory part "PPP Contracts in Context".
10.	We agree that the termination compensation mechanism (book value compensation) is "not guaranteed to compensate the Private Partner fairly". In particular, this is a mechanism that burdens creditors with ensuring that the termination payment exceeds outstanding debt (and other senior claims) at all times, as opposed to other termination provisions that guarantee repayment of senior debt outright. That said, we are actually not aware of a jurisdiction where this consideration has actually stopped creditors from lending. For example, book value compensation is used in 4G projects in Colombia, which have benefited from	Thank you for sharing this insight which is in line with the further examples mentioned in the Report as to where the book value approach is utilized.

	billions of dollars of local and international funding. While the lack of an outright debt repayment clause initially raised some Lender eyebrows, it has also led us to be much more disciplined in calculating total exposure and making sure it is within book value limits.	
11.	We have seen concessions where the Contracting Authority has the right to either make a lump-sum payment, or continue to pay the senior debt out as scheduled. This could be proposed as an alternative under the "Payment capacity" discussion. However, we would note that this would not be a preferred method for lower-rated jurisdictions.	Given that the Report is targeted to Government officials in particularly emerging PPP markets, it has been decided to not highlight this practice as part of the discussion around "payment capacity" under Section 4.6 since – as pointed out – it is not a preferred method for lower-rated jurisdictions.
12.	In practice, the majority of details relating to the concession and award would already be in the public domain. As such, we believe clause 1 (in Sample Drafting 7 – Public Relations and Publicity) would be very restrictive and would therefore get some push-back from sponsors.	The PPP team agrees that in practice, the majority of details relating to a PPP Contract would already be in the public domain at the relevant point in time. Nevertheless, Contracting Authorities may want to control how information relating to the PPP Projects (in particular the information that is not already in the public domain) is publicly communicated. Sample Drafting 7 (1) was modeled after the UK PF2 Guidance (31 (4) (a)) and refers to communication with the press, television, radio or other communications media.
13.	Another factor that could influence contracting parties' choice of governing law would include "insurability" – i.e., Lenders' ability to obtain breach of contract or sovereign non-honoring insurance from development agencies (or private insurers). We have found that Development Finance Institutions (DFIs) may not insure certain jurisdictions / arbitration provisions. This is important in deals that ultimately rely on some level of political risk insurance (PRI) support from multilateral or bilateral development agencies.	This point is well noted and will be reflected in an accordingly amended Section 8.1.2 (concept of a governing law provision).
14.	We believe that the addition of a grid showing what jurisdiction / infrastructure program combination bears what risk would be a valuable addition to this Report.	This is covered in the Report's companion piece, namely the Report on Allocating Risks in PPP Contracts as released by the Global Infrastructure Hub (GIH) in 2016.

15.	It would be useful if the Report could also address the workability and mechanisms of amendments/adjustments that might be necessary to a respective PPP project	In so far as this comment by the reviewer is aimed at "variations", these are outside the Report's ambit.
16.	The Report could also address the context of government support in terms of investment return of the project that have a marginal financial viability, such as Minimum Revenue Guarantee (MGR). This MRG (government support) regime has been stated in the *Framework for Disclosure in PPP* issued by World Bank.	Thank you for this suggestion. Government support is already mentioned in the Report's introductory part "PPP Contracts in Context", Section G and the PPP team has added more language to highlight this point.
17.	We suggest to discuss authority step-In rights in a PPP project in the Report. Authority step-In rights can occur, for example, to mitigate serious risks to health, safety and the environment or to discharge a statutory duty. In a PPP Cooperation Agreement of water supply system sector, the Authority Step-in right may be stipulated in a provision which grants the Contracting Authority the right to step-in and take possession and control of the whole or part of the water supply system for the purpose of operating the water supply system as it deems necessary to ensure the continued operation of the project.	The Report discusses Authority Step-in Rights in the context of Force Majeure in Section 1.2.3 and suggests that in the case of prolonged Force Majeure the Contracting Authority may want to include an option to require the PPP Contract to continue, provided that the Private Partner is adequately compensated.
18.	The Report states that if the PPP Contract is terminated due to uninsurable risk occurrence, it is generally accepted that the Contracting Authority should pay the Private Partner some level of termination compensation. It would be useful if the Report could elaborate how this relates to compensation paid in case of a termination due to a Force Majeure Event.	The Report specifies in Section 1.3.4 that in these cases the level of termination compensation is usually calculated on the same basis as Force Majeure termination compensation (plus, if applicable, amounts of third party claims).
19.	In defining MAGA, the Report elaborates key considerations in defining events that qualify as MAGA, i.e. type of events and materiality of the events itself. The Report, however, does not clearly elaborate to what extent the 'Government' definition should be considered in defining the MAGA. Government functions can, for example, shared between central government and local government (such as provinces, districts and cities). The central government has very little control if the MAGA risk is caused by the actions of a local government. Taking these considerations into account, the Report may need to further elaborate whether and under which circumstances MAGA risk should be borne by the Contracting Authority.	The Report addresses this in the third paragraph of Section 2.2.1.2. The fundamental commercial point is that these are not risks the Private Partner can be expected to take, regardless of which arm of government may be 'responsible'. See suggestion regarding 'fault' and 'no fault' events in the aforementioned Section of the Report.

20.	In defining the Change in Law, the Report elaborates on key considerations relevant to defining events that qualify as Change in Law. However, it does not provide further details on the underlying risk allocation and how key risks relevant in this context will typically be handled between the parties.	This is rather covered in the Report's companion piece, namely the Report on Allocating Risks in PPP Contracts as released by the Global Infrastructure Hub (GIH) in 2016.
21.	The Report provides that termination due to Private Partner's default, should be compensated by the Contracting Authority for bankability reasons. In some PPP projects in Southeast Asia, e.g. toll road projects, compensation paid to the Private Partner for its default that leads to termination is sourced from other private-sector parties who bid to take over the contract. The Contracting Authority will set an amount of money in the bidding document that should be paid by the winning bidder to the defaulting Private Partner. In this case, the Contracting Authority does not have to pay anything to the Private Partner and the PPP Project will continue with the new Private Partner. The major drawback from this scenario is when there is no other private party who is willing to take over the project. The Report also acknowledges that Force Majeure is considered a shared risk. In some PPP Projects in East Asia, this shared risk is interpreted as [if] the government should only pay 50% of the Private Partner's total investment cost. This comes from the notion that the Private Partner should not receive equal compensation in Force Majeure termination compared to Contracting Authority default termination, as it could represent poor value-for-money for the Contracting Authority.	Thank you for sharing these examples of specific projects in Southeast Asia. To the extent this could be sensibly incorporated in the section on Termination Payments, the need to adapt the respective drafting to local conditions has been highlighted further, i.e. under Section .4.4.2(b) (market value).
22.	The provision governing dispute resolution should also highlight specific periods of time within which the parties have to take action. Also and although it is already implied that the chosen forum for dispute settlement in the PPP Contract is obligatory, it will be more beneficial and a preventive measure to include a provision regarding the exclusive legal remedy for settlement of disputes in the Report.	Agreed on both accounts. Such periods of time are already spelled out in the respective Sample Drafting 8 to the extent applicable. Likewise, both Option 1 and Option 2 address the comment pertaining to exclusivity of jurisdiction/final settlement by arbitration.
23.	It would be useful if the Report also addressed the concept of state loan guarantees as part of its commentaries and sample drafting.	Thank you for this suggestion which will be kept in mind for future further editions of the Report.
24.	The remedies in Section 1.2.2 (Force Majeure) do not mention the "deemed construction completion" remedy – arguably this is a combination of the others but may be worth flagging as a concept that is relatively common.	Agreed that this is a combination of the options already mentioned and therefore not specifically covered.

25.	We have seen a number of Force Majeure clauses where specific kinds of mitigation (e.g. payments in excess of a cap, settling industrial action disputes) are excluded from the measures which the Private Partner is expected to carry out. We have also seen a number of Force Majeure clauses where relief from certain obligations (e.g. making payments) is never a consequence of a Force Majeure event.	Thank you for sharing this insight. Additional wording on mitigation has been added.
26.	In regard to Sample Drafting 1, paras (5) and (6), we have not seen many Force Majeure clauses where the notification process can be a bar to recovery. The approach in Sample 1A, where relief is separated from the notification process, is one we see more commonly. Limiting the cross-reference in paragraph (5) to just (4)(c), rather than (4), is a potential solution. On Sample Drafting 1A, para (5), we would like to note that the requirement to agree may be difficult to achieve in practice. Sample 1 drafting in relation to mitigation would be preferable.	Thank you for these comments. The PPP team reviewed these clauses once more to ensure that they do not contain any ambiguity in their application. Thank you for this observation. Nonetheless, Sample Drafting 1A clause (4) encourages the parties to discuss a solution.
27.	In regard to MAGA, we would suggest adding failure by the Contracting Authority to enact laws (either at all or in accordance with an agreed timetable) that are crucial for the project as an example in Section 2.2.1.2. In our experience, this has been an issue in emerging markets that are new to major PPP projects. In line with this, the drafting in Sample Wording 2, para (2)(a) could be widened to include required legislation changes in addition to permits and approvals.	The introductory part "PPP Contracts in Context", Section K flags the need for a suitable legislative framework. The PPP team would not recommend Contracting Authorities entering into PPP Contracts where eventual legislation remains to be enacted and private sector is likely to be deterred by this scenario. It would be advisable to deal with this point as a condition precedent instead.
28.	Section 3.1.2 (Change in Law) does not mention legal (and consequentially fiscal) stabilization provisions and it would be useful to include a detailed discussion of those there.	Thank you for sharing this insight. Including a detailed discussion of these variants will be kept in mind for future editions of the Report.

29.	We would recommend that it is clear the tax gross-up clause would apply to any termination payment from the Contracting Authority (so that the Private Partner is able to pay the full amount to the Lenders net of any applicable tax). Also, the termination payments' section should make it clear how a refinancing would affect the amounts payable (at the moment there is an assumption that there is no refinancing) – the refinancing chapter mentions this but only in passing. We also thought it might be useful to include sections on variations (in particular the process and financial consequences during construction) and material adverse effect / material beneficial change clauses. The former are certainly more common but we have seen the latter in a number of contracts in the last few years.	These points are well taken – the PPP team has reviewed these Sections to ensure that these are sufficiently stressed. Thank you for suggesting these further topics which will be kept in mind for future iterations of the Report.
30.	In regard to the section on PPP Contracts in Context - Risk Allocation (F.) - when assessing the transfer of risks to the party best able to control or mitigate them, the initial risk assessment should also take into account which risks are insurable, as this will vary from country to country.	Agreed. In this context the Report already states in the introductory part "PPP Contracts in Context", Section F: *"In assessing the likely cost impact, the Parties will look at each other's ability to bear such cost and the related impact on prices, as well as whether and how the cost impact could be off set or passed on (e.g. via insurance (...))"*.
31.	In respect of the discussion on alternative payment mechanisms in the Section "PPP Contracts in Context", we would note that, where available, governments may consider making capital payments, which can prove better value for money for the authority and can indicate a commitment to the project in emerging markets. Additionally, it is important to identify the government's required payment frequencies at an early stage. This can be monthly, quarterly, six monthly or in some cases annually. At the same time, it also needs to be considered that there might be issues with the Contracting Authority retaining money and how the private sector rights to payment are protected in these cases.	Many thanks for this suggestion. As this matter is not the current focus of the Report, a detailed discussion will be kept in mind for future iterations,
32.	In regard to the section on PPP Contracts in Context – PPP Contracts in different legal systems (J.), other than the different types of legal systems, procurement law is also an important consideration. In some countries negotiations are not possible under the procurement laws, largely due to issues related to the prevention of corruption. In some cases, appointment is made without pre-qualification or the testing of a sponsor-led proposal or excludes quality evaluation and selects purely on the grounds of price and there is no opportunity to negotiate.	The PPP team agrees that these are all very important aspects. While procurement issues are not the Report's theme, the PPP team has included some language to clarify that procurement laws and additional factors may also limit the ability of the parties to negotiate the contract terms.

33.	Regarding Force Majeure provisions (Section 1.1.3: Relationship to other types of event), consideration needs to be given to anti-corruption provisions. It is typical for public sector strikes to remain the responsibility of the public sector. However, in some markets this is seen by the public sector as an opportunity for the private sector to bribe the public employees. It is therefore suggested that some risk allocation or provision needs to be made to discourage this.	The Report focuses on the most pertinent issue which is the dividing line between Force Majeure and MAGA which is often difficult to draw and depends on the specific jurisdiction (1.1.3 and 2.2.1.2 of the Report). However, the suggested further discussion will be considered for future editions of the Report.
34.	It is recommended that an exhaustive list of different types of Relief Events is provided (including Compensation Events, Delay Events, Excusing causes etc.) to summarize and illustrate key considerations in the management of Relief Events. In our experience, clarity in this aspect of change management is important to the Lenders and also potential investors.	Well noted. This is not within the scope of this edition of the Report but is an area intended to be incorporated in the next iteration of the Report.
35.	There should also be some consideration with regard to the development of the insurance strategy for each country to ensure that each party's cost of risk financing, including insuring a risk and the best value for money position is achieved.	As providing more background concerning insurance strategies is beyond the current Report's ambit, the PPP team will keep this in mind for future editions of the Report.
36.	We recommend that the Report recommends the development of a comprehensive project risk register/matrix; established at the start of the process to establish all (strategic, technical (build-operate), and commercial) project risks to cost and program are identified and consider the party best able to manage them, potential insurability, cost of insurances, likelihood of occurrence and potential cost should the event occur. The aim of this document is to provide a risk transfer which offers best value for money to the Contracting Authority within the boundaries of the national legal system and Contracting Authority structure and also provides a bankable deal for the private sector.	The Global Infrastructure Hub (GIH) has published a companion piece to the Report in 2016, the Report on Allocating Risks in PPP Contracts together with a corresponding online tool providing information on the risk allocation between the public and private sectors in PPP transactions, along with related information on measures to mitigate issues and typical government support arrangements. The GIH includes an analysis of 12 types of projects within the transport, energy and water and sanitation sectors and covers many different risk categories (including insurance risk).
37.	There are many references to negotiations between Public and Private Sector parties. However, it should be noted that in several countries, particularly in emerging markets such negotiation is not possible. This may be due to lack of public sector experience in negotiation, concerns regarding procurement challenge, perceived legal liabilities to the public sector or concerns regarding corruption issues, which contributes to limited dialogue and no preferred bidder phase.	Agreed. Some of these points are what the Report seeks to provide guidance on. The PPP team has added language in the introductory part "PPP Contracts in Context", Section J to clarify that procurement laws and additional factors may limit the ability of the parties to negotiate the contract terms.

38.	There are instances with little evaluation of bids regarding their technical merits or quality and utilizing award criteria linked only to price. It may be worth stating that, for such markets, consultation with the potential market may need to be carried out during the pre-bid phase as part of a market-sounding exercise that could include early consultations on the Contract Documentation, including Specifications, to assess the likely bidders and their appetite for taking on certain risks.	Agreed. While procurement is not a focus of the Report, the PPP team will consider to add language in a future version of the Report to explain how PPP Contracts are initially prepared during the pre-bid phase and further during the bidding process.
39.	From a technical and commercial perspective, a well-written contract is a key tool that can be used by those tasked with delivery of a PPP project. It is also critically important that the procuring authority considers the project governance and management during the construction and operation of the project. There are a number of guides available to suggest possible approaches, such as the 4Ps "A guide to contract management for PFI and PPP projects" or EPEC's "Managing PPPs during their contract life".	The focus of the Report is to provide drafting guidance related to specific PPP contractual provisions. While it contains some basic information on the related but wider topics of project governance and management during construction and operation as background information, a detailed discussion of those would go beyond the scope of the Report. Helpful further resources in this respect are set out in the Report's Annex.
40.	On Section 1.2.1.2 (b) Emerging and developed market differences: "Relief Events": In the United States, Force Majeure events are typically included among the list of Relief Events, and Relief Events typically excuse compliance by the Private Partner with its obligations affected by the relevant event, other than the obligation to timely pay its material obligations. In certain cases, the occurrence of such Force Majeure events may also entitle the Private Partner to compensation.	Thank you for this insight. As the position mentioned is not sufficiently different to merit a separate inclusion and may be confusing because it goes into Relief Events in more detail than the current Report, it was decided to not refer to this approach.
41.	We suggest to add the following text to Section 1.2.1.2 (c): Exclusions and qualifications after the second paragraph: *"and resiliency projects designed to manage the effects of earthquakes or floods may need to exclude those events (at least up to the point they are intended to mitigate) from the definition of Force Majeure".*	Thank you for this helpful comment. A respective detailed discussion will be borne in mind for a future iteration of the Report once more best practice has evolved around these matters.
42.	On the Report's part dealing with Force Majeure - Relief for Private Partner non-Performance (Section 1.2.2.4 Increased finance costs pre-completion): it is noteworthy that compensation from the Contracting Authority to cover such "delay financing costs" is also not uncommon in the US market.	Thank you for this insight as to legal practice found in the US market. As the outlined approach was not found to be typically/generally applied in this specific country context, a respective reference was not included in the Report.

43.	In regard to Section 1.2.3 (Termination in the context of Force Majeure), note that in the United States, PPP Contracts frequently provide for termination only in the case of "significant" Force Majeure events, which have a particularly material adverse effect on the PPP Project (e.g., which cause physical destruction that results in the project being substantially unavailable for public use).	As this approach is not different to the one stated in the Report – as by definition the FM event has to prevent performance of all/material part of Private Partner's obligations and continue for a prolonged period to qualify for termination –, no changes have been made to the Report in this respect.
44.	The definition of "Applicable Law" (Change in Law, Section 3.2.2.1) typically will exclude governmental approvals, including permits, the risks of changes to which are treated separately in the PPP Contract and are frequently allocated to the party that is responsible for obtaining the relevant approval. Also consider mentioning in Section 3.2.4 that time relief is also typically available where the relevant change in law occurs during the construction period.	This valuable point is already reflected in Section 2.2.1.2 but has also been further highlighted. Well noted to the extent any delays cannot be managed within the original construction schedule. The PPP team has included additional language in this regard in the commentary of Section 3.2.4.
45.	Lenders may be reluctant to release their security interests on PPP Project assets until compensation payments have been made in full. This may make the transfer of relevant assets back to the Contracting Authority difficult but would not rule out certain interim solutions such as an arrangement pursuant to which the Contracting Authority has a right to access the PPP Project assets during the period from the termination date until all termination compensation is paid, so long as the Contracting Authority complies with the payment terms with respect to such compensation.	Many thanks for this additional suggestion to Section 4.6 Method and Timing of Payment (Asset Transfer). Amendments have been made to this part of the Report.
46.	Consider including the following as a footnote: *"In certain developed markets, such as the United States, the component of the termination payment comprising senior debt may exclude default interest (even in circumstances where the termination is due to Contracting Authority fault), on the rationale that the Contracting Authority should not be responsible for any failure of the Private Partner to pay its Lenders. Certain concessions provide for default interest to be paid as termination compensation where the relevant failure to pay by the Private Partner is due to the action (or inaction) (including a late payment) of the Contracting Authority."*	Thank you for this further insight as to legal practice found in the US market. As the outlined position was not found to be typically/generally applied in this specific country context, a respective reference was not included in the Report.

47.	Consider including a definition of Redundancy Payments in Sample Drafting 4 (Sub-Contractor Breakage Costs, Redundancy Payments (a) (iv)) along the following lines: *"means the amount of all payments of wages earned, accrued unused vacation time, and any other payments required by Law or required by the Private Partner's employment agreement with its employees, which in each case have been or will be reasonably incurred by the Private Partner as a direct result of termination of the PPP Contract"*	For the purposes of Sample Drafting 4's overall coherence, it was decided to not make the suggested amendment in this edition of the Report.
48.	On Section 5.2.3 (Refinancing – Right to Consent), consider inserting as footnote: "In certain developed markets, such as the United States, rescue refinancings that do not result in an increase in the Private Partner's outstanding debt above a certain percentage threshold (e.g., 10%) are often permitted without the consent of the Contracting Authority."	Thank you for this information. As the outlined approach on this varies across States in the US and greenfield/brownfield projects, ***t***he PPP team decided to not make reference to this practice.
49.	The selection of the applicable payment method (Section 5.2.6 of the Report) should be in the discretion of the Contracting Authority. The Contracting Authority could be (a) paid in a lump sum upon the refinancing, to the extent the Private Partner receives such amounts at the time of the refinancing, (b) paid in a lump sum or periodically at the time of receipt of the relevant payments, or the receipt of the projected benefit thereof (in the case of the "user pays" model), (c) receive the benefit of a reduced availability payment (in the case of the "government pays" model) or (d) a combination of the foregoing.	This point has been further highlighted in Section 5.2.6.
50.	We suggest to add the following wording to Sample Drafting 5, Refinancing (6) (a): "*to the extent the Private Partner receives a lump sum payment as a result of the Qualifying Refinancing, [a lump-sum payment (…)*;".	For the purposes of overall coherence, it was decided to not make the suggested amendment to Sample Drafting 5 in this edition of the Report but clarifying changes have been made.
51.	Consider providing for payments from the Private Partner following the receipt by it of the benefit it is projected to receive from the Refinancing Gain pursuant to the updated Financial Model delivered in connection with the Refinancing.	Same response as to comment No. 50 above.

52.	In regard to Section 6.1.2 (Why do Lenders have step in rights in respect of PPP Contracts?), note that under the direct agreements with subcontractors, Lenders will want to ensure that any rights that the Contracting Authority has vis-a-vis the relevant subcontractor to step in under a Project Agreement are subject to the prior exercise of the rights of the Lenders to do the same.	The PPP team agrees that this is an important point when negotiating direct agreements with subcontractors from a Lenders' perspective. Section 6.1.2 has been amended accordingly.
53.	In respect of Section 6.2.4, consider pointing out that step-in rights are typically more nuanced in direct agreements entered into in the United States. Such rights typically include cure rights (without step-in), step-in rights (with the option to step-out) and full substitution, where either a new Private Partner is designated by the Lenders under the existing PPP Contract or the PPP Contract is replaced in its entirety with an agreement on substantially similar terms entered into between the Lenders' designee/assignee and the Contracting Authority.	Many thanks for sharing this insight. These matters are referenced in the summary under Section 6.3 and are common to other markets. Some additional wording has been added.
54.	Consider to add the following provisions to Section 6.3 (Summary of main provisions): *"(6) The right of the Lenders (or their nominee) to enter into a replacement PPP Contract on equivalent terms with the Contracting Authority in the event that the existing PPP Contract is rejected or terminated in an insolvency proceeding with respect to the Private Partner;* and *(7) The obligation of the Contracting Authority to deposit amounts payable to the Private Partner into a designated account of the Private Partner, which has been pledged to the Lenders under the terms of the financing documents."*	This Section of the Report is rather intended as overview and there is no detailed discussion of the proposed matters. Some additional wording has been added on the first point in the summary under Section 6.3. If an expansion of this part of the Report is envisaged in a future edition, the suggestion will be kept in mind.
55.	Where the material obligations of the Private Partner with respect to construction and/or operation under the PPP Contract are passed through to subcontractors under the Project Agreements, in our view, it would be useful for the dispute settlement provisions to be aligned. The Contracting Authority may have an interest in such alignment as it often is a third party beneficiary of certain material provisions set forth in the relevant Project Agreements.	Thank you for this observation. The point raised is covered in Section 8, Step 4, Section 8.2.3.
56.	It is suggested to amend Sample Drafting 1 – Definition of a Force Majeure Event (1)(d) *as follows "which is not the direct result of a breach by the Affected Party of its obligations under this PPP Contract or, in respect of the Private Partner, under any other Project Agreement."* to *"which is not the direct result of a default by the Affected Party of its obligations under this PPP Contract and the applicable law or, in respect of the Private Partner, under any other Project Agreement."*	Agreed with regard to "applicable law". The PPP team has incorporated this suggestion.

57.	Request to be informed whether certain political risks in accordance with Section 1.4(2)(c)(d)(e)(f) should be treated separately as MAGA or not, and [or] whether the key difference between certain political risks in accordance with Section 1.4(2)(c)(d)(e)(f) and MAGA is the site where the event occurs.	As pointed out in the Report, the dividing line between Force Majeure and MAGA is often difficult to draw and depends on the specific jurisdiction. For more details, see Sections 1.1.3 and 2.2.1.2 of the Report.
58.	It is suggested to amend Sample Drafting 2, (2)(f) as follows *"expropriation, compulsory acquisition or nationalization by any relevant authority of any asset or right of the Private Partner, including any of the shares in the Private Partner"* to *"expropriation, compulsory acquisition or nationalization by any relevant authority of any asset, interests or right of the Private Partner, including any of the shares in the Private Partner."*	The Report has been prepared based on best practice samples. It is important to bear in mind that the drafting guidance needs to be customized to the circumstances of each project and jurisdiction. The PPP team has highlighted this more throughout the document.
59.	It is suggested to add the following content to Sample Drafting 3: *"When 'Change in law' positively affects (i) the ability of a Party to comply with its obligations under the PPP Contract or (ii) [the Base Case Equity IRR], the Contracting Authority is responsible to assist the Private Partner to access to the benefits."*	This is already reflected in the wording as spelled out under Clause 1 in Sample Drafting 3 and Sample Drafting 3A respectively.
60.	It is suggested to amend Sample Drafting 7, (2) (6)(b) as follows *"information (however it is conveyed or on whatever media it is stored) the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of either Party, including all personal data and sensitive personal data; and"* to *"information (however it is conveyed or on whatever media it is stored) the disclosure of which would, or would be likely to, prejudice the state secrets, commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of either Party, including all personal data and sensitive personal data; and"*	The Report deals with state secrets in the commentary in Section 7.1.2: *"(…), the Contracting Authority may also wish to keep certain information confidential, for example if the PPP Contract is in the defense sector*." The PPP team has highlighted further throughout the Report that all actual drafting of PPP contractual provisions needs to be customized to the circumstances of each project and jurisdiction.
61.	It is suggested to amend Sample Drafting 7: 7.3 [2] (9)(d) as follows *"any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority concerned"* to *"any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority concerned*	The PPP team has highlighted even more throughout the Report that the contractual provisions may need to be adjusted with the help of legal advisors to accommodate country-specific circumstances. In general, the suggested addition would be covered by the term "disclosure that is required pursuant to a statutory or legal obligation".

	(*including any enquiry or investigation by any governmental, or regulatory authority having jurisdiction)"*	
62.	It would be useful to learn whether any dispute under this PPP Contract has to be referred to and finally resolved by arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce (ICC), and or whether the parties may in their discretion choose the Rules of Arbitration against the disputes.	Thank you for this comment. As explained in the Report (Section 8.2.3, Step 2), the rules of the International Chamber of Commerce (ICC) are frequently used but there are many other options for commercial arbitration. Sample Drafting 8 is based on ICC Rules for illustrative purposes only which is spelled out in the commentary.
63.	It would be helpful if the Report could emphasize more clearly that, in the context of emerging markets, it may well be necessary for the Contracting Authority to assume more risks that are within its control (or at least should be accepted by it because such risks are outside the control of the Private Partner) to support the feasibility of a PPP project. The level of support that a Contracting Authority would be expected to give is dependent on a number of factors including underlying credit risk of the country and importantly the track record of successfully implementing PPP style projects. Demonstrating a reliable and stable legal and commercial framework for PPP and building a track record of successful projects over time may allow investors to reduce their expectations in terms of risk allocation. However, for initial PPP projects in emerging markets, it would be advisable for Contracting Authorities to adopt a realistic approach in addressing fundamental risks to create a stable framework to attract a broad range of investors to implement PPP projects. We believe it is important to reiterate that to ensure that investors/financiers can enjoy a "reasonable risk adjusted rate of return" on their investment/financing package, a number of other key matters will need to be addressed by the Contracting Authority to achieve the objectives described above and make a PPP project in an emerging market viable. It would be sensible for the Report to make Contracting Authorities aware of such concerns, and where relevant provide additional sample provisions, (even if, due to the contract structure, they may not be appropriate to be included in the PPP Contract itself), so that there is no misunderstanding that [about] the full extent of the necessary commitment that [by] the Contracting Authority (and host governmental bodies) to ensure PPP project viability, is [not] limited to the topics highlighted in the Report.	The PPP team agrees with the importance of these points and emphasizes them in the Introduction and throughout the Report (see the "Emerging and Developed Market differences" text boxes). The introductory part "PPP Contracts in Context", Section C gives an overview and it is also mentioned e.g. under Section F that risk allocation is influenced by various factors, including the maturity of the market, the experience of the participants and the level of competition between bidders. Emerging market Contracting Authorities may therefore be able to transfer more risk to Private Partners once they establish successful track records in their PPP markets. Also, for example, under Section 3.2.3.1 the following information is included: "Although a Contracting Authority may bear all change in law risk at the start of a PPP program, once a track record or legal environment is established in its jurisdiction which generates greater confidence in the private sector, Contracting Authorities procuring new PPP Projects may be able to explore some risk transfer to the Private Partner. "

64.	We believe it would be beneficial (although not strictly a common contractual term) for the Report to possibly include a form of central government body guarantee on the obligations of the Contracting Authority; that may be helpful for Contracting Authorities to understand what may be required to ensure bankability of a PPP Project (in particular in the case of significant projects or during the initial stages of a PPP program before a track record is established).	This is beyond the current Report's ambit but the PPP team will keep this suggestion in mind for future editions of the Report.
65.	It may not always be possible for PPP projects to be promoted and financed solely by domestic parties; in some cases, it may be necessary or strategically important to seek the participation of international players. Accordingly, an appropriate mechanism addressing currency exposure (availability, convertibility and transferability) needs to be developed in the case of PPP projects where revenues (under both "government pay" and "user pay" models) are denominated in local currency. It would be beneficial to include a discussion on this issue and the mechanisms that need to be put in place to ensure that international investors and Lenders are assured the contracted net return and are protected against adverse currency movements (to achieve a USD equivalent real rate of return in line with expectations at the time the bid for the project is submitted). We would advocate that PPP Contracts recognize and address this risk as it is one of the most fundamental bankability issues relating to PPP in the emerging markets. We do not mean, however, that those revenues in local currency should be fully converted into hard currencies (such as USD) under PPP Contracts. Depending on, among other things, creditworthiness of the country, the track record of PPP projects in the country and matureness of the local financial market, and thereby, willingness of local banks to provide long-term limited-recourse finance to PPP projects, PPP Contracts may include a portion of revenues which are not linked to exchange rate movements against hard currencies: this sort of arrangement is also of course subject to the willingness of the private investors (in particular international investors) to receive their returns partially in the local currency. In this connection, the Report could also refer to the importance of host government to develop local financial markets so that where long-term limited-recourse finance in local currency can be extended by local banks. The governmental financial institutions owned by the host government are also expected to play a key role to lead such finance in co-finance with international banks which extend loans in a hard currency.	The PPP team agrees that it is important that PPP Contracts recognize and address currency risk as one of the most fundamental bankability issues to PPPs in emerging markets. Since the Report is currently limited to drafting recommendations and commentary related to eight specific PPP contractual provisions a comprehensive discussion on this issues would however go beyond the scope of the Report. The allocation of currency risks (and other types of key project risks) between the parties of a PPP Contract, along with related information on measures to mitigate these risks and typical government support arrangements are covered in the Report's companion piece, the Report on Allocating Risks in PPP Contracts and the corresponding online tool, launched by the Global Infrastructure Hub (GIH) in 2016. Also, these matters are touched upon in Section 2.2.1.2 of the Report.

66.	Certain projects will require the Private Partner to procure fuel or other feedstock for the ongoing operation of the project. It is important that Contracting Authorities recognize that the obligations of the Private Partner in respect of such "input" needs to be passed through to the customer. Furthermore, in thermal power projects in emerging markets (in particular if the fuel supplier is a state entity or there is no liquid and robust local supply market), it would not be appropriate for the fuel procurement/supply risk to remain with the Private Partner.	Agreed – this and other types of key project risks (as well as their allocation as between the parties of a PPP) are discussed in the Report's companion piece, namely the Report on Allocating Risks in PPP Contracts as released by the Global Infrastructure Hub (GIH) in 2016.
67.	In our experience, the practice of acquiring suitable land for the project site varies. Whereas the government may have powers in certain jurisdictions to grant rights of land use to a developer (through ownership of land or compulsory purchase power), in other jurisdictions governments have attempted to place the obligation on land procurement on the Private Partners. This can lead to cost increase and delay as well as a need to address social and environmental concerns. In preparing projects for PPP tenders, the Contracting Authority should be encouraged to have due regard to these challenges and develop a concrete plan that will ensure that the necessary project land and easement rights will be made available. It is also common practice in PPP Contracts that future limitations on access of land and also all risks associated with the land, including any claims by displaced persons, should be allocated to the Contracting Authority as a MAGA event or otherwise.	The aforementioned Report on Allocating Risks in PPP Contracts covers land purchase and site risk as one risk category. Nonetheless, land procurement issues and additional risks associated with land could be included in a future version of the Report.
68.	Lenders financing a PPP project on a limited recourse basis typically require security interests over all the rights and interests of the project company. This comprises land for the project site, physical assets and equipment, contractual rights and receivables, bank accounts, insurances and the shares in the project company. In certain jurisdictions the law relating to the granting of security may be underdeveloped or may not allow for assets such as land to be secured in favor of foreign Lenders. Contracting Authorities should consider whether, in developing a PPP program, specific legislation or exemptions could be passed to enable PPP project Lenders to benefit from the protections and enforcement remedies that Lenders customarily enjoy. Perceived inadequacies in the security package afforded to Lenders leads to increases in the pricing of debt and in some cases may require direct contractual commitments from the Contracting Authorities to compensate the Lenders for any shortcomings in their expected remedies.	Agreed that this is a pertinent consideration for governments to take into account when developing an enabling legal framework for PPPs. As these matters are beyond the current Report's scope, they will not form a detailed part of it at this point but reference is made in the introductory part "PPP Contracts in Context", Section K.

69.	If there are no prevailing legal requirements that would otherwise hinder the validity of the guarantee, Lenders preference will be that there be no cap. This is because it is not possible to clearly quantify the appropriate amounts that the cap should cover and so concerns arise if a guarantee is intended to cover all payment obligations of the Contracting Authority under the PPP Contract but is subject to a cap. For example: (1) Even though it would be theoretically possible to quantify the amount of the remuneration due over the life of the PPP Contract (under Government pays model), other forms of compensation may be payable prior to termination and may not be quantifiable. A particular example may be MAGA events for which there would obviously be no certainty on the number of events or their duration over the life of the PPP Contract. (2) Also, hedge break costs may be very difficult (if not impossible) to quantify. This will be a particular issue for termination compensation but is also relevant for compensation events occurring during the life of the PPP Contract. In order to resolve these issues Lenders may contemplate possible alternatives which may, in turn, be a concern for Contracting Authorities: One example would be to introduce specific termination events in the PPP Contract based on the level of "consummation" of the cap against the outstanding debt (so that there is a right to terminate before the balance of the cap is lower than the outstanding debt amounts and the other costs).	While we agree on the importance of these points a thorough discussion would go beyond the scope of the current Report. We will however consider to incorporate these thoughts in a future edition.
70.	It is important that a clear legal framework is established to form the basis of a PPP project. As you note, putting in place contracts that provide for the appropriate and clear allocation of risks and a mechanism for resolving conflicts is key. In addition, in order to provide incentives for investment in emerging markets, where the tax regime may be perceived as unpredictable or burdensome, it may be necessary for the government to provide certain tax incentives to promote an attractive basis for the investment and for a stable tax regime to be established for the ongoing economic viability of a project.	Agreed that this is a pertinent consideration for governments to take into account when developing an enabling legal framework for PPPs and reference is made to these matter in the Section dealing with PPP Contracts in Contract, Section K. These matters are beyond the Report's scope.
71.	Many countries impose strict requirements for the procurement of local goods and services. Although the promotion and development of local industry may be an admirable cause, in our experience, imposing strict requirements can have an adverse impact on cost as well as risk potential delay. Requiring a Private Partner to assume burdensome local content requirements could therefore hamper the Contracting Authority's objective of achieving the best value for money.	The focus of the Report is to provide drafting guidance related to specific PPP contractual provisions. While the Report contains some basic information on the related but wider topic "PPP procurement" as background information, a discussion on the benefits and risks related to "strict

		requirements for procurement of local goods" would go beyond the scope of the Report.
72.	It is noted that a distinction is sometimes drawn between (i) war or civil disturbance outside the host country which is treated as Force Majeure (granting time and performance relief for the Private Partner and can result in reduced payments) and (ii) war or civil disturbance within the host country which is treated as MAGA (granting time and performance relief for the Private Partner but on the basis that the Contracting Authority does not reduce payments). We note that practice in South East Asia and the Middle East varies; a distinction is drawn in some jurisdictions but not in others. The significance is of course whether the Contracting Authority would continue to be obliged to pay the service fee in such circumstances; in such cases, the Private Partner may not be able to claim these under insurances either because of exclusions or, depending on the location of the relevant event, an absence of damage to the plant and thus no coverage under business interruption policies. We do recognize that this is a risk that Lenders might be prepared to take but note that there may be situations in which no distinction should be made.	Many thanks for this observation. The PPP team agrees that adequate consideration to the specific country context is crucial in this context which is why it is stressed in both the Section dealing with Force Majeure and the one dealing with MAGA.
73.	We do not quite follow the discussion in the Report that insurable events should not be included within Force Majeure. If the asset is affected by a Force Majeure event and the Private Party is able to recover under the insurance, typically we would expect that the Private Partner is granted time and performance relief under the PPP Project Contract but that it suffers reduced payments from the Contracting Authority. We do acknowledge that if the PPP Contract is terminated triggering an obligation on the Contracting Authority to pay a termination sum, an arrangement is sometimes negotiated to allow the termination sum to be reduced by the amount of insurance proceeds paid or confirmed (by acceptable insurers) to be payable by a set date. In these circumstances PPP Contracts should recognize that application of insurance proceeds is subject to the Lender's reinstatement test provided for in the finance documents. Automatic deduction of insurance proceeds from termination amounts is not acceptable to the Lenders.	Agreed. The Report highlights in Section 1.2.1.4 that "in the early days of PPPs, the definition of Force Majeure was often based on whether a particular event could be insured against" and that "nowadays, the relationship between insurability and Force Majeure is less straightforward." Section 1.2.1.4 also e.g. states: "Equally, if the insurable event is agreed to be a Force Majeure event, this will influence any additional relief that may be agreed by the Contracting Authority and insurance proceeds paid and not used to compensate third parties may also be deducted from any termination amount payable."
74.	The Report notes that in a situation where a MAGA event has occurred, the Private Partner is granted relief from breach of contract and the PPP Contract expressly provides that (under the government pays model) the Private Partner would continue to receive payment from the Contracting Party as if it was still performing. We agree that this is in line with our experience of public infrastructure projects in	Agreed as this is already reflected in Sample Drafting 2.

	emerging markets. It may be useful to also include model form drafting of such a provision in the sample drafting so as to give a complete picture of the risk allocation to the Contracting Authority.	
75.	In emerging markets, where there is an actual or perceived risk that a project is adversely affected by a Change in Law the objective of the Contracting Authority should be avoiding risk premium being built into the bidding price. Accordingly, to better protect investors in, and Lenders to, the PPP project, it may be more appropriate for all Change in Law risks (or at least a Change in Law that impacts on the total project cost) to be capable of being passed through to the Contracting Authority in some way (although though the funding of certain increased project construction costs could initially be assumed by the Private Partner). In addition, there are situations in which it is difficult to ascertain the impact of the new legislation in its draft form, and, typically, it is difficult to make commercial decisions without knowing the details in the secondary legislation or guidelines published by the relevant government authorities. Transferring the Change in Law risk simply for foreseeability is not always appropriate. Finally, it may be necessary that any new or increased taxes due to changes in tax laws (even if of general application in the host country) will need to be passed through to the Contracting Authority (or customer for example increased tolls) to ensure that the intended rate of return is achieved.	This valid point is addressed in Section 3.2.1.3 (see second paragraph) and the PPP team has made a further cross-reference in Section 3.2.3.1. Section 3.2.2.4 states the following: "Classifying what is "in the public domain" at the relevant time will need to be looked at on a case by case basis because the legislative process varies from one jurisdiction to another. The basic principle as regards legislation is that anything enacted in draft form as at the relevant pricing date qualifies." The last sentence also suggests that particular concerns may need specific treatment in the PPP Contract. While the Report does not contain a separate section on tax law, Section 3.2.2.1 spells out the following: "The definition of Applicable Law typically encompasses tax law although this is sometimes included as a separate limb in its own right." In addition, Section 3.2.3.2 explains that ("changes in tax legislation may have to be discriminatory to qualify) while Section 3.2.3.3 refers to discriminatory tax or surcharge which only applies to its Project or that is only applicable to its business now that it is being operated by the private sector.

76.	The Report discusses the argument that the Contracting Authority should be entitled to a "haircut" of the termination payment as otherwise there is no incentive on the Lenders to exercise step in rights to cure the Private Partners breach. In our view, Lenders are not lending to projects with a view to "stepping into them" or being forced to suffer a loss on their loans. In many developing jurisdictions there may be legal or practical limitations on the ability for Lenders (in the context of security enforcement or insolvency proceedings) to actually enforce such "step in" rights. We are concerned that building in a "haircut" into the termination sum in such a scenario might encourage higher pricing of project debt. In case of a Private Partner default it is understandable that the termination sum would exclude any return to the equity investors (and that of itself requires Lenders to analyze the extent which this could have a potential impact on their exposures in various termination sum calculation scenarios). Although we have seen this feature in power projects in certain emerging markets, it is not a common feature. In the context of PPP in new emerging jurisdictions such a scheme could also incentivize Contracting Authorities to act in a manner to cause the Private Partner to be in default so as to effect a buy out of the project at a reduced price. The Report seems to imply that the "haircut" is the market practice but that the level of "haircut" may vary depending on jurisdiction; it may however be better to take the approach that in emerging markets where Contracting Authorities are seeking to implement PPP Projects that they take the approach of not adopting any "haircut" discount. To the extent that the Contracting Authority has concerns regarding the performance by the Private Partner, perhaps a better remedy would be to afford the Contracting Authority a step in right to cure on the basis that it continues to make payment to the Private Partner of a sum sufficient to cover its debt (but not equity) obligations.	Thank you very much for this observation. Section 4.4.2 stresses that the decision as to whether a haircut will be applied and if so, at which exact percentage should be assessed on a project-by-project basis. The competitive tension in a bid process should also mitigate this behavior. See also the factors mentioned in Section 4.4.1. Bidders'/Lenders' concerns as to Contracting Authorities' possible motivation/action will affect their stance on accepting a haircut of any level and if Contracting Authorities were seen to act in such a way this might, amongst other consequences, significantly impact its ability to attract any subsequent private finance. Nonetheless, the PPP team has reviewed this Section once more to ensure that the statements made therein are clear and unambiguous
77.	In our experience, it is important that the PPP Contract includes an effective and impartial mechanism to allow the resolution of disputes between parties. The general practice is for disputes to be resolved by international arbitration held in a jurisdiction with a proven track record for conducting arbitration proceedings. A key element of the analysis is whether international arbitration awards are recognized and enforced by the courts of the host country. Selecting the domestic courts or a "seat" of arbitration in the jurisdiction where the PPP Contract is performed may result in substantial bankability issues, in particular in an emerging market where there is less track record to establish whether the courts have the necessary expertise to determine complex project and financing cases and whether	Agreed and this is exactly the reason why there is a detailed discussion of these points in Sections 8.2.2 and Sections 8.2.3.

	the country is an "arbitration friendly jurisdiction" and there are objective criteria to define the conditions for setting aside an arbitral award. Discussions on the seat of arbitration can be sensitive with Contracting Authorities in emerging markets and we suggest including a specific comment in the Report to outline the possible bankability considerations in addition to "institution" and "rule".	
78.	It may be useful to reflect the well-documented challenges in the implementation of PPP's in practice, drawing from the Independent Evaluation Office's report of 2014, analysis of the Oxford Said Business School, and other reputable sources. This would provide valuable balance and context for the guidance offered in the Report, and would help the World Bank avoid the implication that it may uncritically be endorsing PPPs as the optimal financing model without sufficient regard to evidence. More concretely, we note that the Report contains very useful political economy analysis at various points, e.g. in the final paragraph of page 11 on risks of equity investment. However, Section A on page 10 might be a good place to reflect further necessary complexity, by providing an illustrative list of "challenges" (as well as "themes") including the mixed motives behind PPPs and their use by many finance ministers to get PPP liabilities off-budget (OECD 2011). Page 11, Section B, may be another example, where the remark on the incentivizing impact of the private sector partner's financial exposure could usefully be complemented by an acknowledgement of the countervailing (de-incentivizing) impact of contract renegotiations which typically favor the private sector partner (Public Private Partnerships, Public Guarantees and Fiscal Risk, IMF 2006). And paragraph 3 of Section F ("Risk allocation") might be a good place to reflect lessons about the circumstances in which PPP's may be suitable compared with other financing modalities (IMF 2006).	Thank you for these valuable inputs. The PPP team fully agrees that it is important for governments to be fully informed of the fiscal implications of PPPs which is why the World Bank Group (WBG) advocates for transparency when it supports PPPs and urges governments to be open about PPP risk allocations, payment mechanisms, fiscal commitments, and contingent liabilities. The infrastructure data and tools that the WBG produces (such as the PPP-Fiscal Risks Assessment Model (PFRAM) as developed by the International Monetary Fund and the World Bank – aimed at helping governments to assess fiscal costs and risks associated with PPP projects, and generate the impact in the financial reports of the government), are therefore designed to help governments make informed decisions, including in some cases, not proceeding with a PPP. As flagged in the introductory part "PPP Contracts in Context", the focus of the Report, however, is to provide drafting guidance related to specific contractual provisions that have formed the basis of successful PPP transactions when PPP has been selected as the chosen procurement method rather than guidance on procuring a project as a PPP or not. These matters are addressed by the above-mentioned tool developed by the World Bank and the International Monetary Fund. The PPP team has included a reference to this in the introductory section of the Report.

79.	Spelling out the implications of international human rights and environmental legal obligations for PPP Contracts would seem to be an obvious example, given that international agreements in these fields are part of "applicable law" as defined in the Report (para 3.2.2.1, page 45), and that Contracting Authorities are legally bound to respect and implement them, and an increasing number of private sector actors have committed themselves to respect human rights as expressed in the UN Guiding Principles on Business and Human Rights, the Equator Principles, OECD Guidelines for multinational enterprises (MNEs), and other codes and guidelines. The Report does use normative language ("should", "must") quite frequently, and in our view should do so in spelling out the potential importance of international human rights and environmental law for PPP contractual relationships even if these links are not yet widely reflected in practice.	Agreed. The PPP team has spelled out that international agreements (in particular international human rights and environmental legal obligations) are part of the Applicable Law if they are directly applicable in the respective jurisdiction or have been incorporated into national law. To the extent that certain principles are not legally binding, it will be up to the Parties whether to agree contractually to be bound by them (e.g. to the version in force at contract signature) and whether any subsequent changes to such principles will then also be binding (and if so, how the cost of complying with such changes should be addressed) or not.
80.	In our view the definition and discussion on "bankability" in the Report (pages 12-13 and throughout) may inadvertently occlude proper consideration of non-financial (economic, social, governance) issues, non-financial stakeholders and of public purposes that PPP's are intended to serve. The discussion on bankability, as with risk allocation, does not always seem to reflect the mixed motives, conflicting agendas, and inequality of arms between contracting parties, and the very serious stakes that may be at play for the public and particular population groups particular insofar as mega-infrastructure PPP's are concerned. More concretely, the potentially prohibitive fiscal risks of PPP arrangements, and the no-PPP scenario, are not mentioned. It would be useful if the Report engaged with these issues more explicitly, and discussed the importance of transparency and ensuring that all relevant stakeholders have an opportunity to participate or be consulted in decision-making, even if PPP practice does not widely reflect this. Perhaps the need for rigorous social (including human rights) and environmental due diligence, participatory decision-making processes and effective redress mechanisms could be reflected in a self-standing paragraph at the beginning of the Report, supplemented by specific references throughout the Report.	See the PPP team's response to comment No. 78 above. The focus of the Report is to provide drafting guidance related to specific contractual provisions when PPP has been selected as the chosen procurement method. In regard to the reviewer's comment concerning environmental and social matters, the PPP team has added language to the introductory part "PPP Contracts in Context",

81.	Page 15, final para, the government *"(...) may wish to prohibit the service provider from cutting off the water (...) of delinquent payers, or limit any toll or tariff the Private Partner can charge user"* (emphasis added). It is important to note that the government may not have discretion, or may have only limited discretion, when it comes to disconnections and user fee hikes under the international treaties to which it is party. This is acknowledged implicitly in para 1.2.2.6, page 25, but in our view could usefully be spelled out. In our view para 3.2.3.4 should be amended: *"This is highly unusual (...) without adverse impact on user demand or human rights"* (emphasis added), recognizing that higher user fees may be commercially viable, but discriminatory, putting the State in question in breach of its obligations under the International Covenant on Economic, Social and Cultural Rights (articles 11, 12), the Convention on the Elimination of Discrimination Against Women (articles 2, 3, 12, 13, 14(2)(h)), the Convention on the Rights of the Child (articles 6, 24), and other relevant instruments. In a similar vein, at page 15 ("It may also want to expressly require that documents related to the transaction be disclosed under freedom of information legislation"): it should be pointed out that States parties to the International Covenant on Civil and Political Rights (article 19) may be legally obligated to disclose.	Thank you for this comment. As the reviewer notes, the concerns mentioned are referenced in Section 1.2.2.6. The PPP team has highlighted this aspect further to the extent consistent with the balance of the Report.
82.	In our view it is important to recognize that including strike action within "Force Majeure", MAGA and Change in Law provisions may, depending upon how risk is allocated, create incentives for suppression of the freedoms of association, assembly and expression, and the rights to collective bargaining and to form trade unions under international law. This is a particularly significant risk factor for mega-infrastructure PPP's, including transport and energy PPP's affecting indigenous peoples' lands, culture and livelihoods. The year 2016 was the deadliest year on record to be an environmental or human rights defender, according to Global Witness. Many major extractives and infrastructure projects have encountered delays and major cost overruns due to poor due diligence and social risk management in relation to these kinds of issues.	Thank you for this comment. As this matter has wider implications than just for PPP (which may be a relatively small part of a government's procurement approach) and would require an in-depth discussion of more than just this one event in order to achieve a balanced presentation of drafting considerations in the Report, it has been decided to not incorporate this suggestion at this time. However, it will be considered for future iterations of the document.

83.	Under Section 1.2.2.6, page 25, there is a reference: *"In this instance the Contracting Authority may have to agree to pay such costs."* We would question why this is so. If the Private Partner's due diligence extends (or should extend) to all areas of applicable law, including international treaty commitments potentially affecting and constraining the Contracting Authority's capacity to increase user fees, then should the Private Partner not also bear risk? Similarly, in the Australian example in the box "Emerging and developed market difference" on page 35, shouldn't environmental and social (indigenous peoples' rights) due diligence be undertaken by the operator, and shouldn't this affect the allocation of risk between the Contracting Authority and the operator?	Section 1.2.2 deals with different ways in which the Private Partner may be compensated following Force Majeure in cases where it is entitled to compensation. Section 1.2.2.6 is a way to effect such compensation (by allowing the Private Partner to be compensated for increased costs and lost revenues by increasing the relevant toll payments or tariffs). If this method of compensation is not possible (e.g. due to applicable regulatory or legal regimes), then the Contracting Authority will need to find another way to meet its obligation to compensate. The Australian example in the box on p. 35 is included as a country-specific example of a particular risk that has indeed been assessed by the Contracting Authority (and other parties) and concluded to be most appropriately dealt with as a Contracting Authority risk.
84.	Page 39, 2.3, Sample Drafting 2, clause 2(a): We appreciate that this is a sample clause drawn from practice rather than a model clause drafted by the World Bank. However, we would suggest that clause 2(a) explicitly reflect the relevance of a state's international obligations to the definition and application of MAGA's, e.g. *"(…), except where such failure results from the Private Partner's non-compliance with [Applicable Law] or the Contracting Authority's compliance with its international legal obligations"* (emphasis added). We would also suggest that the reference in clause 2(h) to *"construction of competing infrastructure"* be clarified, to ensure that it is not applied too restrictively without regard to the public interest.	As the reviewer notes, the Report is intended to reflect drafting found to have typically formed the basis of successfully procured PPP transactions rather than suggesting wording from international financial institutions or international organizations in general. For this reason, the suggested amendment has not been incorporated. The PPP team would note that the fundamental point is that there are risks outside the Private Partner's control that it cannot be expected to bear. If it is agreed (based on the Parties' due diligence at the time) that a MAGA event should be included in the Contract in respect of competing infrastructure, this should be carefully drafted from the Contracting Authority's perspective to ensure any limitations are reasonable in the particular circumstances.

		Accordingly, public interest is not a relevant factor if the MAGA event as drafted occurs. Nonetheless, an example has been included in respect of clause 2(h).
85.	We recommend that this Section discusses more concretely the various ways in which international human rights and environmental law should bear upon risk allocation. These bodies of law are part of Applicable Law, and the treaties are eminently accessible and foreseeable, although specific implications may not always be. Hence, nuanced treatment of this subject would be useful, foregrounded by a statement analogous to principle 4 of the UN Principles for Responsible Contracts, i.e. *"Change in Law clauses should be drafted carefully so that any protections for Private Partners against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner, in order to meet its human rights obligations"*. In our view para 3.2.1.2, page 44, should be amended to reflect the reasonableness of international legal requirements governing non-discrimination, health, safety, labor and other relevant social issues pertaining to PPP contact bankability and their foreseeability within the framework of the Private Partner's due diligence.	In alignment with the reviewer's suggestion and the PPP team's response to comment No. 80, it has been spelled out that international agreements (in particular international human rights and environmental legal obligations) are part of the Applicable Law if they are directly applicable in the respective jurisdiction or have been incorporated into national law.
86.	We very much welcome the Report's discussion on this important topic of confidentiality and transparency, and the Report's recognition that any exceptions to the presumption in favor of disclosure need to be subject to objective and rigorous justification by reference to specific protected interests. We would recommend that this Section be foregrounded in a discussion of the right to freedom of information under international law (International Covenant on Civil and Political Rights, article 19, and General Comment no. 34 of the Human Rights Committee, CCPR/C/GC/34, Sept. 12, 2011, paras 18-19, and that, at page 83, the "security" exception be explained in as detailed a fashion as the "commercial" exception is in the second para of Section 7.2.3.	Thank you for this information. The PPP team has included information on the right to freedom of information under international law in a footnote of the Report. The PPP team will consider including explicit drafting guidance and commentary regarding obligations under freedom of information legislation and other topics that are related to confidentiality and transparency in a future edition of the Report.

87.	In relation to dispute resolution, we note that human rights and broader public policy concerns have generally not been adequately reflected in arbitral proceedings under ICSID and elsewhere, which is at least partly due to the professional (commercial law) profile of most arbitrators. Concerns range from the lack of transparency of proceedings, the exclusion of interested third parties, and excessive restrictions on the regulatory authority of the state. We recommend that these constraints be reflected in the guidance given in the Report on dispute resolution options, and that qualitative criteria for effective grievance redress be identified by reference to Guiding Principle 31 of the UN Guiding Principles on Business and Human Rights and Principle 9 of the UN Principles for Responsible Contracts addressing the situation of harm caused by the PPP project to third parties.	Section 8 deals with resolution of contractual disputes between the Parties under the commercial agreement they have entered into (as opposed to third party grievances). The PPP team has reviewed this Section once more to ensure a balanced presentation of matters.
88.	On Section 1.1.3, the greater or lesser likelihood of civil or external war does not put it more or less in the Contracting Authority's control or make it more or less "borne" by the Contracting Authority (see last sentence third paragraph). The Report should consider discussing what happens when the Private Partner prices for the risk of political uncertainty, rather than allocating the entire risk to the Contracting Authority. If truly prohibitive, such a discussion could lend credibility to this allocation of risk, which otherwise on its own could appear biased in the Private Party's favor.	The likelihood of a risk occurring and its potential consequences are key to whether a party is prepared to bear it or not, particularly where it is not a risk they control. In practice, the Contracting Authority is trying to attract private finance – investors carry out an assessment of where best to invest their resources so as to achieve a desired return. If they are expected to bear unreasonable risks, they will invest elsewhere and the Contracting Authority will not achieve the private finance it wants to procure its vital infrastructure. Any kind of war is not a risk the Private Partner has any control or management over. If it considers it a low risk, it may, however, be prepared to accept a share of the risk (as demonstrated by the market practice of war being a shared force majeure risk in some developed stable markets). The Report stresses several times that uncertainty typically attracts a risk premium (see e.g. the introductory part "PPP Contracts in Context', Section F). The PPP team will seek to highlight this important aspect more throughout the Report and has now included additional language in Section

		1.1.3 to emphasize the connection between risk allocation and pricing of political uncertainty.
89.	In regard to the box outlining differences between emerging and developed markets under Section 1.2.1.2, is this saying that natural disasters and government interference are more likely in countries with limited resources? Or that a country with limited resources may have a more difficult time dealing with natural disasters? It's unclear how government interference ties into this concept.	The PPP team has amended this section for clarity.
90.	We suggest the following wording to Sample Drafting 1: 1 (b) and (2) (a): *"plague, epidemic, natural disaster, and abnormal and severe weather conditions, such as but not limited to, storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tsunami, flood, lighting, drought;* The addition of this language is intended to address climate change considerations. For this to work practically in a Force Majeure provision, it will be necessary for the language in Section 1 (b) of this sample drafting to accompany it, i.e., we need to acknowledge that the impact of climate change becomes increasingly foreseeable as society continues to learn more about it, but it would likely not be in the Affected Party's power to prevent, avoid or overcome it on its own.	Thank you for this helpful observation. Respective wording has been added to the commentary in Section 1.2.1.2. A detailed discussion will be borne in mind for a future iteration of the Report once more best practice concerning the treatment of such matters under contractual Force Majeure clauses has evolved generally given that this is not just a PPP issue but one of much wider relevance.
91.	We suggest the following wording to clause 2(c) to Sample Drafting 1: *"(…) sabotage or piracy, [in each case whether occurring inside or outside the Country]*." Based on a review of PPP Contracts governing relationships in a variety of markets, it appears standard to include such conflicts in the definition of Force Majeure, whether they occur inside or outside the host county. This practice suggests that it should not place too great a burden on bankability and therefore should create an opportunity to ease the burden on the Contracting Authority in certain instances in which it likely cannot control or influence such events.	Whether or not wars inside the country are treated as shared risk events or borne by the Contracting Authority depends on the specific project and jurisdiction (see section 1.1.3 and 2.1.3). As the Report indicates in Sample Drafting 1 and 2 the drafting of the Force Majeure clause changes if the PPP Contract contains a separate MAGA clause that deals with certain types of political risk that are borne by the Contracting Authority.
92.	Consider revising clause (4)(a) in Sample Drafting 1 to include "full details of the Force Majeure Event, *including a description of its impact on the Affected Party's ability to perform under the PPP Contract*" and clause (4)(c)(iii) to read "the Affected Party *has taken all steps necessary to on a commercially reasonable basis to mitigate the impact of the Force Majeure Event*".	Thank you for these suggestions which – though in different wording – are already reflected in clause (4) of Sample Drafting 1.

93.	As the Report suggests, we recommend clearly defining Material Adverse Effect. Consider the following addition to Sample Drafting 2: *"materially frustrating or impairing either Party's ability to perform, discharge, receive and/or assume the respective obligations, undertakings, rights and benefits of the PPP arrangement.*	The definitions in the sample drafting deliberately do not include "Material Adverse Effect" – not least as this is difficult to define/satisfy. As the wording, put forward by the reviewer is not a definition of materiality but rather is another way of stating what is already set out in the sample drafting, the latter has not been changed.
94.	We suggest to change (b) as follows: *"was not under wide public discussion by domestic governmental authorities, published as a draft law in the [insert applicable publication source for legislation] or in effect at the Setting Date, and"***.** We also suggest to add (c): *"in the case of Applicable Law relating to climate change, was not published as a draft resolution or agreement in an international forum in which the Contracting Authority's government is a participant."*	As flagged in the definition of Change in Law in Sample Drafting 3, the drafting must reflect the law making process in the relevant jurisdiction – but it should avoid ambiguous criteria. As the first suggested wording does appear to include such terms (e.g. "under wider public discussion'), this was not incorporated into the sample drafting. In regard to the second suggestion, climate change legislation at an international level is unlikely to apply to an individual contract which is why this has not been incorporated at this point.
95.	Regarding Sample Drafting 3: Change in Law provisions should not be invoked unless the change was not foreseeable. Changes in law primarily affect Private Partners, and Private Partners need not have the ability to invoke Change in Law provisions unless such changes are both material and unforeseeable. We suggest to include "and such change was not reasonably foreseeable at the Setting Date" in sub-section (1) of Sample Drafting 3.	The PPP team agrees that the provision should not be invoked if the change in law was foreseeable. As described in Sections 3.2.2.3. and 3.2.2.4 the relevant date and the definition of "foreseeability" (i.e. what is in the public domain) will depend on the specific jurisdiction and project. The basic principle is that anything enacted in draft form at the relevant pricing date qualifies. It may be appropriate to use other foreseeability criteria in certain circumstances.

96.	It's best to be as specific as possible regarding the actual costs of the Change in law. Contracting Authorities should have the option of being able to ask the Private Partner for actual deviations from their Base Case Model or for actual increases in borrowing costs, rather than just changes in revenue or costs. A change in prices would only be relevant to mitigation if the prices contribute to costs of the PPP Project itself.	Thank you for this comment. After careful review of this Section, the respective commentary and sample drafting has been found to adequately reflect common practice in this respect. Also and highlighted throughout the Report, the sample drafting is intended to be a starting point for the parties to negotiate the terms of their respective PPP agreement.
97.	The Private Partner should not be entitled to an automatic right to suspend performance upon the occurrence of a Change in Law.	Agreed and as per the respective Sample Drafting 3(3) and (4) no such automatic right to suspend is granted.
98.	Should the Change in Law definition not include the requirement that the Change in Law be material and adverse, there is a possibility that a Change in Law would result in a benefit to the Private Partner. If the Private Partner is subject to a monetary threshold, above which it bears no risk of loss, it should also have no possibility of benefit over that threshold.	Clause (1) of Sample Drafting 3 and 3A mentions a negative and positive estimated change both of revenue and in the costs of a PPP project from the relevant Change in Law. Thresholds are mentioned in clause (3)(c) of both.
99.	With regard to Sample Drafting 3, the requirement for a continuing Change in Law is an unnecessary hindrance to termination as the Change in Law could be a one-time event.	The definition of Change in Law in Sample Drafting 3 refers to the (one-time) event and the effects of this event (see Required Definitions (a)). The PPP team has reviewed these clauses once more to avoid potential ambiguities.
100.	Consider adding the following to clause (2) of both Sample Drafting 3 and 3A: "*Evidence submitted by the Private Partner shall be consistent with the principles of good faith and fair dealing and the generally accepted accounting principles in* [insert country]."	Thank you for this suggestion. As this was not found to be commonly included in the respective clauses, this was not incorporated in this edition of the Report.
101.	In regard to Sample Drafting 3A, there is no reason to collapse Discriminatory Changes in Law and Specific Changes in Law into one category called "Qualifying Changes in Law". The rights and obligations of the Parties should be different, depending on whether the Change in Law is general, specific, or discriminatory. Also, regarding Section (1) (f): By definition, a "Qualifying Change in Law" is one in which capital expenditure increases.	Sample Drafting 3A is based on the "more developed risk sharing" approach that is explained in Section 3.2.3.3 (c). This approach allocates the risk to the Contracting Authority for (i) General Changes in Law which involve additional capital expenditure, (ii) Discriminatory Changes in Law and (iii) Specific Changes in Law. These three categories are defined in the drafting guidance as

		"Qualifying Changes in Law" – not all need to involve capex increases.
102.	In respect of Sample Drafting 3A, if the Private Partner can prove that the Change in Law is discriminatory or specific (i.e. the Change in Law is targeted at the PPP Project or the Private Partner), the Private Partner should have easier termination rights. However, in order to avail of these provisions, the Parties have to either agree that the Change in Law is discriminatory or specific, or have a tribunal pronounce the targeted nature of the Change in Law.	As the Report flags, terminations for Change in Law is not a feature of all PPP Contracts and incorporation of the extensive additional language that was suggested regarding termination in the case of a Qualifying Change in Law (Sample Drafting 3A) that is discriminatory or specific would not be consistent with this Section's overall coherence in regard to both commentaries on market practice and sample drafting. It may be considered for a future iteration. It is finally worth noting that the suggested sample drafting does allow for different time periods to be inserted in the different termination circumstances.
103.	Consider including the following in the definition of "Losses" in Sample Drafting 4: […] costs, expenses (including legal and other professional charges and expenses *but excluding punitive damages and incidental or consequential losses*), […]".	Since these terms do not form part of the defined terms under Sample Drafting 4 and were not found to be commonly included in such clauses, it was decided to not include them for the time being. As highlighted throughout the Report, the sample drafting is intended to be a starting point for the parties to negotiate the terms of their respective PPP agreement and so terms as suggested by the reviewer could be used if found appropriate by the parties and their legal advisors.
104.	It is suggested to insert provisions regarding mitigation as a precondition for Payment upon Termination. In regard to compensation on Private Partner Default Termination, the Private Partner should not be paid for the project until it delivers something of value to the Contracting Authority. The Contracting Authority should be at liberty to decide what constitutes "substantial performance" or "substantial completion" such that it has received something of value from the Private Partner.	Thank you for these comments and the suggested corresponding revisions to the Section dealing with Termination Payments, many of which go to the fundamental issue of bankability. Not only is the suggested approach on default termination likely to have serious bankability implications, as flagged in Section 4.4.1, legal principles of unjust enrichment would be likely to apply and the Contracting Authority could be at risk of costly dispute

		resolution which it may lose. Adopting this kind of approach may also affect its reputation and deter further private sector interest.
	Also, the credit raised by the Private Partner is an inadequate basis to determine the value of the work done by the Private Partner. A better measure of value is (are) the sum(s) to be paid by the Contracting Party under the agreement.	As costs incurred under a respective construction contract is not a fair representation of what costs the Private Partner incurs in developing a Project, this sample drafting has not been altered in this respect.
	In respect of compensation on Force Majeure Termination, Lenders commonly take into account the risk of default (for reasons of Force Majeure or otherwise) when calculating the interest rate offered to borrowers. It is unnecessary to provide a blanket compensation provision in favor of Lenders. It is particularly unfair to the Contracting Authority to absorb the entire cost of a project that has been rendered unviable because of a Force Majeure event that was unforeseen and outside of the Contracting Authority's control. The fallout out a Force Majeure event should be borne equally between the parties because neither party is in a better position to prevent the loss.	As the Report highlights, the allocation of Force Majeure risk will be project and jurisdiction-specific. Lenders are lending millions on a limited recourse basis against an unbuilt asset which is why Force Majeure has much greater importance than in other types of contract which are lower value and not subject to long term fixed prices. As stated in Section 1, the Contracting Authority does not bear the entire cost of Force Majeure, the risk is shared. The Equity Investors lose their entire equity return which is one of their drivers in entering the Contract in the first place, and if they have a sub-contract position, they again lose their projected return as only limited break costs will be payable. It is fundamental to understand why market practice has evolved to the positions explained and that the Contracting Authority is competing to attract private finance to its project – if the risks it seeks to transfer are commercially unreasonable, the private sector will simply take its finance elsewhere. It should also be remembered that termination compensation is only payable when no solution can be found to continue the Project – this is in neither Party's interest.

105.	Concerning the definition of Base Case Equity IRR, the Private Partner may wish to extend this to clarify that changes to certain documents or other types of circumstances will be exempt.	Agreed – particularly the latter point is already stressed in the commentary of Section 5.
	In regard to the discussion of refinancing gains, the Contracting Authority should have some basis for contesting the calculations used to determine those. There may be some circumstances where the gain is attributable solely to actions for the Contracting Authority, for example, an improvement in overall credit rating or passage of legislation which eases conditions on the project. Perhaps instead of mandating a 50/50 split, it could propose an equitable determination by the Contracting Authority and the Private Partner based on for the improved terms.	Thank you for this helpful comment. This is referenced in Section 5.2.5 which provides an overview rather than a fully-fledged discussion of sharing refinancing gains. Some additional wording has been added.
106.	Principles of public transparency should prevent private parties from concealing mere commercial terms of PPP Contracts, as many of these contracts will be concluded following a bidding process whereby top-line pricing may be disclosed in any case, mitigating any anti-competitive impact, and the public disclosure of key terms will help prevent corruption. Additionally, it would be unreasonable for private parties or competitors to use commercial terms negotiated with a sovereign in connection with a PPP as precedential for future business dealings within the private sector.	As flagged in Section 7.2.3 of the Report the need for transparency and disclosure should be balanced against the interests of the Private Partner and the Contracting Authority to keep certain information related to a PPP Project confidential, such as commercially sensitive or proprietary information. Confidential information in the context of PPP projects should be the exception rather than the rule and will be considered by the Parties on a project-specific basis.
	Also, states should adopt statutes memorializing the public disclosure obligations (and the rights of citizens to seek such information) and should seek to explicitly reference these acts in their PPP Contracts. It is therefore suggested to refer explicitly to freedom of information legislation, PPP Act and the Public Financial Management Act. [Terms to be revised as appropriate for corresponding domestic legislation].	We agree with the importance of public disclosure obligations in laws and policies (see also the World Bank Disclosure Framework and its companion jurisdictional and case study volumes which is referred to throughout the Report). Section 7.2.1 refers to the various laws that need to be taken into consideration when drafting confidentiality and transparency provisions, stressing that they should always be drafted following an analysis of the legal and policy framework. The PPP team has added language to Sample Drafting 7 to highlight where

		any such laws and regulations can be explicitly referred to.
107.	Domestic law of the host country should apply in almost every case (if the law of the home country is so under-developed as to make this problematic, it's difficult to envision a successful PPP arrangement) and the default assumption should be that the national courts of the Contracting Authority would hear the matter. It is also suggested to add the following wording: *"Exhaustion of Local Remedies. Should a Party pursue relief through the courts of [Contracting Authority/Home Country] to a final and unappeasable decision by such courts, and determine in good faith that such resolution violates the Party's legitimate expectations under this Agreement or that such courts have denied such Party fair and equitable treatment under the law, then the aggrieved Party may file to finally resolve the matter by international arbitration".* If the parties desire to apply a minimum time requirement to demonstrate compliance with this provision, such time period should not be unreasonably short.	The commentary and Sample Drafting 8 spell out in which cases domestic law may or may not be sensibly chosen as the governing law. At the same time, the choice between local jurisdiction and international arbitration (as discussed in Section 8.2.2) is clearly made within this Sample Drafting.
108.	It is suggested to delete the part dealing with Expert Determination in Sample Drafting 8. Should negotiation fail, the rules governing the dispute resolution in court or in arbitration should contain appropriate procedures for the retention and treatment of experts. Separate provision for such determination here may delay resolution of the dispute and unnecessarily conflict with existing rules.	PPP Contracts typically include a clause providing that "technical disputes" be referred to an independent expert or panel of experts for determination. The Report recommends in the commentary that the respective clause specifies that the determination of the expert should be final and contractually binding (see section 8.2.5 for more details).
109.	If the home country of the Contracting Authority has an established code for arbitration as is the case in, e.g. the United States and India, we recommend applying that code to the proceedings. There should be a strong presumption that the home country's laws will apply, unless such laws are widely regarded as unacceptable. Equally, domestic mediation rules and procedures should be followed where such rules exist.	Section 8 takes a balanced approach. It does not recommend a specific dispute resolution provision but explains some key considerations Contracting Authorities need to keep in mind when drafting a dispute resolution provision that will enable the Contract to be bankable. The Report also emphasizes that legal advice needs to be sought to find the best solution for the specific circumstances and jurisdiction.

110.	When considering matters of confidentiality under PPP contracts, it is noteworthy that there might be requirements under the respective local law that need to be taken into consideration.	Agreed and this valid point is already emphasized in the commentary contained in Section 7 of the Report.
111.	In the Report one of the options for redressing losses incurred by a project participant/affected party on account of a change in law is that the Parties shall mutually agree on the amount and payment of any compensation to reflect the Estimated Change in Project Costs taking into account the actual increase or reduction in costs reasonably incurred pursuant to such Change in Law. Under model concession agreements for most PPP projects in India the relief for Change in Law is linked with actual quantifiable losses (financial or economical) incurred by the affected party, rather than any deviations in Estimated Project Costs. The Report does not address the impact that interim order of courts may have across sectors in some jurisdictions. While, the ultimate/final court decision would be covered by "Change in Law" provisions, in case of prolonged delays in settlement of interim orders, provisions to protect the Base Case financial model may be required. These would, however, be only if such impact is across the sector, not a project specific situation.	Thank you very much for sharing these insights. The Sample Drafting states that any payment reflects actual costs (see Sample Drafting 3, Clause 3(c), and Sample Drafting 3A, Clause 4(c)). The PPP team has flagged the need to adapt the respective drafting to local conditions throughout the Report. More examples of actual practice in different countries would be one of the areas of focus for a future iteration of the document.
112.	A concern that has been raised with respect to termination payments being linked to capital cost of the project as set out in the financial package is that, since actual cost of the project on the date of termination, may vary significantly from the cost approved in the financial package, termination payments should ideally take into account the actual cost of the project on the date of termination or the amounts advanced by the Lenders towards such actual cost of the Project. This aspect may be considered for the purposes of the Report.	Thank you – the PPP team has reviewed this Section once more to ensure a balanced presentation of matters.
113.	While the Governing Law and Dispute Resolution Chapter covers all important aspects that should be borne in mind with respect to PPP Projects, the following facets may also be considered for the purposes of the Report: (i) in order to ensure neutrality of arbitrators, when a person is approached in connection with possible appointment of an arbitrator, such person should be required to disclose in writing about existence of any relations ship or interest of any kind, which is likely to give rise to justifiable doubts. Such a person with conflict of interest should be ineligible to be appointed as an arbitrator; (ii) a provision for fast track procedure for conducting arbitration should be introduced. Award in such cases should be given	Many thanks for these further suggestions. The Report recommends institutional arbitration – appointment of arbitrators and expert advice are matters typically addressed by the relevant institutional rules. Expert Determination is one means of fast track resolution of technical disputes. The PPP team has added a footnote in respect of expedited arbitration (though not necessarily common in PPP projects).

	within a period of six months; (iii) the arbitration panel should be allowed the discretion of consulting experts on any matter.	
114.	The Report provides that normally "step-in" is for a limited time frame with the aim to provide the party stepping in to rectify the default and prevent termination of the contract. Substitution by Lenders in infrastructure contracts can however be an alternative to termination of the contract. Accordingly, the new party substitutes the original contractor not for a specified time frame but normally for the residual period of the concession. In this respect, the Report does not address in detail the options regarding terms and conditions for substitution. While it briefly discusses assumption of liabilities by the Lenders, there is not assessment of whether the substitution should take place on the terms and conditions of the concession agreement executed by the contractor or whether the financial / technical status of the project should be re-evaluated as on the date of the substitution. This evaluation is particularly relevant in a scenario where a project is in its construction phase; there is significant time overrun leading to substantial cost overrun and the party substituting the contractor is required to step into the concession agreement as executed by the contractor. In such a situation, even if the party substituting the contractor is willing to assume the liabilities of the contractor, it is possible that it may not be commercially viable to perform the contract in its existing terms. There may be a need to review and modify the original concession agreement considering the existing realities, e.g. there may be a need to extend the concession period or increase the toll/tariff to make the project viable and attractive for the party substituting the contractor.	Thank you for this comment – as pointed out in Section 6 of the Report, step in rights are typically enshrined in direct agreement between the Lenders and the Contracting Authority which are normally not outlined in the PPP Contract. This is why the Report does not cover the terms of direct agreements in detail but rather provides an overview. Section 6 mentions substitution and also now includes some further wording regarding a replacement equivalent direct agreement.