



## Joint Submission to the World Bank on the Draft 2019 *Guidance on PPP Contractual Provisions*

30 April 2019

### Introduction

In February 2019, the World Bank issued its [draft revised \*Guidance on PPP Contractual Provisions\*](#) (the Guidance) in order to solicit feedback from stakeholders. After a public comment period, the World Bank plans to release the publication's third edition in June of 2019.

The 2017 version (second edition) of these contractual provisions sparked a strong reaction from developing countries and civil society. It led to a [comprehensive legal review by the law firm of Foley Hoag LLP](#), as well as a digest of [key messages](#). The experts' commentaries and engagement with the World Bank underscored important imbalances in the way risks and rewards, rights and responsibilities were allocated between the private sector partners and the public sector contracting authority. They also urged the World Bank to provide more specific contextual and drafting advice from the standpoint of the contracting authority. Moreover, a study by the International Institute for Sustainable Development (IISD) highlighted what the 2017 edition failed to address: the imperative of sustainable development and [the role of well-executed infrastructure projects in promoting the achievement of the Sustainable Development Goals](#) (SDGs). Regrettably, few of our comments were reflected in the Guidance. Our offer to work in a collaborative manner to contribute to the drafting of the Guidance was also not accepted.

As a result, the undersigned organizations are making another submission to the World Bank team on the draft third edition of the Guidance. This Joint Submission was developed by Foley Hoag LLP and legal experts at the IISD and the Observatory for Sustainable Infrastructure. Heinrich Böll Stiftung, Washington, DC, graciously provided financial support for the preparation of this document.

This submission notes that, while some changes in the text have been made to address concerns expressed in relation to the 2017 edition, the fundamental lack of balance seen in the 2017 version remains in place. For the most part, the Guidance is fixated *on getting the PPP deal to a close* by motivating the private partner at the expense of the host country and its people. The text sees the contract as the endpoint, rather than a key milestone in the life of a PPP and a formal starting point for a successful infrastructure project that supports sustainable development. Host countries are urged to accept as a cost of attracting infrastructure investment the negative consequences that may

fall on them and their people as a result of these contractual provisions. This approach to minimizing the costs of the private partner while maximizing the liabilities of the contracting authority does not equate to the value-for-money proposition that the text seems to imply. It simply maximizes the profit margin of the private partner while potentially creating large contingent liabilities of the host country. The addition of new paragraphs that comment on sustainable development and climate change does little to clarify the link between sustainable development and the obligations of the contract parties that should be embedded in the PPP contract. In fact, the overall approach to PPPs advocated by the Guidance is either indifferent to countries' international commitments to sustainable development, or worse, could hinder rather than support such commitments.

We did find that the three new chapters—Chapter 4 on Contracting Authorities' Step-in Rights; Chapter 6 on Termination Events; and Chapter 9 on Handover of Assets at End of Contract—are written in an even-handed manner and offer advice that has the potential to assist in the negotiation of balanced contractual provisions. We also note the clear indication of local law as the appropriate governing law of the PPP contract (p. 164) and the accompanying sample drafting language (p. 177). These revisions respond to our earlier comments on the 2017 edition of the contractual provisions. Throughout the rest of the Guidance, however, the private partner consistently has the upper hand in the recommended contractual provisions. The contrast between the new chapters and the rest of the Guidance creates an internal inconsistency that may confuse the audience of the Guidance as to the identity of the real intended audience of the Guidance and the overall approach taken by the Guidance on the allocation of risks between the contract parties.

This Joint Submission encourages governments to voice their concerns in order to reorient the Guidance toward a more internally consistent and balanced document that clearly sets its objective as sustainable development of the host country with fair and equitable allocations of risks and rewards, rights and responsibilities between the contract parties.

We also recommend to the World Bank team, for reasons explained below, to delay publishing a revised Guidance for another year until thorough changes and updates can be made along the lines suggested below. The value added of publishing this edition is relatively minor compared to the importance of addressing the need for balance in the existing set of provisions and what remains absent from a broader SDG perspective.

This Submission covers five key points:

1. Context of today's PPPs
2. Audience and purpose of contractual provisions
3. Impacts of the contractual provisions and suggestions for revisions
4. What governments should do in response
5. Recommendations to the World Bank drafting team

## 1. Context of Today's PPPs

PPPs are complex long-term arrangements that can span two to three decades. Over the years, government, academic and civil society inquiries have probed failed PPPs of the past decades and, more recently, the changing context in which today's PPPs (and infrastructure projects generally) operate.<sup>1</sup> These efforts have significantly raised the level of awareness of risks to and from PPPs, among governments, investors and civil society. Today, active debates on these risks, both traditional and new, involving international organizations, governments, businesses and civil society organizations (CSOs) are ongoing in multiple global forums. These include numerous debates on the potential risks around the consequences of devastating climate change impacts on PPPs; inquiries by the International Monetary Fund (IMF) and others about the risk to public finance and concealment of contingent liabilities and economic austerity that can result from fiscal mismanagement and excessive risk taking in PPPs; and the United Nations Commission on International Trade Law's (UNCITRAL) process on the reform of investor–state dispute settlement aimed at addressing some of the risks inherent to this form of dispute settlement. These debates provide a compelling reason for documents such as the Guidance to address them in terms of the changing context of PPPs and suggested PPP contractual provisions. Unfortunately, the Guidance does not stand up to this challenge.

The messaging at the recently held IMF–World Bank Spring Meetings stressed the imperative of the SDGs and offered advice on how governments should implement them through fiscal and other measures. Yet the Guidance does little to contribute substantively to this discourse. The Guidance fails to explain how sustainable development and climate considerations should be addressed by the contracting parties throughout the life of the project, in terms of risk management and enhancement of [economic, environmental and social sustainability co-benefits](#).

As investors and governments search for new opportunities for infrastructure investment, the need for up-to-date and balanced guidance on successful infrastructure investment is more pressing than ever. Too many projects stand to waste the once-in-a-generation opportunity to realize potential public benefits, which in practice are almost always underdelivered.<sup>2</sup> The chances that projects will miss sustainable development opportunities are even greater. Many government representatives have expressed to us their frustration that advice on how to reflect sustainable development considerations in the PPP context cannot be found. Considering the enduring appetite for PPPs,

---

<sup>1</sup> For example see: the Annual Report of the French Court of Auditors (2019, in French): <https://www.ccomptes.fr/fr/publications/le-rapport-public-annuel-2019>; the *PFI and PF2* report by the Comptroller and Auditor General of Great Britain's HM Treasury (2018): <https://www.nao.org.uk/report/pfi-and-pf2/>; *Special report 09/2018: Public private partnerships in the EU: Widespread shortcomings and limited benefits* by the European Court of Auditors (2018): <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=45153>; *Extreme poverty and human rights* (Note by the Secretary General of the United Nations General Assembly [2018]. A/73/396): <https://undocs.org/A/73/396>; IMF's *How to control the fiscal costs of public-private partnerships*: <https://www.imf.org/en/Publications/Fiscal-Affairs-Department-How-To-Notes/Issues/2018/10/17/How-to-Control-the-Fiscal-Costs-of-Public-Private-Partnerships-46294>.

<sup>2</sup> Flyvbjerg, B. (2011). Over budget, over time, over and over again. Managing major projects. (2011). In Peter W. G. Morris, Jeffrey K. Pinto, and Jonas Söderlund (Eds.), *The Oxford handbook of project management* (pp. 321–344). Oxford: Oxford University Press.

notwithstanding the risks and potential failures, today's guide to PPP contractual provisions must take a holistic and balanced approach to better describing and helping to address the recurrent sustainability challenges that governments, investors and people will face over and over again.

## 2. Audience and Purpose of Contractual Provisions

The stated objective of the Guidance is “to assist its target audience, namely Contracting Authorities – and particularly those in emerging PPP markets –, with obtaining a better and more comprehensive understanding of a number of essential provisions typically encountered in a PPP Contract” (p.8). Notwithstanding this stated objective, the overall impression conveyed by the Guidance is that it is designed to get the contracting parties to arrive at a PPP deal as expeditiously as possible and without sufficient regard to the long-term success of the PPP.<sup>3</sup> Nowhere in the document do we find a broad definition of what constitutes a successful PPP, seen from a long-term perspective of sustainable development and not defined in terms of financial close. While value for money and management of fiscal and financial risks are essential, so too is management of the nonfinancial risks of PPPs, such as environmental, social and governance risks.

A related objective of the Guidance, which is not explicitly stated as such but is clearly implied, is to help PPPs become bankable and reach financial close. This is obvious from the recurring use of the term “bankability” and its variance in the Guidance. The objective of the Guidance should not be bankability through disproportionate risk allocation to the contracting authorities. The objective of the Guidance should be to make the PPP fit for sustainable development and to help countries meet their SDG goals and targets. Yet, the contracting authorities are repeatedly warned about the “bankability” of a project and the potential for increasing the cost of a PPP or for failure to reach financial close should the private partner be asked to shoulder more risk.

The foregoing preference for industry concerns is further underscored by the World Bank's own statement in the introduction to the 2019 edition that, following internal and external consultations on the contents of the 2017 Guidance, “it is in response to the industry feedback received during those discussions that this new edition of the Guidance has been developed” (p.8, emphasis added). The Guidance further advises that “once further industry feedback has been collected and as and when new consensus develops,” the Guidance will be finalized (p. 9, emphasis added). Accommodating industry participation and feedback, possibly while excluding the perspective of other stakeholders, such as the contracting authorities, implies who the target audience of the Guidance is. And we suspect that this narrow focus on industry feedback may be the reason why so many of our previous comments have not been reflected in the drafting of the Guidance, especially in the sample drafting suggestions (see below).

---

<sup>3</sup> In an exhaustive evaluation that examined the World Bank Group's support to PPPs from 2002 to 2012, its Internal Evaluation Group observed that, among other things, that the World Bank Group is short on meaningful measures of success in PPPs other than profitability, and that PPPs need to be measured in a more multifaceted manner, focusing on access, pro-poor aspects and quality of service delivery. See: Independent Evaluation Group. (2015). *World Bank Group support to public-private partnerships: Lessons from experience in client countries, FY02-12*. Washington, DC: World Bank. Retrieved from [https://ieg.worldbankgroup.org/sites/default/files/Data/Evaluation/files/ppp\\_eval\\_updated2.pdf](https://ieg.worldbankgroup.org/sites/default/files/Data/Evaluation/files/ppp_eval_updated2.pdf)

A balanced PPP guidance document should advise parties on how to allocate the risks and rewards and rights and responsibilities of the PPP fairly and equitably over the life cycle of the project. This should be done consistently throughout the entire Guidance without preferring the position of the private partner for the sake of closing the deal as soon as possible. The Guidance should anticipate and advise on each party's rights and responsibilities after the contract is signed to ensure that the infrastructure project avoids negative impacts and enhances positive and long-term economic, environmental and social benefits for society as a whole. The absence of meaningful reflection of this need does significant damage to the value of this current effort and its potential to produce guidance to contracting authorities.

### **3. Impacts of the Contractual Provisions and Suggestions for Revisions**

Our 2017 [Key Messages](#) document highlighted the following issues found in the 2017 version of the Contractual Provisions:

- Force majeure/material adverse government action: Government should not bear the risks of disruption from conflict, strikes and climate-related events
- Change in law: need to uphold the government's sovereign right to regulate in the public interest
- Confidentiality and transparency: Need for an unequivocal presumption in favour of transparency
- Governing law and dispute resolution: Need to articulate benefits of applying local law and drawbacks of investor–state dispute settlement

Of these, the first two points have not been addressed in the Guidance, whereas the third and fourth bullet points continue to have some deficiencies. Our overarching point regarding sustainable development also continues to present issues. These deficiencies and issues are explained in turn below.

#### **a. Sustainable Development**

As the [United Nations Conference on Trade and Development has noted](#), no one should assume sustainable development benefits from any form of investment: these benefits result from proper planning and from having high-quality regulatory and institutional settings that purposefully promote this result instead of assuming it. It should not be presumed that parties can leave it to the national law alone to address these challenges, especially when the relationship between contract provisions and domestic law is not always consistently identified in the contracting process.

The Guidance now includes a new heading called Sustainable Development (Section N in the PPP Contracts in Context section) in which several new paragraphs describe the importance of the SDGs, concluding with reference materials. However, considering the Guidance spans over 200 pages, just over one page of text on this important topic can hardly do it justice or set a proper context for any PPP transaction. And the sections of the Guidance that contain sample contractual provisions do not

provide guidance on how to assign responsibilities for sustainable development to the contractual parties in the PPP contract.

For example, the Guidance does not explain the relationship between the process of environmental and social impact assessment (ESIA), procurement and the provisions in the PPP contract. Although the Guidance notes the importance of “issues such as sustainable development, inclusivity, climate change and social and environmental impact” and asserts that “the procurement process will serve to determine the contractual rights and obligations of the Parties throughout the lifespan of the PPP Project, and, ultimately, the impact the PPP Project has on the environment, the wider economy (including employment) and society,” it does not explain exactly how this can be done. Those matters cannot be left simply to the operation of local law but instead must be carefully broken out into specific obligations and embedded in the PPP contract. Even though compliance risk is on the investor, each of the contractual parties has specific environmental and social obligations that should be affirmed in the PPP contract.

It would be helpful if the Guidance carefully spelled out the “handover” of the outcomes of the ESIA (and climate, human rights, labour, biodiversity or any other related assessment) process to the procurement process and to the contractual provisions. If an initial ESIA of the project as proposed had already been carried out by the host government, then the assessment’s recommendations on how the potential impacts should be managed should be built into the requirements for bidders. The winning bidder should still remain responsible for carrying out a detailed ESIA based on the final proposal, technology and locations. The cost of implementing the ESIA and the estimated environmental and social management or mitigation plan as an output to the ESIA process should be included in the bids. The winning bid should be based in part on the environmental and social qualifications of the bidder and the quality of the bid in relation to environmental and social issues. Furthermore, the environmental and social management or mitigation plan must be covenanted by the private partner in the PPP contract, together with other appropriate covenants (such as informational covenants and covenants to monitor compliance and correct any noncompliance with the management plan), and representations and warranties. The PPP contract should also spell out the specific consequences of breaches of the environmental and social obligations. The steps related to the procurement process will be more appropriately narrated in the guidance section, whereas other specific obligations of the contracting parties leading from the procurement process will belong in the sample drafting provisions of the Guidance.

The new climate change language (Section M in the PPP Contracts in Context section) seems to do a better job (compared with the 2017 Guidance) of connecting procurement with climate change aspects of projects and, overall, is consistent with [the World Bank’s publication](#) on mainstreaming climate resilience in large-scale infrastructure PPPs. This is a welcome addition. The new text notes the need to build high levels of climate resilience into any project, including during the procurement stage. The need to ensure climate resilience should fit well with the role of a highly skilled lead private partner, and the liability should follow this technical capacity. Instead, the Guidance discussion suggests it may be better to lower the cost by making the public partner liable for setting the climate risk levels and then taking the risk of a climate event impacting the infrastructure. This seems to us to be a denial of the very principle that the World Bank espouses for risk allocation: the partner best able

to mitigate the risk should take the risk. Furthermore, the Guidance is silent on how the choice of fuel and design specifications and technology upfront can help with climate mitigation; it merely notes that retrofitting is more expensive. And there are no sample contractual provisions in relation to climate change, such as in the definition of force majeure and dispute resolution sections, which remain almost identical to the 2017 edition.

The Guidance hints at a new collection of country experiences in reflecting climate issues in contracts, but the findings are yet to be published. It is hoped that such country experiences and lessons would be reflected in the revision of the Guidance following consultation, and especially in the specific sample drafting.

While international human rights obligations in relation to transparency, disclosure and discrimination related to access to services are referenced, other negative human rights impacts are not,<sup>4</sup> and, in general, social issues and inclusivity aspects do not receive full discussion compared to environmental or climate matters. Considering how often the term “inclusivity” is used in conjunction with infrastructure initiatives without much explanation, it is worthwhile to unbundle the term and connect it with specific concepts that are understandable.

In relation to other elements of [maximizing sustainable development co-benefits](#), such as local employment opportunities, local purchasing, gender equity and so on, we see no changes from the previous Guidance. Advice and specific language on inclusive infrastructure will be particularly welcome, especially since the World Bank has [internal resources](#) on this topic.

#### b. Contingent Liabilities

The Guidance does not properly describe the potentially significant risk of liabilities for the host country, which is the risk that what was presumed to be “off-book” financing will be seen increasingly as “on-book.” According to the IMF, “[a] survey of 80 advanced and emerging market economies showed that the average fiscal cost of PPP-related contingent liabilities that crystallized during 1990–2014 was about 1.2 percent of GDP, while the maximum cost was 2 percent of GDP (Bova and others 2016). With the increasing use of PPPs by countries, the size of associated risks is likely to grow, too” (p. 3).<sup>5</sup> This means that the risk of the contingent liabilities resulting from guarantees provided to private partners as an incentive in PPPs can be very large. As a result, the overall credit ratings and debt ceilings of the host country can be affected.

For projects already committed, this will mean a potential retroactive reclassification of debt and risk assessments, with potential downgrading of the country credit rating, which in turn will hurt the country’s prospect for future foreign direct investments. This is the very opposite effect envisaged by investment promotion and incentive schemes to attract foreign direct investment. As for new project

---

<sup>4</sup> OHCHR and Heinrich Boell Foundation (in press). *The other infrastructure gap: Sustainability* (Environmental and Human Rights Perspectives). Geneva: United Nations.

<sup>5</sup> IMF. (2018). *Fiscal policy: How to control the fiscal costs of public-private partnership* (How To Notes). Retrieved from <https://www.imf.org/~media/Files/Publications/HowToNotes/howtonote1804.ashx>

proposals, there will be no “off-book” advantage to structuring a project as a PPP as compared to traditional infrastructure financing. The interim risk is that the number of such hidden credit risk factors will increase as PPP projects expand with inequitable risk allocation, creating a ticking time bomb for many developing countries.

These problems are not adequately explained in the Guidance. The only warning on contingent liabilities is directed to lenders (p. 116). To the contracting authorities, the Guidance’s only advice on this looming problem is to refer to several accounting tools that countries could use to account for contingent liabilities. The Guidance also fails to explain the macroeconomic crisis and austerity programs that can follow from countries bingeing on PPPs, as was the case with several countries. It is troublesome that Chapter 10 on Confidentiality, Disclosure and Transparency continues to remain silent about the need for transparency in contingent liabilities.

#### c. Change in Law

The risks on the financial side are magnified by the allocation of risk on other fronts, most notably the insulation of the private sector partner from the costs of complying with new laws, even in such critical areas as labour, social inclusion and climate change. The Guidance argues that the government controls the “risk” of implementing new laws and so is best placed to bear all the costs of this risk materializing. This line of argument goes against the UN Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises. It negates the due diligence obligation of private investors to assess the need for developing countries to progressively implement all elements of the SDGs. The risk allocation provisions advocated in the current text potentially work to hinder governments in achieving their international commitments, such as those related to human rights, the environment and climate, and pressing national needs on similar issues through enactment of new laws.

The unevenness of the World Bank’s approach is seen in what appears to be an additional paragraph in this 2019 text: “In practice, in legally stable and developed markets, change in law risk will be defined so the Private Partner is not protected from ‘normal’ legislative evolution and is only protected against the impact of change in law specifically affecting the PPP” (p. 54). Why foreign investors should be protected from “normal” changes in law in developing countries but not in developed countries is never explained, other than by the World Bank’s perceptions of bankability.

#### d. Confidentiality, Disclosure and Transparency

The chapter could benefit from additional changes. For example, the overall responsibility for transparency seems to fall predominantly on the contracting authority, whereas this responsibility should be in principle a shared one between the contract parties.

The parties have a joint responsibility to ensure contract transparency, as well as disclosure of ongoing performance information (using pre-determined key performance indicators), any supplemental ESIA and other relevant analyses as appropriate, as well as the results of ongoing environmental and social

monitoring programs. Finally, the chapter should explicitly promote the transparency of contingent liabilities, as already discussed above.

#### e. Governing Law and Dispute Resolution

We welcome the change made in the governing law section to clearly indicate that it is typical to designate local law as the governing law of PPP contracts (p. 164) and the corresponding change in the sample drafting language (p. 177). However, the Guidance retains the list of reasons why such choice of law is unfavourable to the private partner, without attempting to also list the compelling reasons why local law should govern the PPP contract. As a result, the Guidance creates an impression that the private partner will be entering into a bad deal by agreeing to local law as the governing law of the PPP contract. This language should be adapted to avoid this one-sided discussion.

As for dispute resolution, the advice remains essentially the same as in the 2017 version. While the commentary is balanced overall, the sample drafting does not reflect this balance. Instead it refers to international arbitration under the rules of the International Chamber of Commerce (ICC) as the proposed option. ICC arbitrations are conducted with complete lack of transparency, including the award, and require total waiver of immunities by the contracting authorities. In picking the ICC Rules, much of the balance in the commentary is lost, and it falls on the contracting authority again to push back against the suggested drafting language. If this language is retained, one option to address the lack of transparency would be to include *mutatis mutandis* the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. These can complement any applicable arbitration rules, including ICC Rules. This would be in line with the World Bank's own efforts on contract transparency.

The issue of treaty-based investment disputes is also raised, but the Guidance, as in the 2017 edition, only notes that this would be an option in addition to a contract arbitration. It does not address the issue of putting the state at risk of multiple recourses and claims by investors, and that this problem could be addressed through a waiver in the contract that would exclude treaty claims based on the same underlying issue.

#### f. Protection from Competition

Considering the expense and time usually expended for PPP preparation, and the uncertainty of demand risk, it is plausible that the private partner would seek to insulate the project from future competition. For example, a toll road may seek and receive assurance from the host government that no public transport or a free road will compete with it.<sup>6</sup> The Guidance treats this as a Material Adverse Government Action (MAGA), which may entitle the private partner to terminate the PPP contract and seek compensation. Page 51 of the Guidance advises the drafter of a PPP contract to “[add any event specific to the PPP Project for which government/Contracting Authority is responsible, such as the construction of unauthorised competing infrastructure (e.g. a free road adjacent to the PPP tolled

---

<sup>6</sup> For an analysis of the use of noncompete clauses in U.S. infrastructure PPPs, see K. DeGood's "The hazards of noncompete clauses in public-private partnership deals": <https://www.americanprogress.org/issues/economy/reports/2016/07/27/141873/the-hazards-of-noncompete-clauses-in-public-private-partnership-deals/>

road) or failure to construct planned connecting infrastructure or a government-responsibility pollution event]”.

The proposal to turn future competing projects that have significant public benefit into a MAGA event is contrary to public policy, and noncompete clauses of this nature may even be illegal and not enforceable in some jurisdictions. Moreover, from a sustainable development point of view, we are concerned about parallel scenarios in the energy sector; for example, a traditional energy infrastructure project may be given monopoly status and prevent renewable projects or micro-projects from entering the market for decades, frustrating the intent of the Paris Agreement.

#### g. Project Finance vs. Other Modes of Infrastructure Finance

Fourth, the advice on contractual provisions is based on the traditional project finance model, which is increasingly being replaced by bond and corporate financing. In addition, the push by the G20, the World Bank and other multilateral development banks for institutional investors to invest in infrastructure as an asset class means that new financing structures in the capital markets and shadow banks may come to dominate infrastructure financing in the near future.

The World Bank added one chapter on bond financing and another on corporate financing in the 2017 edition. Both chapters comment on how the contractual provisions in the rest of the Guidance must be amended to fit the different financing models. At the same time, they advise that the basic method of risk allocation contemplated under the project financing model should not change between the contract parties. The Guidance reproduced the two chapters without substantive changes. The Guidance does not provide a more comprehensive analysis of the changed circumstances presented by non-project finance, the overall financing landscape and the implications on contractual provisions. The two add-on paragraphs alone may not meet the increasingly complex needs of investors and governments.

#### 4. What Governments Should Do in Response

We encourage governments, particularly the World Bank’s client country governments, to actively participate in the consultation on the Guidance to voice their opinions and share their experiences. The World Bank’s client country perspectives are particularly important in this context. We note that the finance ministers of Francophone low-income countries issued a [statement](#), making it clear that they will not accept just any PPP—they want public investment projects that target universal access to services in sectors such as education, health, water and energy, with reduced costs and risks in PPPs. Other governments may also wish to steer the orientation of the Guidance by expressing their desired approach to PPPs, their view of the ideal balance between investor rights and responsibilities and those of the state, as well as the balance of emphasis between the short-term and longer-term challenges in PPPs.

Countries are under great pressure to invest in new economic and social infrastructure and upgrade existing infrastructure, and they often see PPPs as the most attractive option. Getting to financial close as soon as possible undoubtedly is important for all stakeholders, and well-balanced guidance on

all the pertinent issues in PPP contracts would be invaluable to would-be contract parties. Yet we understand that some countries are not referring to the previous versions of the Guidance because of the perceived lack of balance and uncertainty as to the best deal possible for the country. As a result, several government representatives mentioned that they are reviewing each project de novo, taking legal advice and not resorting to any sample provisions or models. Such practice defeats the very purpose of the Guidance to standardize and expedite PPP projects.

In fact, there is growing impatience with the previous versions of the Guidance and emerging resolve for a comprehensive guidance document that takes a broader view of infrastructure investment, with sustainable development as the core value proposition. This can be done in consultation with a number of legal firms and CSOs that specialize in supporting developing country governments. It can be done through regional organizations and Regional Economic Communities, for example. And it can be done by coalitions of developing countries themselves. The Guidance should be responsive to these emerging desires and trends in various regions of the world.

## **5. Recommendations to World Bank Drafting Team**

We suggest that the consultation process for updating the PPP contractual provisions be made more open and transparent for all stakeholder groups. The dates and locations of formal consultation meetings should be announced well in advance of the meetings to enable all stakeholders, especially governments and CSOs, to participate. While the Singapore consultation meeting held on April 3 and 4 was well attended by representatives from 11 countries as well as a number of representatives from law firms and public and private financial institutions, no CSO from the region was in attendance. We still have no word on the consultation meeting in Africa, which had been mentioned earlier. We also learned in Singapore that the Guidance will be finalized by June of this year (the World Bank website indicates “summer of 2019”), which gives the World Bank team just over one month from the close of consultation. Under the circumstance, we cannot expect that all comments will be thoroughly considered by the World Bank team. These process deficiencies should be corrected.

Considering the points discussed above, on balance, we do not believe this version of the Guidance is ripe for publishing in its current form. First, there are virtually no changes in the chapters from the 2017 edition so that the Guidance maintains just about all of their prior imbalances and flaws. Second, the additional three chapters, while better balanced than the pre-existing chapters, only make marginal contributions to restoring balance to the overall documents. A more thorough job of creating a better overall balance in the document is urgently needed to avoid confusion and ensure internal consistency. Third, the complete absence of new provisions on the sustainable development dimensions exacerbates the imbalance in the document and militates strongly against publishing yet one more incomplete edition. For these reasons, we strongly recommend that the World Bank extend the drafting process for another year so that these defects can be addressed, and a holistic and comprehensive document can emerge.

As we stated previously, we are happy to engage and participate in collaborative drafting with the World Bank–Allen & Overy team to help address the issues discussed in this submission, and to reflect them in the improved edition of the *Guidance on PPP Contractual Provisions*.

Submitted by:

Foley Hoag LLP  
Heinrich Böll Stiftung  
International Institute for Sustainable Development  
The Observatory for Sustainable Infrastructure