Consolidated comments received during public consultations on the draft Guidance on PPP Contractual Provisions, 2019 edition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 Guidance on PPP Contractual Provisions, 2019 edition from February 2019 to April 2019. It also entails the responses given by the PPP team tasked with further amending the Guidance before its publication during early summer 2019. Please note that for the purposes of concision and comprehensibility, the respective inputs and recommendations were, where appropriate, abridged, and that mere editorial comments are not included in the table.

Feedback	Response
A standardised contract would be useful - is this possible?	We agree standardised contracts can be useful reference but no one size fits all across all sectors and projects and this is beyond the scope of the Guidance. We have included a new Appendix B listing by way of example the type of "standard clauses" typically included in a PPP Contract and noted the ones included in the Guidance. See also Aim of Guidance in PPP Contracts in Context.
Termination payment - could this have formulae, not just words?	Payment formulae are usually bespoke to the project in question - this is an area where bespoke expert advice is needed from financial advisers and is beyond the scope of this Guidance.
Applicable law / Overview sections - Enterprise law or other local laws may apply (eg applicable to corporate SPVs and regulating permitted level of debt of SPV or affecting other relevant aspects)	A reference has been added to Section C (Finance Structures for PPPs), PPP Contracts in Context.
Important for Contracting Authorities to recognise that the guidance is a "signpost", not a full document so don't expect to see all/just this in actual PPP contract.	Noted. Please see Aim of Guidance in PPP Contracts in Context and also new Appendix B which lists by way of example the type of "standard clauses" typically included in a PPP Contract and notes the ones included in the Guidance.
This tool is also great - particularly the comparisons between emerging/developed markets and common/civil law jurisdictions. Could more topics be added? Eg in relation to availability payment; structure; concessionaire.	Thank you. The Guidance is an evolving tool so further topics may be considered for any further editions. Some of these topics are touched on already in the PPP Contracts in Context section.
The 3 new chapters are very well balanced and are nice additions.	Thank you.

Feedback	Response
The content from the 2017 version has not changed much so the chapters are still investor-friendly. If they are retained, need to spell out what negative connotations are for the Contracting Authority.	The whole Guidance was reviewed for the 2019 draft and reflects market practice for achieving privately financed projects. The Guidance provides information on standardised legal wording, and set out risks and benefits, based on wording that is considered balanced and appropriate by all parties to a PPP. It sets out a range of factors to consider on any individual project, and does not seek to impose any one approach or to be investor-friendly. It would be contrary to the aims of the Guidance and of no benefit to Contracting Authorities to present a false impression of achievable risk allocation in the real world. As set out in a number of places (the Introduction and PPP Contracts in Context), the Guidance does not recommend PPP as a procurement model, it provides insight and example drafting to Contracting Authorities who have decided that PPP is the chosen approach to a specific project.
The new sections on environmental/social issues are very brief compared to the rest of the document. Would like to see (i) a sustainable development chapter and effect on actual drafting, and (ii) how to translate environmental/ social issues into procurement.	The Guidance focuses on particular contractual issues and already highlights where social/environmental issues should be considered. Focusing in further depth on these particular issues is beyond the scope of the Guidance (as is the same for other issues) and bespoke consideration and expert advice is essential for all projects. The World Bank has other initiatives on sustainable development and procurement which are cross-referenced as applicable; and social/environmental issues should have been considered much earlier in the procurement process. The sample drafting is specifically flagged as purely indicative and the content of the relevant sections must be read. Further references with specific focus on PPP procurement/contracts and environmental/social issues have been added in the revelant Sections and Sample Drafting of the Guidance. Ambitious environmental and social minimum requirements (standards, reporting etc.) are usually part of the technical annexes to the PPP Contract.
Payment mechanisms - escalation on agreed user fees and basis of indexation.	This falls more on the finance side than within the scope of the Guidance. However, it can be borne in mind in thinking about possible future publications on this topic. An additional footnote has been added to Section G (Alternative PPP payment mechanisms and risk allocation), PPP Contracts in Context to cross-reference Section 3.2.1.1

Feedback	Response
Accounting treatment - can more resources be referenced?	Please see Section H (Accounting treatment considerations), PPP Contracts in Context.
Although risks are allocated to the Private Partner (e.g. design risk, maintenance etc…), their occurrence can have a big impact on the Contracting Authority (e.g. social consequences, reputation etc…). CA needs to be aware of this.	This has been highlighted in WBG in PPP as Chosen Procurement Method section in PPP Contracts in Context.
Unavailability of Insurance - Make it clearer that insurance risk typically sits with the Private Partner and the risk of unavailability (and resulting shared or CA risk) is only in rare cases.	This has been clarified in Section 1.2.1.4 and Section 1.3.
Is there guidance available on bidding criteria?	There is no specific current guidance on this. The suggestion is noted. See World Bank's Procuring Infrastructure PPPs Report.
Civil and common law comparison useful. Also useful to have references to case studies. Best practice on variations - it would be useful to have guidance on how this might be dealt with.	Variations - the Guidance is an evolving tool so further topics may be considered for any further editions.
These tools are very good - is a difficult job. Our organisation has many case studies which could potentially be linked.	Thank you. Suggestions of additional resources for future editions are welcome.
PPP is used also to improve infrastructure quality and services. Include more focus on output - put performance assessment in contract.	See changes in PPP as Chosen Procurement Method in PPP Contracts in Context. Detailed guidance on performance assessment is beyond the scope of this guidance but the PPP Contract Management Tool is envisaged to be released by June 2020.
Each industry has own characteristics - suggest that the World Bank produces a contract on each sector.	We agree standardised contracts can be useful reference although no one size fits all across all projects (and sectors) and this is beyond the scope of the Guidance. Reference is made to different sectors in some places, as well as to the GIH sector-specific matrices, and there are links to various resources in the Appendix.
Once projects are operational, the general public provides feedback and this is provided for in the contract.	Noted. This can be a good way to increase stakeholder involvement and improve later projects.

Feedback	Response
On page 8 Introduction, suggest change reference in first paragraph from "concession" to "PPP contract".	The Introduction has been re-worded.
Given corporate financing possibilities, flag more that the Guidance is based on project finance.	This has been further emphasized in the Introduction and Section C (Finance structures for PPPs), PPP Contracts in Context.
Suggest GIH/WB send the final tools to governments and PPP units in hard copies so that they are properly disseminated (and read - more likely by at least one person if in hard copy not a link).	Thank you for the suggestion which is noted. Methods for best dissemination are being considered.
It might be helpful to have an index/numbering for the PPP Contracts in Context section so that the issues covered are clearly flagged to the reader and not missed as "general intro".	The PPP in Context section headings have been included in the contents table to improve navigation of the Guidance.
Consider further additions on foreign exchange risk.	Reference has been added in Section E ("Bankability" considerations for Contracting Authorities), PPP Contracts in Context.
Understanding lenders' point of view (and how long term finance works) is important.	We agree all parties need to understand each other's perspective and motivation. Additional wording has beeen added to Section E ("Bankability" considerations for Contracting Authorities) and Section F (Risk Allocation), PPP Contracts in Context.
Important that stakeholders comply with social and environmental issues.	Agreed - all parties need to recognise the importance of considering and addressing these issues which is why the new sections on these topics have been added to PPP Contracts in Context (see Sections L - N), as well as references throughout the Guidance.
Important that parties (and Contracting Authorities) understand complexities of project documents and importance of sticking to a bargain over the long term.	We agree and additional wording has been added to Section F (Risk allocation), PPP Contracts in Context .
Various guidance docs were mentioned in the workshop (eg World Bank infrastructure Prioritization Framework; Infrastructure Resilience Tool, Country PPP-Readiness Diagnostic Tool; Procuring Infrastructure PPPs 2018+; Version 2 of PPP FRAM; PPP Screening Tool; GI Hub Reference Tool on Inclusive Infrastructure and Social Equity consultative version).	Various tools and resources are referenced through the Guidance particularly in PPP Contracts in Context.

Feedback	Response
The "Guidance on PPP Contractual Provisions" is generally a comprehensive and very carefully thought through document that provides a good analysis of the theory and the market practice around various key issues.	Thank you
As would be expected there are a number of specific areas where we think that a slightly different emphasis could have been given or where one "sub issue" does not seem to have been addressed. Whilst we fully appreciate the need for the document to be focussed, we consider that some issues could perhaps be considered more "in the round". We have accordingly set out some general comments on the approach adopted generally and second some more specific comments and suggestions cross referenced to the actual provisions of the document.	Thank you for the detailed feedback.
1.1 We completely agree that the approach taken by a Contracting Authority must take into account the specifics of the Project in question. We think that (although implied in the document) consideration should be given to adding an express statement that most Contracting Authorities have the choice, in bidding out a PPP project, to aim for either (a) the best financial terms or (b) the greatest degree of risk transfer to the private sector. Both are sensible and legitimate aims but a Contracting Authority has to chose between them.	An amendment has been made to PPP as Chosen Procurement Method section in PPP Contracts in Context.
1.2 Another very general point is that successful PPP and equivalent programmes are arguably driven not so much by the *quality* of the documentation and risk transfer approach as by the *consistency* of approach taken from project to project. A Contracting Authority that, having done one project, then "rolls out" the documentation (even if imperfect) for its next ten projects with minimal changes (reflecting only the specifics of the new projects) will have more success than one that attempts to "perfect" the documentation and risk allocation approach on the second project and then again on the third.	We agree consistency is a factor. An amendment has been made in Section F (Risk allocation), PPP Contracts in Context.
1.3 We have assumed that the prime "audience" of this document is Contracting Authorities in developing markets (and WBG teams advising them). If this is the case we are not certain that the extensive reference to "developed" markets is especially relevant or helpful. We think that a better focus might be not "developed" as against "emerging" markets but rather jurisdictions where the domestic banking market is deep enough to fund the projects as opposed to those jurisdictions where the debt financing will need to be sourced from international banks, export credit funders and/or multilaterals. Local banks will have a very different risk appetite and this will drive what risks can sensibly be pushed to the private sector.	The aim of the Guidance is to enhance the understanding of Contracting Authorities around typical PPP contractual provisions, based on sample contractual language from developed as well as emerging markets, and explaining how the risk allocation and consequently the wording of key PPP provisions may change depending on the circumstances - the maturity of the market being one of them. Definitions of Emerging Market and Developed Market have been included to reflect the different contexts intended which we think are more nuanced than just domestic banking market depth.
1.4 There is considerable analysis of the linkage between force majeure/MAGA and termination, in terms of the existence of a termination right and the level of termination compensation. However there appears to be less focus on the important linked issue of **who** can exercise a termination right. For example in many contracts, the Contracting Authority might not want to allow termination by the project company for prolonged MAGA on the basis that the Contracting Authority would prefer to continue to provide ongoing compensation.	As regards force majeure, this is addressed in Section 1.2.4 including the emerging and developed market differences box, and in Section 1.5, Sample Drafting 1A Clause (7). Additional wording has been added to Sample Drafting 1 Clause (8). In our experience this right is likely to be more seen in government pays (availability) projects, as Contracting Authority credit risk may be more of a concern in this scenario in demand-risk projects. As regards MAGA, given its nature, it may not be appropriate for the Contracting Authority to have the right to prevent termination by continuing to pay and we have left the drafting as is. The parties could of course agree otherwise at the time.

Feedback	Response
1.5 The force majeure section does not seem to address the issue that on some PPP projects a physical force majeure event might effect the ability of the Contracting Authority to perform its obligations. This is not a concern on all projects but will be significant on some. For example a sewage treatment project relying on inlet and outlet pipes provided by the Contracting Authority may well be unable to perform if a force majeure affects these assets. Similarly the project company is in no position to insure these assets. The Private Partner will be looking for a continuation of payments in these circumstances.	Addditonal wording has been added in Section 1.1.2 to clarify the assumption in this section that the Contracting Authority's obligations are primarily financial and that other considerations might apply if the Contracting Authority is assuming other more substantive obligations that may be affected by a Force Majeure event.
1.6 In terms of MAGA, some jurisdictions (for example Kenya) include concepts of "direct political force majeure" (things that government can control such as loss of consent, embargo, change in law) and "indirect political force majeure" where government has less ability to control (for example war or political violence). The financial consequences of the latter (both in terms of ongoing compensation and termination payments) are less generous to the Private Partner, reflecting this fact.	This is already included in Section 2.2.1.2 as regards defining events and Section 2.2.4 as regards termination. Additional wording has been added to Section 2.2.2 as regards other relief.
1.7 Two considerations on any termination payment regime are not discussed. The first is the concept of redeployment of capital. The economic theory is that if the Private Partner receives a lump sum compensation payment it will be able to redeploy that money to profitable ventures. Thus if it were to be paid the full value of the profit that it would have made through to the expiry of the PPP contract on a termination for Contracting Authority breach, it will actually profit doubly - because it receives the full value of its lost profit (subject to a discount rate representing the time value of money) and is then able to reinvest that amount at a profit. This is undesirable from the Contracting Authority's perspective. The second is the "moral hazard" concern. If, for example, the termination payments on termination for force majeure or MAGA comprise debt plus (equity injected less distributions to date) there will be a point in the life of some PPP projects when the Contracting Authority is able to terminate the contract and purchase the asset for next to nothing (because the debt has been paid off and the sponsors have been able to pay themselves significant amounts in distributions). This could incentivise a Contracting Authority to attempt to create a problem so that it can exercise its termination rights. A termination payment regime that is perceived by the market as representing a significant moral hazard will discourage equity investors.	We do not think this is wholly relevant and is overcomplicated for the Guidance. The redeployment point should not apply to Contracting Authority Default/Voluntary Termination and there may well be a haircut in the other termination scenarios if indeed any equity return is compensated. As regards moral hazard in the case of the Contracting Authority, this seems somewhat theoretical when Contracting Authorities have their ongoing reputations to consider, plus there may not be much tail/time to facilitate a termination depending on the loan term, and it is also unlikely to be a point bidders will want to raise in the tender process.
Section 1.1.4 - We query the overall applicability of a requirement for "equivalent project relief". For PPP projects to be successful all stakeholders - including key construction and operation subcontractors - must be treated fairly. Equivalent Project Relief creates severe difficulties for contractors specifically:	Noted. Ultimately the inclusion of "equivalent project relief" arrangements in the subcontracts will be driven by the requirements of potential lenders to the PPP project. However, for a PPP financed on the basis of limited recourse financing, lenders do in our experience commonly require an equivalent project relief arrangement (or similar) to be reflected in first tier sub-contracts, although it is certainly acknowledged that there may be exceptions to this in certain markets or sector. Given the purpose (and level of detail) of this document and the intended audience, we do not intend to amend/expand upon this point in the Guidance at this time.
• at a theoretical level a Contracting Authority is able to use an equivalent project relief provision in a subcontract to relieve itself of its own liabilities - on the basis that on the Force Majeure or MAGA incident in question as the obligation of the project company to provide relief to the sub-contractor is conditional upon it first obtaining relief from the Contracting Authority, there is no actual loss to the Private Partner that needs compensation	The subcontractor would typically make a claim against the Private Partner which would then claim against the Contracting Authority. If the Contracting Authority refused to award an entitlement to the Private Partner, then this would be a matter for the Private Partner to dispute with the Contracting Authority. There may also be a right for the affected subcontractor(s) to dispute on behalf of the Private Partner (i.e. name borrowing) or to oblige the Private Partner to dispute in its own name, albeit subject to the consent of the lenders. Whilst we note the theoretical level concern, the principle of equivalent project relief arrangements is a well established requirement for lenders financing a PPP project on the basis of limited recourse financing.

Feedback	Response
• at a more practical level the sub-contractor is required to take the risk not only on the event but also on the behaviour of the Private Partner in exercising its rights. The Private Partner may well not wish to raise a major dispute regarding construction with the Contracting Authority (on the basis that it has to manage a 25 year relationship with that authority). This puts the sub-contractor in an impossible position and a well advised sub-contractor would thus only accept an equivalent project relief provision on the basis that it had effective control over the way that the Private Partner pursued the claim against the Contracting Authority	See comments above.
• however, for reasons stated above, no properly advised Private Partner should agree that its subcontractor should have control over the way it conducts a claim with its client	See comments above. To the extent that the subcontractor has a right of name borrowing of the Private Partner, this is typically subject to certain controls, such as lender consent and a right for the Private Partner to assume back direct control of the conduct of a claim, and also certain procedures, including an indemnity from the subcontractor for expenses and losses incurred by the Private Partner as a result of name borrowing.
• finally a PPP Contract will almost inevitably compensate the Project Company through an adjustment to the availability payment or an extension to the concession period - however the subcontractor will need cash to compensate for the costs that it will incur.	If an event occurs which results in a capital expenditure (rather than operating expenditure) for the Private Partner and the Contracting Authority is liable for the cost either expressly (e.g. under the MAGA or change in law provisions) or by agreement through the Force Majeure discussions, typically this capital expenditure would be payable by the Contracting Authority on a lump sum reimbursement basis. This approach would usually offer the best value for money for the Contracting Authority and such capital expenditure would then be paid to the relevant first tier subcontractor. The Contracting Authority may have a right to request that the Private Partner seeks additional or increased financing for this capital expenditure, although the cost of financing would usually mean that this offers significant poorer value for money to the Contracting Authority. In the context of Force Majeure (and by cross-reference MAGA), this is envisaged in Section 1.2.3.8. We have amended the sub-heading to make this clearer.
Section 1.1.4 - For all of the above reasons these provisions are always heavily negotiated and frequently so heavily qualified that they are next to meaningless.	See comments above. Whilst equivalent project relief arrangements are often subject to discussions between the Private Partner (and its sponsors) and first tier subcontractors, they remain an important protection for Private Partners (and lenders) in the context of limited recourse financing and we would not agree that such provisions are negotiated down to be almost meaningless.
Section 1.1.4 - There is good reason for banks (or Contracting Authorities) to insist on these provisions when, for example, the construction sub-contractor is the controlling shareholder of the project company and there is a genuine concern that the project company is no more than a funding vehicle for the sub-contractor. Whether such a provision is fair and appropriate for a third party sub-contractor is far less certain.	See comments above.
Section 1.2.1.4 (Insurability and Force Majeure) - We do not fully understand the analysis in this section. A key concept of force majeure is that a party should not be rendered in breach of obligations (and thus subject to a possible termination sanction) which cannot be performed because of a supervening event beyond the parties' control. Whether an event is insurable should thus have no effect on whether it constitutes a force majeure. The question of insurability goes to the issue of the type and nature of relief prescribed. For example, if a completed water treatment plant is destroyed by an earthquake, if this is not considered force majeure, the Private Partner will be in breach of its obligation to operate the plant and be available to treat water. This exposes it to the risk of a termination for breach (and consequent loss of its equity). This should not happen. However the fact that seismic events are generally insurable should influence the consequences of the force majeure event (it would in most emerging market PPP projects not entitle the project company to any financial compensation because both physical damage and associated business interruption insurance should be available).	As the Guidance explains in Section 1.2.1.4 the relationship between insurability and force majeure is not clear-cut. We take the point that it is not the availability of insurance per se that determines whether an event is Force Majeure but insurance will be relevant to the financial consequences of the event occurring even where insurance responds. See changes to Section 1.2.1.4.

Feedback	Response
Section 1.2.2.2 and Section 1.2.2.3 (Liquidated damages and extensions of time) - The almost universal method in which PPP contracts address the project company's right to relief from a potential exposure to delay liquidated damages is to provide an extension of time. The current layout of the provision seems to contemplate both a relief from damages and an extension of time - which is obviously a duplication and in practice does not happen. We suggest that these provisions are put into one clause.	We think the provision is clear but have added some additional wording in Section 1.2.3.2.
Section 1.2.2.2 and Section 1.2.2.3 (Liquidated damages and extensions of time) -Separately (and more linked to section 1.2.2.5) many availability payment PPP contracts will include a bonus/penalty (or penalty only) regime based on the achievement of certain KPIs. If this is the case, a force majeure (or MAGA) needs to contemplate relief from this penalty regime.	Additional wording has been added at Section 1.2.3.9 (to which Section 2.2.2 refers) to reflect this point.
Section 1.2.2.6 (Tariff increases) - It is perhaps worth adding that the side-effect of a tariff increase may well be to reduce traffic. An example is the BTS ("Skytrain") project in Bangkok where a huge fare increase (from 30 to 50 Baht) was awarded to compensate for the effect of the 1997 Asian financial crisis (Baht devaluation). When the System opened in 1999, the ridership was extremely low, dramatically below forecast, because of affordability and competition issues.	Noted. The effect of a tariff increase on demand is already mentioned in this section.
Section 1.2.4 (Force Majeure and termination) - As stated above in our "General" comments, the analysis of the relationship between the force majeure provisions and the termination payments is incomplete without adding to the analysis the question of **which party** has the right to terminate.	See response to comment on 1.4 above.
Section 1.2.4 (Force Majeure and termination) - At a level of detail we would expect (and this is consistent with the provisions in the document concerning the termination payments) that a termination payment on force majeure would be expected not just to discharge debt but also to repay the investors the equity invested (net of distributions received up to the point of termination).	We have added wording to reflect the position set out in Section 8.5.
Section 1.3.2 and Section 1.3.3 (Uninsurability) - It is perhaps worth mentioning that many contracts similar to PPP contracts (for example long term power purchase agreements with utilities) provide a "financing agreement override" provision in the insurance clause – that provided the Private Partner was in compliance with the insurance requirements of the banks it would not be deemed to be in breach of the insurance requirements of the PPP contract. This is on the basis that the insurance requirements of lenders are likely to be more specific.	Noted but we do think this is so prevalent as to be appropriate to include and not necessarily the approach to recommend to Contracting Authorities.
Section 1.3.2 and Section 1.3.3 (Uninsurability) - As a minor matter, given that almost all major projects are reinsured internationally, we do not see a great distinction between "emerging" and "developed" markets.	Noted. We think the potential lack of a comparative pool of contractors is particularly relevant in emerging markets, and have amended the wording in Section 1.3.2. to clarify this.
Section 1.4 (Definition of Force Majeure) - A Private Partner would argue that an event that rendered the performance of an obligation "materially more difficult or materially more expensive" should qualify for force majeure relief as well – it should not be restricted to events that render performance "impossible". [This is particularly the case in those PPP contracts where MAGA events are treated as "Political Force Majeure" or "Government Force Majeure" within the Force Majeure clause.	We do not think this is the appropriate measure for qualifying as Force Majeure. We do not believe this position is particularly prevalent in the international PPP market and, given the intended audience for the Guidance, we do not believe it would be the approach to recommend to Contracting Authorities.

Feedback	Response
Section 1.4 (Definition of Force Majeure) - In considering the time period for giving notices the Contracting Authority should be aware that in practice the notice and the particulars will come in whole or in a significant part from the project company's sub-contractors and the project company needs time to integrate these claims into its overall claim.	Noted. No change proposed
Section 2.1.2 (MAGA provisions and bankability) - Whilst MAGA is important to bankability, we think that this may not be the prime concern. On most projects even if an event does not constitute MAGA it is very likely to constitute a force majeure and, in most emerging market PPPs the debt is protected on force majeure. The MAGA provisions are at least as important to protect equity - both directly and indirectly (to give the investors in the Private Partner a better set of "hooks" on which to base a political risk policy with extended political risk coverage).	The section refers to both.
Section 2.2.3 (Termination) - We do not agree with "both parties typically have the right to terminate" as a blanket statement. The question of who has the right to terminate in circumstances of MAGA should be considered by a Contracting Authority on a project by project basis.	Noted but no change proposed. We would typically expect the effect of a prolonged MAGA to be treated, from a right of termination perspective, in the same way as a prolonged event of FM. However, the key difference between a termination for prolonged FM and a termination for prolonged MAGA will usually be the compensation terms, as addressed in Section 2.2.4.
Section 2.2 paragraph 8 (Termination for MAGA) - A Contracting Authority should consider whether it should have the right to prevent termination by the Private Partner by electing to continue to pay the ongoing compensation for MAGA provided by the contract.	See above - As regards MAGA, given its nature, it may not be appropriate for the Contracting Authority to have the right to prevent termination by continuing to pay and we have left the drafting as is. The parties can of course agree to continue the contract at the time.
Section 3.2.1.1 (Pricing flexibility) - There needs to be understanding that "user pays" PPP projects can vary enormously. For example whilst a mass transit project relying almost entirely on passenger fares will have limited ability to pass on costs for political and competition reasons, the same is not true for a port or airport with multiple revenue flows from a real "market".	Noted. Some additional wording has been added to Section 3.2.1.1.
Section 3.2.2.3 (Qualifying date) - Contracting Authorities should note the difficulties that can arise when a potential change in law is under discussion at bid date. An example are the recent sewage treatment PPPs in Saudi Arabia bid out at a time where proposed changes that would have drastically increased the applicable environmental standards were under discussion but not certain of implementation in that form. Many bidders determined that the "new" standards were uncertain as to implementation and would require a complete redesign and accordingly qualified their bids in this respect. If a change in law is under discussion that may have a significant impact on a project, it may well be the case that specific treatment of that issue in the bidding documents is needed.	See existing wording in Section 3.2.2.4.
Section 3.2.3.3 (Change in tax) - There is no separate analysis of what sort of tax risk changes should or should not be passed on to the Private Partner. Very frequently Contracting Authorities seek (even on the "protection against all Change in Law" model) to exclude changes in the levels of corporate income/profit tax on the basis that (1) change in this tax represent a risk in doing business in the relevant jurisdiction and (2) tax protection may be negotiated specifically.	Tax law changes are mentioned in Section 3.2.2.1, Section 3.2.3.2, and Section 3.2.3.3. We do not propose any additional wording on this issue in this edition.
Section 8.3.3.2 (Compensation in respect of equity) - Frequently PPP contracts split the equity compensation into two elements: (1) the return of the equity actually contributed and (2) a compensation for the loss of profit that the Private Partner could reasonably have expected to make but for the termination.	[Section references in this submission corrected to refer to Section 8.] Noted - no change proposed as we think this Section is clear as regards the options.

Feedback	Response
Section 8.4.1 and Section 8.4.2 (Compensation on Private Partner Default Termination) - Whilst we agree with the analysis in this section as far as it goes, it does not address what is a significant aspect of these clauses. That is that in these cases of termination the Contracting Authority frequently has the **right but not the obligation** to purchase the asset at this price. It is this provision that incentivises lenders to use step-in to try to effect a cure of the breach.	We do not think that this is the primary driver for Lenders to use their step-in rights and this option for the Contracting Authority may not even be achievable in certain less developed markets. This is discussed in Section 9.2.7, as well as Section 8.4.1.
Section 8.4.1 and Section 8.4.2 (Compensation on Private Partner Default Termination) -The point links to step-in and substitution rights for lenders generally. If the asset is operationally and strategically critical for a country (eg the country's main international airport) the Contracting Authority might well take the view that its need to get the asset back and keep it operational was paramount and thus that it would agree that in circumstances of private partner default, it would accept an **obligation** to purchase the project in question. However if the asset was not "strategic" in that way (one of several water treatment plants for example) it might want to put pressure on the Private Partner and its banks to work to effect a solution by only giving itself a **right** to purchase in such circumstances.	See response above on Section 8.4.1 and Section 8.4.2.
Section 8.6 (Asset trasnfer) - Note in this regard that many PPPs will include a right for the Contracting Authority to step in to cure emergencies. This can be used as the interim solution on a termination.	Contracting Authority step-in is covered in section 4 - this approach would only apply if the Contracting Authority was entitled to step in in the relevant circumstances (the contract may have come to an end by this point).
Section 8.6 (Asset trasnfer) - Note also, though this is not specifically a termination payments issue, that the termination period and other mechanisms must allow for sufficient time to transition the operation (transfer key employees, sub-contracts and intellectual property to the Contracting Authority).	Noted - this is already covered in Section 6.

Feedback	Response
Section 8.7 (Senior finance documents) - Note that on some projects finance might not come from financial institutions - for example there might be a contractor financing. This definition may need to be considered on a project by project basis.	Noted. The drafting is just a starting point.
Section 7.1.1 (Concept of Step-in) - As a matter of clarification, consider whether this should be more specifically distinguished from "substitution" (the process whereby the lender substitutes and entity selected by it in place of the Private Partner on an enforcement of the financing.	[Section references in this submission corrected to Section 7].We think this is sufficiently clear and substitution is also mentioned in Section 7.3(6).
Section 7.1.2 (Why do lenders want step-in rights) - It is probably worth mentioning (see comments on termination above) that in some PPP contracts the Contracting Party might not have an obligation to buy the project on termination - in that scenario step-in is (at least in theory) the lenders' "first line of defence".	We think the defensive purpose is sufficiently clear.
Section 7.2.4 (Main issues) - In many PPP projects the Contracting Authority may wish to reserve to itself a right to step in to take over operation of the project so as to maintain a key public service. If the Contracting Authority has reserved this right the Direct Agreement needs to make clear whose step in right (lenders' or Contracting Authority's) takes precedence.	Section 4 addresses Contracting Authority step in. Additional wording has been added at Section 7.3(7).
Section 11.1.2 (Concept of governing law provision) - It is worth adding that some legal systems contain provisions that are inconsistent with certain key PPP concepts. For example a provision for pay out of debt including interest on termination might not be enforceable under a legal system that is Sharia'h dominated. Hence most project contracts in Saudi Arabian projects for this (and similar reasons) are governed by English law.	[Section references in this submission corrected to Section 11]. Additional wording has been added to Section J (PPP Contracts in different legal systems), PPP Contracts in Context on Sharia'h law systems. However, in our view it cannot be said that the Islamic legal and financial system is inconsistent with PPP. Indeed, the 2017 World Bank Group and Islamic Development Bank Report “Mobilizing Islamic Finance for Infrastructure Public-Private Partnerships” in Chapter 2 sets out how Islamic finance may be applied to infrastructure and PPP projects. The report also sets out several case studies of the successful implementation of shariah-compliant PPP projects around the Muslim world. What is evident in those projects is that they must be structured in such a way that they do not violate Islamic law’s prohibitions against riba (interest) and gharar (uncertainty). This can be done by using well-established Islamic financing techniques (such as istisna-ijara and murabaha). Choice of governing law for these projects is often a complex one—with many jurisdiction-specific local law issues being considered. Of course, English law is often preferred for the high degree of certainty it provides and being globally renowned for its creditor-friendly approach, established system of precedent, and the willingness of English courts to accept jurisdiction even when there is little nexus to the jurisdiction other than the election of the parties. As a result, it has emerged as the favoured choice of law for most complex cross-border Islamic financing transactions. Other factors which have helped English law rise to such prominence are London’s historical significance as a financial centre, its sound regulatory framework, abundance of skilled service providers, and attractive time zone, especially for the Middle East and North Africa.
Section 11.2.4.2 (Disputes Board) - Another consideration on a disputes board is whether it is to be permanent (the board is established at signing and meets regularly so that it is familiar with the project and the parties and thus, in theory, better able to resolve disputes on an amicable basis) or ad hoc (the board is only established for the dispute). Most lawyers would say that the former, though more expensive in the short term, is far more effective in resolving disputes expeditiously whereas the second often becomes just a "rehearsal for arbitration".	This is a helpful suggestion. Please see the additional wording in this section.

Feedback	Response
i.In case of PPP project, previous experience in similar line of business should not be given in the tender document as criteria for the evaluation of the bidder. Success of any project (including PPP project) depend upon capacity of private partner to handle the project, his business sense and entrepreneurship, merely experience do not guarantee the success of any project. ii. Every person has right to diversify his business. Diversification is not only required by the business man but it is necessary for the health of the economy too. iii. In developing countries it is often seen that a person who has capacity to invest may not have previous experience of the same business because many new developments are taking place. iv. The consortium clause provided in the tender document is a good solution to meet out the eligibility criteria in case of applicant do not have experience of similar business but again this business modal has not preferred by many businessmen and further there can be a possibility of dispute between the consortium parties and in such cases, there is likely hood of failure of the project. v. If bank has financed a project on the basis of Technical & Financial Viability, Marketability, Projection of the proposed project and Net Worth of the Borrower then the same should also be followed in case of PPP and another project. vi. Unsolicited proposals can provide a source of innovative ideas hence a separate cell is required to be formed in the government who would deal such proposals, the cell should have its own policies and procedures. Every human has right to place his idea of innovation in the form of unsolicited proposal with the government and he shall be given opportunity of being recognized and be a part of development of that innovation. vii. Set government system are sometime unable to provide desirable result therefore reform in procurement system is needed according to the present scenario, the tender document should reflect positivity and transparency rather than negativity and opportunism. viii. In developing countries there are massive need to expand infrastructure networks and improve service delivery system therefore government has to be flexible in its laws, rules and regulations in procurement system and PPP guidelines, with object to create participation of small business group in the development process which will ultimately lead to poverty reduction and capacity building.	Thank you for your comments which go to issues which are outside the scope of the Guidance as they seem more aimed at procurement, eligibility and evaluation criteria.
ix. In absence of clear rules & guidelines to determine the eligibility criteria in the tender document, concerning public department creates by themselves and act spontaneously which is the main cause of corruption. On the other side some officials are afraid of not being able to meet the high parameter which may be irrelevant looking to the size and need of the contract. High criteria parameter (if irrelevant) fixed by the government are only allowed big business group or multinational to get the work in the developing countries and small business group have to struggle for their survival.	
As the Introduction highlights, the target audience for the Guidance note are the Contracting Authorities and therefore the draft aims to present for each issue (i) a broad overview of the legal concept; (ii) specific considerations based on risk allocation and contract structure; (iii) common positions taken in emerging and developed markets; and (iv) suggested drafting. It is by no means an exhaustive document and as we mentioned during the Singapore WB-GIH workshops, the government contracting agencies should not view this to the “template” for any PPP project. Further many of the commercial/aspects are so bespoke to each transaction and often they sit in the schedules these can only be taken as a high-level general provision. Often the structure of the whole contract could significantly vary based on the structure of the transaction, and sector, and whether it is based on demand risk, MRG or an availability-based model. The payment mechanism, which is the pivot of a contract, unfortunately cannot be generalized, as such these generalizations will remain. Therefore, given the generalized nature of the document, we do not have any substantive comments. Many thanks.	Noted, thank you. Changes have been made to Aim of Guidance in PPP Contracts in Context and new Appendix B.

Feedback	Response
We welcome the update of the Guidance on PPP Contractual Provision and in particular the inclusion of themes such as climate change and environmental/social issues which we consider to be of high importance in the context of PPP Contracts, in particular due to their long-term nature and potentially large social and / or environmental impact. We also support the importance given to resilient project design which may lead to higher initial costs (to take account of disaster resilience and climate change mitigation) but which will benefit the sustainability of the project and help reduce costs in the long-run. Further support by the Bank - beyond the "Resilient Infrastructure PPPs – Contracts and Procurement" initiated by the Global Infrastructure Facility (GIF) and the Tokyo Disaster Risk Management (DRM) Hub - may be needed to support contracting authorities in the complex process to assess the risks related to climate change and to develop the tools on how to best incorporate them in PPP contracts. We propose to reference important supporting documents in the Guidance, such as the Global Benchmarking PPP Procurement provided by PPIAF. We appreciate that in the Guidance advisory support is mentioned. Most of the partners will rely on external technical expertise. We even propose to include a statement on post transaction advisory support, after contract signing as an important tool to stabilize PPP contracts during their first years of execution. IFC has respective experience.	Noted, thank you. Footnote reference and wording have been added to PPP as Chosen Procurement Method in PPP Contracts in Context.

Feedback	Response
As an overall observation, the draft is very focussed on hard infrastructure. There is no guidance specific to service infrastructure PPPs or mixed PPPs where one Private Partner provides the buildings and another provides services eg: New Karolinska Hospital in Sweden, where the building is provided by one company and imaging by another.In healthcare there is a strong split between facilities, clinical support services and clinical services. Each has different risks and requires different skill sets. As a result most companies specialise in one area. It is important to engage all three areas at the concept phase of designing healthcare PPPs. If clinical and clinical support service providers are not engaged early in the process, the buildings will often be sub-optimally designed and built.	Noted. This level of detail is beyond the current scope of the Guidance but we will bear your comment in mind for future editions of the Guidance. The importance of involving clinical expertise at an early stage is drawn out in the GI Hub PPP Risk Allocation Tool "New Hospital risk matrix".
There is no guidance or discussion of the appointment of an 'Owners Engineer' to oversee the construction and or setup to ensure that best practices and followed and that the service is built/operated to the contract. This is a vital part of the successful execution of a PPP project and deserves to be highlighted.	Noted. This level of detail is beyond the current scope of the Guidance but we will bear your comment in mind for future editions of the Guidance.
P13 Section: A. Overview of infrastructure development utilizing PPPs - bullet 1: "the need for the public sector to reduce the cost of building and maintaining infrastructure assets without negatively impacting on the quality of public sector services;" References to reducing cost are unhelpful and controversial. It would be better to concentrate on efficiency – suggested text: "the need for the public sector to maximise the efficiency of building and maintaining infrastructure assets without negatively impacting on the quality of public sector services;	Noted. Amendment has been incorporated.
P17 Section: G. Alternative PPP payment mechanisms and risk allocation – "User pays" model: Although risks are discussed it is important to highlight the uncertainty will incur a risk premium -suggested text at the end: "As a result of the greater uncertainty the Private Partner will charge a risk premium for taking the Demand Risk."	Section F (Risk allocation), PPP Contracts in Context discusses the implications of transferring risks to the Private Partner. As demand risk projects rely on user revenue, the Private Partner will need to weigh up the effect on user demand of an inflated price and will also be subject to bid competition, as well as constraints on user tolls/tariffs. For these reasons, the PPP team does not think this suggestion is necessary.
P82 5.1.2 Why do PPP Contracts contain refinancing provisions?: The section only discusses 'refinancing gains', It should at least acknowledge the converse is possible and that a 'refinancing loss' may occur – suggest: In para two after '… called "refinancing gain".': "Where the debt cost are increased this is called a "refinancing loss". At the end of para three after' … which are exempt.': "In the case of a refinancing loss from a forced refinancing the contract will need to cover the sharing of losses."	The Private Partner bears the risk of the project as regards its financing costs and has priced the cost of its financing into its bid price during the competitive bid process. The Contracting Authority shares in refinancing gain for the reasons explained in Section 5.1.2 which are not applicable in reverse (e.g. refinancing gain may arise in part due to market improvement in financial terms as opposed to the Private Partner's actions). The Private Partner may have to undertake a rescue refinancing because it has mis-budgeted or under performed, not because financing terms have worsened (which it should have protected itself against through its original structuring) - if the Contracting Authority were to share in a refinancing "loss" that would undermine the risk transfer on which the PPP Contract is built.

Feedback	Response
Government should not bear the risks of disruption from conflict, strikes or climate-related events.	The Guidance does not take the view that contracting authorities should take all risks related to the disruption of conflict, strikes and climate-related events. Instead it outlines considerations when assessing how to allocate these risks. (See the wording in Section 1.2.1.2(b)(i), Section 1.2.1.5, Section 2.2.1.2 and Section 1.4, Sample Drafting 1 clause 2 notes, Section 1.5, Sample Drafting 1A Force Majeure definition notes and Section 2.3, Sample Drafting 2 clause (2) notes). It seeks to explain that risks that are impossible for the private partner to control or mitigate against are typically either borne by the contracting authority (e.g. in the case of events that are attributable to or under control of the government) or treated as shared risk (which may e.g. be the case for climate-related disaster events). As explained in Section F (Risk Allocation), PPP Contracts in Context, doing differently would mean to limit competition to a potentially unsatisfactory pool of bidders and/or paying hefty risk premiums for risks that may never materialize. It would also likely limit the ability of local contractors to become involved because the private partner would expect to pass on such risks back-to-back to its sub-contractors. This is neither in the government's nor citizens' interest.
The new section on Sustainable Development ("PPP Contracts in Context", Section N) seems too short to 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. 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.	The PPP team agrees on the importance of integrating sustainable development considerations into PPP contracts as highlighted in the three new subsections introduced into the PPP Contracts in Context section in the 2019 edition: Section L (Environmental and Social Impact), Section M (Climate Change) and Section N (Sustainable Development). The team has further reviewed the PPP Contracts in Context section and has included additional language in Section L explaining the connection between environmental and social impact assessments on the procurement of a PPP project and drafting of a PPP contract. While it is beyond the scope of the Guidance to provide a full analysis of these important issues, some additional wording and further relevant sources are signposted for the reader.
The new climate change language ("PPP Contracts in Context", section M) 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.	Thank you for this acknowledgement.
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.	Thank you for highlighting this point. This is addressed in Section M (Climate Change), PPP Contracts in Context (one of the new subsections introduced into the 2019 edition). This section sets out considerations and different approaches that have been seen as regards the allocation of risks related to climate change risks, reflecting the risk allocation principles outlined in Section F (in particular paragraphs 2 and 3). Section F flags that private sector rather than public sector responsibility for certain events in certain projects may facilitate a faster and more efficient response time for mitigating such events. Section M also discusses climate mitigation and the PPP team has added additional wording to flag more clearly the importance of considering how to mitigate the effect of the project itself on climate change.
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 PPP team has reviewed the wording of the force majeure section once more and included further wording in Section 1.2.1.5 and Section 1.4, Sample Drafting 1 related to/cross-referencing Section M (Climate Change), PPP Contracts in Context to clarify where the sample drafting might have to be adapted in light of considerations pertaining to climate change and that climate change will not be as key a risk in some projects compared to others. We would expect the contractual dispute resolution provisions to apply equally to any disputes relating to climate change so no changes have been made to the respective Section of the Guidance. There is a continuing debate amongst dispute resolution practitioners and academics about the most appropriate way to resolve climate change disputes (see in particular the ICC's collection of articles "Dispute Resolution and Climate Change: The Paris Agreement and Beyond", found here). However, in the context of PPP contracts, we do not consider the sample wording needs to be amended in this regard.

Feedback	Response
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.	Yes, the findings of these publications (even though not published yet) have been set out and referred to in Section M (Climate Change), PPP Contracts in Context.
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, and, in general, social issues and inclusivity aspects do not receive full discussion compared to environmental or climate matters. 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.	The PPP team agrees that these are all very important points to consider when planning, designing and managing PPP projects, as referenced in Section N (Sustainable Development), PPP Contracts in Context. Given the focus of the Guidance on specific selected PPP provisions rather than the overall policy framework for PPP projects, a full-fledged discussion of social and inclusivity issues would go beyond its scope. However, the importance of these matters and how these might be addressed by the parties to a PPP contract (such as agreement on quota for local employment opportunities and gender equity) is already touched upon and highlighted in Section L (Environmental and Social Impact) and Section N (Sustainable Development) and further resources are referenced. Additional wording has been added to Section L (Environmental and Social Impact) in PPP Contracts in Context to highlight the importance of and increasing focus on human rights issues in commercial contracts.
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.” 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.	The PPP team agrees that an appropriate assessment of the fiscal implications of PPPs is a crucial aspect for governments when deciding whether to implement a project as a PPP or not and this is highlighted in a number of places in the Guidance (such as PPP as Chosen Procurement Method and Section H (Accounting Treatment Considerations), PPP Contracts in Context). Notwithstanding that the Guidance explains that it is intended to be used as a guide how to do a PPP in terms of contractual drafting and not if to do a project as a PPP at all (see, for example, the Introduction and also “Aim of Guidance” and “PPP as Chosen Procurement Method” in PPP Contracts in Context), the PPP team has already included additional language and cross-references to relevant resources for assessing the fiscal implications of PPP (such as PFRAM) in the sections first mentioned above. In the same vein, Section 8.1.2 and Section 8.6 discuss where compensation payments require parliamentary legislative/appropriations processes before the contracting authority is able to make the payment.
It is troublesome that chapter 10 on Confidentiality, Disclosure and Transparency continues to remain silent about the need for transparency in contingent liabilities.	The World Bank Group’s disclosure framework, which is included in Chapter 10 of the Guidance (e.g. Section 10.1 and 10.2), stresses the need for transparency particularly as it relates to contingent liabilities. In addition, explicit references to this aspect have been included in the commentary of this chapter for further clarification (see Section 10.1.2).

Feedback	Response
As regards the chapter on change in law, Government's sovereign right to regulate in the public interest is not upheld: 1. Private sector partner is insulated from the costs of complying with new laws, even in such critical areas as labour, social inclusion and climate change. 2. 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. 3. 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. 4. The risk allocation provisions advocated in the current text potentially works 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. 5. General approach to risk allocation uneven. Not clear why foreign investors should be protected from "normal" changes in law in developing countries but not in developed countries (new paragraph on page 54).	The commentary in the Guidance does not intend to stifle the government's right to regulate in the public interest. Section 3.1 clearly states that the terms of the PPP Contract cannot fetter government's ability to implement new laws (see also other additional wording in Section 3). The point which seems to be misunderstood is that there may be commercial consequences of some changes in law which are appropriate to be addressed under the PPP Contract for the reasons explained further below: 1. The Guidance does not take the view that the private sector should be insulated from the costs of complying with new laws, even in such areas as labor, social inclusion and climate change. It takes a differentiated view and explains how and why the costs for change in law are typically allocated between the private and public sector, depending on various factors, including foreseeability of the change in law, point in time of the change in law, the type of change in law and the type of market. 2. and 3. This seems to be misunderstood. The Guidance explains that the private partner and its lenders will perceive change in law as a form of political risk that the private sector cannot control or manage and that in a long-term fixed price contract based on known conditions at the time of bidding it may therefore be fair and more appropriate for the contracting authority as an arm of government to bear the risk. It also explains that where the private partner and its lenders are willing to accept the risk of adverse changes in law over the long life of the PPP contract, this risk would then be priced into the contractual price (or tariff). As explained above and in Section F (Risk Allocation), PPP Contracts in Context and Section 3.2.1.3, inappropriate or unfair risk allocation will likely result in competition being limited to an unsatisfactory pool of bidders and/or the contracting authority paying risk premiums in the price paid to the private partner for risks that may never materialize. This is neither in the government's nor citizens' interest. 4. The PPP team agrees that PPP contracts (as well any other contracts) cannot include provisions which are in contradiction to government's obligations with respect to internationally agreed standards concerning human rights, the environment as well as climate. These commitments need to be factored in by the public sector when considering change in law issues, and the parties may want to agree particular treatment. This is already highlighted in Section 3, Change in Law; see also Section 3.1.2, 3.2.2.1 and 3.2.2.4 where additional wording has been added. 5. To avoid confusion, this paragraph has been deleted.
Confidentiality and transparency: The new edition addresses the need for an unequivocal presumption in favor of transparency.	Thank you.
However, it continues to have some deficiencies: 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.	The PPP team has revisited this chapter and has added additional language in Section 10.1.2 to further stress this matter.
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).	Thank you for this acknowledgment.

Feedback	Response
However, the Guidance retains the list of reasons why such choice of law is unfavorable 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.	This seems to be misunderstood. This particular section of the Guidance gives a detailed overview of the considerations the private sector will take into account when carrying out due diligence in relation to the project and its governing law, in order to help contracting authorities understand why the private partner may have certain concerns in some projects and why such factors contribute to establishing an environment for successful PPP procurement (as explained in Section K, PPP Contracts in Context). The recent UK Supreme Court decision in Verdanta Resources v Lungowe is an example of how insisting rigidly to local law and jurisdiction may not be in the best interests of the stakeholders in need of protection.
While the commentary is balanced overall regarding dispute resolution, 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. 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.	The Guidance mentions a variety of institutional rules and institutions for arbitration that the contracting authority can choose from. With respect to the drafting, it is made clear in several places that the ICC Rules have been indicated for illustrative purposes only and that the drafting will need to be adapted when using alternative institutions' rules. In the investor state context, the PPP team has added a reference that the parties may wish to apply the UNCITRAL Rules on Transparency in Treaty based Investor State Arbitration in any subsequent investor-state arbitration between them.
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.	Thank you for this comment. The Guidance mentions in Section 11, Schedule 2 recourse to dispute settlement mechanisms specifically designed for disputes between foreign private investors and States to give a complete overview of possible available recourse. The PPP Contract is only between the Private Partner and the Contracting Authority, so a waiver is unlikely to bind other parties (e.g. the shareholders) and investors are likely only to choose this form of dispute resolution mechanism where the Contracting Authority has not complied with processes and obligations under the PPP Contract.
The Guidance treats a breach against non-compete provisions 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). The proposal to turn future competing projects that have significant public benefit into a MAGA event is contrary to public policy, and non-compete clauses of this nature may even be illegal and not enforceable in some jurisdictions. Parallel scenarios in the energy sector may give a traditional energy infrastructure project monopoly status, thereby frustrating intent of the Paris Agreement.	This seems to be misunderstood. The Guidance merely explains that certain events for which the government/contracting authority is responsible should be treated as a MAGA event. This may include breach of a commitment made by the contracting authority to the private partner that a competing asset will not be built within a certain distance of the project, to address the fact that the private partner is relying on user revenue from the project asset. This does not constrain the contracting authority from building such assets, but provides for the commercial consequences if it does. Additional wording has been added in Section 2.2.1.2 and Section 2.3, Sample Drafting 2 to expand on this point.
The Guidance does not provide a more comprehensive analysis of the changed circumstances presented by non-project finance (e.g. bond financing and corporate financing), the overall financing landscape and the implications on contractual provisions. The two chapters added in this regard in the 2017 edition 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 two add-on paragraphs alone may not meet the increasingly complex needs of investors and governments.	There appears to be a misunderstanding as bond-financed projects are still project financings – the type of debt is simply bond rather than bank finance. Appropriate drafting changes where bond finance is used instead of bank debt are clearly flagged in Section 12.3.9 (and evidenced in the corresponding sections of the Guidance listed in that section). As regards Section 13, Corporate Financing, the whole section flags up considerations that the contracting authority is likely to need to take into account in terms of procuring and drafting the PPP contract, as summarized in Section 13.2.9. The contractual risk allocation principles set out in the other relevant chapters of the Guidance remain equally valid to corporate financings, but as Section 13, Corporate Financing, highlights, the agreed allocation will depend on the project dynamics which are likely to be different to those in a traditional limited recourse financing involving third party lenders. For this reason, and because the approach will be very project and corporate specific and remains relatively uncommon in PPP Projects, the PPP team does not feel this section needs further expansion currently. We will, however, keep your suggestions in mind for further editions of the Guidance. Generally, both governments and investors alike have to date given positive feedback regarding the usefulness of both these chapters.