NATIONAL GOVERNMENT AGENCY PUBLIC-PRIVATE PARTNERSHIP MANUAL

VOLUME 4

Annexes

Acknowledgement

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National Government Agency Public-Private Partnership

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Acronyms

ADB	Asian Development Bank
APSC	Air Pollution Source and Control
BLAs	Bilateral agencies
BOT	Build-Operate-and-Transfer
BR	Board Resolution
CCA	Climate Change Adaptation
CNC	Certificate of Non-Coverage
COFACE	CompagnieFrancaised'Assurance pour la Commerce Exterieur
DAO	DENR Administrative Order
DENR	Department of Environment and Natural Resources
DOH	Department of Health
DPWH	Department of Public Works and Highways
DRR	Disaster Risk Reduction
EBRD	European Bank for Reconstruction and Development
ECAs	Environmentally Critical Areas
ECC	Environmental Compliance Certificate
ECGD	Export Credit Guarantee Department
ECP	Environmentally Critical Project
ECRSC	EIA Coverage and Requirements Screening Checklist
EGF	Environmental Guarantee Fund
EGGAR	Engineering Geological and Geohazard Assessment Report
EIA	Environmental Impact Assessment
EIARC	EIA Review Committee
EIS	Environmental Impact Statement
EIARC	EIA Review Committee
EMB	Environmental Management Bureau
EMF	Environmental Monitoring Fund
EMP	Environmental Management Plan/ Program
EPC	engineering procurement and construction
ERA	Environmental Risk Assessment
ESIA	Environment and Social Impact Assessment
Eximbank	Export-Import Bank
FM	force majeure
FS	Feasibility Study
GAD	gender and development
GSIS	Government Service Insurance System
GSSR	Geological Site Scoping Report
GTZ	GesellschaftfürTechnischeZusammenarbeit
IA	Implementing Agency
ICC	Investment Coordination Committee
ICCs/IPs	Indigenous Cultural Communities/ Indigenous Peoples
IEC	Information Education and Communication
IEE	Initial Environmental Examination
IFC	International Finance Corporation
IP	Indigenous Peoples
IPP	Indigenous Peoples Plan
IPRA	Indigenous Peoples Rights Act
IRR	Implementing Rules and Regulations
JBIC	Japanese Bank for International Cooperation
KfW	Kreditanstalt fur Wiederaufbau
LD	Liquidated Damage
LGU	Local Government Unit
LLDA	Laguna Lake Development Authority
M&E	Monitoring & Evaluation
MC	Memorandum Circular
MCA	Multi-Criteria Analysis
MGB	Mines and Geosciences Bureau

MIGA	Multilateral Investment Guarantee Agency
MLAs	Multilateral Agencies
MMT	Multipartite Monitoring Team
MOA	Memorandum of Agreement
MPSS	Minimum Performance Standards and Specifications
NEDA	National Economic and Development Authority
NGA	National Government Agency
NGO	non-governmental organization
O&M	operations and maintenance
OECD	Organization for Economic Cooperation and Development
P/O	Permit to Operate
PC	Public Consultation
PCG	Philippine Coast Guard
PD	Presidential Decree
PDMF	Project Development and Monitoring Facility
PEIS	Philippine Environmental Impact Statement
PEISS	Philippine Environmental Impact Statement System
PFS	prefeasibility study
PPP	Public-Private Partnership
RA	Republic Act
RAP	Resettlement Action Plan
ROWA	Right-of-Way Acquisition
SIA	Social Impact Assessment
SPC	Special Purpose Company
SPSC	Scoping/Procedural Screening Checklist
SV	Site Visit
TOR	Terms of Reference
UNFCCC	United Nations Framework Convention on Climate Change
USAID	United States Agency for International Development
VGF	Viability Gap Funding

ANNEX 1
Scoping the Project

1.0 INTRODUCTION

The term, project scoping, can provide different meanings at different phases in the development of a candidate PPP project. In this annex, project scoping will be taken to mean: a desktop investigation of the project that is sufficiently deep to be able to describe the project qualitatively. In particular its siting options including merits of each, minimum performance standards and specifications (MPSS), probable payment mechanism, potential structuring options, rough approximation of implementation and operating costs, and some concept of how its revenue would be structured.

The approach described here is intended to focus at a high level on certain attributes of the project that aid in understanding the project conceptually.

The analysis is aided by the conceptual description of a very simple financial model that can be developed by the IA analyst, the ultimate objective of which is to measure the level of revenues the project requires in order to be bankable to the private sector. As proposed below, the targeted revenues can be identified by working backwards from distributable cash flows, to debt service and operating expenses to get an approximation of the revenues needed. Once there is a fix on revenue requirements, it may be easier to make judgments regarding the ability of the project to be commercially sustainable with just user fees; or alternatively some combination of (a) user fees and VGF; (b) user fees and usage fees such as shadow tolls and minimum revenue guarantees; (c) performance based fees, or (d) availability payments.

Project scoping is not a precise art; it is merely one way to understand a project and its potential requirements.

It is recommended that IAs develop their own approach to Project Scoping that is consistent with the attributes of projects in their sectors.

2.0 EXAMPLE FOR SCOPING A REGIONAL AIRPORT PPP PROJECT

The example below (Table 4.1) features a regional airport. While the principles of project scoping are the same for every sector, there may be slight differences in the way that the project is conceptualized with certain attributes taking on more importance than others.

Table 4.1 Project Scoping of a Regional Airport in the Philippines

Item	Project attributes/ Procedures	Links to Guidance
1	Purpose of the project	At this stage the IA should have at least a broad idea of what the project is expected to deliver, i.e. its outputs or minimum performance standards and specifications (MPSS).The project scoping is "high level", i.e. overall broad goals, and it is understood it will be refined with additional detail during the development of the project, particularly the PFS and FS stages.
2	Is there a "do minimum" scenario	Consider the range of management or administrative actions that might temporarily meet the demand for the service the proposed project is expected to provide e.g., instead of building a new regional airport, consider the improvement of the road to a distant regional airport with excess capacity. The alternative, constructing the road, will involve close coordination with DPWH. If the alternative is viable, consider how far into the future does the alternative resolve demand for the service. Consider what other ways can the demand for the service be met through a "do the minimum" scenario.
3	Is there more than one technical solution?	If the regional airport is absolutely needed, determine the differences in project cost for the technical solutions. The next step below provides guidance on determining project cost in each location or each technical configuration.
4	Project site	• Is there a proposed site or sites? • Are the sites available? • What is the size of the airport? How many runways? What length? Size of aprons? Size of passenger terminal? Number of gates? Concessions needed? • What are the merits/demerits of each site? • Consider the technical difficulties of constructing a regional airport in each site.
5	Project cost	Use past experience to provide a rough maximum and minimum estimate of project cost for each technical configuration - such that the actual is almost certain to fall in the selected range but exclude cost for ROWA for this purpose. Note: To avoid confusion, the material below assumes there is only one technical solution and one high estimate of project cost and one low estimate. An excel file will be created for each scenario.
6	Calculate equity for high and low project cost estimate (use separate excel spread sheet for each calculation)	Allocate 30%[1] of the high and low project costs to equity and allocate disbursements of equity over the construction period (See Chapter 3, Section 3.8.5 of the Manual on debt and equity ratio for the financial structure of PPPs). Equity is normally disbursed on a paripassu basis with the construction "S" curve, see Step 9. Two calculations of equity are needed, one for the high estimate of project cost on one excel model; one for the low estimate of project cost on a second excel model.

[1] The ratio of debt to equity will depend on the perceived risks of the project. For PPPs, debt can cover as much as 70-90% of the total funding requirement of a project. For this example, debt is assumed 70% while equity is assumed 30%. For riskier projects, debt will be lower and may not exceed 60-65% of total funding requirement of a project (Source: http://ppp.worldbank.org/public-private-partnership/financing/issues-in-project-financed-transactions)

Item	Project attributes/ Procedures	Links to Guidance
7	Future value of equity	Three steps in the excel model(s): a. Determine what constitutes a reasonable rate of return for the project, or similar projects that are being developed, e.g. assume 15% based on the ICC predetermined hurdle rate for EIRR; b. To calculate the future value of equity as of the end of the construction, each equity disbursement must be compounded at the rate of 15% until the end of the construction period. All the components and the rolled up interest[2] are then added up to arrive at a total value of equity at the end of construction; c. Calculate the future value of equity for the high and low estimates of project cost on separate excel models.
8	Calculate the level of distributable dividends needed by the project	The formula involves multiplying the reasonable rate of return on equity (assume 15%) by the value of equity at the end of the construction period; D =(E)t x 0.15 WHERE (E)t = the full value of equity at the end of construction Two calculations of distributable dividends are needed: one for the high estimate of project cost; one for the low estimate of project cost in the second model.
9	Length of construction period	• Should fall in the range of 1-3 years, preferably less than three • Consider the "S" Curve of project cost expenditure: • For 3-year construction: 25%, 50%, 25%, respectively for years 1,2 and 3 • For 2-year construction: 30%, 70%
10	Calculate the debt service requirements	Since equity is assumed at 30% (see Step 6), the remaining 70% of project costs would then have to be financed through debt (See Chapter 3, Section 3.8.5 of the Manual on debt and equity ratio for the financial structure of PPPs). Five steps in the excel model (s): a. Determine what is an acceptable estimate for the LT cost of debt funds in the market; b. Allocate disbursement of debt over the construction period as per the S curve; c. Calculate the rolled up interest for each disbursement during the construction period using the reasonable estimate of LT cost of funds; d. Arrive at the full value of debt including rolled up interest at the end of the construction period and allocate this sum in equal installments over a ten year period for both, the high project cost scenario and the low project cost scenario; e. Add interest payments during the operating period on unpaid balances in both models, based on the reasonable estimate of LT cost of debt funds; f. Two calculations of debt service will be required: one for the high project cost excel file; the other for the low project cost excel file.
11	Implications for intermodal facilities	• This includes access roads to airport, links to major arteries; • Estimated ancillary costs of improving the intermodal facilities serving the airport; • Coordinate with DPWH, LGUs, and other appropriate agencies.
12	How will the intermodal facilities get funded?	• Are those agencies or entities mentioned in Step 11 willing to participate in their development? • What plans are there for covering these costs? • An alternative is to assign them to the Project Proponent, but that may render the whole project unattractive; • Another alternative is to use a VGF approach and fund the intermodal connections.

[2] Interest that is not paid at the end of the applicable interest period but which is, instead, added to the outstanding principal amount of the loan (hence the phrase "rolled up")

Item	Project attributes/ Procedures	Links to Guidance
13	Identify operating costs - fixed - variable	• Estimates should be based on the actual experience the IA has for similar undertakings; • Fixed operating costs are usually a fixed percentage of project cost, indexed to inflation; • Variable operating costs are a function of the size of the airport and may be negligible in the case of regional airports. Add fixed and variable operating costs to the excel file that contains the high estimate of project cost and similar estimates of operating costs to the excel file containing the low estimate of project cost.
14	Calculate the required revenues needed to cover the costs of operating the project (e.g. costs include dividends to the project sponsors or shareholders, debt service, and the project's fixed and variable costs)	Add items 8, 10 and 13 for a rough approximation of the level of revenues needed for the first year of operations. Calculate a high and low estimate, based on high and low project cost excel files. The two excel files (high and low estimates) define the approximate range in the level of revenues needed to commercially sustain the project, without taking inflation into account. The issue now is to determine whether the project is capable of generating this level of revenues immediately, over time and with what time lapse. This will essentially depend on the trends in the various factors affecting the demand for the project (see Step 15), the allowable level of tariffs or fees for the service that the project provides (see Step 16-17), other potential sources of revenues for the project (see Step 18) and to some extent, the potential for government support (see Step 19).
15	Demand	Check on the following aspects to determine if statistics are available: • Population served by the new proposed airport? • Economic growth forecasts for the area? • Induced demand, that is, demand that is likely to be captured from other neighbouring airports due to comfort and convenience? • Business demand? • Tourist demand? • Family oriented travel to/from Metro Manila? • Cargo demand? • International travel to and from proposed airport? • An excellent way to understand the factors that are normally used to project future airport usage is to contact Boeing and Air Bus to see if there are recent updates on projected air travel in the region to determine how they might affect traffic at the proposed airport. Normally, these are updated on a rolling 20-year basis.
16	Passenger, cargo, landing fees	Likely size of aircraft needed • Small • Narrow body • Wide body Check on the regulatory determinations related to uniform passenger, cargo and landing fees (check to see if these are uniform across the country)
17	Terminal fees	Check to see if these are uniform across the country.
18	Other sources of revenue	Food, drinks and other concessions?

Item	Project attributes/ Procedures	Links to Guidance
19	Possible government support	The approach is not definitive as it is just a way to estimate (at an early stage) the range of levels and source of revenues required to make the project viable. The range of revenues may not be achieved immediately. In some instances there maybe room to increase user fees. If increases are unlikely to be feasible (due to affordability issues, for example), some form of support such viability gap funding or subsidies may be required.

Familiarity with this methodology would make the process of undertaking an MCA Screen much easier and more effective.

ANNEX 2
Overview of Project Finance[3]

1.0 INTRODUCTION

Project finance is one of the most common forms of financing for PPP projects. It is often referred to as "limited-recourse" as the project lender's security relies primarily on the performance of the project itself which comprises of the project's cash flow and sensitivity to risks, and the Project Proponent's equity in the project. This means that under project finance, the lenders are entitled to repayment only from the cash flow revenues and assets of the project that the loan is funding, not from other assets of the borrower (Project Proponent). This is in contrast with corporate finance - the more conventional way banks lend to businesses ("full-recourse") – wherein lenders lend on the basis of the borrower's balance sheet and have the right to take any or all assets of the borrower or even recover from a third party (e.g. the government or project's customers and suppliers of the project) guarantees. See Box 4.1 on the definition of Project Finance.

Box 4.1 Definition of Project Finance

There is no strict definition of "project finance." The term implies a financing arrangement that involves:

- Some element of reliance on project assets and cash flows without full recourse to the project proponent or borrower,
- Specialist technical and economic evaluation of the project, the project proponents' or operators' business and through on-going monitoring by the lender,
- Complex loan and security documentation, involving innovative financing structures; and
- Higher margins and fees to reflect the lender's exposure to the project – and often political – risk

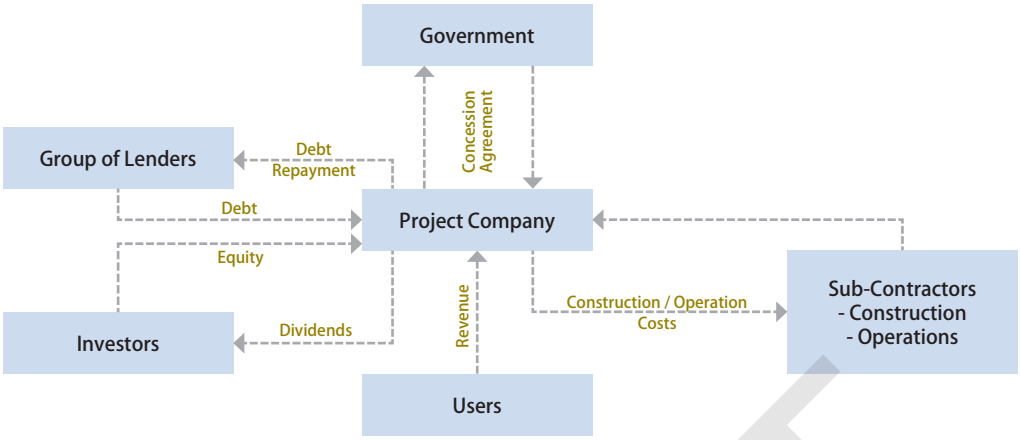
Source: Chance, C. (1991). Project Finance. IFR Publishing, London

Using project finance implies that in a typical Build-Operate-and -Transfer (BOT) project (See Figure 4.1), the special purpose company that is set-up for the project is ring-fenced from the other businesses of the Project Proponent. The PPP project risks and debt are therefore isolated from the borrower's parent company, preserving the parent company's borrowing capacity and credit rating. Such an "off-balance sheet" treatment under project financing allows for additional borrowing capacity for new investments.

[3] This annex aims to provide a brief general introduction to Project Finance. It is not meant to be an exhaustive treatment of the subject, for a more comprehensive introduction, readers may see the various sources cited in the footnotes of this annex and in the list of references at the end of this annex.

To a certain extent, project finance is used to keep the project's debt and liabilities off the balance sheet of the government, thus freeing up fiscal space though it would not necessarily reduce actual liabilities.[4]

Figure 4.1 Typical BOT Project Structure



Source: National Economic Development Authority (2000). Advanced Manual on Project Evaluation Volume 2, NEDA, Pasig City.

2.0 LENDERS, PROJECT BANKABILITY AND TAKING SECURITY

Given the limited recourse of the financing arrangement, lenders will bear a big part of the project risks borne by the project company. Lenders will therefore pay careful attention to all possible reasons for project failure, analyzing in detail the project's "bankability," i.e. whether the project risk allocation sufficiently protects the project company.[5] In a typical PPP Project (as seen in Figure 4.1), lenders would want to ensure that risks are allocated in the most efficient way possible to the various subcontractors, which will be tasked to build and operate the project and to ensure that these subcontractors have the capability (technically and financially) to undertake the project.

Debt normally accounts for the largest share of project finance, i.e. borrowings normally exceed equity. Since lenders do not have direct control over the management of the project, they will try to protect their investment through collateral and contracts, broadly known as a security package, which can help ensure that the loan can be repaid.

Generally, lenders cannot take security over a PPP project's physical assets (e.g. a dam or road cannot be foreclosed and be sold as a matter of public policy) but will rely primarily on the contract between the project company and the government to undertake the PPP project and the cash flows that can be derived from the PPP project. Lenders would commonly require assurances that the project will; (i) be completed, (ii) generate enough cashflow to service the debt and (iii) be able to repay debt even if the project is interrupted, suspended or terminated for any reason (including force majeure). With these in mind, project lenders will be concerned with:[6]

[4] Delmon, J. (2009) Private Sector Investment in Infrastructure: Project Finance, PPP Projects and Risk, Second Edition. Kluwer Law International, The Netherlands
[5] Ibid.
[6] As cited in Farquharson E., Torres de Mastle, C., Yescombe, E.R. and Encinas, J. (2011) How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets, World Bank and Public-Private Infrastructure Advisory Facility, Washington DC

- Bankability of Public Sector obligations
- Soundness and stability of the legal framework
- Effectiveness and enforceability of the PPP contract and related agreements
- Sector regulatory regime when applicable
- Right to step-in if a project fails and availability of alternative contractors
- Ability of contractors and quality of contractor guarantees
- Risks that are understood, controllable, finite, and appropriately allocated
- Reputation impact of the project (environmental, social)
- Availability and effectiveness of insurance cover, where needed
- Protection of lender rights
- Political risks
- Expropriation
- Early-termination payments
- Residual value of project assets upon termination
- Dispute resolution and enforcement

Lenders will essentially take various security rights for their lending to mitigate risks and such security will vary from project to project. Some common examples of security are listed in Box 4.2.

Box 4.2 Common Forms of Security

The security package utilized will differ across projects and jurisdictions. Below are some of the more common elements of security in project finance:

1. The Trust/Escrow Account – In a nutshell, escrow accounts are accounts held in the borrower's name by a bank under the auspices of an escrow account agreement between the lender and borrower wherein all operational revenue or proceeds from the sale of assets of the project will be paid into this account. The lender will usually require in the project's security package that such collected funds be held for its benefit as secured creditor so that it has priority in disbursements if the creditors are to be paid off upon default of debt payment or failure of the project (after which subordinated debts may then be paid).
2. Charges over Borrower Assets – This could be done by either having a fixed charge/mortgage or a floating charge over the project assets. A fixed charge does not attach to an asset until a specified event occurs at which point the charge crystallizes and becomes a fixed charge over the relevant assets.
3. Assignment of Implementation Agreements and Other Benefits – This entails the assignment of rights under the key contracts of the project (the concession, off-take contract, construction contracts, etc.) as security for the lender. This type of security is more relevant after the project has reached operational stage. The objective is to provide the lender step-in rights through the special purpose company, against other stakeholders (e.g. off-taker purchaser or project users; input suppliers, the operator, construction contractor and insurers) in the event of default.
4. Sponsor (or Project Proponent) Support and Guarantees – Sponsor support may include the establishment of a fund, normally pledged or secured, which can be used to bridge any deficiencies of funds or an increase in costs during the period of limited recourse. Also, support could also take the form of price guarantees (ensuring pricing of offtake), purchase guarantees (which ensure a minimum quantity of the project's output will be 'purchased' over a set period), tax loss purchases (i.e. a shareholder agrees to purchase certain tax losses from the project company), technical support, extended warranties and maintenance arrangements, and contingent equity or subordinated debt to cover construction overruns.
5. Insurance, Political Risk Guarantees and Guarantee Funds - A security package may also include insuring the project against physical damage or loss, pollution, third party liability, business interruption (e.g. protect against defined regulatory risks) and even political risks (e.g. losses due to defined political events such as currency risks, expropriation or war or the inaction or actions of government resulting in a breach of contract)., The insurance benefits of the Project Proponent are assigned to the lender or investor/shareholder. Some governments establish a guarantee fund (such as in Brazil and Indonesia) to specifically cover the risk of the contracting public entity's failure to meet its obligation under the PPP contract.

Sources: Achonwa, Jeremiah. Elements of Security in Project Finance, 2008/2009 Center of Energy, Petroleum, and Mineral Law, and Policy Gateway, Volume 13 (http://www.dundee.ac.uk/cepmlp/gateway/?news=30858); Delmon, J. (2009) Private Sector Investment in Infrastructure: Project Finance, PPP Projects and Risk, Second Edition. Kluwer Law International, The Netherlands; Farquharson E., Torres de Mastle, C., Yescombe, E.R. and Encinas, J. (2011). How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets, World Bank and Public-Private Infrastructure Advisory Facility, Washington, DC

3.0 ADVANTAGES OF PROJECT FINANCE

Essentially there are two important advantages of project finance over the traditional collateral-based corporate finance:[7]

a. Increase the availability of finance – Since risks of the PPP project will be considered separate from the Project Proponent or the project company's key shareholder's existing business, the financial integrity of their core businesses would not be jeopardized should the project fail. Proper structuring will protect the Project Proponent's capital base and debt capacity, allowing the PPP project to be financed without requiring too much equity as the case will be if the project is financed through traditional corporate finance. This enables the Project Proponent to increase debt (which is less expensive than equity) and expand its overall business (See Box 4.3).

[7] IFC (1999).Lessons of Experience No. 7: Project Finance in Developing Countries (http://www.ifc.org/wps/wcm/connect/publications_ext_content/ifc_external_publication_site/by+title/lessonsofexperienceno7) and Chance, C. (1991). Project Finance. IFR Publishing, London

Box 4.3 Project finance in Large Complex Projects

A project can be funded using corporate finance wherein lenders lend directly to construction and operations and maintenance contractors; which in turn funds the project. Lenders can recover their loan (full recourse) from all the assets of the contractors or through guarantees (either from direct guarantees or from third parties, such as the government or the project's customers or suppliers). But project contractors may often have limited capacity to take on debt, especially if the project is large in relation to their business. Thus, they may prefer to take on equity investment in a stand-alone project. Project finance in this case is a more efficient way for lenders and investors to finance major infrastructure investments by the private sector as well as increase the availability of financing. It is normal for the public authority to let the bidders decide whether or not to use project finance and allow the competitive process to drive the most efficient funding structure.

Source: Farquharson E., Torres de Mastle, C., Yescombe, E.R. and Encinas, J. (2011) How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets, World Bank and Public-Private Infrastructure Advisory Facility, Washington DC

b. Efficient risk allocation, thereby reducing the overall risk for major project participants - by allocating project risks among the project stakeholders (Project Proponent, shareholders of the project company, project subcontractors, lenders, etc.), project finance makes it possible to undertake projects that would be too large or would pose too great a risk for one party on its own. With the repayment of loans tied to the performance or success of the project, lenders will take a long-term view of its viability and ensure risks are appropriately allocated and monitored. This drives many of the benefits of the PPP process. Section 4 discusses the major participants in project finance deals while Section 5 provides an overview of the risks faced by project finance participants.

4.0 PARTICIPANTS IN PROJECT FINANCE DEALS

There are a number of parties involved in a project finance deal of a typical BOT project:

a. Project Proponents and Special Purpose Company (Project Company) – Project Proponents are private sector entities (either a corporation or a consortium), which put together a bid for a PPP project. Once it is selected for the project, Project Proponents will create a Special Purpose Company (SPC), which will have contractual responsibility for the project. The creation of a SPC enables the Project Proponent to finance the project on a limited recourse basis.

The SPC is registered in the host country for the purpose of implementing and operating a given project. Where a corporate joint venture or limited partnership is used, the rights and obligations in terms of funding, administration, profit sharing, transfer of interests, termination and other issues are defined in a shareholders, or joint venture agreement. The SPC will usually include shareholders which specialize in one or several tasks needed to be performed / delivered under the BOT contract.

Project Proponent(s) are required to make capital investments in the SPC according to the terms of the SPC agreement. In almost all cases, there is usually a designated lead Project Proponent. In the case of a corporate joint venture, the lead Project Proponent(s) is the leader of the consortium and in the case of a partnership; it is the dominant partner under the joint venture arrangements.

b. Construction Contractor – The SPC will enter into a engineering procurement and construction (EPC) contract

with a contractor to design, build, test and commission the project. This is generally undertaken on a turnkey basis (i.e. undertake the project from concept, design to construction up to completion) thereby placing completion and performance risk on the construction contractor. Provisions on contractual liquidated damage (LD), performance bonds, retention bonds and other instruments are usually imposed on the construction contractor, which can be called upon to remedy any breach of the contract. The construction contractor will generally subcontract some of the construction obligations to other entities to be able to share risks and revenues, subject to any restrictions under the construction contract or the BOT contract.

Lenders usually prefer a single EPC contract because it gives them a single-point responsible party for all subcontractors and activities. Occasionally, however, two separate contracts by two affiliated parties are used to define the construction arrangements: an installation, erection and commissioning contract with one contractor and a supply of equipment contract with another. To achieve the contractual equivalent of single-point responsibility, each contractor is required by the lenders to cross-guarantee the other's obligations.

c. Lenders – the group of lenders would differ from project to project. It may include a combination of private sector commercial lenders, export credit agencies and bilateral and multilateral finance organizations. They fund projects either by sovereign wealth funds, project bonds that are sold on the capital markets, and other financial intermediaries. In any project they want to have certainty on their financial exposure and thus may be involved in the most important phases of the project such as the drafting of the project documents and certification of completion. They will generally have review powers over the project with the assistance of an independent engineer.

- Multilateral and Bilateral Agencies - Multilateral Agencies (MLAs) represent a group of nations, and are owned and funded by their members, such as the World Bank (including the World Bank's International Finance Corporation or IFC and the Multilateral Investment Guarantee Agency or MIGA), Asian Development Bank, Inter-American Development Bank, African Development Bank and European Bank for Reconstruction and Development (EBRD). MLAs participate in project finance through equity investments (e.g. IFC and EBRD) and the provision of loans and guarantees in developing countries where they have a mandate to support economic development and alleviate poverty. Certain MLAs specialize in providing political risk coverage for projects, for example World Bank's MIGA. MLAs, given they represent several countries, will often require internationally competitive tender of project contracts to encourage equality of treatment, transparency and free trade between its member countries. Bilateral agencies (BLAs) are also quite active in emerging markets as well and are similar to MLAs in purpose but are funded by only one nation. BLAs provide support in the form of equity investment or debt and are more politically oriented as they carry out the agenda of their donor nation (for example, requiring projects funded by the BLA to source contractors only from the donor nation). When MLAs and BLAs are involved in projects, they usually place strict project requirements, such as on environmental and social safeguards.

- Export Credit Agency – is attached to a given government department of a country. Its role is generally to support exports from their country through the use of direct loan and guarantee mechanisms. Since the mid-

1990s, several Export Credit Agencies have established Project Finance divisions designed to assist exporters to compete in new international infrastructure projects. Six of the more important of these agencies are the US Eximbank, Export Credit Guarantee Department (ECGD) of the UK, Japanese Bank for International Cooperation (JBIC), Compagnie Francaise d'Assurance pour la Commerce Exterieur (COFACE) of France and Kreditanstalt fur Wiederaufbau (KfW) of Germany.

- Commercial lenders – are commonly private banks, insurance companies, credit corporations and other financial institutions, based either abroad or in the host country. In higher income emerging markets and industrialized countries, the largest part of the debt financing mobilized for a given project is usually from commercial lenders. For less developed countries, donors and Export Credit Agencies are very active in assisting with the financing of projects sited in these countries.

- Private placement and bond market – project financing can also be raised through the capital market.[8] Investors in capital market instruments generally shy away from projects that are not able to achieve an investment grade rating or better, although this is not always the case. Established bond markets are in US, UK, Germany and Japan. Other, regional, bond markets interested in financing infrastructure in Asia are only now emerging.

d. Insurance Providers – Project Proponent(s) will procure all insurance coverage required by applicable law. In addition, the terms of the service agreement and the requirements of lenders often result in the need to obtain a broader portfolio of insurance policies and coverage. In some cases, Project Proponent(s) may seek additional insurance coverage, such as political-risk insurance from the World Bank's MIGA, the Asian Development Bank, or USAID, to protect their investment.

e. Off-Taker – "Off-taker" is the name given to the entity that is the single purchaser of all of the project output subject to a formal contract. In some deals, there may be more than one off-taker, but this is relatively uncommon. Other projects may not have any off-takers, or off-take agreements, e.g. a toll road, container port or mass transport system. When an off-take agreement exists, it generally defines the minimum amount of revenue that will be generated by the project based on a minimum level of product or service that is to be sold at a given price (including annual escalation). An off-take agreement is designed frequently to permit the SPC to hedge against certain other risks, including inflation and foreign exchange parity risks. Payments due under the off-take agreement constitute a major element in determining the bankability of the project.

f. Third-Party Operator - is responsible for the operations and maintenance (O&M) of the project. The operator customarily receives a fee, subject to upward or downward adjustments based on performance results of the project. When a third-party operator is not used in a project, the Project Proponent(s) may undertake this role. However, if the operator is a shareholder of the SPC at the time of contract negotiation or later, a conflict of interest arises in the negotiation and implementation of the O&M agreement between the SPC and the operator. The use of independent project managers or executives in the management of the SPC and the use of independent experts to verify data and decisions can be used to address this issue.

[8] Note that issuing bonds means more regulatory work as these would need to be rated by a credit rating agency and then have to be approved by the Security and Exchange Commission.

g. Resource Supplier - is responsible for the delivery to the project of necessary inputs, such as fuel (for a power project), bulk water supply (for a water-treatment facility), or utility services (such as water and electricity which many, if not most, projects require). For power projects using fossil fuels, Project Proponent(s) and lenders are concerned with the underlying economics of the supply arrangements (in relation to expected revenues) and the ability of suppliers to perform their contracts (including payment of damages in the event of non-performance).

h. Other Parties - Depending on the project, there may be other parties involved, e.g. third party equity sources (straight equity provided by parties which are unaffiliated with the Project Proponent(s)) or mezzanine investors or lenders (whose participation may take the form of convertible debt). In the Philippines, these would include Government Service Insurance System (GSIS) and Macquarie Group of Companies (Philippines). Mezzanine investors tend to be passive, and thus totally uninvolved with operations of the facility. There are also potential local partners who, unlike investors, do expect to participate actively in the operations of the project. Finally, there are the project managers who are designated by the active Project Proponents to run the facility as well as other parties who assist during the development or operation periods, e.g. financial advisors, engineering consultants, environmental advisors and lawyers.

i. Government – A typical BOT project is usually granted by a contracting authority such as a Government Agency or LGU "authorized by law or their respective charters to contract for or undertake infrastructure or development projects (Revised IRR of the BOT Law)." The Government will play an important role in ensuring that the project starts on time and is completed successfully and also during operation with respect to regulatory requirements. It can also provide indirect credit support by purchasing a project's product or service and act as a supplier of key resource inputs. The Government (through the Department of Finance) may also provide some fiscal incentives to the Project Company (e.g. tax holidays, viability gap financing, etc.) and assistance to obtaining financing, insurance and guarantees from lenders such as MLAs and Export Credit Agencies.

5.0 PROJECT RISKS AND PROJECT FINANCE

The identification, analysis, mitigation and allocation of risk are crucial to the planning and success of every project. By structuring risk appropriately, the project participants can maximize the likelihood that the project will be successful. As a matter of principle, *risk should be allocated to the party that is best able to mitigate or control such risk.*

The appropriate structuring of project finance lies in understanding the project risks. Project lenders take into careful consideration all possible risks to the project's successful completion and operation. NGA Manual Volume 1, Chapter 3 and Volume 4, Annex 7 which contains NEDA's risk allocation matrix, discuss the various project risks and its allocation from the perspective of the government. The discussion in this annex focuses on the types of risks inherent in project finance:

a. ***Completion risk*** - Completion risks are those associated with

a) failure to complete the project at all;

b) a construction delay and/or a cost overrun;

c) failure of the project to perform to technical specifications resulting in shortfalls in expected capacity, output, efficiency, etc.;

d) shortfalls in expected resources (reserves); (e) occurrence of a force majeure (FM) event leading to a construction delay and cost overrun; and

e) unavailability of qualified staff, managers and reliable subcontractors.

Completion risk is the single most important risk that is faced by the Project Proponents. Its mitigation measures include: (a) seeking performance bonds and/or guarantees from third parties covering the performance of the contractor, its suppliers and subcontractors; (b) obtaining adequate levels of commercial insurance; and (c) negotiating an adequate level of liquidated damages (LDs) for delays and performance shortfalls.

b. ***Credit risk*** - The perceived credit risk of a project has a significant impact on the ability of the project to raise financing. It is the risk that the borrower will not be able to service its debt to the lenders. To assess this risk properly, it is necessary to examine the risks associated with the project's sources of revenue, including an assessment, for example, as to whether (a) payments from an off-taker may be interrupted due to an inability or an unwillingness to pay; or (b) users of the facility or service are willing to pay the user fees or, from a different perspective, whether the total revenue derived from its collective usage by the consuming public will be below expectation.

The ability of the Project Proponent(s) to mitigate these risks through the use of detailed market studies becomes critical in the risk-sharing process. In some instances credit enhancements from the government can be applied, such as viability gap funding wherein the government may pay part of the capital cost. Another option is to make payments during the operating phase depending on the performance of the project, which lessens the dependence of the project on tariff revenue while providing incentives for performance. Credit guarantees – wherein project debt is being guaranteed by another entity – may also be used to enhance the project's ability to raise financing from the credit market. Some MLAs (e.g. the World Bank) offers partial credit guarantees, which cover the tail end repayments due on a long-term project finance loan. Also large insurance companies (known also as monoline insurers) have also been known to offer a full-credit ("wrap") guarantee to cover the entire debt of the project.[9]

c. ***Demand and operating risk*** - Once commissioning of the project is achieved, Project Proponents must address other risks associated with the sale of its service/outputs. For example, demand risk becomes significant for projects in the transportation sector where user fees are a key source of project revenues. A Project Proponent faces the risks that (a) actual usage of, or demand for, services are below forecasted amounts; (b) unexpected competition develops; (c) tariff barriers are stronger than contemplated, affecting cost of inputs or ability to export; (d) physical access (i.e. transportation) and commercial access (i.e. market entry) are denied due to government regulations or similar factors; (g) technology becomes obsolete; and (h) new technologies utilized by the project fail outright or result in cost overruns from delays.

[9] This type of guarantee however is rarely used in emerging or developing countries. Source: Farquharson E., Torres de Mastle, C., Yescombe, E.R. and Encinas, J. (2011) How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets, World Bank and Public-Private Infrastructure Advisory Facility, Washington DC

There is also the related risk of performance, i.e., whether the project will perform according to the expectations of the off-taker. For its part, the Project Proponent can reduce this risk by operating the project efficiently through the use of experienced managers and staff (or an experienced operator) and the application of strong O&M programs.

Mitigation measures to address demand risks include the negotiation of long-term, take-or-pay contracts (power, resource extraction projects); throughput agreements (oil pipelines); the use of shadow toll mechanisms (toll roads) or minimum revenue guarantees (transportation projects).

d. ***Financial risk*** - The potential impact of financial developments outside the control of the project is a source of project risk to both lenders and the Project Company. These include the variability of (a) exchange rates; (b) interest rates; (c) world commodity prices which in turn affect energy supplies and raw materials; (d) decreases in world prices of the product produced by the project; (e) inflation; and (f) international trends in trade, tariffs and protectionism. Mitigation measures include use of (a) currency swaps; (b) interest rate swaps; (c) commodity forward or option contracts; (d) hybrid debt instruments; (e) negotiation of tariff indexation and pass-through mechanisms; and (f) forward sales and option contracts.

e. ***Political risk*** – Political risk includes several components: (a) there are future changes to existing legislation related to tax, import duties, customs procedures, ownership, foreign exchange laws and environmental mitigation, leading to an adverse impact on the project; (b) a future administration decides to confiscate, expropriate or nationalize project facilities; (c) permits, licenses and other consents from the government are not in place in a timely fashion or are not granted or maintained; (d) restrictions are placed on repatriation of profits and interest payments; (e) controls or restrictions apply on the rate of depletion of the project's reserves; (f) war, revolution or political violence breaks out in the country, negatively affecting project performance; and (g) devaluation occurs in the local currency, leading to a reduced value of the dividend stream.

To mitigate these risks, Project Proponent(s) and lenders obtain; (a) protection against change in law and similar events through the PPP Contract; (b) political-risk insurance or guarantee as an added cover; and (c) other undertakings from the government such as ensuring licenses and permits will be granted on time and be transferable to lenders in the event of project vehicle default, and that all waivers would be granted for import duties and similar assurances.

f. ***Legal risk*** - This risk is defined as the (a) inability to enforce security arrangements; (b) absence of adequate protection for intellectual property; (c) inability to enforce foreign judgments; (d) absence of a choice of law; (e) inability to refer disputes to arbitration or to have a choice with regard to arbitration rules, venue and language. Mitigation measures for most of these risks are not always available and the contractual allocation of these risks to the parties that are most able to control or address them becomes critical.

g. ***Environmental and social risk*** - The preservation of the environment, health and safety, gender and the protection of the resettlement rights of individuals who are displaced as a result of the implementation of a project are increasingly becoming an important concern among governments, lenders and Project Proponent(s).

Environmental risk relates to the failure of the project to comply with environmental and resettlement standards and regulations which are a matter of law. It could also refer to exogenous risks such as Climate Change, where individual projects contribute to conditions which accelerate climate risk.

Equally important, however, is the opportunity to use public-private partnerships as a means to improve gender equality and economic opportunity as well as that of other project affected persons. Two laws that recognize the role of women in nation building and their equal rights with men have been enacted by the Philippine Congress: Republic Act 7192, an "Act Promoting the Integration of Women as Full and Equal Partners of Men in Development and Nation Building and for other Purposes" (February 12, 1992) and Republic Act 9710 or the Magna Carta for Women (enacted July 2008; its Implementing Rules and Regulations (IRR) were approved in March 2010).

Failure to comply with environment, gender and other such laws could generally result in public outcry, project delay, litigation, and/or imposition of fines and penalties that increase project liabilities and raise lender concerns. Mitigation measures applied by lenders include (a) requirement that an environmental impact assessment (EIA) and resettlement action plan (RAP) be prepared on the project by a qualified, internationally respected company; and (b) preparation of a social plan to implement opportunity and mitigation measures with regard to gender and indigenous peoples, the costs of which are absorbed by the project.

h. ***Force Majeure (FM) risk*** - This risk is created potentially by events outside of the reasonable control of the affected party to a contract, which it could not have prevented by good industry practices or by the exercise of reasonable skill and judgment. In a typical Project Finance deal, provisions with regard to FM typically excuse the affected party from contract performance during the period that it is in effect. Nonetheless, there may be adverse financial effects on the project. Mitigation measures are usually negotiated between Project Proponent(s) and lenders or other third parties.

6.0 CAVEAT

Project finance has its rigorous requirements. For a project to reap its benefits, it needs to be carefully structured with the obligations of all parties involved well negotiated and contractually binding. Lenders, financial and legal advisers and other experts would likely spend considerable time and effort on undertaking due diligence and negotiating the usually very complex project agreements. These will add to the cost of setting up the project and may delay its implementation.

But overall financial cost of project finance may not be as high as under corporate finance if the project is (i) carefully structured, (ii) risks and appropriate risk mitigating measures are identified, and (iii) financing is sourced appropriately from different categories of investors.[10]

[10] Ibid.

Useful references and glossaries of project finance terms can be found at;

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ANNEX 3
Philippine Law on the Protection of Indigenous People's Rights

Legislation was enacted in 1997 by the Philippine legislature that recognizes, protects and promotes the rights of Indigenous Peoples. This law is otherwise known as the Indigenous Peoples Rights Act (IPRA) or Republic Act 8371.

Under the IPRA, Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) refers to "a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as an organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed customs, tradition and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and culture, became historically differentiated from the majority of Filipinos. ICCs/IPs likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains."

The rights of the Indigenous Peoples as defined in the relevant provisions of the IPRA law serves as the framework for this IP guideline for PPP projects. The guidelines are intended to provide the basic procedures to NGA project preparers in examining the potential positive and adverse impacts of their proposed PPP projects on the culture and overall quality of life of the IPs as a vulnerable group. TECHNICAL NOTE 1 (following) provides the list and description of the rights of IPs under the IPRA law.

1.0 SCREENING OF PPP PROJECTS

PPP projects that affect IPs should be thoroughly screened and evaluated by the Project Proponent and IP leaders with technical assistance or guidance from anthropology experts or consultants in order to safeguard IPs interest and various

rights. Examples of these projects are the construction of multi-purpose dams, major roads and highways, airports and seaports, upland orchards and tree farms, and tourism resort development, among others. Physical infrastructure construction and operation within or near their ancestral lands and water domains such as lakes, rivers and coastal waters may possibly affect their culture and livelihood activities. Hence, development projects should be designed in such a way that is supportive of their culture, livelihood systems, and property rights. As such, proposed PPP project development and implementation must comply with the relevant provisions of the IPRA law.

Various international lending institutions also promote the protection and enhancement of Indigenous Peoples' cultural rights and quality of life such as the Safeguard Policies of ADB and the World Bank, and the Performance Standards set by international private banks.

When IPs culture, dignity, human rights, livelihood systems, cultural resources or ancestral lands are threatened and directly or indirectly affected by the proposed project, a thorough social impact assessment is required. The measures to avoid or minimize the negative impacts of PPP projects on IPs should be included in the Indigenous Peoples Plan (IPP) that must be prepared as part of the documentary requirement of the PPP project proposal.

Mainstreaming Indigenous Peoples in project development and implementation involves: a) their participation in planning and decision making; b) making sure that they benefit from the project; and c) that they are not in any way adversely affected by the project. Hence, PPP projects that will affect IPs are classified by ADB (2009) into the following types:

1) **Category A**. These are projects that would most likely have significant impacts on Indigenous Peoples. An Indigenous Peoples plan (IPP), including assessment of social impacts, is required.
2) **Category B.** These projects are likely to have limited impacts on Indigenous Peoples. An IPP, including assessment of social impacts, is required.
3) **Category C.** These projects are not expected to have adverse impacts on Indigenous Peoples. No further action is required.

2.0 ASSESSMENT OF A PPP PROJECT'S IMPACTS ON INDIGENOUS PEOPLES

The general procedures for the assessment of the potential impacts of a PPP project on IPs include the following:

1) Identify the presence of IPs in the project site.
2) Determine whether the project operations will directly or indirectly affect the IPs in the site or neighboring areas.
3) Inform the IPs on the proposed PPP project.
4) Conduct scoping of issues with IP leaders and representatives.
5) Identify the potential adverse impacts of the project on the IPs using an impact assessment checklist.
6) Gather baseline data for further analysis of impacts on the socioeconomic, cultural and environmental concerns of IPs.
7) Determine the significant impacts of the proposed project.

8) Categorize the project using the ADB category for IPs.
9) Determine whether the project would require an EIA, IEE or PD.
10) Propose measures to avoid or mitigate the significant impacts of the project.
11) Prepare the IPP Plan for Category A and B projects.
12) Integrate the IP Plan in the EIA or IEE document.
13) Consult the IP leaders on the proposed IP plan.
14) Obtain proofs on the acceptability of the project to IPs owning titled ancestral lands.
15) Secure consent and agreement or documented covenants with the IPs for the implementation of the project that will affect their properties and customary rights.
16) Involve the IP representatives in monitoring of the project's compliance to the agreement/covenant and IP Plan.
17) Prepare implementation arrangements for the IP Plan.
18) Prepare a Monitoring and Evaluation System.
19) Estimate budget requirements.
20) Monitor and evaluate the benefits of the project to IPs.

Checklist for Identifying Potential Impacts of PPP Projects on IPs:

Proposed PPP projects should be screened for their significant impacts on IPs in terms of the following (Table 4.2):

Table 4.2 Checklist for Screening Potential Impacts of PPP Projects on IPs

Socioeconomic, environmental and cultural factors	Type of impacts			Magnitude of impacts			
	Negative	Positive	None	Low	Medium	High	Unknown
Cultural properties and ancestral lands							
Access to natural resources							
Settlements and housing							
Entry of migrants							
Safe and clean air and water							
Local institutions and decision making							
Religious, cultural sites and ceremonies							
Archeological sites and artifacts							
Cultural heritage							
Indigenous knowledge							
Health and sanitation							
Water							
Education							
Employment and Livelihoods							
Transportation							
Food security							
Peace and security							

Examples of Potential Significant Impacts from Development Projects on IPs that would require the preparation of an IP Plan (IPP):

1) *Intrusion or encroachment on ancestral lands and customary resources*
2) *Threats to languages, cultures, religions, spiritual beliefs, and institutions.*
3) *Loss of natural resource-based livelihoods*
4) *Loss of access to natural resources*
5) *Severe degradation or destruction of cultural heritage*
6) *Defacement, removal or destruction of artifacts*
7) *Decline or loss in food production*
8) *Displacement and relocation of communities*
9) *Pollution of water sources (lakes, rivers, coastal waters) and ambient air*

3.0 OUTLINE OF AN INDIGENOUS PEOPLES PLAN (IPP)

An IPP is required for PPP projects with significant impacts on Indigenous Peoples to ensure that proper safeguards are designed and implemented together with the implementation of the project.

The proposed outline for a prototype IPP is as follows (World Bank, 2005, 2011; ADB, 2009):

1) Legal and institutional framework
2) Indigenous Peoples profile (culture, demographic structure, gender and intergenerational relations and social organization, institutions, production systems, religious beliefs, and resource use patterns)
3) Description of the project
4) Assessment of Potential Impacts of the Project to IPs
5) Avoidance and Mitigation Measures
6) Consultation and Agreement or covenants with IPs
7) Implementation Plan for an IPP
8) Grievance Redress Mechanism
9) Monitoring and Evaluation System
10) Financial Requirements

A brief description of the foregoing IPP outline is provided in TECHNICAL NOTE 2 (following).

The other important components of the IP plan are the following (World Bank, 2005):

1) Summary of social assessment.
2) Summary of results of the free, prior, and informed consultation.
3) Action plan of measures to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate.
4) Action plan on avoidance and mitigation measures on adverse affects of the project.

5) Cost estimates and financing plan for the IPP.

6) Accessible procedures appropriate to the project to address grievances by the affected Indigenous Peoples' communities arising from project implementation.

7) Mechanisms and benchmarks appropriate to the project for monitoring, evaluating, and reporting on the implementation of the IPP.

4.0 CONSULTATION AND INFORMED PARTICIPATION

The IPs affected by the project should be involved in a process of "free, prior and informed consultation" in accordance with the IPRA law. They should be given the necessary information and briefing about the project to solicit their comments and know their apprehension so that facts can be given to them about project benefits and potential adverse impacts, and proposed mitigation or avoidance measures. The IPs have the right to make decisions on projects affecting them. The results of the consultation shall be documented through a signed covenant between the IPs and the Project Proponent or implementing agencies and private partners. The PPP Center may also attest to the signing of the covenant.

Experts on anthropology, ancestral lands, environment and natural resources, etc. from the academe, reputable research institutions and NGOs should be engaged in the process by the Implementing Agency to explain properly to the IPs the issues and concerns that they raised and the results of the impact assessment.

The IPs should also be informed of their rights under IPRA so that they can knowledgeably and confidently participate and make better decisions concerning the sociocultural and environmental soundness of the proposed project.

5.0 CONSENT OF AFFECTED IPs AND AGREEMENTS ON PROPOSED PROJECT

Some projects may have unintended adverse effects on the IPs cultural practices, property rights, and socioeconomic conditions. Thus, the potential impacts of proposed projects need to be thoroughly examined together with the IPs. Participation of IPs will facilitate communication and understanding of the potential adverse impacts of the projects, how to mitigate or avoid these impacts and the benefits that they will derive from the project. Through the involvement of the IPs in the project development cycle, they will be in a better position to judge and make decisions on whether to give or withhold their consent and agreement in the implementation of the project. In case of disagreement on certain terms of the project such as the design, location, or the IPP itself, further negotiations with the IPs may be undertaken by the Project Proponent. As much as possible, the Project Proponent should avoid the physical displacement of IPs by exploring alternative project designs. When avoidance is impossible, a resettlement package that is acceptable and meets the requirements of the IPs must be provided and properly executed. If possible, the plan will also allow the relocated IPs to return to their ancestral land when the reasons for their relocation cease to exist. The consent and agreement between the Project Proponent and the IPs shall be documented in a signed covenant.

The client should then prepare the documentation that provides the details of the process and outcomes of consultations with IPs. An agreement document may also have to be signed by concerned parties as proof of the acceptability of the project to the IPs. The PPP Center and the financing institution can then verify these documents as part of the validation process.

6.0 GRIEVANCE REDRESS MECHANISM

The Project Proponent should establish a mechanism whereby IPs complaints and grievances can be discussed and resolved. The mechanism should be easily accessible and sensitive to the culture and traditions of the IPs to facilitate resolution of issues. A Grievance Redress committee should be created by the Project Proponent. Its main purpose is to resolve and settle amicably conflicts in interest and other undesirable impacts of the project on the stakeholders. Nonetheless, the option for the IPs and others affected to seek remedies in court should remain open if the complaints cannot be resolved through amicable settlement by the Grievance Facility. The existence of the mechanism should be communicated well to the IPs including the protocols for their access and resolution of cases.

7.0 MONITORING, EVALUATION AND REPORTING

It is the responsibility of the Project Proponent with the oversight of the PPP Center to establish a monitoring, evaluation and reporting system wherein IP representatives can participate. The system should be able to monitor, capture and measure the progress of the implementation of the IPP and the complaints or satisfaction of the IPs on the way the project is constructed and operated.

The system should be able to monitor the compliance of the project to the IPP and the actual impacts of the project on IPs cultural and socioeconomic welfare. A multi-partite monitoring team consisting of representatives from the implementing agency, IP group, and NGOs should be provided logistical and financial support to conduct the monitoring and reporting. Periodic reports should be submitted to the PPP Center and concerned NGA/LGU.

TECHNICAL NOTE 1- RIGHTS OF INDIGENOUS PEOPLES UNDER THE IPRA LAW

The Indigenous Peoples (IP) Rights protected under the IPRA law can serve as the framework for assessing the impacts of proposed PPP projects. These rights include the following:

1) Rights to Ancestral Domains- The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights shall include:

a) *Rights of Ownership* – The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;

b) *Right to Develop Lands and Natural Resources* – The right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation of and/or encroachment upon these rights;

c) *Right to Stay in the Territories* – The right to stay in the territory and not be removed therefrom. No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain. Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free and prior informed consent of the ICCs/IPs concerned and whenever possible, they shall be guaranteed the right to return to their ancestral domains as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or through appropriate procedures, ICCs/IPs shall be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development. Persons thus relocated shall likewise be fully compensated for any resulting loss or injury;

d) *Right in Case of Displacement* – In case displacement occurs as a result of natural catastrophes, the State shall endeavor to resettle the displaced ICCs/IPs in suitable areas where they can have access to a temporary life support system: Provided, That the displaced ICCs/IPs shall have the right to return to their abandoned lands until such time that the normalcy and safety of such lands shall be determined: Provided, further, That should their ancestral domain cease to exist and normalcy and safety of the previous settlements are not possible, displaced ICCs/IPs shall enjoy security of tenure over lands to which they have been resettled: Provided, furthermore, That basic services and livelihood shall be provided to them to ensure that their needs are adequately addressed;

e) *Right to Regulate Entry of Migrants* – Right to regulate the entry of migrant settlers and organizations into the domains;

f) *Right to Safe and Clean Air and Water* – For this purpose, the ICCs/IPs shall have access to integrated systems for the management of their inland waters and air space;

g) *Right to Claim Parts of Reservations* – The right to claim parts of the ancestral domains which have been reserved for various purposes, except those reserved and intended for common and public welfare and service; and

h) *Right to Resolve Conflict* – Right to resolve land conflicts in accordance with customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice whenever necessary.

2) *Rights to Ancestral Lands* - The right of ownership and possession of the ICCs/IPs, to their ancestral lands shall be recognized and protected.

a) *Right to transfer land/property* – Such right shall include the right to transfer land or property rights to/among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned; and

b) *Right to Redemption* – In cases where it is shown that the transfer of land/property rights by virtue of any agreement or device, to a non-member of the concerned ICCs/IPs is tainted by the vitiated consent of the ICCs/IPs, or is transferred for an unconscionable consideration or price, the transferor ICC/IP shall have the right to redeem the same within a period not exceeding fifteen (15) years from the date of transfer.

3) *Right to Participate in Decision–Making* – ICCs/IPs have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through procedures determined by them as well as to maintain and develop their own indigenous political structures. Consequently, the State shall ensure that the ICCs/IPs shall be given mandatory representation in policy-making bodies and other local legislative councils.

4) *Right to Determine and Decide Priorities for Development* – The ICCs/IPs shall have the right to determine and decide t*heir own priorities for development affecting their lives, beliefs, institutions, spiritual well-being, and the lands they own, occupy or use. They shall participate in the formulation, implementation and evaluation of policies, plans and programs for national, regional and local development which may directly affect them.*

The [indigenous peoples] shall, within their communities, determine for themselves policies, development programs, projects and plans to meet their identified priority needs and concerns. The [indigenous peoples] shall have the right to accept or reject a certain development intervention in their particular communities. The indigenous peoples' decision to accept or reject a proposed policy, program, or plan shall be assessed in accordance with their development framework and their value systems for the protection of land and resources.

5) *Rights to Religious, Cultural Sites and Ceremonies* – ICCs/IPs shall have the right to manifest, practice, develop and teach their spiritual and religious traditions and customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites; the right to use and control of ceremonial objects; and the right to repatriation of human remains. Accordingly, the State shall take effective measures, in cooperation with the burial sites, such that they are preserved, respected and protected. To achieve this purpose, it shall be unlawful to:

a) Explore, excavate or make diggings on archeological sites of the ICCs/IPs for the purpose of obtaining materials of cultural values without the free and prior informed consent of the community concerned; and

b) Deface, remove or otherwise destroy artifacts which are of **great importance** to the ICCs/IPs for the preservation

of their cultural heritage.

6) *Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technology* – ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

7) *Access to Biological and Genetic Resources* – Access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources, shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community.

TECHNICAL NOTE 2- ANNOTATED OUTLINE OF IP PLAN

The proposed outline for IPP is as follows (ADB, 2009, WB, 2005, 2011) (Table 4.3):

Table 4.3 Annotated Outline of IP Plan

Main Chapter	Brief Description of Contents
1. Legal and institutional framework	Describes the legal and institutional framework of the IPRA law as the basis for assessing the impacts of the projects on the IPs.
2. Indigenous Peoples profile	Provides baseline information on the demographic, social, cultural, and political characteristics of the affected IP communities; the land and territories that they have traditionally owned or customarily used or occupied; and the natural resources on which they depend.
3. Description of the project	Discusses project components and activities that may bring impacts on Indigenous Peoples. The project area's location, physical and natural characteristics and land use are described.
4. Assessment of Potential Impacts of the Project to IPs	Analyzes and presents the potential significant impacts of the project to the IPs. The methods for assessment are presented as well as the results. Also describes the potential benefits that can be received by the IPs from the project.
5. Avoidance and Mitigation Measures	Provides the various measures to avoid and/or mitigate the adverse impacts of the project on IPs. When the avoidance is not possible, the measures to minimize and compensate the IPs for identified unavoidable adverse impacts are identified.
6. Consultation and Agreement with IPs	Identifies key project stakeholders and elaborates a culturally appropriate and gender-sensitive process for meaningful consultation with IPs at each stage of project preparation and implementation, taking the review and baseline information into account. Documents the agreements concerning the acceptability of the project and informed consent of affected IPs. Also describes the procedures to redress grievances by affected IP communities. It also explains the procedures and protocols for the grievance system.
7. Implementation Plan for IPP	Specifies the organizational arrangements, strategies and actions that will be undertaken to implement the IPP. Also provides the capacity building needed by NGAs/LGUs and IPs to meaningfully participate in project development and operation.
8. Monitoring and Evaluation System	Describes the monitoring system, indicators and evaluation method for the impacts of the project and compliance with the IPP. The participation of IPs, LGUs and implementing government agency is also described.
9. Financial requirements	Provides the itemized budget for the activities included in the IPP. The cost schedule is also provided including the sources of funds.

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ANNEX 4
Guidelines for Gender Mainstreaming in PPP Projects

1.0 CONCEPTS AND DEFINITIONS

The GAD guidelines (NEDA, 2007) describes Gender as a shortened form of the phrase "social relations of gender", which seeks to make evident and to explain the global symmetry that appears in male-female relations in terms of power sharing, decision making, division of labor, and return to labor both within the household and in society. Gender Analysis is defined in the guidelines as an examination of a problem or situation in order to identify gender issues within the context of a project, and the obstacles to the attainment of gender equality or similar goals. Gender analysis is a form of social analysis that requires the collection, analysis, and application of sex-disaggregated information. It is the process of considering the different impacts that a development project or program has on women and men, and on the economic and social relationships between them (ADB, undated and GTZ, 2007).

Gender analysis can also be described as a systematic method of examining the present and future situation with and without the project with respect to gender equality and women's empowerment. Analysis of the present issues and potential issues "with the project" is done to determine the potential positive and negative impacts of the PPP project on gender concerns and GAD objectives. Based on the results of gender analysis, the issues are defined and the corresponding strategies and measures are formulated to address them. The strategies and measures are validated with stakeholders and are then integrated in the design of the PPP project. Whenever necessary, a GAD plan is prepared to enhance the gender responsiveness of the PPP project.

2.0 POLICY AND LEGAL FRAMEWORK

Two laws that recognize the role of women in nation building and their equal rights with men have been enacted by the Philippine Congress. These are the Republic Act 7192, an "Act Promoting the Integration of Women as Full and Equal Partners of Men in Development and Nation Building and for other Purposes" that was approved in February 12, 1992;

and Republic Act 9710 or the Magna Carta for Women that was enacted in July 2008 while its Implementing Rules and Regulations (IRR) was approved in March 2010. Gender mainstreaming was adopted by the Magna Carta for Women as its strategy for implementation.

There is a specific provision in the Magna Carta for Women that requires project funds from official development assistance to allot a substantial portion (5-30%) to gender and development (GAD) programs for the improvement of women's welfare. Moreover, the law also mandates that the cost of implementing GAD programs shall be charged to the government agency's or the local government unit's GAD budget which should be at least five percent (5%) of their total budget appropriations.

Pursuant to RA 7192, the NEDA and the National Commission on the Role of Filipino Women (NCRFW) prepared the GAD guidelines in 2007 for the main purpose of providing government agencies a tool with which to integrate gender and development in their planning, budgeting and program and project implementation activities. The NEDA guideline is a harmonized version that considered, in its development, the Gender guidelines of other international institutions such as the ADB and the World Bank.

Both the aforementioned Gender laws promote empowerment of women and uphold their equal rights and opportunities with men. These laws do not only recognize the equal rights of women but also ensure that they benefit from government's development projects and participate meaningfully in the decision-making, planning, implementation and management of these projects. Furthermore, they also ensure that there is an adequate budget available to implement GAD programs.

The Philippine Gender laws serve as the foundation and legal framework for mainstreaming GAD policies into the development, implementation and monitoring and evaluation of PPP projects. Hence, the design of PPP projects is expected to be gender responsive and ensure that they implement a component on GAD.

3.0 MAINSTREAMING FRAMEWORK

Mainstreaming gender in the development, implementation and monitoring and evaluation of PPP projects will ensure that these projects are gender responsive and supportive of the goals of gender equality and women's empowerment in development.

The guidelines and procedures for mainstreaming Gender in PPP project cycles are consistent with the harmonized NEDA GAD guidelines (2007) and the Gender integration strategies and guidelines of other international lending institutions such as the ADB and the World Bank. The mainstreaming guidelines prescribed herein are patterned after the approach adopted for the Environment and Social Impact Assessment (ESIA) to facilitate linkage and to establish clearly the connection among these related guidelines in formulating and implementing PPP projects.

The table below (Table 4.4) illustrates gender mainstreaming in the project development cycle of PPP projects. It shows the gender responsive elements or measures that should be integrated in the given phases of the project cycle. Specifically, the gender responsive measures provided are the procedures that must be undertaken to ensure that gender concerns are sufficiently considered and integrated throughout the stages of project development and operation. The main procedures in mainstreaming gender concerns in the PPP projects are briefly summarized in Table 4.5.

Table 4.4 Framework for Mainstreaming Gender in PPP Project Development

PPP Project Phases	Proposed Procedures for Gender Mainstreaming
Project Identification	• Prepare a project concept note or initial project profile • Collect sex disaggregated data • Conduct stakeholder analysis and gender analysis • Screen project impacts on gender • Identify issues concerning gender equality, benefits and women empowerment • Formulate strategies to address gender issues that could possibly be spawned by a PPP project
Preliminary Design	• Prepare a project design integrating GAD concerns • Prepare a Gender responsiveness checklist for sector PPP projects • Assess PPP project design using checklists to determine its responsiveness to GAD
Feasibility Study	• Incorporate Gender responsiveness in the TORs of the consulting firms preparing Feasibility Studies (FS) and the Design and Monitoring Framework for the PPP project • Assess potential impacts of the project's design using a Project impact checklist for gender • Prepare a separate chapter on GAD in the FS • Prepare a budget for GAD: calculate project cost including GAD cost and its impact on the tariff • Formulate strategies and measures to safeguard women's rights and enhance equal opportunities with men using the results of project evaluation • Develop sex disaggregated monitoring and performance indicators for Gender • Develop a M&E system including a reporting system for Gender
Tendering	• Include Gender data collection as part of the TOR for the contract manager • Conduct briefing and seminars for the private sector on the GAD component of PPP projects • Prepare a GAD plan for sector PPP projects (Prepare a detailed GAD plan for Project Categories A and B, and a simple GAD plan for Project C) with the following minimum contents: a. explicit gender equality goals, objectives and outcomes; b. issues and strategies; c. programs and projects; d. budget estimates; and e. monitoring and evaluation plans
Construction and Supervision	• Create a committee with women membership to discuss issues and complaints on construction • Prepare periodic reports by the private sponsor on statistics needed to be tracked (e.g., number of women employed and benefitted by the project) • Monitor compliance of contractors with performance standards established for GAD
Operation	• Operationalize GAD M&E • Monitor compliance of the project or business operator to GAD plan • Monitor Gender impacts of the project and evaluate performance periodically • Generate regularly performance reports on GAD

Table 4.5 General Procedures for Mainstreaming Gender in PPP Projects

1.	Gather gender disaggregated data of the population located in the project site and those that will be potentially affected (benefitted and disadvantaged) by the project.
2.	Screen the positive and negative impacts of the PPP project's design on women's rights, equal opportunities and access to benefits through the use of Gender analysis methods and an impact screening checklist.
3.	Inform and engage participation of local women's organizations and mandated government agencies (NEDA and Philippine Commission on Women) on the proposed PPP project and in the evaluation of its Gender responsiveness using GAD checklists.
4.	Conduct scoping of issues with local women leaders and government agency representatives (NEDA and Philippine Commission on Women) and confirm results of initial project screening and GAD checklist.
5.	Determine and validate the significant adverse impacts on gender of the proposed project with local stakeholders and concerned agencies and institutions.
6.	Integrate in the project design the proposed strategies and measures to avoid or mitigate the significant potential impacts of the project on women, children and the disabled.
7.	Prepare the GAD Plan for Category A and B projects.
8.	Involve the local women leaders and concerned government agencies (Implementing agency and private sector partner, NEDA and Philippine Commission on Women) in the preparation of the GAD plan.
9.	Secure consent and agreement or covenant with the selected local women's organization and government agencies (Implementing agency and private sector partner, NEDA and Philippine Commission on Women) for the implementation of the project.
10.	Prepare a GAD Monitoring and Evaluation System and reporting system; and build up sex-disaggregated data base.
11.	Prepare implementation arrangements for the GAD Plan.
12.	Estimate budget requirements for implementing GAD programs and projects.
13.	Implement the GAD plan with participation of women stakeholders.
14.	Involve the local women's organization in monitoring of the project's compliance to the agreement and GAD Plan. Create a monitoring team consisting of the Implementing agency and private sector partner, and representatives from local Women's organizations.
15.	Monitor and evaluate the benefits of the PPP project to women, children and the disabled with the participation of local women's organization representatives. Monitor the compliance of the PPP project to Gender laws and GAD guidelines and their impacts on gender.
16.	Sustain the implementation of the GAD plan by concerned organizations (implementing government agency and private sector) by allotting a regular budget to GAD programs and projects and institutionalizing the implementation process.

4.0 OPERATIONALIZATION OF GENDER MAINSTREAMING

The following actions, not necessarily in order, need to be undertaken in mainstreaming Gender in PPP projects:

- Include a separate section on Gender mainstreaming guidelines in the PPP manual;
- Briefing of PPP Center staff and Implementing agency case handlers on Gender mainstreaming and GAD;
- Hiring of Gender a specialist(s) by PPP Center to oversee mainstreaming compliance and GAD plan implementation by Implementing Agency;
- Engagement of Gender specialist by Implementing Agency to conduct gender analysis and GAD plan preparation;
- Include responsibilities on GAD plan implementation in the TOR of transaction advisers;
- Collection of sex disaggregated data for gender analysis by Implementing agency's Gender specialist and trained support staff;
- Prepare strategies and mechanisms to implement GAD budget by Implementing agency;
- Establish linkage with local women's' organizations;

- Conduct consultation and encourage participation of local women's organizations in project identification, gender analysis and GAD planning;
- Conduct workshop orientation for bidders on guidelines on gender;
- Multi-media campaign on PPP and gender impacts;
- Include women GAD expert as members of the external monitoring team for PPP projects;
- Build a cadre of gender specialists (offer training courses through educational institutions);
- Include a GAD component in the PDMF for every one of its Feasibility Studies;
- Establish a registry of gender specialists;
- Conduct a special study on evaluating the impacts of Gender mainstreaming on financial and economic performance of the PPP project and the profitability of the private investor; and
- Develop Gender mainstreaming guidelines specific for the PPP sectors.

5.0 PROJECT IDENTIFICATION

Candidate PPP projects are selected and prioritized from the list of projects provided in the NGA's investment plan consistent with identified eligible projects for PPP for NGAs. The process of selection and prioritization should already consider gender criteria and concerns particularly equal rights and opportunities between men and women and the promotion of women's empowerment through participation in all stages of project development. Brief project profile or concept note is prepared for the selected project for PPP funding.

It is in this phase that a stakeholder analysis is undertaken, with focus on gender analysis. Sex disaggregated data are collected and gender analysis is conducted to determine the present situation on gender equality and women's empowerment. The potential future scenarios with the PPP project are also examined so that the necessary gender measures are incorporated in the design of the selected and prioritized project. Gender issues are identified and the strategies and measures to address them are formulated within the local context.

To enable a comprehensive assessment of the project's potential impacts on gender, an impact screening matrix is employed in Table 4.6, below. The matrix initially identifies whether the PPP project will cause positive, negative or uncertain impacts on gender elements such as equal rights and access, benefits and improved welfare, representation and participation, ownership of assets, protection and security, and safety from man-induced and natural disasters. The impacts are then characterized according to their potential magnitude, i.e., low, medium and high. The results of the impact assessment will determine whether the PPP project has the potential to create significant adverse impacts.

Table 4.6 provides the checklist matrix for screening the potential impacts of the PPP project on gender, particularly women's rights, equal opportunities and access to the potential benefits of the project.

Table 4.6 Project Impact Screening Matrix

Project Phase	Checklist for Screening						
	Gender Concerns	Potential impacts of PPP Project			Magnitude of impacts		
	Project will affect:	Positive	Negative	Uncertain	Low	Medium	High
Project Identification	**Equal rights and access of women to:**						
	• Health						
	• Housing						
	• Land						
	• Natural resources						
	• Food						
	• Decent work						
	• Livelihood, credit, capital and technology						
	• Ownership of assets						
	• Education and training						
	• Information						
	• Social protection / social security						
	• **Recognition and preservation of cultural identity and integrity**						
	• **Safety from natural and human-induced disasters**						
	Floods						
	Earthquake						
	Volcanic eruption						
	Toxic and hazardous substances						
	Chemical pollution						
	Other hazards and risks						

5.1 Classification of PPP Projects according to Gender Responsiveness

PPP projects can be categorized into three types according to the level of significance of their impacts on Gender:

1) **Category A**. These are projects that would most likely have significant adverse impacts on Gender concerns. A GAD analysis and plan should be prepared.

2) **Category B.** These projects are likely to have moderate adverse impacts on Gender concerns. The project design should be able to address the adverse impacts through avoidance or mitigation measures. The project design should integrate gender responsive measures. A simplified GAD plan is prepared.

3) **Category C.** These projects are inherently gender neutral projects and are expected to have positive and enhancing impacts on Gender concerns. Preparation of a GAD plan is optional.

NEDA's harmonized GAD guidelines (2007) contain checklists for scoring the responsiveness of the project in its different stages of the project cycle. The NGA project preparers can use these checklists to determine the gender responsiveness of its proposed project under different project cycle stages. These GAD checklists for every stage of the project cycle can be downloaded from the NEDA website.

6.0 PROJECT DESIGN

After the initial project design is laid out, the NEDA GAD responsiveness checklist is applied to determine the Gender weaknesses of the initial design. Gender concerns lacking in the design are then incorporated. Likewise, the results of project screening under the Project identification stage would further firm up the findings of the NEDA responsiveness checklist.

For the PPP project to have a gender responsive design, it must be able to determine and address two important agenda items: 1) gender issues arising from gender analysis of proposed PPP projects; and 2) strategies and measures that must be incorporated in the PPP project design to resolve issues to be potentially generated by the proposed project during its construction and operation phases. Hence, the full design formulation of the proposed project would be guided by properly accounting for the project's predicted impacts during its construction and operation phases. By projecting the project's adverse impacts on gender concerns, the necessary strategies and measures can be integrated in the project's design.

Another important component of the design is the capacity building and communication mechanisms to ensure informed choices are made by the affected vulnerable sectors.

7.0 PROJECT FEASIBILITY STUDY

This project development stage involves the conduct of technical, financial, economic, social and institutional feasibility or viability of the proposed project. This stage is undertaken after the full project design has been formulated. It is advisable, whenever possible, for the project evaluation team to integrate gender concerns in the feasibility analysis tools that will be employed for project evaluation.

In project evaluation, it is important to determine the potential benefits that women would derive from the project. Likewise, gaps and constraints related to gender integration that are anticipated in the project implementation stage should be addressed in the final design formulation of the project prior to its implementation. The use of sex disaggregated monitoring and performance indicators are developed and applied during the project evaluation stage.

Table 4.7 provides the matrix tool for assessing the potential impacts of the proposed project during its operation stage on gender indicators and for formulating the strategies and measures to mitigate or avoid negative impacts.

A GAD plan is prepared as a separate chapter of the FS. The content of the GAD plan is as follows:

a) Explicit gender equality goals, objectives and outcomes;
b) Issues and strategies;
c) Programs and projects;
d) Budget estimates; and
e) Monitoring and evaluation.

This development stage also involves the estimation of appropriate amount of funds for the purpose of budgeting and programming the implementation of the GAD program in accordance with relevant provisions of RA 9710 and RA 7192. The implications of implementing the GAD program on tariffs are determined since this might affect the investment decision of the private sector partner.

Sex disaggregated monitoring and performance indicators for Gender as well as the M&E and reporting system are developed during the FS stage.

Table 4.7 Potential Project Impact Assessment Checklist

Checklist indicators	Yes	No	Strategies / Measures
Will the project:			
Improve physical welfare of women and girls in terms of:			
Lower incidence of malnutrition, morbidity, and mortality among girls and boys			
Improved functional literacy of various groups of women, particularly among the older age groups in rural areas and among indigenous peoples groups			
Improved school participation of girls and boys at various levels			
Promote equal access of women and men to development opportunities in terms of:			
Employment generated by the project			
Resources and benefits which implies the removal of constraints, barriers and various forms of gender-based discrimination with respect to women's access			
Greater understanding of women's human rights among women and men in terms of:			
Commitment of the State to recognizing, protecting, and fulfilling human rights, particularly of women and girls			
Changes in attitudes and beliefs concerning gender relations, as indicated by a reduction in the incidence of violence against women and a more equal gender division of labor			
Equal participation of women in bodies or organizations created by development programs or projects			
Equal control of women and men over resources and processes and outcomes of development			

Sources: NEDA 2007; RA 9710 (Magna Carta for Women).

8.0 TENDERING

During the Tendering and Contracting stage, Gender data collection is made a part of the TOR for the contract manager. It is also important at this stage that those involved in PPP projects, particularly the private sector partners, are provided briefings and seminars on GAD.

The GAD plan for sectoral PPP projects (Detailed GAD plan for Project Categories A and B and simple GAD plan for Project C) is included in the contract of PPP project contractors

9.0 CONSTRUCTION AND SUPERVISION

A committee with women membership is created to receive complaints during construction and operation of PPP projects. The other important role of the committee is to ensure that the GAD plan is properly implemented as part of the project.

Periodic reporting by the contractor on statistics needed to track Gender concerns such as the number of women employed and benefitted by the project is systematically and periodically undertaken during the construction stage. The compliance of the contractor in implementing the GAD plan is monitored during construction by a designated monitoring committee that includes representatives from the local women's organizations.

10.0 OPERATION AND SUPERVISION

Support by top management of the implementing agency is critical to the success of GAD mainstreaming during implementation of PPP projects. An equally important factor to consider is sustaining the implementation of the GAD plan or project component in the PPP project. For this purpose, a regular budget has to be allotted by the Implementing agency to be able to sustain the implementation of the GAD component of the PPP project.

Local women's organizations, NGOs, and concerned government agencies should be harnessed to ensure the sustainable implementation of the GAD program as an inherent part of the PPP project. These organizations have the competence and commitment to successfully sustain the implementation of the GAD program.

It is in this stage that the GAD M&E is fully operationalized. Monitoring and evaluation of the GAD program and project includes two dimensions: 1) monitoring compliance to the GAD plan; and 2) evaluating the actual impacts of the project on Gender as measured through its performance indicators.

The NEDA GAD guidelines contain pullouts of sector-specific GAD monitoring indicators that can be applied for monitoring the gender responsiveness of PPP projects. The sectors covered by GAD monitoring indicators include: 1) Agriculture and Agrarian Reform, 2) Natural Resource Management, 3) Social Sector: Education, Health, Housing and Settlement, Women in Areas under Armed Conflict, 4) Justice, 5) Information and Communication Technologies, and 6) Microfinance.

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ANNEX 5
Guidelines for Environmental Assessment and Monitoring of PPP Projects

1.0 INTRODUCTION

Environmental assessment and management of projects eligible under the Public-Private Partnership (PPP) Program is a major requirement. The PPP Program adheres to the concept of sustainable development, and thus, the Implementing Agency (IA) should undertake environmental assessment of projects at the early stage of project preparation and environmental monitoring during project implementation. Environmental impact assessment (EIA) is a major component of a well-prepared PPP Project.

There are various Philippine environmental and natural resources laws, rules, and regulations that programs and projects have to adhere to and comply with. However, for purposes of the PPP projects, this Annex provides an overview of the requirements, processes and procedures that generally cover most PPP projects, most particularly, the Philippine Environmental Impact Statement (PEIS) System.

This Annex provides information that should enable the IA to gain basic knowledge and understanding of the environmental impact assessment (EIA) process and corresponding environmental monitoring and reporting requirements for various PPP projects.

2.0 POLICY AND LEGAL FRAMEWORK

Environment and natural resources (ENR) management in the country is guided by two major laws, the Philippine Environmental Policy and the Philippine Environment Code, Presidential Decree (PD) 1151 and 1152 respectively. The Philippine Environmental Policy declares "a continuing policy of the State (a) to create, develop, maintain, and improve

conditions under which man and nature can thrive in productive and enjoyable harmony with each other, (b) to fulfill the social, economic, and other requirements of present and future generations of Filipinos, (c) to ensure the attainment of an environmental quality that is conducive to a life of dignity and well-being." The Philippine Environment Code on the other hand, sets forth management policies and prescribed quality standards for the environment in its totality.

Both laws took effect in the 1970's, together with other major environmental laws, including the Philippine Environmental Impact Statement (PEIS) System, which is PD 1586. Other major environmental laws were developed and implemented in the last four decades.

Depending on the project's circumstances, the requirements and obligations under the environment and natural resources laws will need to be complied with for specific PPP projects. During project preparation, it is essential that the IAs are aware of these laws and regulations so that any specific requirements may be complied with, and the costs for such requirements included in the project budget.

2.1 Philippine EIS System

The Philippine EIS System (PD 1586) requires all projects to undergo environmental impact assessment (EIA) prior to any development. The PEIS System covers projects declared as Environmentally Critical Projects (ECPs) or projects located in Environmentally Critical Areas (ECAs) presumed to have potential significant impacts on the quality of the environment. Section 4 of PD 1586 provides that no person, partnership or corporation shall undertake or operate such declared ECP and those projects located in ECAs without first securing an Environmental Compliance Certificate (ECC).

The Department of Environment and Natural Resources (DENR), through the Environmental Management Bureau (EMB), implements this law. Under this law and consistent with the principles of sustainable development, the Philippine government declares it a policy to implement a systems-oriented and integrated approach to the EIS system to ensure a rational balance between socio-economic development and environmental protection for the benefit of present and future generations. The EIS System is concerned primarily with assessing the direct and indirect impacts of a project on the biophysical and human environment and ensuring that these impacts are addressed by appropriate environmental protection and enhancement measures.

With the Philippine commitment to the United Nations Framework Convention on Climate Change (UNFCCC), assessment of climate change adaptation (CCA) and disaster risk reduction (DRR) concerns of projects have been integrated into the PEIS System.

All the PEIS-related regulations are downloadable from the EMB website.

3.0 ENVIRONMENTAL CLASSIFICATION OF PPP PROJECTS

The DENR/EMB Revised Procedural Manual for DENR Administrative Order No. 30, series of 2003 (DAO 03-30) provides a comprehensive listing of projects that are covered by the PEIS System. The list provides information on the project classification or grouping, and the corresponding project size parameters, EIA report type required, and the decision document to be issued by the DENR/EMB.

Table 4.8 is a list of PPP-eligible projects taken from the PEIS Revised Procedural Manual that are categorized as environmentally critical. By virtue of their project size and capacities and their potential to cause significant environmental impacts, these PPP-eligible projects are required to undergo comprehensive EIA and submit detailed EIS report to DENR/EMB to secure an ECC.

Table 4.8 Environmentally Critical PPP Projects

Project Type	Project Size Parameter for PEIS Coverage	
1. MAJOR DAMS	Reservoir flooded area OR Water storage capacity	≥25,000 OR ≥20 million cu m
2. MAJOR RECLAMATION PROJECTS	Area reclaimed	≥50 hectares
3. MAJOR ROADS & BRIDGES		
a. Bridges and viaducts, new construction	Length	≥10.0 kilometers (km)
b. On-grade railway system, new	Regardless of length and width	
c. Roads, new construction, widening (including RO-RO facilities)	Length with no critical slope or length with critical slope	≥20.0 km OR ≥10.0 km
d. Tunnels and sub-grade roads and railways	Length	≥1.0 km
4. MAJOR POWER PLANTS **(Under PP 2146: fossil-fueled, nuclear fueled, hydroelectric or geothermal)**		
a. Fuel Cell	Total power production capacity	≥100 MW
b. Gas-fired thermal power plants	Total power production capacity	≥50 MW
c. Geothermal facilities	Total power production capacity	≥50 MW
d. Hydropower facilities	Water impounding capacity	≥20 million cu m
e. Other thermal power plants (e.g. diesel, bunker, coal, etc)	Total power production capacity	≥30 MW
5. OTHER POWER PLANTS NOT LISTED IN PP 2146		
a. Renewable energy projects such as ocean, solar, wind, tidal power except waste to energy and biogas project	Total power production capacity	≥100MW
b. Substations /switchyard	Power output	≥50.0MW
c. Waste to energy projects including biogas projects	Total power production capacity	≥50.0MW

Taken from Annex 2-1b of the Revised Procedural Manual for DENR Administrative Order No. 30, series of 2003 (DAO 03-30); Aug 2007

Table 4.9, on the other hand, lists some PPP-eligible projects that are categorized as non-ECPs based on their capacities as listed in the PEIS Revised Procedural Manual. These projects are expected to cause environmental impacts that are relatively minimal. When these projects are to be located in ECAs, these will be required to undergo an EIA and secure an ECC.

Table 4.9 Selected Non-ECP PPP Projects[11]

Project Type	Project Size Parameter for PEIS Coverage	
1. MINOR DAMS	Reservoir flooded area AND water storage capacity	<25 hectares and <20 million cu m
2. MINOR RECLAMATION PROJECTS	Area reclaimed	<50 hectares
3. MINOR ROADS & BRIDGES		
a. Bridges and viaducts, new construction	Length	≥80m but <10.0km
b. Roads, new construction, widening (including RO-RO facilities)	Length with no critical slope, OR length with critical slope	≥2km but <20.0km, OR ≥2km but <10.0km
c. Elevated roads, flyover, interchanges	Regardless of length and width	
d. Tunnels and sub-grade roads and railways	Length	<1.0km
4. MINOR POWER PLANTS (Under PP 2146: fossil-fueled, nuclear-fueled, hydroelectric or geothermal)		
a. Fuel Cell	Total power production capacity	≥5MW but <100MW
b. Gas-fired thermal power plants	Total power production capacity	≥10.0MW but <50.0MW
c. Geothermal facilities	Total power production capacity	≥1.0MW but <50.0MW
d. Hydropower facilities	Water impounding capacity	<20 million cubic meters
e. Other thermal power plants (e.g. diesel, bunker, coal, etc.)	Total power production capacity	≥5.0MW but <30.0MW
5. OTHER POWER PLANTS NOT LISTED IN PP 2146		
a. Power barge	Total power production capacity	>1MW but <10MW
b. Power transmission lines	Power carrying capacity	≥138KV
c. Renewable energy projects such as ocean, solar, wind, tidal power except waste to energy and biogas project	Total power production capacity	≥5MW but <100MW
d. Substations /switchyard	Power output	>1MW but <50MW
e. Waste to energy projects including biogas projects	Total power production capacity	>1MW but <50MW
e. Wind farms / wind projects	Total power production capacity	≥5MW but <100MW

[11] The complete types of projects that may be considered as non-ECPs are found in Annex 2-1b of the PEIS System Revised Procedural Manual

Table 4.10 shows the DENR non-ECP Project grouping where other PPP-eligible projects may fall under. These types of PPP projects when located in ECAs will be required to undergo an EIA and secure ECC depending on their project capacities.

Table 4.10 Other Eligible Projects for PPP that are Non-Environmentally Critical Projects

Selected Additional Non-ECP Project Groups (from PEIS Revised Procedural Manual)	Other PPP Projects Types (from the Revised IRR of the BOT Law)
1. Buildings, storage facilities and other structures	• Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities; • Education and health infrastructure; • Government buildings, housing projects; • Markets, slaughterhouses, and related facilities; • Warehouses and post-harvest facilities
2. Tourism industry	• Tourism estates or townships, including ecotourism projects, such as terrestrial and coastal/marine nature parks, among others and related infrastructure facilities and utilities
3. Transport terminal facilities	• Port infrastructures like piers, wharves, quays, storage, handling, ferry services and related facilities; • Airport, air navigation, and related facilities
4. Waste management projects	• Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others
5. Water supply, irrigation or flood control projects	• Irrigation and related facilities; • Water supply, sewerage, drainage, and related facilities

The IAs are encouraged to check the PEIS System Revised Procedural Manual and discuss with DENR/EMB on the final categorization and requirements of their PPP projects.

4.0 MAJOR ENVIRONMENTAL ASSESSMENTS AND STUDIES REQUIRED

The PEIS system requires some major assessments and studies to complete the requirements for the issuance of Environmental Compliance Certificate (ECC). Aside from the EIA, other major assessments and studies include Environmental Risk Assessment (ERA), Social Impact Assessment (SIA), and Engineering Geological and Geohazard Assessment Report (EGGAR). Conduct of these assessments and studies are also the responsibilities of the Project Proponent. These assessments and studies are briefly discussed below.

4.1 Environmental Impact Assessment (EIA)

Environmental Impact Assessment (EIA) of projects is the main requirement under the PEIS System. All PPP projects that are covered by the PEIS Systems shall undergo environmental impact assessment (EIA). The EIA involves evaluating and predicting the likely impacts of a project (including cumulative impacts) on the environment during construction, commissioning, operation and abandonment. The EIA also covers natural hazards and related risk as well as the anticipated

rise in the frequency and intensity of climatological hazards associated with climate change. Systematic analysis of the potential disaster/climate risk-related consequences of a project via its impact on the environment is included as a central component of the environmental assessment process especially in hazard-prone areas.

The EIA includes designing appropriate preventive, mitigating and enhancement measures, including disaster risk reduction (DRR) and climate change adaptation (CCA) measures that will address the consequences to protect the environment and the community's welfare.

Environmental Risk Assessment (ERA)

An environmental risk assessment (ERA) covers the risk that can be brought about by certain activities to all ecosystems, including humans, exposed via, or impacted through various media. DENR/EMB does not specify the outline of the ERA report. The IA may use the basic key stages of environmental risk assessment as follows:

a. Hazard identification
b. Identification of consequences if the hazard was to occur
c. Estimation of the magnitude of the consequences
d. Estimation of the probability of the consequences (also called exposure assessment)
e. Evaluating the significance of a risk (also called risk characterization)

At the end of the risk assessment process, existing controls and further measures needed to reduce or eliminate the risks are identified. The ERA is conducted as a major part of the EIA and its results are included in the EIS document as a major section.

Social Impact Assessment (SIA)

An inherent part of environmental assessment is the social impact assessment, which focuses on the effects of the project to the society. For the PEIS System requirement, social assessment starts from the determination of the impacted areas, particularly the communities and stakeholders that may be affected by the project. Social aspects of the project that are assessed include socio-economic, health and safety, relocation, indigenous peoples, and gender mainstreaming. Annexes 3 and 4 of this Volume discuss in more detail the guidelines and regulatory requirements concerning indigenous peoples and gender mainstreaming in projects, which are also used in the PEIS System.

The results of the various socio-economic studies conducted for the project are integrated into the EIS, particularly in the Social Development Plan, which forms part of the EIS Report.

Geological Studies

Subdivision, housing and other land development and infrastructure projects are also required to undergo engineering geological and geohazard assessment. The purpose of this type of assessment is to adequately and comprehensively address and mitigate the possible effects/impacts of geologic hazards.

The IAs should coordinate with the DENR Mines and Geosciences Bureau (DENR-MGB), which conducts a preliminary site geological inspection of the proposed project area or land development area to come up with a Geological Site Scoping Report (GSSR). The report recommends the scope of work to be undertaken by the Project Proponent in terms of detailed engineering geological, structural geological and geohazard assessment and geotechnical engineering tests, including specialized studies, if necessary. The result of this study is the Engineering Geological and Geohazard Assessment Report (EGGAR), which is submitted to DENR-EMB, through the DENR-MGB, as part of the EIS report.

5.0 TYPES OF ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REPORTS

The environmental impact assessment (EIA) report is a vital requirement of the DENR/EMB for the issuance of an Environmental Compliance Certificate (ECC).

The following are the types of EIA Report that are prepared by the Project Proponent depending on the project category of the PPP Project and based on the agreed scoping checklist:

a. **Environmental Impact Statement (EIS):** required for major ECPs and for some non-ECPs located in ECAs that have project size or threshold that are considered to result in significant environmental impacts. The report documents the comprehensive EIA study conducted for the specific project. The document contains the details of the study and includes an Environmental Management Plan/Program that the Project Proponent will fund and implement to protect the environment. The complete document includes all other related studies that were required during the scoping stage. The DENR provides an EIS Outline found in DENR MC No. 2010-14.

b. **Initial Environmental Examination (IEE) Report or Checklist Report:** required for minor ECPs and for some non-ECPs located in ECAs that have project size or threshold that are considered to result in relatively minimal environmental impacts. These reports are both similar to an EIS, but with reduced details and depth of assessment and discussion.

The following types of PPP-eligible projects have IEE Checklist Report Forms with DRR/CCA sections that are available from EMB. These projects include:

- Building Projects (Commercial, Institutional, Land Transportation Terminal, and Storage Facilities)
- Resorts and other Tourism/Leisure Projects
- Roads and Bridges

- Water Supply Projects
- Irrigation and Flood Control Projects
- Waste Management Projects

c. **Project Description (PD)** is the document required for non-ECPs that have minimal environmental impacts and are not located in ECAs. This document is submitted for the issuance of Certificate of Non-Coverage (CNC).

Typical EIA Reports contain the following:[12]

i. Project Description, including its location, scale and duration, rationale, alternatives, phases and components, resource requirements, manpower complement, estimate of waste generation from the most critical project activities and environmental aspects, project cost;
ii. Baseline Environmental Description (of the land, water, air and people), focused on the sectors and resources most significantly affected by the proposed action;
iii. Impact Assessment, focused on significant environmental impacts (in relation to pre-construction, construction/ development, operation and decommissioning stages), taking into account cumulative, unavoidable and residual impacts; and
iv. Environmental Management Plan, specifying the impacts' mitigation plan, areas of public information, education and communication, social development program proposal, environmental monitoring plans (with multi-sectoral public participation for EIS-based projects) and the corresponding institutional and financial requirements/arrangements.

6.0 ENVIRONMENTAL COMPLIANCE CERTIFICATE (ECC)

The Environmental Compliance Certificate (ECC) is issued by the DENR/EMB based on its positive review of the documents submitted by the Project Proponent. The ECC certifies the Project Proponent has complied with the requirements of the PEIS System and appropriate measures are or will be taken by the Project Proponent to ensure that the proposed project will not cause significant negative environmental impacts. It certifies that the Project Proponent has committed to implement its approved Environmental Management Plan/Program. The ECC contains specific measures and conditions that the Project Proponent has to undertake before and during the operation of a project, and in some cases, during the project's abandonment phase to mitigate identified environmental impacts.

The ECC has three major parts:

- Part 1: The certificate of environmental compliance commitment, which defines the scope and limits of the project in terms of capacity, area, technology or process. This part of the ECC is signed-off by both the endorsing and the issuing authorities. This part of the ECC comes with a covering letter transmitting the ECC to the Project Proponent, signed off by the deciding and signing authority (either the DENR Secretary, EMB Director or EMB Regional Director);

[11] Section 1, Revised Procedural Manual for DENR Administrative Order No. 2003-30

- Part 2: Annex A of the ECC lists the conditions of the ECC that are within the mandate of the EMB. Non-compliance to any of the conditions may impose a corresponding penalty on the Project Proponent. The Project Proponent commits to fully comply with the ECC through its Sworn Statement of Full Responsibility to implement the mitigation measures; and

- Part 3: Annex B of the ECC lists the EIA Review Committee's recommendations to the Project Proponent, as well as suggestions to other government agencies and LGUs that have mandates over the project so that they can integrate the EIA findings into their decision-making process. The EIARC Chair, the EMB EIA Chief and the EMB Director/Regional Director sign this portion of the ECC. This last part of the ECC is formally transmitted by the DENR-EMB to the concerned government agencies and LGUs.

Once a project is started, the ECC remains valid and active for the life of the project. The ECC automatically expires if the project is not implemented within five years from ECC issuance.

The IA and its private partner must understand all the terms and conditions of the ECC, as these will be monitored during project implementation, from pre-construction to project operation, and even up to abandonment as may be applicable.

7.0 EIA PROCESS AND PROCEDURES

The PEIS System process has six (6) major stages, namely: a) screening; b) scoping; c) EIA study and report preparation; d) EIA review and evaluation; e) DENR decision-making; and f) Post-ECC monitoring, validation, and evaluation. The first three stages are the responsibility of the Project Proponent, which, for PPP projects can either be the Implementing Agency (IA) or its private partner, or both depending on their agreement.

Figure 4.1 presents the PEIS system stages and the major activities of the Project Proponent during each stage. These are further discussed in the following sub-sections.

The Revised Procedural Manual for DENR Administrative Order (DAO) No. 30 Series of 2003— Implementing Rules and Regulations (IRR) of PD 1586 (www.emb.gov.ph) contains very detailed steps, requirements, and pro-forma documents. The IAs and their private partners are encouraged to refer to this Revised Manual for more details.

7.1 Stage 1: Screening

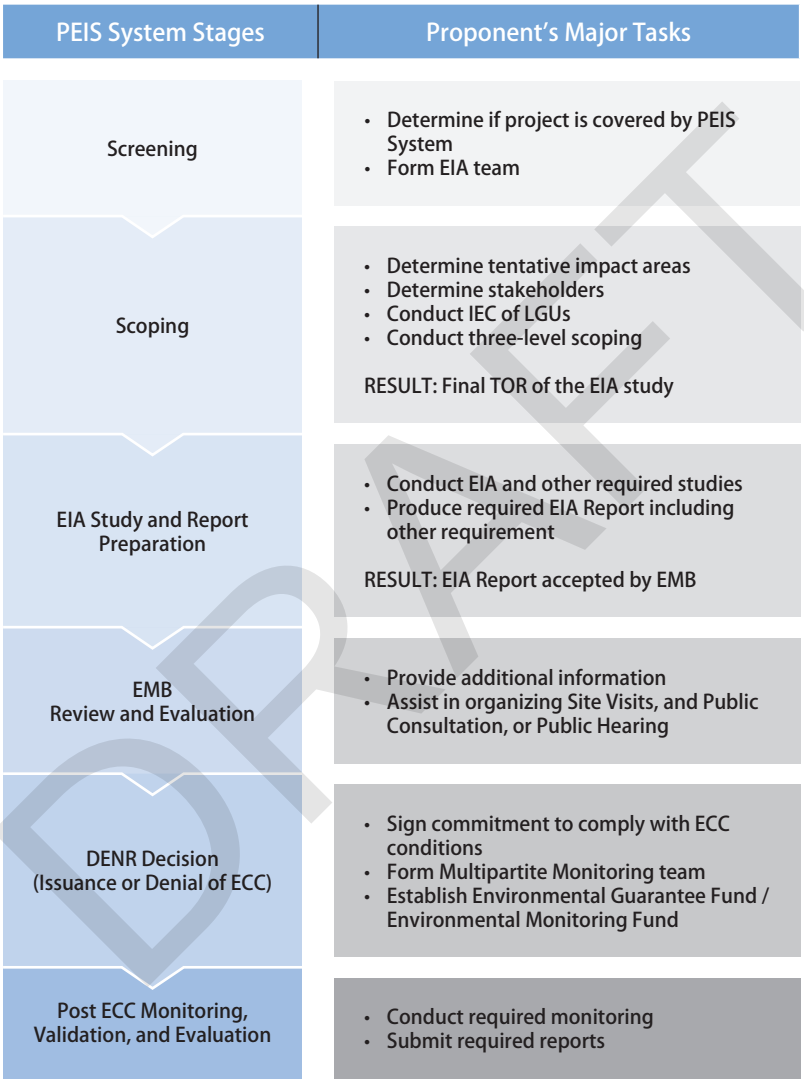
As a first step, the Project Proponent should determine whether or not the project is covered by the PEIS System. The Project Proponent may use the EIA Coverage and Requirements Screening Checklist (ECRSC)[13] to do a self-screening of the project. The same document is also used by EMB as a screening validation form, which they will sign to validate that the project and sub-project categorization is correct. It is at this stage where a team of experts is formed by the Project Proponent to undertake the detailed assessment covering all environmental sectors and aspects of the projects, including biological, physical, socio-economic, climate change, and disaster risk considerations.

[13] Annex 2-1a of the PEIS Revised Procedural Manual

IAs that are quite familiar with the PEIS System and the categorization of their projects may skip this process and go directly to Project Scoping.

EIS Screening Forms that integrate DRR and CCA are available for some projects that are PPP-eligible, such as hydropower/ dam, sanitary landfill, and thermal power plants (see DRR-CCA EIA Technical Guidelines; www.emb.gov.ph).

Figure 4.2 PEIS System Stages and Project Proponent's Major Tasks



7.2 Stage 2: Scoping

Scoping is a required activity under the PEIS System. The Project Proponent initiates the process through formal communications with the DENR/EMB. The PEIS Revised Procedural Manual provides the list and pro-forma documents that should be submitted by the Project Proponent.

Depending on the type of the proposed project, DENR/EMB forms an EIA Review Committee (EIARC), whose main responsibility is to make substantive reviews of the EIA report and provide recommendations to the DENR/EMB on the decision to be made on the ECC application. The EIARC consists of an EMB Case Handler, third party EIARC members and/or Resource Person/s.

DENR/EMB requires a Three-Level Scoping Activity, which is preferably done one-time on site or in the region of the project location. The Project Proponent, in consultation with the EIARC, organizes the scoping activity.

The scoping activity includes:

a) Project Briefing with the Review Team, during which Project Proponent presents the project overview, key issues and proposed TOR of the EIA Study.
b) Public Scoping with project stakeholders, during which community sectors raise their issues to be addressed in the EIA Study. Public scoping is not required for projects in national waters outside of any local government unit (LGU) jurisdiction.
c) Technical Scoping with the Review Team, during the full scope of the EIA, including all technical and document requirements are discussed and agreed between the Project Proponent and the Review Team. The EIA Scoping/Procedural Screening Checklist (SPSC)[14] documents these agreements.

At the end of the scoping activity, the coverage, details, types of documents to be produced, and other requirements for the EIA study should be clearly agreed upon between the Project Proponent and the EIARC.

7.3 Stage 3: EIA Study and Report Preparation

The main bulk of the activities are undertaken here. The EIA Team conducts the comprehensive EIA study. The study assesses the existing site and conditions and evaluates the anticipated impacts on the natural resource (flora, fauna), environment (air, water, land), economy, historical, climate change, disaster risks, and social factors of the proposed project and provides specific actions to be undertaken so that the impacts are reduced if not eliminated.

Detailed mitigation measures and management plan with cost estimates and institutional arrangements are included in the report.

The EIA Team prepares the report based on earlier agreements with the EIARC.

[14]Annex 2-7a of the PEIS Revised Procedural Manual

7.4 Stage 4: EIA Review and Evaluation

EIA review and evaluation may be done at EMB central or regional office depending on the project category. EIS reports of ECPs are processed at EMB Central Office, while those of non-ECPs are processed at the EMB regional office having jurisdiction in the project area.

Part of the review process is the conduct of Site Visit (SV), and Public Consultation (PC) or Public Hearing (PH) by EMB, with the EIARC members in the presence of the Project Proponent and/or its EIA Consultant Team. The Project Proponent usually organizes these activities upon request of the EMB.

Based on the results of the substantive review, the EIARC makes recommendations to EMB on whether the ECC may be issued or the application is denied. These EIARC actions and recommendations are fully documented.

7.5 Stage 5: Issuance or Denial of Environmental Compliance Certificate

The DENR Secretary or the EMB Director issues an ECC or denies the application based on the results of the EIARC review. For ECPs, the DENR Secretary upon the recommendation of the EMB Director, signs the ECC. Other ECCs are signed by the EMB Director upon recommendation of the EIA Division Chief.

It is important that the IA and its private partner understand all the conditionalities of the ECC, as these will be monitored during project implementation, from pre-construction to project operation, and even up to abandonment as may be applicable.

Part of the ECC conditions for ECPs are the creation of a Multipartite Monitoring Team (MMT), and the establishment of an Environmental Guarantee Fund (EGF) and Environmental Monitoring Fund (EMF). These requirements are briefly discussed below.

7.5.1 Creation of Multipartite Monitoring Team (MMT)

ECPs are required to form project-specific MMT. For Non-ECPs in ECAs, the EMB Regional Offices have the option to require the formation of MMTs.

The MMT has the primary responsibility of validating the Project Proponent's environmental performance. The MMTs are composed of representatives of the Project Proponent and of stakeholder groups, including representatives from concerned LGUs, locally accredited NGOs/POs, the community, concerned EMB Regional Office, relevant government agencies, and other sectors that have been identified during the EIA Study as potentially affected by the various phases of the project.

For projects with significant environmental impacts that do not persist after the construction phase, the existence of the MMT is only during the construction phase. Other projects with impacts that could be addressed through the mandates of other government agencies (e.g., Department of Health (DOH) for health projects, LGU for building/structural safety, MGB for geological aspects), the MMT will have a specific term, which is not of the same timeframe as the project life. These are agreed and contained in the Memorandum of Agreement (MOA) signed among the members of the MMT and the Project Proponent, in the presence of EMB. The MOA contains all agreements, including reporting responsibilities and funds for the operation of the MMT. The MOA and all required reports have pro-formas, which are found in the PEIS System Revised Procedural Manual and the DRR/CCA Technical Manual.

The MMT requirement is not applicable for EIS-based projects that have no resident communities within the direct impact areas and which are outside any LGU jurisdiction. For these types of projects, concerns on environmental impacts/risks shown to potentially affect the nearest islands may be referred by the DENR-EMB to the appropriate government agency with mandate and permitting authority over the management of such concerns (e.g. Philippine Coast Guard (PCG) for projects entirely in national waters).

7.5.2 Establishment of Environmental Guarantee Fund (EGF) and Environmental Monitoring Fund (EMF)

The Project Proponent establishes these funds for two different purposes.

The EMF is established for projects with MMT to which the funds will be used to support the MMT activities. It may be time-bound depending on the existence of the MMT and can be easily planned and budgeted.

The EGF is required for projects that have been determined by DENR to pose a significant public risk or where the project requires rehabilitation or restoration. EGF is established to be used to fund community-based environment-related programs, compensate parties and communities affected by the negative environmental impacts of the project, and for clean-up and rehabilitation of areas affected by damage to the environment and the resulting deterioration of environmental quality as a direct consequence of a project's construction, operation or abandonment. The EGF has different components including IEC, community training, community environmental programs, and emergency and disaster preparedness.

Detailed guidelines on the setting up of both funds are also available in the PEIS System Revised Guidelines.

7.6 Stage 6: Post-ECC Monitoring, Validation and Evaluation/Audit

There are three groups responsible for conducting post-ECC monitoring, validation and evaluation activities, namely the Project Proponent, the Multipartite Monitoring Team (MMT), and the EMB.

The monitoring, validation, and evaluation or audit schemes are discussed fully in the PEIS System Revised Procedural Manual.

For PPP projects, the monitoring responsibility rests on the private sector partner who won the bid to operate the project. Thus, it is important that this responsibility is included in the Terms of Reference (TOR) of the project being tendered. Regardless, the IA shall have the continuing responsibility to monitor compliance of the private partner on the environmental performance of the project.

8.0 OTHER ENVIRONMENTAL PERMITS AND CLEARANCES

The IA or its private partner should also ensure that other major environmental permits and clearances are secured for PPP Projects depending on the type of the project and the status of its implementation. These may include:

i. Wastewater Discharge Permit - required under Clean Water Act (RA 9275) for all land-based sources of water pollution
ii. Permit to Operate (P/O) Air Pollution Source and Control (APSC) Facilities - required under the Clean Air Act (RA 8749) for all stationary sources of air pollution
iii. Water Permit - Required under Water Code of the Philippines (PD 1067) for use of ground and surface waters for domestic, irrigation, power, fisheries, industrial, livestock, recreational and commercial purposes
iv. LLDA Clearance - Required under LLDA Board Resolution (BR) 408, series of 2011, amending BR 223,s 2004 and BR 286, s 2006 as authorized under RA 4850 as amended for development plan /program /project in the Laguna de Bay Region (resource extraction, agriculture, manufacturing, service, waste management, other development projects defined under BR 408

The IA should check with the DENR and EMB which and when among these permits and clearances shall be secured for specific projects.

GLOSSARY OF TERMS

(The following definitions of words and terms are taken from relevant Philippine environmental laws, particularly PD 1586 and RA 9729)

1. Adaptation – is the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities

2. Adaptive capacity – is the ability of ecological, social or economic systems to adjust to climate change including climate variability and extremes, to moderate or offset potential damages and to take advantage of associated opportunities with changes in climate or to cope with the consequences thereof.

3. Certificate of Non-Coverage – a certification issued by the EMB certifying that, based on the submitted project description, the project is not covered by the EIS System and is not required to secure an ECC.

4. Climate Change – a change in climate that can be identified by changes in the mean and/or variability of its properties and that persists for an extended period typically decades or longer, whether due to natural variability or as a result of human activity

5. Co-located projects – projects, or series of similar projects or a project subdivided to several phases and/or stages by the same Project Proponent, located in contiguous areas.

6. Disaster Risk – is the potential disaster losses in lives, health status, livelihood, assets and services, which could occur to a particular community or a Society over some specified future time period.

7. Environment – surrounding air, water (both ground and surface), land, flora, fauna, humans and their interrelations.

8. Disaster risk reduction – is the concept and practice of reducing disaster risks through systematic efforts to analyze and manage the causal factors of disasters, including through reduced exposure to hazards, lessened vulnerability of people and property, wise management of land and the environment, and improved preparedness for adverse events.

9. Environmental Compliance Certificate (ECC) – a certificate of environmental compliance commitment to which the Project Proponent conforms with, after DENR-EMB explains the ECC conditions, by signing the sworn undertaking of full responsibility over implementation of specified measures which are necessary to comply with existing environmental regulations or to operate within best environmental practices that are not currently covered by existing laws. It is a document issued by the DENR/EMB after a positive review of an ECC application, certifying that the Project Proponent has complied with all the requirements of the EIS System and has committed to implement its approved Environmental Management Plan. The ECC also provides guidance to other agencies and to LGUs on EIA findings and recommendations, which need to be considered in their respective decision-making process.

10. Environmentally Critical Area (ECA) – an environmentally sensitive area declared through Proclamation 2146 wherein significant environmental impacts are expected if certain types/thresholds of proposed projects are located, developed or implemented in it. Updating of technical descriptions of ECAs is vested on the DENR-EMB through Section 2-D of AO 42 (2002).

11. Environmentally Critical Project (ECP) – projects belonging to project types declared through Proclamation No. 2146 and Proclamation No. 803, which may pose significant negative environmental impact at certain thresholds of operation regardless of location. Updating of technical descriptions of ECPs is vested on the DENR-EMB through Section 2-D of AO 42 (2002), in coordination with the DTI as provided for in Section 3-A of AO 42.

12. Environmental Guarantee Fund (EGF) – fund to be set up by a Project Proponent which shall be readily accessible and disbursable for the immediate clean-up or rehabilitation of areas affected by damages in the environment and the resulting deterioration of environmental quality as a direct consequence of a project's construction, operation or abandonment. It shall likewise be used to compensate parties and communities affected by the negative impacts of the project, and to fund community-based environment related projects including, but not limited to, information and education and emergency preparedness programs.

13. Environmental Impact Assessment (EIA) – process that involves evaluating and predicting the likely impacts of a project (including cumulative impacts) on the environment during construction, commissioning, operation and abandonment. It also includes designing appropriate preventive, mitigating and enhancement measures addressing these consequences to protect the environment and the community's welfare.

14. Environmental Impact Assessment Review Committee (EIARC) – a body of independent technical experts and professionals of known probity from various fields organized by the EMB to evaluate the EIS and other related documents and to make appropriate recommendations regarding the issuance or non-issuance of an ECC.

15. Environmental Impact Statement (EIS) – document, prepared and submitted by the Project Proponent and/or EIA Consultant that serves as an application for an ECC. It is a comprehensive study of the significant impacts of a project on the environment. It includes an Environmental Management Plan/Program that the Project Proponent will fund and implement to protect the environment.

16. Environmental Management Plan/Program (EMP) – section in the EIS that details the prevention, mitigation, compensation, contingency and monitoring measures to enhance positive impacts and minimize negative impacts and risks of a proposed project or undertaking. For operating projects, the EMP can also be derived from an EMS.

17. Environmental Monitoring Fund (EMF) – fund that a Project Proponent shall set up after an ECC is issued for its project or undertaking, to be used to support the activities of the multi-partite monitoring team. It shall be immediately accessible and easily disbursable.

18. Environmental Risk Assessment (ERA) – assessment, through the use of universally accepted and scientific methods, of

risks associated with a project. It focuses on determining the probability of occurrence of accidents and their magnitude (e.g. failure of containment or exposure to hazardous materials or situations).

19. Initial Environmental Examination (IEE) Report – document similar to an EIS, but with reduced details and depth of assessment and discussion.

20. Initial Environmental Examination (IEE) Checklist Report – simplified checklist version of an IEE Report, prescribed by the DENR, to be filled up by a Project Proponent to identify and assess a project's environmental impacts and the mitigation/enhancement measures to address such impacts.

21. Multipartite Monitoring Team (MMT) – community-based multi-sectoral team organized for the purpose of monitoring the Project Proponent's compliance with ECC conditions, EMP and applicable laws, rules and regulations.

22. Philippine Environmental Impact Statement System (PEISS) – Presidential Decree (PD) 1586 issued in June 1978, is the Philippine law which declares it a policy of the government to attain and maintain a rational and orderly balance between socio-economic growth and environmental protection. The law established a Environmental Impact Statement System founded and based on the environmental impact statement required, under Section 4 of Presidential Decree No. 1151, of all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities for every proposed project and undertaking, which significantly affects the quality of the environment.

23. Project Description (PD) – document, which may also be a chapter in an EIS, that describes the nature, configuration, use of raw materials and natural resources, production system, waste or pollution generation and control and the activities of a proposed project. It includes a description of the use of human resources as well as activity timelines, during the pre-construction, construction, operation and abandonment phases.

24. Project – any activity which may have varying levels of significance of impact on the environment, e.g. from high to moderate to nil significance, implying different intensities of preventive or mitigating interventions

25. Project Proponent – any natural or juridical person intending to implement a project or undertaking.

26. Public Participation – open, transparent, gender-sensitive, and community-based public involvement in the EIA process, aimed at ensuring the social acceptability of a project or undertaking, involving the broadest range of stakeholders, commencing at the earliest possible stage of project design and development and continuing until post-assessment monitoring.

27. Scoping – the stage in the EIS System where information and project impact assessment requirements are more definitely established and focused to provide the Project Proponent and the stakeholders the final scope of work and terms of reference for the EIS.

28. Significant Impacts – impacts which damage the environment to the point that the environmental resource loses its capacity to sustain life or to continue functioning within baseline levels and efficiency; impacts which need action through prevention, (e.g. change in project siting or design) or mitigation (reduce, repair, rehabilitate) or other interventions to protect the environment from being harmed at levels that reduce its functionality for its users or dependent biota.

REFERENCES

Revised Procedural Manual for DENR Administrative Order No. 30, series of 2003 (DAO 03-30) (Implementing Rules and Regulations of Presidential Decree No. 1586, Establishing the Philippine Environmental Impact Statement System); Environmental Management Bureau; August 2007

EMB Memorandum Circular No. 2011-005, Incorporating Disaster Risk Reduction (DRR) and Climate Change Adaptation (CCA) concerns in the Philippine EIS System, Environmental Management Bureau, Quezon City, November 2011

DENR Memorandum No. 2000-28, Implementing Guidelines on Engineering Geological and Geohazard Assessment as Additional Requirement for ECC Applications covering Subdivision, Housing and other Land Development and Infrastructure Projects; Department of Environment and Natural Resources; March 2000

Proclamation No. 2146, Proclaiming Certain Areas and Types of Projects as Environmentally Critical and within the Scope of the Environmental Impact Statement System Established under Presidential Decree No. 1586; Office of the President, Philippines, December 1981

The Philippine Amended BOT Law, R.A. 7718, and its Revised Implementing Rules and Regulations, 2012 Revision of the IRR; Public Private Partnership Center; Quezon City, 2012

ANNEX 6
Instruments Issued by Donors and Bilaterals in Support of PPP Projects

1.0 INSTRUMENTS PROVIDED BY DONORS

Besides credit enhancements and performance undertakings extended by the Government, there may be guarantees issued by donors. Such guarantees usually protect the project company against certain political risks, but under some circumstances they may also cover breach of the Project Agreement by the Contracting Authority, for instance, where the project company defaults on its loans as a result of the breach of an obligation by government.

In addition to lending to governments and public authorities, the World Bank, ADB and other donors have developed programs to support PPPs. For example, they provide guarantees that are assignable to commercial lenders for qualifying projects. In some cases, guarantees provided by these institutions require a counter-guarantee from the Government. The instruments used are designed to mitigate the risks of default on sovereign contractual obligations or long-maturity loans that private lenders are not prepared to bear and are not equipped to evaluate. For instance, guarantees provided by the World Bank and ADB may typically cover specified risks (the partial risk guarantee) or all credit risks during a specified part of the financing term (the partial credit guarantee), as summarized below:[15]

(i) **Partial risk guarantees.** A partial risk guarantee covers specified risks arising from non-performance of sovereign contractual obligations or certain political force majeure events. Such guarantees ensure payment in the case of debt service default resulting from the non-performance of contractual obligations undertaken by governments or their agencies. They may cover various types of non-performance, such as failure to maintain the agreed regulatory framework, including price formulas; failure to deliver inputs, such as fuel supplied to a private power company; failure to pay for outputs, such as power purchased by a government utility from a power company or bulk water purchased by a local public distribution company; failure to compensate for project delays or interruptions caused by government actions or political events; procedural delays of any kind including issuance of licenses to operate; and adverse changes in exchange control laws or regulations.

[15] NOTE that ADB provides guarantees under terms similar to those of the World Bank. Material in this Appendix is drawn from World Bank and Berne Union websites.

(ii) **Partial credit guarantees.** Partial credit guarantees are provided to private sector borrowers with a government counter-guarantee. They are designed to cover the portion of financing that falls due beyond the normal tenure of loans provided by commercial lenders. These guarantees are generally used for PPP projects that need long-term funds to be financially viable. A partial credit guarantee typically extends maturities of loans and covers all events of non-payment for a designated part of the debt service.

The Multilateral Investment Guarantee Agency (MIGA) offers long-term political risk insurance coverage to new investments originating in any member country and destined for any developing member country other than the country from which the investment originates. New investment contributions associated with the expansion, modernization or financial restructuring of existing projects are also eligible, as are acquisitions that involve the privatization of state enterprises. Eligible forms of foreign investment include equity, shareholder loans and loan guarantees issued by equity holders, provided the loans and loan guarantees have terms of at least 3 years. Loans to unrelated borrowers can also be insured, as long as a shareholder investment in the project is concurrently insured. Other eligible forms of investment are technical assistance, management contracts and franchising and licensing agreements, provided they have terms of at least 3 years and the remuneration of the investor is tied to the operating results of the project. MIGA insures against the following risks:

(i) **Transfer restrictions.** The purpose of guarantees of foreign currency transfer extended by MIGA is similar to that of sovereign foreign exchange guarantees that may be provided by the Government. This guarantee protects against losses arising from an investor's inability to convert local currency (capital, interest, principal, profits, royalties and other remittances) into foreign exchange for transfer outside the host country. The coverage insures against excessive delays in acquiring foreign exchange caused by action or failure to act by the Government, by adverse changes in exchange control laws or regulations and by deterioration in conditions governing the conversion and transfer of local currency. Currency devaluation is not covered. On receipt of the blocked local currency from an investor, MIGA pays compensation in the currency of its contract of guarantee;

(ii) **Expropriation.** This guarantee protects against loss of the insured investment as a result of acts by the Government that may reduce or eliminate ownership of, control over or rights to the insured investment. In addition to outright nationalization and confiscation, "creeping" expropriation –a series of acts that, over time, results in an expropriation –is also covered. Coverage is provided on a limited basis for partial expropriation (for example, confiscation of funds or tangible assets). Actions taken by government which are non-discriminatory (i.e., apply to all firms) and are taken through the exercise of legitimate regulatory authority are not covered. For total expropriation of equity investments, MIGA pays the net book value of the insured investment. For expropriation of funds, MIGA pays the insured portion of the blocked funds. For loans and loan guarantees, MIGA insures the outstanding principal and any accrued and unpaid interest. Compensation is paid upon assignment of the investor's interest in the expropriated investment (for example, equity shares or interest in a loan agreement) to MIGA;

(iii) **Breach of contract.** This guarantee protects against losses arising from the Government's breach or repudiation of a contract with the investor. In the event of an alleged breach or repudiation, the investor must be able to invoke

a dispute resolution mechanism (for example, arbitration) under the underlying contract and obtain an award for damages. If, after a specified period of time, the investor has not received payment or if the dispute resolution mechanism fails to function because of actions taken by the Government, MIGA will pay compensation;

(iv) **War and civil disturbance.** This guarantee protects against loss from damage to, or the destruction or disappearance of, tangible assets caused by politically motivated acts of war or civil disturbance in the host country, including revolution, insurrection, coup d'état, sabotage and terrorism. For equity investments, MIGA will pay the investor's share of the least of the book value of the assets, their replacement cost or the cost of repair of damaged assets. For loans and loan guarantees, MIGA will pay the insured portion of the principal and interest payments in default as a direct result of damage to the assets of the project caused by war and civil disturbance. War and civil disturbance coverage also extends to events that, for a period of one year, result in an interruption of project operations essential to overall financial viability. This type of business interruption is effective when the investment is considered a total loss; at that point, MIGA will pay the book value of the total insured equity investment.

2.0 INSTRUMENTS PROVIDED BY EXPORT CREDIT AND INVESTMENT PROMOTION AGENCIES

Insurance against certain political, commercial and financial risks, as well as direct lending, may be obtained from export credit and investment promotion agencies. Such agencies have typically been established in a number of countries to assist in the export of goods or services originating from those countries. They act on behalf of the governments of the countries supplying goods and services for the project. Most of them are members of the International Union of Credit and Investment Insurers (Berne Union), whose main objectives include promoting international cooperation and fostering a favourable investment climate; developing and maintaining sound principles of export credit insurance; and establishing and sustaining discipline in the terms of credit for international trade.

While the support available differs from country to country, export credit and investment promotion agencies typically offer two lines of coverage:

(i) **Export credit insurance.** In the context of the financing of PPP projects, the essential purpose of export credit insurance is to guarantee payment to the seller whenever a foreign buyer of exported goods or services is extended credit by the seller. Export credit insurance may take the form of supplier credit or buyer credit insurance arrangements. Under the supplier credit arrangements, the exporter and the importer agree on commercial terms that call for deferred payment evidenced by negotiable instruments (for example, bills of exchange or promissory notes) issued by the buyer. Subject to proof of creditworthiness, the exporter obtains insurance from an export credit agency in its home country. Under the buyer credit modality, the buyer's payment obligation is financed by the exporter's bank, which in turn obtains insurance coverage from an export credit agency. Export credits are generally classified as short-term (repayment terms of usually under 2 years), medium-term (usually 2-5 years) and long-term (over 5 years). Official support by export credit agencies may take the form of pure cover, by which is meant insurance or guarantees given to exporters or lending institutions without financing support. Official support may also be given in the form of financing support, which is defined as including direct credits to the overseas buyer, refinancing and all forms of interest rate support;

(ii) **Investment insurance.** Export credit agencies may offer insurance coverage either directly to a borrower or to the exporter for certain political and commercial risks. Typical political and commercial risks include war, insurrection or revolution; expropriation, nationalization or requisition of assets; non-conversion of currency; and lack of availability of foreign exchange. Investment insurance provided by export credit agencies typically protects the investors in a project company established abroad against the insured risks, but not the project company itself. In other words, the equity investors are covered by the insurance but not the creditors of the project company or its suppliers. Investment insurance cover tends to be extended to a wide range of political risks. Export credit agencies prepared to cover such risks typically require sufficient information on the legal system of the host country.

The conditions under which export credit agencies and investment promotion of member countries of the Organization for Economic Cooperation and Development (OECD) offer support to both supplier and buyer credit transactions have to be in conformity with the OECD Arrangement on Guidelines for Officially Supported Export Credits (also referred to as the OECD Consensus). The main purpose of the arrangement is to provide a suitable institutional framework to prevent unfair competition by means of official support for export credits. In order to avoid market-distorting subsidies, the OECD Consensus regulates the conditions of terms of insurances, guarantees or direct lending supported by governments.

ANNEX 7
Generic Preferred Risk Allocation Matrix Adopted by NEDA for PPP Project Evaluation

GENERIC PREFERRED RISK ALLOCATION MATRIX ADOPTED BY NEDA FOR PPP PROJECT EVALUATION

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Pre-contract risks					
Existing structure (refurbishment / extension)	• Risk that the procurement process will experience any of the following: (a) failure to attract sufficient qualified bidders and/or responsive offers; (b) prolonged and expensive negotiations; or (c) collapse of negotiations.	• Government	• Government does not have a partner yet at this stage, so it has no option but to bear this risk.	• Careful preparation and management of the procurement process. • Ensure that the agency's procurement team is experienced and competent. • Establish a procurement schedule commensurate with project complexity.	• There is no agreement yet signed with any other party, there is no specific allocation instrument but lack of recourse to any sort of compensation.
Site Risk					
Existing structure (refurbishment / extension)	• Risk that existing structures are inadequate to support new improvements, resulting in additional construction time and cost.	• Private	• Private sector can manage cost-effectively if proper due diligence of existing structure is conducted.	• Private firm will pass to builder which relies on expert testing and due-diligence. • Give private firm enough time to do site studies.	• Contract clause requiring private partner to provide performance bond.
Site conditions	• Risk that unanticipated adverse geological conditions (geotechnical risk) are discovered which cause construction cost to increase and/or cause construction delays.	• Private-except when complex geological conditions are present AND project is government solicited; private to absorb only up to a specific cost amount, after which government assumes	• Private sector can manage cost effectively if site study effort is moderate and enough time is provided to bidders. • Complex structures on linear infrastructure (road, rail, pipeline) may require more thorough and detailed geo-technical studies (for example, long tunnel and long span bridges in unstable terrain), that may not be reasonably completed within the bidding period of may be too expensive for bidders to conduct at the bidding stage without cost-sharing.	• Private firm will pass to builder which relies on expert testing and due-diligence. • Give private firm enough time to do site studies. • Reimburse part of the bidding cost to encourage bidders to prepare their own site studies.	• Contract clause requiring private partner to provide performance bond. • Contract clause stipulating the conditions and mechanism to compensate private sector for agreed upon portion of cost overruns on technically complex structures (for example, tunnel cost overrun guarantee).

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Permits and approvals	• Risk that necessary approvals (for example, environmental license, environmental management plan, construction permit) may be obtained or may be obtained only subject to unanticipated conditions which have adverse cost consequences or cause prolonged delay.	• Private if and when: - Permits and approvals have been obtained prior to the submission of proposals by potential bidders, and later modified at the request of the successful bidder. • Government if and when: - Permits and approvals have not been obtained prior to bidder proposal submission—private is responsible to manage the process, though.	• When Private: - Private is better informed about the rationale for its request. • When Government: - Government is better informed and positioned to influence the speed of the approval process, particularly in situations that are complex or sensitive.	• Government to obtain in advance of the bidder proposal submission stage the requisite permits and approvals, which would allow the private firm to achieve a measure of pre-contractual certainly and an early start of the approval process.	• Contract clause stipulating the schedule to obtain permits and approval and stipulating liquidated damages payable to private partner in case of delay.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Environmental liabilities existing prior to project	• Risk that project site is contaminated requiring significant remediation expenses.	• Private, except when: - Project was solicited by the government; and - Cost and time required to conduct a full due-diligence (site study) for each bidder are such that the project would be significantly delayed or would deter potential serious bidders—in such case, some risk sharing along the lines of geotechnical site risk could be a solution.	• When Private: - Private sector can manage cost-effectively if site study effort is moderate and enough time is provided to bidders. • When shared: - Sites where site study effort may not be reasonably completed within the bidding period or may be too expensive for bidders to conduct at the bidding stage without cost-sharing.	• Private firm will pass to builder which relies one expert testing and due diligence. • Give private firm enough time to do site studies. • Reimburse part of bidding cost to encourage bidders to prepare their own site studies.	• Contract clause requiring private partner to provide performance bond. • Contract clause stipulating the conditions and mechanism to compensate private sector for agreed-upon portion of remediation expenses.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Environmental liabilities created during operation	• Risk that the use of the project site over the contract term has resulted in significant environmental liabilities (clean up or rehabilitation required to make the site fit for future anticipated use).	• Private, if and when: - Environmental license and environmental management plan has been approved prior to submission of proposals. - Environmental license and management plan have not been approved prior to submission of proposals—liability is limited to amount estimated in the proposal. • Government, if and when: - Environmental license and management plan have not been approved prior to submission of proposals—liability for any excess over investor's proposed estimate.	• Private partner is able to manage the use of the asset and attend to its maintenance and refurbishment according to the environmental requirements known at the proposal stage. • Government is better able to manage environmental requirements not known to bidders at the proposal stage.	• During procurement private partner must demonstrate financial capacity or support to deliver the site in the state required by the government at the end of the contract. • Government to require sinking funds if it is to resume the site and its use is liable to result in significant clean-up/ rehabilitation cost.	• Contract clause defining what constitutes environmental liability and the mechanism to estimate the private partner's liability and pursue payment. • Contract clause requiring the establishment of clean-up/ rehabilitation sinking fund.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Cultural heritage	• Risk of costs and delays associated with archaeological and cultural heritage discoveries.	• Government to assume risk on government preferred site. • Private partner to assume risk on private partner preferred site.	• Government generally has a better understanding of procedures, and is usually in best position to manage this risk.	• Research cadastral records and obtain expert advice.	• Contract clause defining risk and stipulating site availability schedule and liquidated damages payable in case of delays.
Availability of site	• Risk that tenure/ access to a selected site which is not presently owned by government or private partner cannot be negotiated. • Risk of costs and delays in negotiating land acquisition.	• Government to assume risk on government preferred site—private partner may remain responsible for managing the process. • Private to assume risk on private partner preferred site.	• If government preferred site: - Government has a better understanding of procedures, has special powers of acquisition and use of land for infrastructure and its usually in best position to manage. - Government is in better position to negotiate where policy discourages use of compulsory acquisition power. • If private preferred site: - Private partner is in control of site selection.	• Research cadastral records and obtain expert advice. • If government preferred site: complete land acquisition prior to proposal stage. • If private preferred site: oblige bidders to secure access prior to contract signing.	• Contract clause stipulating site availability schedule and liquidated damages payable in case of delays.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Design, construction and commissioning risk					
Design	• Risk that the design of the facility is substandard, unsafe, or incapable of delivering the services at the anticipated cost and specified level of service (often resulting in long term increase in recurrent costs and long-term inadequacy of service).	• Private- private partner will be responsible except where an express government mandated change has caused the design effect.	• Private partner has more experience, knowledge and control over the variables that determine the quality of the design (i.e., experience, competent staff, etc.).	• Ensure that the feasibility study is available well in advance of the procurement process to adequately inform the design process. • Incorporate strict experience and competency requirements in the procurement process. • Private partner may transfer risk to builder/ architects and other subcontractors while maintaining primary liability; government has the right to abate service charge payments where the problem cannot be suitably remedied	• Contract clause requiring performance bond. • Contract clause stipulating liquidated damages.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Construction	• Risk that events occur during construction which prevent the facility being delivered on time and on cost.	• Private except when: - The event is one for which relief as to time or cost or both are specifically grounded under the contract, such as force majeure or government intervention. - In situations when the technical or geological complexity (for example, tunnels) prevents from having sufficient and reliable information to measure risk, the government may assume part of the risk.	• Private partner has more experience, knowledge and control over the variables that influence construction cost and control over construction process (i.e., schedule, equipment, materials and technology, etc.)- this assumes that private partner has enough information to estimate costs and start operations on schedule and as planned. • A possible exception is in contractually agreed upon situations that classify as force majeure or government intervention.	• Incorporate strict experience and competency requirements in the procurement process. • Ensure that feasibility study is available well in advance of the procurement process. • Private firm generally will enter into a fixed term, fixed price building contract to pass the risk to a builder with the experience and resources to construct so as to satisfy the private firm's obligations under the contract.	• Contract clause requiring performance bond. • Contract clause stipulating liquidated damages. • Contract cost overrun guarantee for complex structures.
Commissioning	• Risk that either the physical or the operational commissioning tests which are required to be completed for the provision of services to commence, cannot be successfully completed.	• Private- although government will assume an obligation to cooperate and facilitate prompt public sector attendance on commissioning tests.	• Private partner is in control of the design and construction process and its inputs, and therefore better positioned to manage the risk.	• Incorporate strict experience and competency requirements in the procurement process.	• Contract clause requiring a performance bond. • Contract clause stipulating liquidated damages (until all physical and operational commissioning tests passed).

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Sponsor and Financial Risk					
Interest rates pre-completion	• Risk that prior to completion local currency interest rates may move adversely.	• Government	• Government has more experience and information regarding the factors influencing local currency interest rates and is in better position to manage risk.	• Construction loan interest rate hedging instrument (if and when available).	• Contract clause defining mechanism to compensate private for interest rate changes during construction.
Interest rates post completion	• Risk that after completion interest rates may move adversely.	• Private	• Private partner in control of selecting and arranging long-term financing.	• Interest rate hedging instruments (for example, interest rate swap from (IFC). • Arrange financing using a mix of foreign and local currency.	• Contract clause holding government harmless.
Exchange rate	• Risk that during operation, exchange rates may move adversely, affecting the private partner's ability to service foreign denominated debt and obtain its expected profit.	• Shared Government to assume part of it by allowing total or partial indexing of payments to exchange rate. • Private to assume remainder.	• Private partner is in control of selecting and arranging local and foreign currency mix for long-term financing. • Government has more experience and information regarding the factors that influence exchange rates.	• Private to partially mitigate by financing part of the project in local currency. • Private to establish Foreign Exchange Liquidity Facility to cover part of the potential mismatch between project's local currency and foreign currency debt. • Government to partly transfer risk to users by allowing payment indexing to exchange rate.	• Contract clause requiring establishment of a Foreign Exchange Liquidity Facility. • Tariff or facility payment adjustment contract clause.
Currency convertibility and profit repatriation	• Risk that local currency cannot be converted into foreign currency as a result of government restrictions.	• Government	• Government has more experience and information regarding the factors that influence currency convertibility.	• Purchase partial risk guarantee from an International Financing Institution.	• Contract clause stipulating that private partner can benefit from the guarantee to compensate for losses related to currency convertibility and repatriation of profits.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Inflation	• Risk that value of payments received during the term is eroded by inflation.	• Shared - Government to assume part of it by allowing total or partial indexing of payments to inflation. - Private to assume remainder risk through the methodology adopted to maintain value.	• Government has more experience and information regarding the factors that influence inflation.	• Government to transfer part of it to users by allowing total or partial indexing of payments to inflation rate. • Government to ensure its payments do not overcompensate for inflation and to avoid any double payment for after costs adjustments (for example, changes in exchange rate).	• Contract clause defining payment adjustment mechanisms.
Financing unavailable	• Risk that when debt and/or equity is required by the private firm for the project it is not available then and in the amounts and on the conditions anticipated.	• Private	• Private partner is responsible for arranging finance.	• Government requires all bids to have fully documented financial commitments with minimal and easily achievable conditionality.	• Contract clause requiring firm letters of credit from reputable financial institutions.
Sponsor risk	• Risk that the private partner is unable to provide the required services or becomes insolvent. • Risk that the private partner is later found to be an improper person for involvement in the provision of these services. • Risk that financial demands on the private partner exceed its financial capacity causing corporate failure.	• Government	• If this risk materializes, there is no private partner to transfer the risk to.	• Ensure project is financially remote from external financial liabilities. • Ensure adequacy of finances under loan facilities or sponsor commitments supported by performance bond. • Ensure adequacy of finances through the use of non-financial evaluation criteria and due diligence on private partner.	• Contract clause requiring a performance bond and letters of credit. • Contract clause requiring minimum liquidity and debt ratios.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Further finance required due to government action	• Risk that by reason of a change in law, policy or other event additional funding is needed to rebuild, alter, re-equip etc., the facility which cannot be obtained by the private firm (resulting in no funding available to complete further works required by government).	• Government takes risk that private finance is unavailable- however, private partner to assume best endeavors obligation to fund at agreed rate of return with option on government to pay via an increase in fees over the balance of the term via a separate capital contribution.	• Government has more information and is better positioned to manage risk.	• Government to satisfy itself as to likelihood of need arising, likely criticality if it does arise, and as to financial capacity of private to finance and (if appropriate) budget allocation if government is required to fund it.	• Contract clause of best endeavors obligation by private to fund with option on government to compensate via fee increase or capital contribution. • Contract clause providing a buy-out (put) option or termination with compensation for private, should finance not be obtained and facility cannot be further operated.
Change in ownership	• Risk that a change in ownership or control of the private firm results in a weakening in its financial standing or support or other detriment to the project.	• Shared - Government risk as to the adverse consequence of a change if it occurs. - Private firm risk that its commercial objectives may be inhibited by a restrictive requirement for government consent to change.	• If change occurs, the ability of private partner to manage risk is diminished. • Private partner would have to accept requirement to sign agreement, hence if condition is not acceptable, it would walk away from the project.	• Government requirement for its consent prior to any change in control. • Private firm will seek to limit this control to circumstances where substantive issues are of concern such as financial capacity and probity.	• Contract clause requiring government consent prior to any change in control, and providing ability to influence or prevent change only in specific circumstances.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Refinancing benefit	• Risk (upside) that at completion or other stage in project development the project finances can be restructured to materially reduce the project's finance cost.	• Private partner to benefit. • Government to share in limited circumstances (i.e., symmetrical risk allocation and super profits).	• Similar to interest rate risk- private partner has control over its choice of long term financing- if downside burden is placed on private partner, same principle applies to upside (symmetrical risk allocation).	• Government to assure itself that likely benefit has been factored into competitive bids to avoid the risk that the private firm will be allowed to earn super profits from the project.	• Contract clauses spelling out circumstances where government is to share and at what rate.
Tax changes	• Risk that before or after completion the tax impost on the private firm, its assets or on the project, will change.	• Private if and when: - Tax increases or new taxes arising from general changes in tax law. • Government, if and when: - Tax increases or new taxes arising from discriminatory changes in tax law.	• General changes in tax law affect all businesses in the country. • The government is in better position to influence specific discriminatory tax law changes affecting the project.	• Private partner to incorporate in project due-diligence- financial returns of the private partner should be sufficient to with stand general tax law changes.	• Contract clause providing compensation terms for discriminatory changes in tax law. • Contract clause providing a buy-out (put) option or termination with compensation for private partner when no other compensation mechanism is available.
Operating Risk					
Inputs	• Risk that required inputs cost more than anticipate, are of inadequate quality or are unavailable in required quantities.	• Private except when: - Government controls inputs (for example, water catchment).	• Private partner is in control of the selection of inputs.	• Private partner may manage through long term supply contracts where quality/quantity can be assured. • Private partner can address to some extent in its facility design.	• Contract clause imposing penalties for breach of specific and well-defined performance and quality specifications. • Contract clause on compensation to private for issues attributable to government- supplied inputs.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Maintenance and refurbishment	• Risk that design and/ or construction quality is inadequate resulting in higher than anticipated maintenance and refurbishment cost.	• Private	• Private partner is in control of design and construction processes.	• Private firm to manage through long-term subcontracts with suitably qualified and resourced sub-contractors.	• Contract clause imposing penalties (and possible termination) for not meeting specific and well defined performance, level of service, and quality specifications. • Contract clause requiring performance bond from private.
Changes in output specification outside agreed specification range	• Risk that government's output requirements are changed after contract signing whether pre or post commissioning. • Change prior to commissioning may require a design change with capital cost consequences on the significance of the change and its proximity to completion. • Change after completion may have a capital cost consequence or a change in recurrent cost only (for example, where an increase in output requirements can be accommodated within existing facility capacity).	• Government	• Government is in better position to manage and mitigate the occurrence of the risk.	• Government to minimize the chance of its specifications changing and, to the extent they much change, it will ensure the design is likely to accommodate it at least expense; this will involve considerable time and effort in specifying the outputs up front and planning likely output requirements over the term.	• Contract clause of best endeavors obligation by private to fund with option on government to compensate via fee increase or capital contribution. • Contract clause providing a buy-out (put) option or termination with compensation for private, should finance not be obtained and change makes project unviable.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Operator failure	• Risk that a subcontract operator may fail financially or may fail to provided contracted service to specification (failure may lead to service unavailability and a need to make alternate delivery arrangements with corresponding cost consequence).	• Private	• Private partner is fully and primarily liable for all obligations to government irrespective of whether it has passed the risk to a subcontractor.	• Government to carry out due diligence on principal subcontractors for probity and financial capacity and commission a legal review of the major subcontractors including the guarantees or other assurances taken by the private partner; if failure does occur the private partner may replace the operator or government may require operator replacement.	• Contract clause imposing penalties (and possible termination) for not meeting specific and well defined performance, level of service, and quality specifications. • Contract clause requiring performance bond from private partner.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Technical obsolescence or innovation	• Risk of the contracted service and its method of delivery not keeping pace, from a technological perspective, with competition and/or public requirements - Private partner's revenue may fall below projections either via loss of demand (user pays model) payment abatement (availability model) and/or operating cost increasing; - Government may not receive contracted service at appropriate quantity/quality.	• Private-- except where contingency is anticipated and government agrees to share risk possibly by funding a reserve.	• Private partner is able to use its expertise and know-how to minimize the risk.	• Government to develop detailed, well-researched output specifications. • Private partner to develop detailed, well-researched design solution. • Private partner may have recourse to designer, builder or their insurers. • Private partner to arrange contingency/ reserve fund to meet upgrade costs subject to government agreement as to funding the reserve and control of reserve funds upon default. • Both partners to monitor obligations in the contract.	• Contract clause imposing penalties (and possible termination) for not meeting specific and well-defined performance, level of service, and quality specifications. • Contract clause defining the condition required of the facility at the end of the term • Contract clause requiring performance bond from private. • Contract clause specifying mechanism to establish a reserve fund (private, public-private, public).

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Demand risk					
Demand risk	• Risk that operating revenues fall below forecast as a result of decrease of service volume (i.e., traffic volume, water or power consumption) attributable to an economic downturn, tariff increase or change in consumer habits.	• Private except when: - Uncertainty in demand forecast is such that providing an availability payment element and/or a minimum revenue guarantee is necessary to attract private investment (for example, greenfield toll road), in which case, the government will share in the risk through an availability payment or a minimum revenue guarantee.	• When demand can be estimated with relative certainty, the private partner is in better position to mitigate risk through commercial management practices. • Where government is the primary off-take it has better information to manage risk.	• Government and private to perform independent market demand analyses commensurate with project scale and characteristics. • Where users pay private partner will ensure robust financial structure and financier support. - Adequate debt coverage - Adequate reserves - Credit enhancement insurance	• Contract clause stipulating the availability payment or mechanism to establish minimum revenue payments.
Non-technical losses (tariff avoidance)	• Risk of a portion of users or customers not paying or evading payment for service, leading to a shortfall in cash flows.	• Private, except when: - There is limited scope for private to stop service or pursue payment (for example, service delivery or payment collection is controlled by government).	• Private sector has better access to information needed to identify non-paying users and stop/continue service to them.	• Private firm to incorporate measures (technological, business processes, and otherwise) to identify non-paying customers and prevent and deter non-payment.	• Contract clause giving the ability to private partner to stop service to non-paying customers and stipulating the mechanisms available to collect payment.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Network and interface risk					
Withdrawal of support network	• Risk that, where the facility relies on a complementary government network, that support is withdrawn or varied adversely affecting the project.	• Government, where the change discriminates against the project.	• Government is in control of complementary network management.	• Government to conduct thorough network planning process when developing project concept.	• Contract clause defining what constitutes unfair discrimination against the project and specifying mechanisms to compensate private (for example, liquidated damages).
Change in competitive network	• Risk that an existing network is extended/ changed/ re-priced so as to increase competition for the facility.	• Private except when: - Changes are discriminatory against the project. - Competition is government-subsidized (for example, a competing toll-free road on the same corridor).	• Government manages network allowing it to influence the materialization of network risk and its consequences.	• Government to conduct thorough network planning when developing project concept. • Private firm to review likely competition for service and barriers to entry prior to entering agreement. • Private firm will seek compensation against change which unfairly discriminates against the project by government subsidizing competition (existing or new).	• Contract clause to provide private partner with non-compete protections and compensation mechanisms.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Interface (1)	• Risk that the delivery of core services in a way which is not specified/ anticipated in the contract adversely affects the delivery of contracted services.	• Private except when: - Changes involve discriminatory to the project—government to provide compensation.	• Government manages core service activities allowing it to influence the materialization of inter-face risk and its consequences.	• Government to conduct thorough system planning when developing project concept. • Upfront assessment (by both government and private partner) of likely interface issues. • Continuous review and monitoring developments of a communications strategy in respect of delivery of the two related services.	• Contract clause to specify the extent of core services and the way in which they will be delivered so that only manifest and adverse changes and deficiencies can trigger this risk. • Contract clause defining compensation mechanism for private partner.
Interface (2)	• Risk that the delivery of contracted services adversely affects the delivery of core services in a manner not specified/ anticipated in the contract.	• Private	• Private firm manages contracted service activities.	• Upfront assessment (by both government and the private partner) of likely interface issues. • Continuous review and monitoring and development of a communications strategy in respect of delivery of the two related services.	• Contract clause requiring a performance bond and specifying liquidated damages.
Industrial relations risk					
Industrial relations	• Risk of strikes or industrial action causing delay and cost to the project.	• Private	• Private partner has better information about and control over the causes of industrial action.	• Private partner (or its sub-contractors) manages project delivery and operations.	• Contract clause requirement payment of liquidated damages to government.
Legislative and government policy risk					
Approvals	• Risk that additional approvals required during the course of the project cannot be obtained.	• Private, except when: - Government has initiated the change requiring approval.	• Government is in better position to manage and mitigate the occurrence of the risk.	• Private to anticipate requirements	• Contract clause to specify private partner compensation mechanism (for example liquidated damages).

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Changes in law/ policy	• Risk of a change in law/policy of government only, which could not be anticipated at contract signing and which has adverse capital expenditure or operating cost consequences for the private firm.	• Private if and when: - Changes occur in general law and are not project or service specific. • Government if and when: - Changes are discriminatory and directed specially and exclusively at the project or the services.	• General changes in law affect all businesses in the country. • Government is in better position to influence specific discriminatory tax law changes affecting the project.	• Private partner to incorporate in project due-diligence-financial returns of the private partner should be sufficient to withstand general law/ policy changes. • Government to monitor and limit (where and possible) changes which may have these effects or consequences on the project. • Government to require the private firm to effect the change in a way that the financial effect on government in minimized (for example, pay on a progressive scale); • Government to pass through to end users	• Contract clause allowing compensation to private in a pre-specified formula. • Contract clause to allow pass through to end users.
Regulation	• Risk that where there is a statutory regulator involved there are pricing or other charges imposed on the private firm which do not reflect its investment expectations.	• Private except when: - Tariffs and payments are pre-specified in the contract.	• The private partner has the ability to undertake its own assessment of the regulatory system.	• Private firm to assess regulatory system and may make appropriate representations.	• Contract clause to specify whether payment will be subject to regulator or not, and if not, specify mechanism to set and adjust tariffs

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Force majeure risk					
Force majeure	• Risk that inability to meet contracted service delivery (pre or post completion) is caused by reason of force majeure events.	• Private takes risk of loss or damage to the asset and loss of revenue when risk is insurable (for example, earthquake, floods, fire and drought). • Government take some risk of service discontinuity both as to contracted service and core service when risks are uninsurable (i.e., terrorism acts, war, civil unrest, etc.).	• Private partner can buy insurance from the marketplace—commercial. • Government is better positioned to manage uninsurable risks.	• Private to purchase insurance for insurable risks. • If uninsurable, private firm may self-insure by establishing reserve funding. • If uninsurable, government to establish contingency for alternate service delivery.	• Contract clause to expressly define events that will constitute acts of God and political force majeure events. • Contract clause to relieve private from consequences of service discontinuity. • Contract clause to require that if insurable, private must ensure availability of insurance proceeds towards asset repair and service resumption and government is to be given the benefit of insurance for service disruption costs.

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Asset ownership risk					
Default and termination	• Risk of loss of the facility or other assets upon the premature termination of lease or other project contracts upon breach by the private firm and without adequate payment.	• Private firm will take the risk of loss of value on termination.	• Private firm has more knowledge of the underlying causes of default and can identify risk earlier than government.	• Only serious breaches by the private firm to lead to termination. • Private partner to be given time and opportunity to remedy defaults by the private partner which may lead to termination. • If termination occurs pre-completion government may (but need not to) make payment for value in the project on a cost to complete basis. • If termination occurs post completion the private partner may receive fair market value less all amounts due to government. • Government to require step in rights to ensure access and service continuity until ownership/control issues are resolved.	• Contract clause to define options for remediation of default. • If and when necessary, contract clause to define method to establish compensation to private in case of termination (pre and post completion).

Risk	Definition	Preferred Allocation	Rationale	Possible Mitigation Strategies	Allocation Instrument
Residual value on transfer to government	• Risk that on expiry or earlier termination of the services contract the asset does not have the value originally estimated by government at which the private partner agreed to transfer it to the government.	• Private	• Partner can incorporate life cycle maintenance, refurbishment, and performance requirements into the design facility, and can manage these process during the term of the contract.	• Government to impose on the private maintenance and refurbishment obligations. • Government to ensure an acceptable maintenance contractor is responsible for the work, commission regular surveys and inspections. • Government may require private to establish a dedicated sinking fund to accumulate funds sufficient to bring the asset to agreed condition and/or (if required) obtain performance bonds to ensure the liability is satisfied.	• Contract clause specifying the conditions in which assets are to be transferred to the government at the end of the term. • Contract clauses stipulating the performance indicators and frequency of monitoring of these indicators. • Contract clause requiring the creation of a sinking fund to cover the cost of bringing the facility up to the desired standard.

Source: National Economic and Development Authority.

ANNEX 8
Refinancing Gains

1.0 INTRODUCTION

Sharing the gains arising from a refinancing operation is an important issue for the design and implementation of the PPP contract that has become increasingly relevant over the past decade. Refinancing is understood as the replacement or renegotiation of the original capital structure, debt and/or equity of the Project Company on more favorable terms. Refinancing is attractive to the Project Company when interest rates fall (if the Project Company can benefit from such a fall under its hedging policy) or when the risk profile of the Project Company has improved. Refinancing can take different forms, such as:

- A reduction in the debt pricing;
- Extension of the debt maturity;
- An increase in the gearing (i.e. the amount of debt relative to equity). This is possible when lenders are prepared to relinquish some of their contractual protection as the perceived project risks are reduced;
- Lighter reserve account requirements; or
- The release of guarantees provided by the shareholders of the Project Company, or Project Proponents, or by third parties.

Refinancing will often result in financial gains for the shareholders of the Project Company. Some of the gains may be justified by the good performance of the Project Company, but some may also arise from macro-economic factors or lenders' greater confidence in a specific PPP market (i.e. factors not attributable to the Project Company). In this case, financial gains for the shareholders may appear undeserved and give rise to political difficulties. As a result, sharing the financial gains from a refinancing operation between the Project Company shareholders and the Implementing Agency is often considered appropriate.

Current practice is to include detailed provisions in the PPP contract setting out a method for determining and sharing the gains from future refinancing – rather than to rely on broad principles and full renegotiation of the contract when refinancing takes place. The UK started the trend in 2002 with its standardized contract provisions for refinancing.

Other countries have followed a similar approach.

Refinancing mechanisms are complex and their assessment requires the support of financial and legal advisers. The PPP contract provisions require specific drafting that needs to address several steps that involve:

- Calculating the expected refinancing gain to the Project Company shareholders (e.g. using net present value techniques); determining the portion of the gain that should be allocated to each party (e.g. 50:50 split, the Implementing Agency's share increasing, if specified tests are met, as in the UK, where the marginal rate attains 70%); and
- Deciding how the gains should be shared (e.g. lump sum payment to the Implementing Agency, reduction in the service fee payable to the Project Company).

Many details (e.g. the discount and interest rates to be used in the calculations, and treatment of the possible impact of a refinancing operation on the termination payment that the Implementing Agency might have to make in the future) need to be addressed in the PPP contract to avoid subsequent discussion and disagreements. As with many other aspects of PPPs, it is important to anticipate the issues as much as possible and to set out detailed provisions in the PPP contract.

2.0 SAMPLE CLAUSE – REFINANCING GAINS[16]

2.1 REFINANCING

2.1.1 IMPLEMENTING AGENCY may request the Project Company to proceed with a Qualifying Refinancing at any time after the Effective Date and upon receipt of such request from IMPLEMENTING AGENCY in writing, the Project Company shall promptly proceed with a Qualifying Refinancing in accordance with the terms and conditions set out in this clause. SPC will have no obligation to incur external costs in undertaking the preliminary analysis of refinancing opportunities.

2.1.2 In the event the Project Company wishes to proceed with a Qualifying Refinancing, the Project Company shall obtain IMPLEMENTING AGENCY's written consent prior to proceeding with any Qualifying Refinancing, such consent not to be unreasonably withheld or delayed, provided that, the Project Company has complied with its obligations under Clauses 1.1.3 and [ ][17]. IMPLEMENTING AGENCY's consent in relation to a Qualifying Refinancing shall be deemed rejected if IMPLEMENTING AGENCY has not expressly consented or objected to the Qualifying Refinancing within 30 days of the date upon which the Project Company has provided the information set out in Clause [ ].

2.1.3 Both IMPLEMENTING AGENCY and the Project Company shall at all times act in good faith in the performance of their obligations under this clause.

2.1.4 The Project Company shall promptly provide IMPLEMENTING AGENCY with full details of any proposed Qualifying Refinancing, including term sheet or other documentation setting out the terms and conditions upon

[16] The material on Refinancing Gains comes from a project in the Middle East which closely mirrors the UK approach
[17] Clause [ ] being hypothetical depending on circumstances

which any Financier(s) have agreed to provide funding in connection with the proposed Qualifying Refinancing, a copy of the financial model (if any) relating to such proposed Qualifying Refinancing and the basis for the assumptions used in the financial model and an estimate of the external costs the Project Company anticipates it will incur in connection with the proposed Qualifying Refinancing.

2.1.5 IMPLEMENTING AGENCY shall, before, during and at any time after the implementation of the Qualifying Refinancing, have rights of audit over any financial model and documentation related thereto (including any aspect of the calculation of the Refinancing Gain) which is used in connection with that Qualifying Refinancing.

2.2 DETERMINATION OF AMOUNT OF REFINANCING GAIN

2.2.1 The Refinancing Gain arising from a Qualifying Refinancing shall be the amount that is equal to the greater of zero and (A - B),

Where:

A = the Net Present Value of the Distributions projected immediately prior to the Qualifying Refinancing (taking into account the effect of the Qualifying Refinancing, the amount and timing of costs incurred in accordance with Clause [ ] and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Qualifying Refinancing) to be made to the Project Proponents (without double counting) over the remaining term of this Agreement following the Qualifying Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Qualifying Refinancing (but without taking into account the effect of the Qualifying Refinancing and using the Financial Model as updated (including as to the performance at the Project) so as to be current immediately prior to the Qualifying Refinancing) to be made to the Project Proponents (without double counting) over the remaining term of this Agreement following the Qualifying Refinancing.

2.2.2 IMPLEMENTING AGENCY and the Project Company will negotiate in good faith to agree the estimated amount of the Refinancing Gain and the consequential adjustment to the Treatment Charge prior to any Qualifying Refinancing being implemented.

2.2.3 For the avoidance of doubt, the consequences of a Change in Statutory Requirements shall be dealt with in accordance with Article [ ] of the Agreement.

2.3 IMPLEMENTING AGENCY'S ENTITLEMENT TO SHARE OF REFINANCING GAIN

2.3.1. Subject to Clause 1.3.2, IMPLEMENTING AGENCY's entitlement pursuant to Clause 1.2.2 to a share of any Refinancing Gain shall be as follows:

a) in relation to the amount of any Refinancing Gain which is up to but not exceeding US$ 1 million, IMPLEMENTING AGENCY shall be entitled to payment of fifty percent (50%) of the value of such Refinancing Gain;

b) in relation to the amount of any Refinancing Gain which is in excess of US$ 1 million but not greater than US$ 2 million, IMPLEMENTING AGENCY shall be entitled to payment of sixty percent (60%) of the value of such Refinancing Gain in excess of US$ 1 million; and

c) in relation to the amount of any Refinancing Gain which is in excess of US$ 2 million, IMPLEMENTING AGENCY shall be entitled to payment of seventy percent (70%) of the value of such Refinancing Gain in excess of UAS$ 2 million.

2.3.2 In the event of a Qualifying Refinancing that includes a reduction of the Project Proponents' equity participation in the Project and/or a Distribution to the Project Proponents, in either case arising directly from such Qualifying Refinancing, the following will prevail in relation to IMPLEMENTING AGENCY's entitlement pursuant to Clause X:

a) in the event that the Qualifying Refinancing is either (i) agreed prior to the Expansion Commercial Operation Date or (ii) implemented within one year after the Expansion Commercial Operation Date, IMPLEMENTING AGENCY will benefit from 100% of the Refinancing Gains.

b) in the case of other Qualifying Refinancings the provisions of clauses 1.3.1 will apply subject to IMPLEMENTING AGENCY and the Project Company agreeing on an additional compensation to IMPLEMENTING AGENCY to take into account the benefit to the Project Proponents of any reduced Project Proponents' equity participation in the Project Company and/or the reduction in exposure of Project Proponents in respect of the Project. In the event that no such compensation is agreed upon, no Refinancing will be authorized.

2.4 METHOD OF PAYMENT OF IMPLEMENTING AGENCY'S SHARE OF REFINANCING GAIN

IMPLEMENTING AGENCY shall receive its share of any Refinancing Gain arising from a Qualifying Refinancing agreed pursuant to Clause [ ] as a reduction in the Treatment Charges payable over the remaining Contract Period.

2.5 DISPUTES

If the Parties fail within 90 days from the date of financial close of the Qualifying Refinancing to agree any of the matters referred to in Clause [ ], such dispute shall be resolved in accordance with Article [ ] (save that, in connection with any appointment of an Expert in accordance with Article [ ] to determine any matter relating to or in connection with this clause, the first sentence of Article [ ] shall not apply and instead such Expert shall be an expert in the field of finance with not less than fifteen (15) years of relevant experience).

2.6 COSTS

Upon financial close of a Qualifying Refinancing, the Project Proponents will be entitled to reimbursement of one hundred percent (100%) of substantiated and approved (with supporting documentation) external costs the Project Proponents

incur in connection with a Qualifying Refinancing plus another twenty five percent (25%) of the total amount of such external costs to account for any internal costs incurred by the Project Proponents in connection with a Qualifying Refinancing. The Project Proponents shall be entitled to reimbursement of such costs prior to effecting any reduction in the Treatment Charges in accordance with Clause [ ].

3.0 DEFINITIONS

"Distribution" means, whether in cash or in kind, any:

a) dividend by, or other distribution in respect of share capital of, the Project Company;

b) reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital of the Project Company;

c) payments under the Project Proponent Loans (whether of principal, interest, breakage costs or otherwise);

d) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or

e) receipt by the Project Proponents of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms.

"Exempt Refinancing" means:

a) any Refinancing that was fully taken into account in the calculation of the Treatment Charges or necessary to finance the performance of obligations of the Project Company pursuant to agreements to which the Project Company is a party;

b) a change in taxation or change in accounting treatment;

c) the exercise of rights, waivers, consents or similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:

d) breach of representations and warranties or undertakings;

e) the movement of monies between or investments made from monies in, or security posted in connection with monies in the Project Accounts in accordance with the terms of the Financing Documents as at Financial Close, including pursuant to the exercise of rights, waivers, consents or similar actions in accordance with such terms;

f) late or non-provision of information, consents or licenses;

g) amendments to contracts entered into between the Project Company and the Project Company's Contractors;

h) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Financing Documents);

i) failure of the Project Company to obtain any consent by statutory bodies required by the Financing Documents; or

j) voting by the Financiers under the Facility Agreement and the voting arrangements between the Financiers in respect of the levels of approval required by them under the Financing Documents;

k) any amendment, variation, modification, supplement of or waiver in respect of any agreement (other than the Project Proponent Loans) approved by IMPLEMENTING AGENCY under this Agreement;

l) any sale of shares in the Project Company by the shareholders or securitization of the existing rights and/or interests attaching to shares in the Project Company;

m) any sale or transfer of the Project Proponents' existing rights and/or interests under the Project Proponent Loans or securitization of the Project Proponents' existing rights and/or interests under the Project Proponent Loans; or

n) any Qualifying Bank Transaction.

"Net Present Value" means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions to be made to each of the Project Proponents, in each case discounted using the Threshold Equity IRR.

"Project Accounts" means accounts referred to in and required to be established under the Financing Agreements.

"Qualifying Bank Transaction" means:

a) the syndication by a Financier of any of its rights or interests in the Financing Documents; and/or

b) the grant by a Financier of any rights of participation, or the transfer or disposition by a Financier of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Financing Documents in favor of (i) any other Financier (ii) any institution which is recognized or permitted in any jurisdiction to carry on the business of a credit institution or which is otherwise permitted to accept deposits (iii) a local, public or governmental authority or agency (iv) any institution which is recognized or permitted in any jurisdiction to carry on the business of insurance (v) any unit trust scheme, pension fund, provident fund or similar recognized or permitted in any jurisdiction (vi) any other institution in respect of which the prior written consent of IMPLEMENTING AGENCY has been given.

"Qualifying Refinancing" means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing.

"Refinancing" means:

a) any amendment, variation, novation, supplement or replacement of any Financing Document (other than any Project Proponent Loan);

b) the grant of any waiver or consent, under the Financing Document (other than any Project Proponent Loan);

c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Documents (other than the Project Proponent Loans) or the creation or granting of any other form of benefit (such as a reduction in the fees, expenses, margins or cost of funds to the Project Company and/or an increase in the tenor or average weighted life of the Outstanding Debt) or interest in or from either the Financing Documents (other than the Project Proponent Loans) or the revenues or assets of the Project Company; or

d) any other arrangement put in place by the Project Company or another person which has an effect which is

similar to any of (a) - (c) above or which has the effect of limiting the Project Company's ability to carry out any of (a) - (c) above

in each case, save where an Event of Default (as defined in the Facility Agreement) and an acceleration of the repayment of the Loan Amount (as defined in the Facility Agreement) has occurred.

"Refinancing Gain" has the meaning given to it in Clause 0.

"Threshold Equity IRR" means [ ]%\

ANNEX 9
Compendium of External Resources

I. APPENDIXES RELATED TO TOOLKITS AND THEIR WEB ADDRESSES

Appendix 1	Toolkit for Public Private Partnerships in Roads and Highways http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/index.html
Appendix 2	Railway Reform: A toolkit for Improving Rail Sector Performance http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/railways_toolkit/index.html
Appendix 3	Port Reform Toolkit http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/toolkit.html
Appendix 4	Legal Tools for Port Reform http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/module4/annex.html
Appendix 5	Guidebook for Developing and Leasing Airport Property http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_047.pdf
Appendix 6	Building Regional Power Pools http://siteresources.worldbank.org/EXTENERGY2/Resources/toolkit_book_final.pdf?resourceurlname=toolkit_book_final.pdf
Appendix 7	Developing Best Practice for Promoting Private Sector Investment in Power http://www.adb.org/publications/developing-best-practices-promoting-private-sector-investment-infrastructure-power
Appendix 8	Emergency Power Procurement Toolkit http://ppp.worldbank.org/public-private-partnership/sector/energy/laws-regulations/toolkits/emergency-power-procurement
Appendix 9	Concession for Infrastructure – A Guidebook to their Design http://rru.worldbank.org/Documents/Toolkits/concessions_fulltoolkit.pdf
Appendix 10	Private Sector Participation in Municipal Solid Waste Management http://www.worldbank.org/urban/solid_wm/erm/CWG%20folder/Guidance%20Pack%20TOC.pdf

Appendix 11	Guidebook to Municipal Solid Waste Management in India http://www.urbanindia.nic.in/programme/uwss/pp_partnership.htm
Appendix 12	Approaches to Private Sector Participation in Water Services http://siteresources.worldbank.org/INTINFNETWORK/Resources/ApproachestoPrivateParticipationWaterServices.pdf
Appendix 13	ADB Developing Best Practices for Promoting Private Sector Participation in Infrastructure: Water Supply http://www.adb.org/publications/developing-best-practices-promoting-private-sector-investment-infrastructure-water-supp
Appendix 14	Public Private Partnerships – Improving Performance of Irrigation Services Provision [an e-learning course] http://einstitute.worldbank.org/ei/course/public-private-partnerships-ppp-improving-performance-irrigation-services-provision
Appendix 15	Public Private Partnership in e-Government Knowledge Map http://www.infodev.org/en/Publication.821.html
Appendix 16	Alternate Dispute Resolution Manual: Implementing Commercial Mediation http://rru.worldbank.org/Documents/Toolkits/adr/adr_fulltoolkit.pdf
Appendix 17	Resource Manual for Airport In Terminal Concessions http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_054.pdf

II. APPENDIXES RELATED TO LEGAL AGREEMENTS AND THEIR WEB ADDRESSES

Appendix 1	Wind Power Energy Purchase Agreement (Developed for Pakistan) http://ppp.worldbank.org/public-private-partnership/library/power-purchase-agreement-ppa-produced-pakistan
Appendix 2	Implementation Agreement (four examples for power plant) http://ppp.worldbank.org/public-private-partnership/ppp-sector/energy-power/energy-power-agreements/implementation-agreement
Appendix 3	Fuel Supply Agreements for Power Plant (two examples) http://ppp.worldbank.org/public-private-partnership/sector/energy/laws-regulations/bulk-fuel-supply-agreements
Appendix 4	Power Purchase Agreements [Several Examples, different fuels] http://ppp.worldbank.org/public-private-partnership/ppp-sector/energy-power/energy-power-agreements/power-purchase-agreements
Appendix 5	Performance Based Contracts in the Road Sector – Brazil Experience http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1227561426235/5611053-1229359963828/TP-31_PBC_Brazil.pdf
Appendix 6	Sample Bidding Document and Agreement for Performance Based Contracts in Roads http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20646773~isCURL:Y~menuPK:84284~pagePK:84269~piPK:60001558~theSitePK:84266,00.html
Appendix 7	Road Concession Agreements (four examples) http://ppp.worldbank.org/public-private-partnership/sector/transportation/roads-tolls-bridges/road-concessions
Appendix 8	Skukuza Airport Public Private Partnership Agreement (South Africa) http://ppp.worldbank.org/public-private-partnership/library/skukuza-airport-public-private-partnership-agreement-south-africa
Appendix 9	Operations, Management and Development Agreement for Airports (India) http://www.airportsindia.org.in/righttoinformation/OMDA_DIAL.pdf
Appendix 10	Sample Concession Agreements for Ports (Several Examples) http://ppp.worldbank.org/public-private partnership/sector/transportation/ports
Appendix 11	Sample Concession Agreements for Rail, Light Rail Trams and Metro (Several Examples) http://ppp.worldbank.org/public-private-partnership/sector/transportation/railway-trains
Appendix 12	Examples, Solid Waste Management Agreements http://ppp.worldbank.org/public-private-partnership/sector/solid-waste/sample-agreements
Appendix 13	Agreements for Bulk Supply of Water, O&M of water utility, Lease/Affermage, Concessions http://ppp.worldbank.org/public-private-partnership/ppp-sector/water-sanitation/water-agreements