CAMBODIA
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<th>Description</th>
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<tbody>
<tr>
<td>AP</td>
<td>Availability Payment</td>
</tr>
<tr>
<td>AWEA</td>
<td>American Wind Energy Association</td>
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<tr>
<td>BLT</td>
<td>Build Lease Transfer</td>
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<td>BOO</td>
<td>Build Own Operate</td>
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<tr>
<td>BOOT</td>
<td>Build Own Operate Transfer</td>
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<tr>
<td>BOT</td>
<td>Build Operate Transfer</td>
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<tr>
<td>BRI</td>
<td>Belt and Road Initiative</td>
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<td>BT</td>
<td>Build and Transfer</td>
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<tr>
<td>BTO</td>
<td>Build Transfer Operate</td>
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<tr>
<td>CAO</td>
<td>Contract Add Operate</td>
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<tr>
<td>CBA</td>
<td>Cost-benefit Analysis</td>
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<td>COVID-19</td>
<td>Coronavirus Disease of 2019</td>
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<td>CSDG</td>
<td>Cambodia Sustainable Development Goal</td>
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<tr>
<td>DBFMO</td>
<td>Design Build Finance Maintain Operate</td>
</tr>
<tr>
<td>DBFOT</td>
<td>Design Build Finance Operate Transfer</td>
</tr>
<tr>
<td>DMC</td>
<td>Developing Member Countries</td>
</tr>
<tr>
<td>DOT</td>
<td>Develop Operate Transfer</td>
</tr>
<tr>
<td>DOTr</td>
<td>Department of Transportation, Philippines</td>
</tr>
<tr>
<td>DP</td>
<td>Development Partner</td>
</tr>
<tr>
<td>DTF</td>
<td>Department of Treasury &amp; Finance, Australia</td>
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<tr>
<td>E&amp;S</td>
<td>Environmental and Social</td>
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<tr>
<td>ECA</td>
<td>Export Credit Agency</td>
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<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<td>EHS</td>
<td>Environmental, Health and Safety</td>
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<tr>
<td>EMP</td>
<td>Environment Management Plan</td>
</tr>
<tr>
<td>ENR Code</td>
<td>Environmental and Natural Resources Code</td>
</tr>
<tr>
<td>EP</td>
<td>Equator Principle</td>
</tr>
<tr>
<td>EPC</td>
<td>Engineering Procurement and Construction</td>
</tr>
<tr>
<td>EPNRM Law</td>
<td>Law on Environmental Protection and Natural Resource Management 1996</td>
</tr>
<tr>
<td>ERS</td>
<td>Ensured Revenue Stream</td>
</tr>
<tr>
<td>ESAP</td>
<td>E&amp;S Action Plan</td>
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<td>ESF</td>
<td>Environmental and Social Framework by World Bank</td>
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<tr>
<td>ESS</td>
<td>Environmental and Social Standards</td>
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<td>EWL</td>
<td>East-West Link project, Australia</td>
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<tr>
<td>FS</td>
<td>Feasibility Study</td>
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<tr>
<td>GDICDM</td>
<td>General Department of International Cooperation and Debt Management</td>
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</table>
GDPPP  General Department Public Private Partnership
GDR  General Department of Resettlement
GPRAM  Generic Preferred Risk Allocation Matrix
GSM  Government Support Mechanism
IA  Implementing Agency
IDFC  Infrastructure Development Finance Company, India
IEIA  Initial Environment Impact Assessment
IIGF  Indonesia Infrastructure Guarantee Fund
IMC  Inter-ministerial Committee
IPF  Infrastructure Prioritisation Framework
IT  Information Technology
KPI  Key Performance Indicator
KPPIP  Committee for Acceleration of Priority Infrastructure Delivery, Indonesia
LAR  Land Acquisition and Resettlement
LOC  Law on Concessions
MAGA  Material adverse government action
MCA  Multi-criteria Analysis
MDB  Multilateral Development Bank
MEF  Ministry of Economy and Finance
MLMUPC  Ministry of Land Management, Urban Planning and Construction
MOE  Ministry of Environment
MOLIT  Ministry of Land, Infrastructure and Transport, Republic of Korea
MOP  Ministry of Planning
MOWA  Ministry of Women’s Affairs
MPWT  Ministry of Public Works and Transport
MRD  Ministry of Rural Development
MRG  Minimum Revenue Guarantee
NAIA  Ninoy Aquino International Airport
NET  Nottingham Express Transit, United Kingdom
NSDP  National Strategic Development Plan
ODA  Official Development Assistance
O&M  Operations & Maintenance
PDF  Project Development Fund
PDP  Project Development Plan
PEO  Provincial / Urban Environmental Office
PFI  Private Finance Initiative
P-FRAM  PPP Fiscal Risk Assessment Model
PIC  Public Investment Committee
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>PIP</td>
<td>Public Investment Program</td>
</tr>
<tr>
<td>PJPK</td>
<td>Penanggung Jawab Proyek Kerjasama, Indonesia</td>
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<tr>
<td>PMU</td>
<td>Project Management Unit</td>
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<tr>
<td>PPP</td>
<td>Public-Private Partnership</td>
</tr>
<tr>
<td>PPP Law</td>
<td>Law no. NS/RKM/1121/018 on Public Private Partnership dated 18 November 2021</td>
</tr>
<tr>
<td>Pre-FS</td>
<td>Pre-feasibility Study</td>
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<tr>
<td>PS</td>
<td>Performance Standards</td>
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<td>PSP</td>
<td>Private Sector Participation</td>
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<td>QIP</td>
<td>Qualified Investment Project</td>
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<td>RGC</td>
<td>Royal Government of Cambodia</td>
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<td>ROO</td>
<td>Rehabilitate Own and Operate</td>
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<tr>
<td>ROT</td>
<td>Rehabilitate Operate and Transfer</td>
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<td>RS</td>
<td>Rectangular Strategy</td>
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<tr>
<td>RTA</td>
<td>Roads &amp; Traffic Authority, Australia</td>
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<tr>
<td>SANDAG</td>
<td>San Diego Association of Governments, USA</td>
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<tr>
<td>SBX</td>
<td>South Bay Expressway, USA</td>
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<tr>
<td>SDG</td>
<td>Sustainable Development Goal</td>
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<tr>
<td>SOE</td>
<td>State-owned Enterprise</td>
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<td>SOP</td>
<td>Standard Operating Procedures for PPP</td>
</tr>
<tr>
<td>SOP I</td>
<td>Standard Operating Procedure Volume I (Policies and Procedures)</td>
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<tr>
<td>SOP II</td>
<td>Standard Operating Procedure Volume II (Guidelines)</td>
</tr>
<tr>
<td>SOP III</td>
<td>Standard Operating Procedure Volume III (Procurement Manual)</td>
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<tr>
<td>SPC</td>
<td>Special Purpose Company</td>
</tr>
<tr>
<td>TA</td>
<td>Transaction Advisor</td>
</tr>
<tr>
<td>Template BOT Contract</td>
<td>An example form of contract as included in Annex A of Volume 8 of the SOPs</td>
</tr>
<tr>
<td>UPR</td>
<td>Universal Periodic Review</td>
</tr>
<tr>
<td>USP</td>
<td>Unsolicited Proposal</td>
</tr>
<tr>
<td>VAGO</td>
<td>Victorian Auditor General Office</td>
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<tr>
<td>VAT</td>
<td>Value Added Tax</td>
</tr>
<tr>
<td>VIM</td>
<td>Value for Money</td>
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<tr>
<td>VGF</td>
<td>Viability Gap Funding</td>
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<tr>
<td>WCCC</td>
<td>Women and Children’s Consultative Committee</td>
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</table>
Acknowledgements

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The study was executed by the consultant consortium, consists of EY Corporate Advisors Pte. Ltd., Ramboll Environ Singapore Pte. Ltd., and VDB Loi Law Firm., contracted by the World Bank. The information contained in this Report has been prepared based on publicly available sources and documents shared by MPWT and MEF, which give us an understanding of the current PPP environment in Cambodia. No legal opinion or legal advice is provided by EY. Legal advice required for the preparation of this Report was obtained from VDB, the legal consultants subcontracted by EY. EY’s role in the review of the legal advice received was limited to critically analysing the key issues and recommendations presented.

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Section 1

Executive summary
1. Executive summary

1.1 Introduction and background

Over the last 10 years, 12 PPP projects have reached financial close, including 10 projects in the energy sector. The energy sector also contributed the largest investment share over a 20-year period. However, significant gaps remain in infrastructure availability and access. Cambodia ranks 106th out of 141 countries for infrastructure competitiveness in the World Economic Forum’s Competitive Index for 2019. There are challenges around adequacy, accessibility and quality of basic infrastructure across sectors. Accordingly, the Global Infrastructure Hub estimates an investment gap of around USD 28 billion across all sectors (including USD 13 billion for transport) between 2016 to 2040, translating to an infrastructure investment requirement of over 11% of annual GDP, well above the current level of approximately 7.5%.

Recent announcements and the national vision as articulated in the National Strategic Development Plan (NSDP) and Rectangular Strategy (RS), reflect the strong focus on infrastructure as a means of driving economic recovery and growth through welfare programs and fiscal budget allocations. The RS comprises four core policy pillars with a central theme of good governance: (1) human resource development; (2) economic diversification; (3) private sector development and employment; and (4) inclusive and sustainable development.

To meet Cambodia’s infrastructure needs, a combination of public and privately financed infrastructure (including through PPPs) is needed at scale and at pace. It is in this broader context that Cambodia is developing a PPP framework to support privately financed infrastructure projects and increase private sector participation in infrastructure development. The context for developing PPPs should also consider emerging impacts from government responses to COVID-19, as supply chains are disrupted, customer demand falls, and regulations force a change in the way businesses and societies are ordered in Cambodia and elsewhere.

Many countries have attracted private investment in developing infrastructure through the Public Private Partnership (PPP) procurement model. PPPs not only help governments in the financing of infrastructure, but successful implementation can also deliver:

- Technological and industry innovation—As a result of adopting a whole-of-life and output-based approach to delivering and maintaining infrastructure, the wider economy and industry has been shown to have benefited from the application of private sector expertise, innovation and technology (e.g., network and operations, technical and engineering specialists, R&D capacity) leading to better project design, construction, delivery, operation and performances.

- Improved delivery of infrastructure—When project risks are properly allocated between private and public sector, PPPs have shown to deliver improved results (when compared with conventional government procurement) particularly in driving the timely completion of Projects within budgets and improved asset maintenance and operational performance over asset lifecycles.

- Attracting private finance—Private sector resources provide access to potentially larger sources of funding for the development of infrastructure, to complement government funding. There is a strong interest globally, both by equity and debt providers, in investing in infrastructure, with well-structured PPPs offering long-term predictable cash-flows. The opportunity to invest in PPPs...

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2 Infrastructure investment at current trends and needs, Global Infrastructure Hub, 2021, https://outlook.gihub.org/countries/Cambodia
projects could catalyse and deepen the Cambodia domestic funding markets, both banking and potentially the capital markets in due course, by attracting different forms of capital and financial expertise and innovation into Cambodia.

Enhancing transport connectivity, domestically and with neighbouring countries, is a priority of the Royal Government of Cambodia (RGC) to ensure sustained economic growth and regional competitiveness. Cambodia has made sizeable investments over the past decade to modernise transport infrastructure, which includes national road corridors, airport infrastructure, seaports, and secondary and tertiary road networks.

To further expand Cambodia’s transport infrastructure, the Ministry of Public Works and Transport (MPWT) and the Ministry of Economics and Finance (MEF) are seeking to enhance private sector participation in Cambodia’s infrastructure sector. To-date, Cambodian PPPs have been primarily financed by Export Credit Agencies (ECAs), Multilateral Development Banks (MDBs), and climate funds (please refer to Section 2—PPP Context in Cambodia for further details). To encourage private sector participation in PPPs, the RGC has undertaken initiatives to implement PPP projects per international best practices, such as the establishment of a General Department Public Private Partnership (GDPPP) under the MEF and the preparation and adoption of a new PPP Law and associated guidelines.

1.2 Purpose of this Report

This Report reviews a number of aspects of the PPP Law, as well as other relevant regulations that govern PPPs, that could potentially impact on the successful development of PPPs in Cambodia. Noting that the primary focus of the study has been on transport sector, the report takes broader focus on PPPs across sectors while implications for PPPs in the transport sector are noted where relevant.

This report also provides recommendations to mitigate those issues identified, based on best practices and precedent from other markets.

The structure of this Report is set out in the table below:

<table>
<thead>
<tr>
<th>Section</th>
<th>Section title</th>
<th>Description</th>
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<tbody>
<tr>
<td>1</td>
<td>Executive summary</td>
<td>Summarises the background, purpose of the report and key findings and recommendations.</td>
</tr>
<tr>
<td>2</td>
<td>PPP context in Cambodia</td>
<td>Describes the historical development of PPPs in Cambodia.</td>
</tr>
<tr>
<td>3</td>
<td>Institutional framework review</td>
<td>Describes the current institutional structure for PPPs, constraints and recommendations.</td>
</tr>
<tr>
<td>4</td>
<td>Legal and regulatory review</td>
<td>Describes the key issues in the current legal and regulatory environment that should be addressed to increase private sector investment into  infrastructure PPPs.</td>
</tr>
<tr>
<td>5</td>
<td>Commercial and financial review</td>
<td>Describes key issues in the current approach to PPPs that should be addressed to increase private sector investment into infrastructure PPPs. Each issue will be covered in terms of an issue description, common international practices, general views of key stakeholders, and recommendations on how to potentially address the issue, either within the current regulations or recommending regulatory change.</td>
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<tr>
<td>5</td>
<td>Environmental and social considerations</td>
<td>Summarises the key environmental, social, gender, health and safety-related issues in PPPs / Private Sector Participation (PSP), including the current approach, issues for improvement and recommendations.</td>
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<td>7</td>
<td>Impact of COVID-19 on transport PPPs</td>
<td>Discusses emerging lessons of COVID-19 impacts on transport PPPs.</td>
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<tr>
<td>8</td>
<td>Appendices</td>
<td>Provides additional supporting details on key discussions in the Report.</td>
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**Approach to this Report**

In preparing this Report, the study team have undertaken a detailed review of the PPP Law as well as its supporting Standard Operating Procedures (SOPs) provided by MEF (refer to Appendix 1 — Materials provided by MEF for the list of documents).

A mix of ASEAN and global examples have been used as international benchmarks to provide perspectives on how different countries have addressed similar challenges. The examples offer a mix of ideas based on their relevance to Cambodia as either a market at a comparable state of development or a global market leader, the specific approach adopted, and/or the availability of documented information on the approach.

A workshop on PPP and financing issues was also organised for MEF and MPWT teams and the line ministries on 25 May 2021 to gather their views on our initial review of the documents. Insights and feedback obtained from the attendees of the workshop have been presented within the Report.

**1.3 Summary findings**

The report identifies key legal, commercial, financial, and environmental issues in the PPP Law and SOPs that may act as a constraint to private sector participation and discussed potential considerations and recommendations to support private sector participation in the Cambodian transport sector. The key issues and the considerations and recommendations have been summarised in the following table. The recommendations are for consideration only and should be considered in the context of RGC’s overall PPP policy objectives. The application of the recommendations, should be flexible and pragmatic, taking into account issues including project feasibility, project structure, preferred risk allocation, and other strategic factors.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Current guidance and recommendations</th>
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<tbody>
<tr>
<td><strong>Institutional framework review</strong></td>
<td>Per the PPP Law and existing legislation, the MEF is the competent institution for leading and managing PPP projects in Cambodia. The MEF acts through the GDPPP which acts as a secretariat of the MEF.</td>
</tr>
<tr>
<td>Institutional framework (section 3.1)</td>
<td>Clear communication and capacity building should be undertaken to clarify the responsibility for government obligations with respect to the PPP contract, and the key agencies responsible for specific activities.</td>
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<td></td>
<td>At the project preparation stage, the RGC could consider the creation of an intergovernmental committee involving all institutions involved in the project to ensure that all factors are taken into account in project structuring as already done for large projects (mainly unsolicited proposals). The SOPs clearly outline the agencies involved in each stage of the project lifecycle. However, IAs may need greater support for the implementation of their initial PPP projects and hence more hands-on support and guidance from MEF could help accelerate the development of PPPs in Cambodia.</td>
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**Legal and regulatory review**
<table>
<thead>
<tr>
<th>Issue</th>
<th>Current guidance and recommendations</th>
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</table>
| Laws relating to PPP, procurement, and government budgeting (section 4.1) | The PPP Law and existing legislation do not specifically provide for the publication of the list of priority projects that have been identified for PPP implementation or the timeline for their approval. The RGC could consider publishing guidelines or directions setting out the process of public announcements of priority projects and timelines for issuing relevant project approvals to guide the market (as has been done elsewhere in the regulations, e.g., for unsolicited proposals).  

The PPP Law existing SOP on Risk Management of Fiscal Commitments provides guidance on the budgetary mechanism for allocating funds to IAs for use in infrastructure projects such as project preparation and discharging contingent liabilities and termination payments. The RGC should develop its capacities in this aspect during actual project implementation with support from its development partners.  

In summary, based on information available, it is understood that the RGC expects that the implementation of the SOP and the establishment of the PDF will render predictability to the work associated with PPP projects and would enable the RGC to engage actively with the market. |
| Laws relating to investments, environment, and security interests (section 4.2) | Cambodia has already enacted similar laws to regulate potential PPP projects in the country. Nonetheless, there still remain aspects that the RGC could look into to ensure proper implementation of such projects, including the fast-tracking of SPC incorporation, introducing a fast-track process for the licensing of PPP projects, centralising registration of security across regions, etc.  

With respect to the assessment of social impact of projects, the existing legal framework in Cambodia provides guidance on the right of persons affected by any process associated with implementing the project such as land acquisition, construction etc. to seek compensation from the implementing authority. In general, land acquisition and resettlement issues are project specific and handled by MEF through the GDR in accordance with the SOP applicable to it.  

In terms of compensation for land acquisition, the relevant government authority will enter into a contract to formalise the compensation arrangement. However, the mechanism for deciding the quantum of compensation is not provided in law. Such decisions are likely taken when negotiating the contract between the relevant government authority and the affected person.  

The existing legal framework supports offshore financing of projects. And to that end, offshore lenders are legally allowed to take various types of security interest over various immovable assets (such as project land) or movable assets (such as shares of the project company, equipment and installations at the project site). The security interest is generally held in the name of an onshore bank (which acts as the agent of the offshore lender(s) for this purpose). The security interest over movable (and immovable) property is perfected by registering the same with the Secured Transactions Filing Office (and relevant land office where the immovable property is situated). There is also a requirement to renew the registration of such interest after lapse of every 5 years. |
<table>
<thead>
<tr>
<th>Issue</th>
<th>Current guidance and recommendations</th>
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<tbody>
<tr>
<td>Investment and foreign ownership (section 4.3)</td>
<td>Given the supportive approach of Cambodia in respect of investment and foreign ownership, there are not many substantive legal issues to address in this area. However, to further encourage foreign investors, the RGC could consider introducing certain procedural enhancements, such as a special fast-track process for the Council for the Development of Cambodia to grant an investment license to PPP projects, and a single-window investment clearance scheme to streamline the procedures of registrations with various government authorities, including the MOC, the GDT and MLVT. This would match other jurisdictions where PPP projects benefit from a fast-track process and simplified investment requirements.</td>
</tr>
<tr>
<td>Land: ownership restriction, acquisition, and registration (section 4.4)</td>
<td>The scope of land use rights is limited by the land ownership title of the lessor. As such, it is important to clearly identify the type of land titles to be used in a PPP project and the allocation of responsibilities between the IA and private partner in acquiring land rights for the PPP project. The current intention is that the actual implementation related to land acquisition shall be the subject of the project structuring (during the FS and tendering stages) and the negotiation between the RGC and the selected private partner. The PPP Contract shall be the primary contractual document to reflect the responsibilities related to land acquisition on specific projects. Project owners commonly struggle with registration of land rights or security when the project land site is registered under a soft title, and filing practices vary in different regions. This usually results from the different implementation requirements in different land offices in practice. The contracting authority should try to reduce the practical differences among land offices in different regions and thus facilitate a speedy process for registering land rights and perfecting security rights. The cost of any such process could be allocated in accordance with the provisions of the PPP contract, with due recognition of costs associated with resettlement of displaced persons, compensation for loss of livelihood, and implementation of a grievance redress mechanism. ‘Soft title’ is evidence of only possessory right in real property (such as land) and is not a secure method of land ownership because of lack of registration of title at a national level. ‘Hard title’ on the other hand is evidence of ownership of real property and is secure method of land ownership because such title is registered at the national level.</td>
</tr>
</tbody>
</table>
| Project preparation and procurement (section 4.5) | The proposed framework for the procurement for PPP projects is fairly robust. There are clear timelines for the two stages of the bidding process, and demarcation of responsibilities of the authorities that would review, evaluate and approve the bids. However, MEF should closely monitor the effectiveness of the procurement framework and incorporate any lessons learned during implementations. Currently, the Procurement Manual states that members of the PPPU should be ‘suitably qualified’. However, there is no guidance on the qualifications required to become a member of the PPPU. The RGC could consider providing more clarity on the qualification requirements of such members to include, for example:  
- Relevant sector experience  
- Experience in the commercial principles of PPPs and key issues typically considered  
- Experience in risk management for projects in general and specific procurement models including PPPs in particular  
- Experience in key issues arising in tendering competitively for PPPs and/or in sole-sourced negotiations for PPPs, as appropriate  
Such an approach could provide additional confidence to project proponents and help enhance implementation of the procurement process. |
### Issue | Current guidance and recommendations
--- | ---
SPC matters (section 4.6) | While the PPP Law and existing legislation prescribes the type of legal entity that could implement the PPP project, some issues remain that the RGC could consider clarifying for investors:
  - Enacting legislation or implementing guidance defining changes of ownership and control and determining the procedures and approvals needed for such processes, so that investors have a clearer understanding of requirements when designing their investment structure.
  - Providing some flexibility with respect to the timeline for incorporating the SPC, taking into account the potential time that overseas shareholders might take to prepare and execute the documents according to the formalities of the Cambodian authorities.

Tax incentives (section 4.7) | Tax incentives applicable to PPP projects will be governed by the Law on Investment and Law on Taxation with no preferential treatment compared with other types of investment.

It is typical for developing and mature markets not to provide special tax incentives to PPP projects. Based on discussions with the RGC, it is understood that the tax incentive regime for private investment projects is set out in general laws relating to investment and tax. The RGC intends for investment sponsors to refer to these laws to prepare the financial analysis of their projects.

Investment protection (section 4.8) | A clarification might be desirable for the scope of compensation covered for “impact on (tenant’s) business operation” provided under the Law on Expropriation. It is understood that the Law on Investment has set out the fair principles about investment protection. However, it does not explicitly provide that it prevails over the previously enacted laws on the same subject. In case of conflict with the Law on Expropriation and other laws on the same subject, it will be good to clarify that the Law on Investment will prevail the Law on Expropriation so that investors could have a clear idea. Investors may want to see clear reference in the law or in the agreement with government that compensation will cover the facilities and equipment attached to the project land. This is particularly the case when investors are operating a PPP project in the capacity of lessee of the land, but not the owner.

Cambodia has entered into several investment treaties with other countries, which may, in addition to the Law on Investment, provide other investment incentives and protections to investors from those specific countries. It might be desirable to conduct a country-by-country review and establish an internal database of the international treaties to which Cambodia is a party, and clarify the protections granted to investors from the countries under these treaties, compared to what is provided in domestic legislation. Such a review may help the government have a better picture of what investment schemes it has agreed with specific countries and encourage investors from those countries to invest in Cambodia if they find out they have extra protection other than the Law on Investment.

Cambodia is a party to the New York Convention of Recognition and Enforcement of Foreign Arbitral Awards 1958. Provided that the PPP contract contains foreign arbitration as a dispute resolution mechanism, a foreign arbitral award should be enforceable in Cambodia.
<table>
<thead>
<tr>
<th>Issue</th>
<th>Current guidance and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Commercial and financial review</strong></td>
<td></td>
</tr>
</tbody>
</table>
| **Project identification and prioritisation (section 5.1)** | A multi-step process (a preliminary step, Step 1 and Step 2) assists to identify and prioritise PPP projects. A detailed process map on the lifecycle of PPP projects is also provided.  

The current minimum project size requirement should be subject to ongoing evaluation, as it can be challenging for projects at the low end of the range to justify the transaction costs involved with PPPs. While the current SOPs permit projects below the minimum size threshold to be considered with prior approval of the Minister of MEF, as the framework continues to mature, MEF may consider introducing standardised models for procurement of specific project types, which would lower the costs of procurement and could permit a lower threshold as compared to complex projects. Defining different minimum contract periods for different contracting models is also recommended.  

Consideration could be given to allocating higher scores to projects with larger benefits in absolute and relative terms. It is also recommended to consider deliverability and contracting models for projects.  

Further consideration could be given to adopting a streamlined process for similar projects to reduce project development costs. For instance, road projects could follow a consistent review and evaluation process. Guidance and training could be provided for IAs to ensure consistent application of the criteria and processes for project identification and prioritisation. The priority PPP project list and assessment criteria could be reviewed periodically. Consideration could also be given to allowing independent reviews of some projects. MPWT should be closely involved in defining some of criteria and pipeline for transport projects. |
| **Unsolicited Proposals (USP) (section 5.2)** | The PPP Law details the eligibility requirements, project lifecycle, and procurement options for USPs. Further consideration of the wording of the innovation criterion could be undertaken to focus more on unique benefits that can be attained through open competition. Based on information available, it is understood that the IAs would be required to consider adequate justifications when pursuing USPs. |
| **Government Support Mechanisms (GSM) (section 5.3)** | The PPP Law details the types of government support available, high-level eligibility criteria for government support, and GSM evaluation at different project lifecycle stages.  

Drawing on international experience, MEF could adopt additional eligibility criteria to select / prioritise projects based on the value and proportion of GSM needed for projects during the project identification and feasibility stage.  

Closely monitoring implementation should help in identifying trends in the value and proportion of support on projects. It would be generally expected that PPPs of a similar nature / sector would typically benefit from comparable levels of government support. MPWT could potentially consider a sector-wide limit for the transport sector while evaluating the upcoming project pipeline in Cambodia.  

For each project, the level of government support should be evaluated based on project feasibility, risk allocation, demand / supply projections, strategic importance and market appetite. |
<table>
<thead>
<tr>
<th>Issue</th>
<th>Current guidance and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue / benefit sharing (section 5.4)</td>
<td>Currently, the Template BOT Contract provides a placeholder to address scenarios involving demand risk sharing, but does not provide guidance on upside revenue / benefit sharing. Further consideration of a ‘cap and collar’ mechanism could be undertaken to introduce revenue / benefit sharing in PPP contracts, subject to applicability to specific projects. Gross revenues could be used as a basis for computing revenue sharing as it requires a lower degree of supervision / monitoring. Alternative instruments to cash sharing, such as extending the duration of a concession or reducing user tariffs, could be considered as the PPP market matures. Such considerations are particularly relevant to the transport sector. For instance, in a roads project, the level of confidence in the underlying demand / traffic forecast and MPWT’s wider policy considerations will inform the thresholds for the revenue sharing mechanisms to be implemented.</td>
</tr>
<tr>
<td>Termination payments (section 5.5)</td>
<td>The PPP Law covers key aspects such as circumstances for early termination, rights and obligations, and the termination payment. While the Template BOT Contract acknowledges termination as a last resort and allows standardised contract guidance, further consideration of including termination rights for prolonged Government Events and Changes in Law could be undertaken. It is recommended to test the Template BOT Contract and termination provisions with lenders / other financiers to obtain their feedback on the drafting. It may be desirable to provide both MEF and IAs with support and training in relation to termination, along with other contract enforcement and general contract management issues.</td>
</tr>
<tr>
<td>Contract preparation (section 5.6)</td>
<td>The PPP Law describes the risk allocation, contract formulation guidelines and templates, and project Key Performance Indicators (KPIs) to be considered in the PPP contract. The SOP Volume II provides a draft risk matrix for IAs to build on. Further considerations of adopting sector-specific standard risk allocation frameworks and guidelines for commonly used contracting options could be undertaken. MEF should closely monitor the development of PPP projects and periodically review and update the guidelines and templates based on lessons from implemented projects and evolution of national standards. MEF could consider adopting output-based KPI principles to ensure the effective linkage of performance criteria to the payment mechanism. For example, in road projects, data collection on road congestion should be consistent with the IA’s overall road network management approach, such that the performance data is measurable and easily usable.</td>
</tr>
<tr>
<td>Issue</td>
<td>Current guidance and recommendations</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Management of fiscal risks (section 5.7)</td>
<td>The PPP Law details the role of entities and procedures to manage fiscal commitments. It is recommended to consider standard accounting approaches for fiscal commitments, including particularly by differentiating between direct and contingent liabilities. Consideration of fiscal liability management at different micro and macro levels could also be undertaken to facilitate timely management of fiscal risks and financial obligations. Additionally, capping each IA’s annual spending limits on PPPs could be considered. MEF is currently the sole agency responsible for fiscal management and monitoring. With the PPP programme being in its early stages, it is recommended to consider providing more guidance and assistance to the IAs in their initial attempts at monitoring and reporting of fiscal commitments, particularly during implementation.</td>
</tr>
</tbody>
</table>
### Environmental and social considerations

<table>
<thead>
<tr>
<th>Issue</th>
<th>Current guidance and recommendations</th>
</tr>
</thead>
</table>
| **Sustainable development as a driver for increasing investment in infrastructure (section 6.2)** | Cambodia has an environmental regulatory framework. Article 59 of the constitution entrusts the state to preserve and protect the environment and is supported by a number of national environmental laws. The Cambodia Sustainable Development Goals are the nationalised framework for Cambodia based on the Global Sustainable Development Goals. Emerging climate risks are not specifically referenced in the regulatory framework, however Cambodia has aligned with multilateral action on climate change and, under the United Nations Climate Change (UNFCC) secretariat’s Paris Climate Agreement, has submitted its plans for climate action under the updated Nationally Determined Contribution (NDC) for Cambodia. While social aspects are not systematically assessed as routine, revisions to the environmental assessment process are expected to broaden the consideration of environmental, social and climate risks, and thus sustainable development as a whole, during the project development phase.  

The RGC could consider incorporating a climate assessment into the ESIA requirements for proposed infrastructure developments to evaluate exposure to the following physical climate hazards:  

- Inland flooding (i.e., riverine and precipitation flooding)  
- Coastal flooding from sea level rise and storm surge  
- Tropical cyclones / typhoons  
- Heat stress  
- Wildfire  
- Water stress and drought  

Implementing agencies should undertake detailed assessments of the environmental and social considerations during the feasibility stage to ensure the technical design requirements and project performance standards incorporate sustainable development objectives.  

In order to realise the potential benefits of including E&S considerations in PPPs, it is necessary to have the institutional capacity to create, manage, and evaluate them. International standards for E&S assessment such as the World Bank’s ESF, IFC’s Performance Standards or the Equator Principles are recommended to be deployed on infrastructure projects, as a tool for assessing and managing E&S risks in infrastructure projects. |
Section 2

PPP Context in Cambodia
2. PPP Context in Cambodia

2.1 Context: PPPs in Cambodia

Over the last 10 years, 12 PPP projects have reached financial close, including 10 projects in the energy sector. The energy sector also contributed the largest investment share over a 20-year period.  

To date, most PPP projects in Cambodia have been financed with debt provided by Export Credit Agencies (ECAs), Multilateral Development Banks (MDBs) and climate funds, such as China Development Bank, China Exim Bank, JICA, ADB, IFC, DEG, Interact Climate Change Facility, Strategic Climate Fund, and Export-Import Bank of Thailand. Participation of international or local private lenders has been observed in only a few PPPs. The following table highlights some of the lenders that have participated in Cambodian PPP projects.

Table 3. Examples of types of lenders in PPP projects in Cambodia

<table>
<thead>
<tr>
<th>Project</th>
<th>Sector</th>
<th>Lender type</th>
<th>Loan provider</th>
<th>Project cost (USD m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phnom Penh to Sihanoukville Expressway</td>
<td>Transport</td>
<td>International lender / MDB / ECA</td>
<td>▶ Bank of China ▶ Bank of Communications ▶ China Development Bank ▶ China Exim Bank</td>
<td>2,000</td>
</tr>
<tr>
<td>Kandal Stung District (New Phnom Penh) Airport</td>
<td>Transport</td>
<td>MDB</td>
<td>▶ China Development Bank</td>
<td>1,560</td>
</tr>
<tr>
<td>Orussei Hydropower Plant</td>
<td>Energy</td>
<td>ECA</td>
<td>▶ China Exim Bank</td>
<td>558</td>
</tr>
<tr>
<td>Sihanoukville Seaport II</td>
<td>Transport</td>
<td>ECA</td>
<td>▶ JICA</td>
<td>234</td>
</tr>
<tr>
<td>Sihanoukville Coal-Fired Power Plant</td>
<td>Energy</td>
<td>International lender</td>
<td>▶ OCBC ▶ Maybank ▶ AmBank ▶ Bank of China</td>
<td>170</td>
</tr>
<tr>
<td>North Phnom Penh-Kampong Cham Transmission Line</td>
<td>Energy</td>
<td>International lender</td>
<td>▶ ING ▶ Mizuho</td>
<td>55</td>
</tr>
<tr>
<td>Battambang Solar PV Plant</td>
<td>Energy</td>
<td>MDB</td>
<td>▶ DEG ▶ Interact Climate Change Facility</td>
<td>45</td>
</tr>
<tr>
<td>Chhnang Solar PV Plant Phase I IPP</td>
<td>Energy</td>
<td>MDB</td>
<td>▶ ADB ▶ Strategic Climate Fund ▶ IFC</td>
<td>37</td>
</tr>
<tr>
<td>Battambang to Cambodia Power Transmission</td>
<td>Energy</td>
<td>International lenders / ECA / MDB</td>
<td>▶ Arco Capital ▶ Export-Import Bank of Thailand ▶ Foreign Trade Bank of Cambodia ▶ ADB</td>
<td>34</td>
</tr>
<tr>
<td>Bavet PV Solar Farm</td>
<td>Energy</td>
<td>MDB</td>
<td>▶ ADB</td>
<td>13</td>
</tr>
</tbody>
</table>

Source: IJ Global, Infrawation, PPI World Bank database

Over the years, Cambodia has taken several steps to improve the investment climate and attract foreign and private investment. Comprehensive infrastructure development plans have been prepared but implementation has been constrained. Most funding for infrastructure is sourced from state-owned

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enterprises (SOEs) and through concessional loans from development agencies.\footnote{Assessment of Public–Private Partnerships in Cambodia: Constraints and Opportunities, ADB, 2012 \url{https://www.adb.org/sites/default/files/publication/29921/assessment-ppp-cambodia.pdf}} However, it is widely acknowledged that Government and official development assistance (ODA) funding resources will be insufficient to meet Cambodia’s large future infrastructure funding needs and hence there is a need to unlock other sources of finance.

Cambodia ranks 106th out of 141 countries for infrastructure competitiveness in the World Economic Forum’s Competitive Index for 2019. There are challenges around adequacy, accessibility and quality of basic infrastructure across sectors. Accordingly, the Global Infrastructure Hub estimates an investment gap of around USD 28 billion across all sectors (including USD 13 billion for transport) between 2016 to 2040, translating to an infrastructure investment requirement of over 11% of annual GDP, well above the current level of approximately 7.5%.\footnote{Cambodia: Infrastructure investment at current trends and need, Global Infrastructure Hub, 2021, \url{https://outlook.gihub.org/countries/Cambodia}} Recent announcements and the national vision as articulated in the National Strategic Development Plan (NSDP) and Rectangular Strategy (RS), reflect the strong focus on infrastructure as a means of driving economic recovery and growth through welfare programs and fiscal budget allocations. The RS comprises four core policy pillars with a central theme of good governance: (1) human resource development; (2) economic diversification; (3) private sector development and employment; and (4) inclusive and sustainable development including sustainable management of natural resources, ensuring environmental sustainability and pre-emptive response to climate change.

To meet Cambodia’s infrastructure needs, a combination of public and privately financed infrastructure (including through PPPs) is needed at scale and at pace. It is in this broader context that Cambodia is developing a PPP framework to support privately financed infrastructure projects and increase private sector participation in infrastructure development.

The context for developing PPPs should also consider emerging impacts from government responses to COVID-19, as supply chains are disrupted, customer demand falls, and regulations force a change in the way businesses and societies are ordered in Cambodia and elsewhere. Momentum on specific projects has been more difficult to maintain, as the RGC has focused on the response to COVID-19.

There are currently 629 public investment projects approved under the Public Investment Program (PIP) 2021-2023. 203 of these projects are ongoing with a combined value of USD 8.3 billion. 426 will be new projects requiring an investment of over USD 4.3 billion. Around 50% of the PIP’s total investment is focused on infrastructure projects.\footnote{Cambodian Cabinet Ministers Endorse 629 Public Investment Projects For 2021-2023, 2020, \url{https://en.khmerpostasia.com/2020/10/09/cambodian-cabinet-ministers-endorse-629-public-investment-projects-for-2021-2023/}} Transport sector projects (roads, ports, railways, and civil aviation with an estimated investment of USD 1.5 billion (~12%) are planned in the PIP 2021-2023 as set out in the following chart. However, media reports in August 2021 indicate that the RGC is considering reducing the number of approved public investment projects in a budgetary move to preserve funds for fighting against COVID-19. Specific projects that may be deferred are yet to be identified. In his speech, the prime minister also noted that main infrastructure projects of roads have not been paused or cancelled.\footnote{Government considering reducing public investment projects, Khmer Times, 2021, \url{https://www.khmertimeskh.com/50907215/government-considering-reducing-public-investment-projects/}}
Figure 1. PIP 2021-2023’s public investment targets by sector and sub-sector

Social sectors 32%
Economic sectors 24%
Transport 12%
Water and sanitation 4%
Power and electricity 4%
Post and telecommunications 1%
Services and cross-sectoral programmes 21%
Unallocated 2%

Source: PIP 2021-2023

Social sectors include education, technical and vocational training, health etc.
Economic sectors include agriculture and land management, rural development, manufacturing, mining and trade
Services and cross-sectoral programmes include gender mainstreaming, tourism, environment and conservation, culture and arts etc.

2.2 Overall PPP framework

PPPs can help the government meet this financing gap by helping to stimulate private sector investment and financing for infrastructure. To enable the development of PPPs, the Ministry of Economy and Finance (MEF) is developing the regulatory framework through the PPP Law and providing guidance materials through the Standard Operating Procedures (SOPs). The SOPs are expected to provide comprehensive guidelines to enable implementing agencies to successfully develop and implement PPP projects.

Figure 2. Snapshot of the draft SOPs for PPP projects

With the proposed robust framework, the PPP contracting parties, as well as private investors and lenders, will be able to participate in the Cambodia PPP market with greater confidence. This could in

Cambodia: Current PPP Development, MEF, 2021,
https://www.unescap.org/sites/default/files/Cambodia%20PPP%20Development_Mr.%20Vuthika%20Hang.pdf
turn result in lower costs of finance and greater competition for projects. Many governments in other countries have implemented similar measures, particularly in the early stages of developing their PPP markets.

There are a few key principles around PPPs globally that should be highlighted. These principles should be viewed in the context of the new PPP Law and SOPs, to ensure that they are not only acceptable to the RGC but are also “bankable” to private investors and lenders.

The key principles are as follows:

i. **Importance of harmonising the PPP law with other laws and addressing legal gaps to operationalise PPPs**

   Leaving aside policy and institutional considerations, a strong PPP Law should rest comfortably within a wider legal and regulatory framework that encourages a business environment in which PPPs can thrive. This means that the PPP Law cannot be viewed in isolation, but must work within a legal environment that spans across all elements of infrastructure development from procurement to financing and from permitting to the environment. The PPP Law should be the bridge that connects government regulations on capital investments with those of the private sector. As such, it is important that the provisions in the PPP Law are well-harmonised with other laws, as well as address those gaps in the legal framework that may not be covered in other laws.

ii. **Risks should be allocated to the party best able to manage them**

   Risk allocation between the government and private sector (with risks allocated to the party best able to manage and mitigate the impacts of the risk) underpins the PPP contracting model and the potential for value for money to be achieved on a project. The PPP Law should support a pragmatic approach to risk allocation that allocates to the private sector only those risks that they are well placed to manage. The PPP Law should not require the private sector to take on significant risks that are better managed by the Government partner. In addition, if a Project is in line with government policy and provides value for money, the government should also consider providing support where necessary to make a PPP project bankable.

iii. **The PPP Law should be drafted at a high level with specifics and details to be provided in SOPs (already adopted in Cambodia)**

   PPPs by their nature are a complex means of procurement, so a well-organised PPP Law should convey and communicate these complex processes in a clear and structured manner. This includes breaking down and structuring these parts into hierarchies, sections and subdivisions that follow a logical and organised progression. Any supporting details to the general provisions in the PPP Law should be provided within the SOPs or other implementation guidance to ensure that the PPP Law is kept simple and easy for implementing agencies and potential investors to understand and follow. Due to the wide range of potential PPP projects and the different levels of risk-sharing depending on specific sectors, the Law should provide for adequate flexibility to facilitate successful negotiations between the government (represented by IAs) and the private sector on any given project. The new PPP Law in Cambodia is in line with this approach.
Section 3

Institutional Framework Review
3. **Institutional Framework Review**

This section outlines the current roles and responsibilities of the authorities involved, and makes recommendations for creating a more efficient institutional framework for PPP projects in policy development and also across the project lifecycle.

3.1 **Institutional framework**

3.1.1 **Guidance per the PPP Law**

**Ministry of Economy and Finance (MEF)**

As per the PPP Law, the MEF is the competent institution for leading and managing PPP projects in Cambodia. The MEF acts through the General Department of PPPs (GDPPP) which acts as a secretariat of the MEF. The following is a list outlining the major functions of the MEF acting through its secretariat:

- Acts as the single-window agency in charge of PPP projects in Cambodia;
- Develops policies and guidelines on PPP projects;
- Approves proposals and risk allocation for PPP projects;
- Comments on fiscal commitments and PPP contracts;
- Co-operates with IAs; and
- Prepares the budget for PDF and VGF.

An illustrative framework for transport projects has been included in Appendix 2 – List of institutions for transport sector.

**Implementing Agencies (IAs)**

As per the PPP Law, IAs are competent institutions who act as the government party in PPP contracts with a private partner. These are usually line ministries who have the following functions:

- Identifies and prioritises projects;
- Selects transaction advisors;
- Undertakes / coordinates preliminary and full feasibility studies and reviews and endorses reports;
- Submits FS for MEF’s review;
- Leads working group that procures private parties;
- Leads working group that negotiates the PPP contract;
- Manages / implements contract obligations;
- Monitors, supervises and evaluates implementation and operation of PPP projects; and
- Requests funding on preparation, implementation, supervision, and monitoring of projects.

**Council for the Development of Cambodia (CDC)**

As per the Investment Law of 1994 (as amended from time to time), the CDC is the primary agency of the RGC for the rehabilitation, development and investment activities in Cambodia. Its major function is to approve projects as ‘Qualified Investment Projects’ (QIPs).
General Department of Public Private Partnerships (GDPPP)

As per the PPP Law, the Ministry of Economy and Finance shall have a General Department acting as secretariat in leading and managing of PPP mechanism in the Kingdom of Cambodia. The organisation and functioning of this General Department will be set forth in the sub-decree. The draft sub-decree stipulates the following functions:

► Provide recommendations on the development of policy for the PPP mechanism and lead the preparation of regulations, standard operating procedures (SOPs), and relevant legal documents on the preparation and implementation of the PPP projects.

► Review and provide recommendation(s) in relation to the:
  ▶ approval of PPP project proposals, including prioritisation and inclusion in the Priority PPP Projects List;
  ▶ financial viability of PPP project proposals;
  ▶ risk allocations between the Royal Government of Cambodia (RGC) and the private partner on PPP projects;
  ▶ fiscal commitments and RGC support for PPP projects;
  ▶ PPP contracts and other relevant agreements related to PPP projects; and
  ▶ annual budget of IAs relating to fiscal commitments and approved State support under the PPP framework.

► Provide recommendations on the development of policy for the PPP mechanism and lead the preparation of regulations, standard operating procedures (SOPs), and relevant legal documents on the preparation and implementation of the PPP projects.

► Review and provide recommendation(s) in relation to the:
  ▶ carrying out the financial analysis of PPP project proposals;
  ▶ risk management and state support for the PPP projects.

► Prepare an annual report on fiscal commitments under PPP contracts, obligated to be fulfilled by the RGC.

► Prepare budget, manage and operate the Project Development Facility (PDF) and Viability Gap Financing (VGF) Fund.

► Prepare and manage the data system related to PPP program and PPP projects in Cambodia.

► Cooperate with Implementing Agencies (IAs) and other ministries and institutions, to review and monitor obligations and performance of the project implementation, as specified in the terms and conditions of the PPP contract and applicable legal documents.

► Provide support for the PPP project development and capacity building training related to project development and monitoring of the PPP project implementation to the ministries and institutions of the RGC.

The GDPPP will oversee all PPP activity undertaken in Cambodia.

PPP project-specific committees

The authorities described above are responsible for establishing the following committees to discharge certain project specific functions and appointing officials with relevant expertise and experience to manage them:
Table 4. PPP project specific committees

<table>
<thead>
<tr>
<th>Committee</th>
<th>Managed By</th>
<th>Function</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bid Evaluation Committee</td>
<td>IA</td>
<td>Selection of private partner</td>
</tr>
<tr>
<td>Consultant Evaluation Committee</td>
<td>IA</td>
<td>Selection of TAs</td>
</tr>
<tr>
<td>Contract Management Committee</td>
<td>IA / MEF</td>
<td>Decision making body on PPP contract matters</td>
</tr>
</tbody>
</table>

Capacity building

There are opportunities to build capacity across the project lifecycle, from identification and business case analysis, through to all phases of tender development and into contract management, including cross-cutting considerations related to Gender Equality and Social Inclusion (GESI) and Disaster Risk Reduction and Climate Change (DRRCC).

The Law and SOPs help identify specific areas for detailed capacity building, e.g., government support measures (GSMs). Where issues are not currently addressed in detail, e.g., GESI and DRRCC, it may be beneficial to examine and strengthen them through the capacity building process.

The approach taken in previous capacity building materials can be enhanced through, e.g., toolkits that are applicable on live projects, and reference materials that are relevant and tailored to the point of use by going beyond theoretical considerations.

International principles governing PPP institutional framework

The OECD has developed principles for the establishment of a clear and predictable institutional framework for PPP projects around three principles:

1. **Strong political leadership to ensure public awareness in procurement of PPP projects:**
   - Ministry of Finance, line ministries and executive agencies should ensure coherent approach to PPP roll out in the relevant public sector and adjacent fields.
   - PPP to be in line with integrated public sector investment framework.
   - Active consultation with all stakeholders central to PPP development.
   - Designing PPPs on an output basis is essential to generating VfM.

2. **Key institutional roles and responsibilities to be maintained with clear mandates:**
   - There needs to be sound procurement, implementation and fiscal and budget monitoring.
   - The authority responsible for PPP projects is the ultimate decision-maker.
   - Critical skills to ensure VfM should be concentrated in a dedicated PPP Unit.
   - PPP Unit should be sufficiently staffed and funded with required financial, legal, economic and project management skills.
   - Central budget authority to scrutinise each PPP project.

3. **Clear and transparent PPP projects**
   - Provide RGC and other stakeholders with access to information and decision-making.
   - Removal of unnecessary red tape.
   - Coordination of approval processes across different levels of government (central / provincial).
3.1.2 **International benchmarks and considerations**

The current institutional framework in some developing and mature PPP markets is set out in the following table.

**Table 5. Project management—Benchmark countries comparable practices**

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| **Indonesia** | ► The competent authority to manage PPP projects in Indonesia is the National Public Procurement Agency (NPPA) which is designated as a non-ministerial government agency and reports directly to the President of the Republic of Indonesia.  
  ► In conducting its function and duties, the NPPA is under the coordination of the State Minister for the National Development Planning / Head of the National Development Planning Agency (Bappenas).  
  ► Various line ministries act as implementing agencies for PPPs across the sectors of the Indonesian economy.  
  ► Executive Order No. 8 series of 2010, as amended by Executive Order No. 136 series of 2013, appoints the PPP Center (PPPC) to facilitate the implementation of the country’s PPP Program and Projects. The PPPC is the main driver of the PPP Program. It serves as the central coordinating and monitoring agency for all PPP projects in the Philippines.  
  ► The PPCP provides technical assistance to (i) National Government Agencies (NGAs), (ii) Government-owned-and Controlled Corporations (GOCCs), (iii) Government Financial Institutions (GFIs), (iv) State Universities and Colleges (SUCs), and (v) Local Government Units (LGUs) as well as to the private sector to help develop and implement critical infrastructure and other development projects.  
  ► Through Executive Order No. 136, the PPP Center shall act as the Secretariat of the PPP Governing Board. The Board is the overall policy-making body for all PPP-related matters |
| **Philippines** | ► Potential PPP projects may be approved by (i) the National Assembly; (ii) the Prime Minister or (iii) Provincial-level People’s Council (each a “Competent Authority”) on the basis of satisfaction of one of several criteria listed in the Law on PPP Investment (“VN PPP Law”) used by each of these authorities to approve such projects⁹  
  ► The pre-feasibility evaluation and feasibility evaluation may be conducted by the Evaluation Council (“EC”) set up by the respective Competent Authority. In this regard, Decree No. 35/2021/ND-CP dated 26 March 2021 (“Decree 35”) provides as follows:  
  ▪ The State EC will be established by the Government to evaluate the projects of national importance. Such projects require the approval of the National Assembly  
  ▪ The inter-branch EC will be established by the Prime Minister for each project based on the Ministry of Planning and Investment’s proposals  
  ▪ The grassroots EC will be established by a Minister, the head of a central agency or other agency or the head of the provincial People’s committee of the relevant project¹⁰  
  ► The Ministry responsible for implementing the PPP project will designate a procuring entity under its supervision which will take steps to select private partner for the PPP project. |
| **Vietnam** | |

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⁹ Article 12 of VNPPP Law  
Country | Key characteristics
---|---
| ► The Ministry may also designate any department or agency subordinate to it to sign the PPP contract with the private party.\(^{11}\)  
► Projects that are approved by the National Assembly or the Prime Minister as the case may be, will be supervised by a central administration agency for PPP projects. Similarly, projects that are approved by the Provincial-level People’s Council will be supervised by the administration agency appointed by such council.

**Australia**

► Australia does not have a specific legislative framework which regulates PPP procurement at the whole commonwealth level. In 2008, however, Infrastructure Australia developed the National PPP Policy and Guidelines. These documents have been prepared and endorsed by Infrastructure Australia and the State, Territory, and Commonwealth governments, as an agreed framework for the delivery of PPP projects.  
► Each state has enacted separate laws to complement the National PPP Policy and Guidelines. For example, in New South Wales ("NSW"), Infrastructure NSW Act 23/2011 was enacted by the government, which established Infrastructure NSW, a governmental entity that oversees PPP projects in NSW. The Infrastructure Financing Unit of the NSW Treasury is the first point of contact for PPPs in NSW.


### 3.1.3 Recommendations

The following could be considered by the RGC in terms of strengthening the institutional framework e.g.:

► Responsibility for government obligations with respect to the PPP contract could be formally allocated to a mix of the specific IA involved (e.g., MPWT or State Secretariat of Civil Aviation (SSCA)) and MEF and other key ministries, with the IA taking on the project management / co-ordination role.

► At the project preparation stage, the RGC should consider the creation of an intergovernmental committee involving all institutions involved in the project to ensure that all factors are taken into account in project structuring. The RGC could also consider whether additional institutions could be involved in the management of the project post-award (e.g., National Audit Authority, Cambodian National Budget).

► Building institutional capacity is identified as one of the key challenges for Cambodia. MEF, either through development agencies or external consultants, can support implementing agencies by capacity building and ‘learn by doing’ projects by providing technical / commercial / financial support for the entire lifecycle of PPP projects for the first few PPPs developed under the new legal framework.

► A mechanism to share experiences and emerging precedents should be introduced so that lessons learnt from implementation on one project can be shared with other implementing agencies.

► Long-term plans should explicitly include succession planning to ensure that the balance of skills and institutional experience is fully maintained over time.

\(^{11}\) Article 5(2) of the VNPPP Law
Section 4

Legal and Regulatory Review
4. Legal and regulatory review

The main objective of a robust and supportive PPP legal and regulatory framework should be to establish a clear, stable and predictable framework that consistently respects the rights and enforces the obligations of all parties throughout the project lifecycle. Such a framework will help encourage investors to undertake projects and ensures that the risks of dealing with the government as a counterparty are minimised, which in turn can encourage competitive bidding and reduce the costs of projects for the government.

While some countries have chosen to enact detailed PPP legislation, others have passed enabling legislation and then implemented policy through subordinated legislation (e.g., decrees) and/or guidelines. The latter approach provides more flexibility, as it can be more easily amended / updated over time.

The Royal Government of Cambodia (RGC) enacted a dedicated PPP law and issue various policy documents to encourage potential lenders and investors to partner with the government in developing infrastructure projects.

The PPP Law updates the existing Concessions Law of 2007. The RGC also intends to issue standard operating procedure documents (SOPs) to provide detailed guidance on how the government expects to implement PPP projects under the PPP Law.

This section examines those key legal and regulatory issues related to the proposed PPP framework, and addresses:

► General overview of laws governing public private partnerships, procurement and government budgeting (section 4.1)
► General overview of laws governing security interest, land and environment (section 4.2)
► Investment and foreign ownership (section 4.3)
► Land ownership (section 4.4)
► Project preparation and procurement (section 4.5)
► Corporate matters (section 4.6)
► Tax incentives (section 4.7)
► Investment protection (section 4.8)

► Each section makes reference to the approaches adopted in other countries and summarises international best practices to make suitable recommendations for Cambodia.

4.1 Laws relating to PPPs, procurement and government budgeting

4.1.1 Guidance per the PPP Law and existing legislation

PPP Law

The PPP Law replaces the Law on Concessions of 2007 (the “Concessions Law” or “LOC”). This law is not a major departure from the LOC, but rather an update of it. The PPP Law aims to address and consolidate issues that were not covered or covered only to a limited extent when the LOC was enacted. For example, unsolicited proposals were not particularly regulated in the LOC or in other published regulations. More specific guidance for USPs is now included in the PPP Law.
The PPP Law refers to PPP projects rather than concessions, which suggests a potentially wider range of risk allocations may now be permissible. This widening is in line with the evolution of most regulations across the region. For example, Vietnam also decided to adopt general regulations for PPP projects rather than specific decisions on Build Operate Transfer (BOT) projects in 2015. However, the project structure forms and sectors eligible for the development of PPP projects are largely the same in both the PPP Law and the LOC.\(^\text{12}\)

The PPP Law enacts several policies that are expected to incentivise private investors and lenders alike. These include:

- Financial support from the RGC;
- Investment incentives in line with the Law on Investments;
- Land use rights;
- Currency convertibility and repatriation;
- Security rights over PPP project assets and shares of project company;
- Lenders’ step-in rights; and
- Dispute resolution.\(^\text{13}\)

The law also provides a clear mandate to RGC to monitor and implement the PPP project through its duly appointed agencies.

**The Law on Public Procurement**

The law states that a private partner in a solicited or unsolicited PPP project may be selected by way of competitive bidding or direct negotiation.\(^\text{14}\) Procurement and related aspects are governed by the Public Procurement Law of 2012 (the “**PP Law**”). The law applies to all public procurements irrespective of the source of the funds, other than those specifically exempted thereunder such as:

- any procurement that is financed by Development Partners (e.g., multilaterals) and that needs to comply with the procedures specified under a financing agreement. If the financing agreement does not define any other procurement procedure, the procurement process shall conform to the provisions of the PP Law; or
- any procurement that impacts on confidential information pertaining to National Defence and public order, that needs approvals from the Prime Minister; or
- the granting of concessions by the RGC that shall comply with separate laws and regulations.\(^\text{15}\)

The PP Law sets out the different types of (i) competitive and (ii) non-competitive bidding processes to select service providers.\(^\text{16}\) In competitive bidding, all bidders, other than those blacklisted or forbidden by the courts, are given a free and fair chance to participate. The process of competitive bidding is determined by sub-decree No.105 on public procurement.

The process of selecting a private partner contemplated under draft Volume 8-3 of SOP III appears

\(^{12}\) Article 5 of the PPP Law identifies eligible sectors as infrastructure and public services in the transportation and logistics sector including roads, bridges, rails, airports, ports, public parking, canals, post, telecommunication, information technology and digital technology. Eligible sectors also include production, transmission and distribution of oil and gas, pipelines, water, wastewater treatment, healthcare, education, tourism, sports, social housing etc.

\(^{13}\) The Law permits parties to contractually decide the mechanism to resolve disputes - Article 30 of the PPP Law states that any disputes between the implementing agency of the RGC and the private counterparty shall be settled as per the dispute resolution mechanism stipulated in the PPP contract.

\(^{14}\) Article 17 of the PPP Law

\(^{15}\) Article 3 of the PP Law

\(^{16}\) Articles 11, 12, and 13 of the PP Law
more meticulous than that under the PP Law. For example, the Procurement Manual sets eligibility criteria for bidders, describes the types and stages of bidding including the list of documents to be issued by the IA, and the timelines within which the bid process needs to be completed. The procurement process under the PP Law does not set out these aspects in such detail. Although there are procedures described in both the PPP Law and the PP Law, it is understood that the PPP Law is expected to govern the procurement of PPPs.

The Law on Public Finance System

As per the PPP Law, the RGC may source funding for a Government Support Mechanism (GSM) from the (i) national budget, the sub-national budget, the approximate public entities budget, the public administration establishment budget and/or the budget of the state-owned enterprises, or (ii) Official Development Assistance (ODA) such as loan or grant assistance provided to the RGC from Development Partners or (iii) Viability Gap Funding as stipulated in the PPP Law.17

The Law on Public Finance System (the “PFS Law”) sets out the timeline for the preparation of the Annual Financial Law by the MEF. The Annual Financial Law will allocate credit for expenditures by ministries, institutions and public entities at the national and sub-national levels. The recipients are then required to mobilise their allocated credits towards the respective tasks of their sector.

The PFS Law stipulates strict requirements with respect to institutional accountability. The heads of institutions and ministries that receive allocated credits from RGC are required to provide reports to the MEF regarding the utilisation of such funds, implementation of projects pertaining to borrowings or provision of guarantees, financial commitments, and revenue earned from investments on financial fixed assets.18

Although not stipulated in the PPP Law or the PFS Law, it may be reasonably assumed that payments by the IA to the private partner under the PPP Contract (for example, termination payments) will be sourced from the credit allocated to it as per the Annual Financial Law.20

4.1.2 International benchmarks and considerations

Some current frameworks in developing and mature PPP markets are set out in the following table. These countries have enacted specific PPP Laws to clearly set out the respective rights and obligations of the government and the private partner. These countries also have regulations relating to procurement and government budget allocation for project expenditures.

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17 Article 15 of the PPP Law
18 Article 14 of the PPP Law
19 Article 71 of the PFS Law
20 The Annual Financial Law (AFL) is a fiscal legislation prepared by the MEF to give effect to the revenue and expenditure proposals of the government ministries and public entities. The AFL regulates the allocation of credit to ministries and their expenditure by said ministries towards developing the socio-economic agendas of the RGC. The PFS law is the framework under which the Annual Financial Law is enacted – the PFS law aims to develop the overall financial management system of Cambodia. It regulates preparation, adoption and implementation of national and state budget and enactment of AFL.
Table 6. Comparable practices in PPP, procurement and budgeting

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Indonesia</strong></td>
<td></td>
</tr>
</tbody>
</table>
  **PPP framework:** The PPP framework in Indonesia is primarily governed under Presidential Regulation No. 38 of 2015, titled ‘Co-operation between Government and Business Entities in Infrastructure Provision.’  
  **Procurement:** With regard to procurement, the process of selection of a private partner for the implementation of a PPP project for both solicited and unsolicited proposals was governed by the LKPP Regulation 19/2015. However, as of November 6, 2018, procurement for solicited PPP proposals is governed separately under the LKPP Regulation 29/2018.  
  **Government budgeting:** The central government allocates credit for expenditures by local governments for utilisation in infrastructure projects. The intergovernmental allocation and transfer is regulated by the Directorate General of Fiscal Balance (DJPK), under the Ministry of Finance.  
| **Philippines** |  
  **PPP framework:** The PPP framework in the Philippines is primarily governed under the Republic Act No. 9184 or the Government Procurement Reform Act (RA 9184) for the procurement of goods, supplies and services, and Republic Act No. 6957 as amended by Republic Act No. 7718 or the Philippine Build-Operate-and-Transfer (BOT) law which provides a more focused framework in PPP infrastructure development.  
  **Procurement:** The Republic Act No. 9184 deals with procurement of goods, supplies and services.  
  **Government budgeting:** The Congress passes the Annual General Appropriations Act each year. There is no reference in law as to whether allocations for credit expenditure by local governments are provided in the said Act.  
| **Vietnam** |  
  **PPP framework:** The Law No. 64/2020/QH14 titled the ‘Law on Public Private Partnership Investment’ which was ratified by the Vietnamese legislature on 18 June 2020 and has come into effect on 1 January 2021 regulates the PPP activities in Vietnam ("VN PPP Law"). Implementing guidelines were issued in Decree 35/2021/ND-CP dated 26 March 2021. PPP investment sectors include transportation sector among others as listed in the VN PPP Law.  
  **Procurement:** The procurement process is governed by the Bidding Law of 2013. This law along with several circulars regulate the public procurement process for PPP projects. The law and circulars set out the requirement for foreign bidders to form joint venture with local contractors. It also sets out the eligibility of tenderers and investors among other things.  
  **Government budgeting:** Under Decree No. 28/2021/ND-CP ("Decree 28"), the State Treasury of Vietnam will be the authority in charge of controlling state capital payments in PPP projects. The allocation and examination of the allocation of state capital in PPP projects will follow the same rules applicable to investment capital originating from the state budget  
| **Australia** |  
  **PPP framework:** The basic principles for PPPs in Australia are set out in the National PPP Policy, but state-level governments have their own initiatives and can deviate from the national policy.

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24 Article 4 of the VN PPP Law.  
25 Vietnam: New Decree on financial management for Public-Private Partnership (PPP) projects, Baker McKenzie, 2021, [https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOqEFC8EGQJsWJiCH2WAVfnLvn2qghRGIQg5zrn7x91%3D%3D&attdoparam=pB7Hesq%2F2312Bak8Ol6eJILc%2BY4beLEAmkxWDMG5VhE%3D&fromContentView=1](https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOqEFC8EGQJsWJiCH2WAVfnLvn2qghRGIQg5zrn7x91%3D%3D&attdoparam=pB7Hesq%2F2312Bak8Ol6eJILc%2BY4beLEAmkxWDMG5VhE%3D&fromContentView=1)
Country | Key characteristics
--- | ---
 | from the National PPP Policy for projects funded at state level. While the states often negotiate some funding support for projects from the federal government, they drive the project development, set policy and priorities, and legislate for themselves.
 | **Procurement**: Volume 1 of the National PPP Policy deals with procurement option analysis. It discusses various project delivery models in the infrastructure sector in Australia including PPP model. However, the procurement process for PPP projects differ amongst States.
 | **Government budgeting**: State government budget has provisions for appropriations towards infrastructure development in the respective States.

Source: World Bank, Benchmark Infrastructure Development (Indonesia, Philippines, and Australia)

There are some key learnings emerging from the review of PPP frameworks globally:

- Most countries have adopted similar frameworks, with a specific PPP Law sitting alongside legislation relating to procurement requirements for government generally and to make provision for the funding of projects.
- The budget and fiscal management considerations are set out clearly to assist implementing agencies and provide transparency to the market.

### 4.1.3 Recommendations

Based on the analysis of the benchmarks and best practices, it seems that Cambodia is progressing towards the right direction in terms of establishing a clear framework for PPP projects. However, as seen here and in subsequent sections below, this framework could potentially be further developed.

While the enactment of a dedicated PPP law (together with supporting guidelines) is a welcome step towards attracting private investment, here are certain aspects in the law that the RGC could consider strengthening, to enhance the appeal of the PPP framework to investors:

- **Public notice of PPP projects and timeline of approval under the PPP Law**: The PPP Law and SOPs do not specifically require the publicising of the list of priority PPP projects or the timeline for their implementation. The RGC could consider publishing guidelines or directions setting out the process of public announcements of priority PPP projects and the timelines for issuing relevant project approvals.

- **Budgetary allocation**: The current SOP on Risk Management of Fiscal Commitments provides guidance on the mechanism for allocating funds to government agencies for use in infrastructure projects such as for project preparation and for discharging contingent liabilities as and when such liabilities arise during the lifecycle of a project, as well as on the budgetary mechanism for allocation of funds to the IA in respect of termination payments and other fees that could arise under a PPP Contract. It is understood that the RGC intends to develop capacities in this respect to be able to better handle PPP projects. For transport projects, active participation of the MPWT is important to ensure that forward-looking budgets are prepared on a proactive basis incorporating MPWT’s short-term and medium-term plans.
4.2 Laws relating to investments, environment, social and security interests

4.2.1 Guidance per the PPP Law and existing legislation

Investment and corporate laws

The Law on Investment 2021 governs the domestic and foreign investment landscape in Cambodia.26 Together with the Law on Financial Management, it determines the type of tax incentives that investment projects can receive. However, given that the Law on Investment has been recently enacted, there is currently some uncertainty regarding the implementation of certain provisions of the law.

The general law regulating the incorporation of companies in Cambodia, is the Law on Commercial Enterprises of 2005 and the sub-decrees associated with it.

A SPC may be established and registered in the Kingdom of Cambodia as a commercial entity within 60 working days after signing the PPP contract, to act as the private partner.27 Further, within 14 working days after its establishment and registration, the parties to the PPP contract and the SPC are required to sign a novation agreement in order to transfer title of the private partner to the SPC, while retaining the same terms and conditions. The current PPP Law or the SOP does not have a template of the novation agreement. There is no foreign shareholding restriction in Cambodian law. So offshore investors may own 100% shares of an SPC. And the laws do not provide for variation in control based on the sector.

The investment and corporate aspects are discussed in more detail in Section 4.3 and Section 4.6 respectively, of this Report.

Environmental Law

Under the Law on Environment Protection and Natural Resource Management of 1996, every investment project owner is required to carry out an environmental impact assessment (EIA) of their project. The EIA report is required to be examined by the Ministry of Environment (MOE) and submitted to the RGC for approval. The sub-decree No. 72 ANRK.BK on EIA process (“SD 72”) issued on 11 August 1999 sets out the procedure for carrying out EIA for projects at the national and provincial levels.

SD-72 applies to projects (proposed or ongoing) undertaken by private parties or state government or a joint-venture or ministry institutions. It sets the EIA reporting requirement for projects at national and provincial levels. For example, projects involving national ministries require that EIAs be submitted to the MOE for review, while projects involving provincial departments must submit their EIAs to the Provincial / Urban Environmental Office (PEO).

A project owner must prepare an initial EIA report, submit it to the MOE (or, for provincial level projects, to the PEO) and forward a copy to the project approval ministry of RGC.28 The MOE will review the EIA report and provide its findings and recommendations to (i) the project owner and (ii) the project approval ministry / institution, within 30 working days, commencing from the date of registration of the project owners’ initial EIA and Pre-feasibility Study (Pre-FS) reports. The project owner must acknowledge the findings and recommendations of the MOE on their initial EIA and/or

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26 The Law on Investment of 1994 was replaced in 2021 by a new investment law. As per Article 40 of the new investment law, the projects that received the investment license and incentives under the previous law would be deemed to have also been licensed under the new law and be entitled to continue receive the same incentives as under the previous law.
27 Article 21 of PPP Law
28 Article 14 of Environmental Law
EIA report(s) which have been approved by the MOE before they can proceed their project's implementation.29

Project owners are mandated to carry out the Environment Management Plan (EMP) as stated in their EIA report for a period of six calendar months commencing from the date of confirmation of their EIA report. The MOE has the right to request the project owner to adjust the environment management technique.

For projects that have the potential of causing serious impact on the natural resources, ecosystem, health and public welfare, the project owners are required to provide (i) a full EIA report and (ii) Pre-FS report to the MOE for their review. The steps of MOE review and issue of recommendations already discussed in the above paragraph will apply in this case.

The RGC pursuant to its commitment under international treaties and related instruments on environment (such as the United Nations Framework Convention on Climate Change, the United Nations Sustainable Development Goals etc.) has promulgated the Climate Change Strategic Action Plan (2014-2023) and the National Environment Strategy and Action Plan (2016-2023). These action plans guide the relevant ministries, institutions and stakeholders to formulate policies for managing environment and resources to ensure sustainable development of the economy. They are integrated into the National Strategic Development Plan, the overarching policy setting out the RGC’s five-year macro-economic development plan.30

The Civil Code and the Law on Secured Transactions

In Cambodia, security interests over assets are mostly governed by the Civil Code 2007 (“Civil Code”) and the Law on Secured Transactions 2007.

The Civil Code lists the types of security rights that may be created over real property such as ‘hypothec’ or ‘pledge’ and so on.31 A hypothec is created through an agreement between a creditor, and a debtor or third party that provides immovable property as security.32 Lease of immovable property for a period of not less than 15 years (also referred to as ‘perpetual lease’ under the Civil Code of Cambodia33, may be made the object of a hypothec.34 In other words, a lessee (e.g., the SPC in case of a PPP project) may create a hypothec over the perpetual lease for the benefit of a creditor.35

In case of offshore debt financing, the hypothec will be held by an onshore bank (appointed as a collateral agent by the offshore creditor). Movable property36 of a company such as its shares may be pledged for the benefit of a creditor. Similar to the above, the security interest over shares will be in favour of an onshore bank (which will be appointed as collateral agent to hold the security interest for the benefit of the creditor). The security interest will need to be registered with the Secured Transactions Filing Office (STFO).

A notice filed for security interest will be valid for five years, and a continuation statement needs to be

29 Article 20 of Environmental Law. In practice what happens is that once the EIA report has been reviewed by the MOE, the MOE will invite the project owner to sign an environmental protection agreement. In such agreement, the project owner shall agree to comply with all provisions stated in the report including any issues arising out of the project and risk mitigation under the EMP.


31 Article 132 of Civil Code

32 Article 844 of Civil Code

33 Article 244 of Civil Code

34 Article 843(1) of Civil Code

35 Creditors may be onshore or offshore banks or financial institutions. However, in case of offshore banks/financial institutions, security interest over Cambodian assets is often held by onshore security agent (which usually are local banks), especially for interests over immovable property.

36 Article 120(3) of Civil Code
filed every five years thereafter. Failure to file the continuation statement on time will render the previous filing void as at the date of original registration.

4.2.2 International benchmarks and considerations

Laws in some developing and mature PPP markets are set out in the following table. These countries have enacted specific laws to provide clear-cut guidance on aspects such as investment and environmental licensing and permitting, corporate entity establishment and providing project assets as security to project lenders.

Table 7. Benchmarking of investment and corporate laws, environment law and secured transaction law

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
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</table>
| Indonesia | ► Investment and corporate laws: Law No. 25 of 2007 governs domestic and foreign investments in Indonesia. As per Article 5, foreign investors are required to incorporate a limited liability company to carry out permitted investments. Law no. 40/2007 sets out the process of incorporating a limited liability company. Presidential Regulation 38/2015 (governing the PPP framework) provides for regulation of the return on investment of the private partner (Chapters VI and XI) by the government contracting agency.  
► Environment law: Law No. 32/2009 sets out the requirements to carry out environmental impact assessments for certain projects. Projects are selected for EIA based on the criteria set out in Articles 22, 23, 34 and 35 of the Law No. 32/2009.  
► Secured transactions law: In Indonesia, various statutes form the secured transaction framework. The Fiduciary Security Act 1999 and the Civil Code govern most secured transactions. However, if the subject of a security interest is stock issued by a company, the transaction is governed by the Limited Liability Company Act 1995. Under these laws, both possessory and non-possessory pledges can be granted over movable assets.  |
| Philippines | ► Investment and corporate laws: Foreign Investment Act 1991 (Republic Act 7042) governs the domestic and foreign investment landscape in the Philippines. This was amended by Republic Act 8179. The Corporation Code of 1980 regulates the establishment of companies in the Philippines.  
► Secured transactions law: Republic Act No. 11057 provides for the creation, perfection, determination of priority, establishment of a centralized notice registry, and enforcement of security interests in personal property. Further, Title XVI of the Civil Code of 1949 provides for security creation rights over immovable property.  |

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37 Section 36 of Law on Secured Transactions  
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
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| Vietnam | Investments by both domestic and foreign investors and corporate matters. Some sectors, for example, banking, financial services and insurance will be subject to special regulations designated for such sectors.  
► **Environment law:** The Law on Environmental Protection ("LEP") is the primary law in Vietnam concerning environment protection. A revised version of the LEP will soon come into effect in 2022. Before the new law comes in to effect, the current EIA system in Vietnam is governed through the LEP and other associated decree and regulations, including the Decree on Environmental Protection Planning, Strategic Environmental Assessment, Environmental Impact Assessment, and Environmental Protection Plans and the Circular on Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans.⁴⁴  
► **Secured transactions law:** The Civil Code 2015 stipulates the types of security available for secured transaction in Vietnam. Typically forms of security are mortgage and pledge. There are also special regulations for security on special assets, such as the Vietnam Maritime Code, Law on Civil Aviation 2006 (as amended in 2014) and the Land Law 2013.⁴⁵ |
| Australia | Investment and corporate laws:** Foreign investments are regulated by Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and Foreign Acquisitions and Takeovers Regulations 2015 (Cth) and administered by the Foreign Investment Review Board (FIRB).⁴⁶ The Corporations Act of 2001 sets out the company incorporation process.⁴⁷  
► **Environment law:** Commonwealth environmental legislation is the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), which outlines the legal framework for managing significant impacts on matters of national environmental significance.⁴⁸ There are different laws at the state level. For example, in New South Wales, the Environment Planning and Assessment Act 1979 sets out in Part 5 (Infrastructure and Environment Impact Assessment) the requirement for project owners to submit Environment Impact Statements for approval of the relevant authority under the Act.⁴⁹  
► **Secured transactions law:** The Personal Property Securities Act 2009 governs the creation of security over movable properties to secure loans. This act does not apply to interest created in land (Section 8) |

Sources: Government websites of relevant countries, World Bank materials, Benchmark Infrastructure Development (Indonesia, Philippines, and Australia), private publications by law firms

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⁴⁶ Australia’s foreign investment regime, Pinset Masons, 2020, [https://www.pinsentmasons.com/out-law/guides/australias-foreign-investment-regime](https://www.pinsentmasons.com/out-law/guides/australias-foreign-investment-regime)


⁴⁸ Environmental law and practice in Australia: overview, Thomson Reuters, 2021, [https://uk.practicallaw.thomsonreuters.com/1-502-8908?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a807089](https://uk.practicallaw.thomsonreuters.com/1-502-8908?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a807089)

4.2.3 Recommendations

Based on the above analysis and comparison with benchmark countries, it is evident that Cambodia has already enacted similar laws to regulate potential PPP projects in the country. That being said, there still remain aspects that RGC could look into to ensure proper implementation of such projects. The RGC could consider fast tracking the incorporation of SPCs, introducing a fast-track process for licensing of PPP projects, centralising registration of security across regions and so on. This will be discussed in more detail in subsequent sections of this Report.

4.3 Investment and foreign ownership

4.3.1 Guidance per the PPP Law and existing legislation

The legal framework governing investment and foreign ownership in Cambodia is the Law on Investment 2021. There are also sub-decrees implementing the Law on Investment, including the Sub Decree No.111 ANK/BK dated 27 September 2005 on the implementation of the Law on the Amendment to the Law on Investment (“SD 111/2005”), and sub-decree No.34 ANK/BK dated 23 April 2007 to further remove the restricted investment activities under SD 111 (“SD 34/2007”).

Cambodia adopts a supportive approach to foreign investment in the country: few restrictions are imposed on foreign ownership on investment activities. Foreign investor shall be treated in a non-discriminatory way, except in respect of ownership of land. SD 111/2005 used to provide a list of prohibited investment activities, which was later on removed by SD 34/2007.

Apart from that, investment activities are categorised by their eligibility for different incentives under the annexes of SD 111/2005, and not by the ownership of foreign investors in the investment projects. Investors seeking approvals under the Law on Investment will be subject to the same incentives according to their business fields and will not be distinguished by their nationality.

Therefore, the Cambodian laws generally do not impose significant restrictions on foreign ownership for typical PPP projects, e.g., infrastructure, energy, telecommunications, etc. Compared with other countries in the ASEAN region, Cambodia has fewer ownership barriers for foreign investors in implementing PPP projects.

4.3.2 International benchmarks and considerations

The table below reviews the current laws in developing and mature PPP markets. These countries have enacted specific laws to provide clear-cut guidance on foreign investments.

<p>| Table 8. Investment and foreign ownership international benchmark countries comparable practices |</p>
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>▶️ Indonesia adopts the “negative investment list” approach, where foreign investors are not allowed to invest in sectors/businesses set forth in the negative investment list. Foreign investors can be subject to different restrictions on foreign ownership (ranging from 0% – 100%) depending on the investment sector they intend to enter. ▶️ Indonesia passed a new law in 2021 to open more sectors to foreign investors, which has significantly reduced the number of business sectors restricted from foreign investors from 350 to 46 business ‘fields’. Typical PPP projects fall mostly within the “priority” sectors, where foreign ownership restrictions are more relaxed.</td>
</tr>
</tbody>
</table>

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50 Article 15 of the Law on Investment
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| Philippines | ► The Philippines also adopts the “negative investment list” approach. There are notable foreign ownership restrictions in various business fields and often it requires Philippine nationals to hold controlling interests in the investment. The level of ownership restrictions imposed on foreign investors is relatively high in the Philippines compared with other ASEAN countries.  
► Under the current regulatory framework, restrictions are not imposed on a sector-wide basis, but rather on the “public franchise” nature of the project. Where an infrastructure facility’s operation requires a public utility franchise, the facility operator must be Filipino, or a company owned at least 60% by Filipinos. However, the project owner may appoint another entity for operations and maintenance of the project. Such subcontractor may be a foreign-owned entity.  
► However, it is understood that the Philippines is undergoing a process of approving new laws to revise the above position, and to open more sectors to attract foreign investors.  
► The restrictions applicable to foreign investment in Vietnam can be primarily found in the country commitments that Vietnam undertakes under the regime of World Trade Organization (“WTO Commitments”). According to the WTO Commitments, foreign investors may be restricted from or subject to special conditions for the market access in some services sectors, such as rental/lease services related to machinery and equipment, rail transport services, education, etc.  
► The Law on Investment also provides a list of conditional businesses where foreigners need to meet certain conditions in order to invest in such business, for example, banking, education, telecommunications with network infrastructure, publishing and healthcare.  
► Article 31 of the PPP Law of Vietnam expressly permits different selection procedures to apply to international investors if the project falls within a sector that has not been opened for market accessibility by foreign investors, or project with concern on national defence, security or state secret protection. |
| Vietnam |  |
| Australia | ► Australia does not have a straightforward “negative investment list” as in Indonesia, or the Philippines. Some traditional areas are restricted for foreign investment are, for e.g., banking, international airlines, airports, etc.  
► Other than that, a new law effective from 2021 stipulates that foreign investors are subject to screening and review for their investment in “national security business”, and also for acquisition of businesses in Australia reaching a certain threshold, depending on the proportion and value of acquisition. Therefore, rather than sector-specific restrictions, foreign investors will need to notify the Foreign Investment Review Board (FIRB) and go through such “national security business” screening and review before they can implement the investment project.  
► In addition, all foreign investors are required to register their ownership in Australian assets with the authority. |

Source: World Bank materials, Benchmark Infrastructure Development (Indonesia, Philippines, and Australia), government websites of benchmark countries.

4.3.3 Recommendations

Given the supportive approach of Cambodia in respect of investment and foreign ownership, there are few, if any, substantive legal issues that RGC need to address. However, to further encourage
foreign investors, the RGC may want to consider introducing certain procedural enhancements such as a special fast-track process for the Council for the Development of Cambodia to grant an investment license to PPP projects, and introduce a single-window PPP investment clearance scheme to streamline the procedures of registrations with various government authorities, including the MOC, the GDT and MLVT. This would match other jurisdictions where PPP projects benefit from a fast-track process and simplified investment requirements.

4.4 Land: ownership restrictions, acquisition and registration

4.4.1 Guidance per the PPP Law and existing legislation

Restriction on foreign ownership of land

Land right issues for foreign investors are addressed in a number of Cambodia laws, including the Land Law, the Law on Investment, the Civil Code and the Law on Expropriation. While foreign investors in Cambodia are generally not subject to restrictions for investment in business sectors, they are subject to restrictions over ownership of land.

Project sponsors will receive land use rights in accordance with applicable Cambodian law, i.e., the Land Law of 2001 (the “Land Law”). The Land Law sets out the regime of ownership of immovable properties in Cambodia.

Only natural or legal entities of Khmer nationality (meaning companies where 51% or more of its shares are owned by Cambodians or Cambodian-owned companies) have the right to own land in Cambodia. In other words, foreign investors may only indirectly hold land through a Cambodian entity where its foreign shareholding is no more than 49%. A lease arrangement is not “ownership”, so it is not subject to such restrictions.

The owner of the property may mortgage the land in order to secure a debt. Mortgage is defined in the Land Law as a security in rem which essentially involves the transfer of interest in the property without delivery of its possession. The mortgagee is permitted to claim the proceeds of sale of such property to recover the debt at enforcement time.

If a Cambodian national entity disposes its shares in a way that results in reduction of shareholding of Cambodian nationals below the 51% threshold, then it will no longer be qualified to own land. It would need to dispose of the land to a qualified owner before its change of shareholders. Breach of such a restriction may result in the land in issue being confiscated by the authority and becoming state property.

As a result, foreign investors generally obtain land use rights in the form of a lease, which is recognised by the Law on Investment. The Law on Investment expressly allow foreign investors to enter into short- or long-term leases with Cambodian landowners and may also create security over their land rights. As long as they comply with certain formalities and registration requirements, foreign investors can enter into long-term leases with terms of 15 years or more, called a “perpetual lease”. A perpetual lease can be set initially at a term between 15 to 50 years and can be further extended upon expiration of the initial term.

Transfer of lease rights needs consent of lessor (and lenders, if there are any pre-existing security over the land site), and if the land is used for a project with government concession, prior government

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53 Article 35 of PPP Law  
54 Article 8 of Land Law  
55 Article 197 of Land Law  
56 Article 8 of Land Law
approval is also expected. As a matter of procedure, if the lease is a registered long-term lease, transfer of interests under the lease (e.g., change of parties, mortgage, etc.) shall also be registered with local land office accordingly.

The Law on Investment and the Civil Code also allows the separate ownership of the buildings and structures constructed on land to be treated separately from the land. That is, while a foreign investor may not own the underlying land, it may have ownership of the buildings and structure that it constructed on the land subject to the applicable laws, as long as it and the landlord have agreed in the lease agreement regarding the separation of the ownership. In practice, there is no separate ownership title for the building.

**Land acquisition for PPP projects**

Sponsors will receive land use rights in accordance with Cambodian law. There is no separate regime regarding land rights for PPP projects.57

As discussed in the previous sub-section, in Cambodia, land use rights for the project owner of a concession project are commonly recognised under the perpetual lease agreement (or long-term lease) which are governed by the Land Law and the Civil Code. In this case, the project owner may initiate identification of the suitable project land site, but it may need the government to step in for acquisition of the land site and grant the land rights in proper form to the project company, because the project company may not own the land itself. Contribution by the government through land acquisition is also one of the most common and important forms of government support measures for PPP projects.

Land Acquisition and Resettlement (LAR) is conducted by the General Department of Resettlement (GDR) under the MEF, which will set up a dedicated team to work with the IA and the contract engineer.58 Some examples in other countries about the roles of the IA and private partner in land acquisition for PPP projects will be examined below.

The RGC may acquire private land for public purpose. However, the landowner will require to be paid fair and just compensation prior to such acquisition.

**Registration of land rights**

Registration of land ownership, changing land type, hypothec and other security rights over immovable property, as well as perpetual leases are all managed by the local land registration office where the land is located, i.e., municipal or provincial cadastral administration office under the MLMUPC.

The processes for acquiring land, changing land types and registering perpetual leases are not uniform in Cambodia due to each land office establishing different requirements regarding the standard document checklist of registration issued by the MLMUPC. Delays in registration and different requirements of application dossiers are common issues in acquiring land and registering security for projects in Cambodia.

In 2020, Cambodia started a new workflow process by having municipal / provincial administration offices act as a central unit to receive all applications for land process matters. This may be helpful for future PPP projects across different regions in Cambodia.

Additionally, in practice, the PPP land site should be registered under a hard title (as state-owned private land) that would be recognized at the national level (rather than a soft title that would be recognized only at the provincial level) for ownership in order to register the project owners’ leasehold

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57 Article 35 of PPP Law
58 Paragraph 3.2.4, chapter VII of SOP I
right according to the Civil Code and perfect the security of those rights to lenders. This may be problematic to project owners as lessees, since they will need to go through the process to convert land titles to “hard title” (private-owned land) with the local land authority, if they have not yet been converted. The description of ‘soft title’ and ‘hard title’ is provided in the table below.

The PPP Law and the current SOPs do not provide a clear process for each registration. The “Standard Operating Procedures for Land Acquisition and Involuntary Resettlement” are in development. Related issues should be addressed in the SOP, particularly the land type of the PPP land site, conversion process, continuation of filing notice and land areas that may cross jurisdictions of different local land registry authorities.

**Table 9: Description and differences between ‘soft title’ and ‘hard title’**

<table>
<thead>
<tr>
<th>Title</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soft title</td>
<td>► Letter of possessory rights &lt;br&gt;► It refers to land documentation issued by the local land authorities which evidences the right to use and occupy land; it is only evidence of possession and not ownership nationwide and thus may be disputed &lt;br&gt;► Not a secure method of land ownership because of the lack of registration of such titles on a national level.</td>
</tr>
<tr>
<td>Hard title</td>
<td>► Certificate of title &lt;br&gt;► It refers to land documentation issued at the national level which evidences right of land ownership &lt;br&gt;► Secure method of land ownership since ownership rights are registered with the land office with effect across the country. To officially register a security, it also requires a hard title. &lt;br&gt;► Two ways of acquiring hard title: (i) transfer by a person holding such title; or (ii) process whereby a person who has had peaceful and uncontested possession of land for at least five years prior to issuance of the Land Law, requests hard title from the responsible land office.</td>
</tr>
</tbody>
</table>

Source: Land Law of Cambodia

**Registration of security interests over land**

Registration of security rights over immovable property may face similar issues of inconsistent filing requirements before different local land registry offices. The security provider is required to submit a notice of creation of security to the MOC. This notice is effective only for a period of five years, after which the security provider is required to renew such notice or else such notice will lapse.

As the PPP project could involve long-term loans, the lenders may find it costly to monitor and repeat the registration from time to time, with the risk of a disproportionate penalty for late filing. A more attractive system to lenders might be to allow a longer term of validity for such notice or allow automatic renewal of the notice as long as no party files a termination / release notice of security interest to the contrary.

In most offshore lending transactions, the offshore financiers appointing a Cambodian incorporated bank as ‘onshore security agent’ to hold the security interest (over land or other assets) on their behalf in Cambodia. Further, this ‘onshore security agent’ undertakes the filing of security interest with the

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59 “State-owned private land” means land owned by state but can be granted by the land owner (i.e., state) to a private party to use, where this specific entity may use this land for that entity’s own purpose as agreed in the lease terms with the state.
60 “Private-owned land” are land owned by Cambodian individual or Cambodian entities in Cambodia. A specific land title (soft title or hard title) will be issued to those individual and entities to confirm their ownership.
61 Article 33 of the PPP Law
62 Article 30 of Secured Transactions Law
63 Article 36 of Secured Transactions Law
Secured Transaction Filing Office and its name appears in the register as the security holder.64

4.4.2 International benchmarks and considerations

Land acquisition for PPP projects

Land acquisition is a crucial process to most PPP projects. Any problem and/or defects in acquiring the land site may result in an increase in project costs, delays, and even cancellation in some cases. It can also affect the appetite of lenders to invest and the timely disbursement of financing. In many countries, projects have been delayed due to issues in land acquisition and ownership.

The table below reviews the current laws in some developing and mature PPP markets. These countries have enacted specific laws to provide clear-cut guidance on aspects of land acquisition for a PPP project.

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64 The Law on Trust of Cambodia was promulgated in 2019 and before that the concept of trust was not explicitly recognized under the Civil Code. Therefore, security trustee is a relatively new concept under Cambodia law, but use of agent for holding security is not uncommon in practice. ‘Trust’ per se was not common for certain reasons. Providing trustee services as a regular business may require one to obtain approval from the MEF and other regulators as applicable, according to the Law on Trust. Therefore in practice people may also tend to categorize the relationship as ‘security agent’ rather than a trust relationship.
## Table 10. Land acquisition: Benchmark countries comparable practices

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| **Indonesia** | Land acquisition for PPP projects is to be carried out by the government itself (Presidential regulation on cooperation between government and business entities in infrastructure provision, section 10).  
- Funds can come from the central or local government and be reimbursed by the private party, if the project is ‘financially feasible’.  
- The regulations are silent on the provision of appropriate rights of way for PPP projects.  
- The government is responsible for obtaining rights of way, and for providing adequate appropriations to allow IAs to acquire the required right of way, site or location for any national infrastructure project (R.A. 10752, Act to Facilitate the Acquisition of Right-of-Way, section 10).  
- The IA may either require the private party to advance the funds for land acquisition or receive reimbursement through the charges to be levied on project users or any other fees. |
| **Philippines** | The government should be primarily responsible for land acquisition for PPP projects as ownership of land in the country are vested in the state (Article 4, Land Law 2013). Individuals may obtain “ownership” in the form of land use rights granted by the state.  
- The Land Law stipulates that the government can allocate or lease land to foreign invested companies for a period of a maximum of 50 years, which may be extended to 70 years in exceptional cases (Article 126, Land Law 2014).  
- Although theoretically foreign investors may be able to get land use rights via lease with the government, in practice it is a cumbersome process for foreign investors to obtain such rights directly from the government. As a result, foreign investors often work with local partner in flexible terms with respect to land use rights. These may include sub-lease from a local landlord which obtain the land use rights from the government, or acquisition of a project or a company established by local partner which has secured land use rights.65  
- The government is responsible for obtaining rights of way, and for providing adequate appropriations to allow IAs to acquire the required right of way, site or location for any national infrastructure project (R.A. 10752, Act to Facilitate the Acquisition of Right-of-Way, section 10).  
- The IA may either require the private party to advance the funds for land acquisition or receive reimbursement through the charges to be levied on project users or any other fees. |
| **Vietnam** | The government should be primarily responsible for land acquisition for PPP projects as ownership of land in the country are vested in the state (Article 4, Land Law 2013). Individuals may obtain “ownership” in the form of land use rights granted by the state.  
- The Land Law stipulates that the government can allocate or lease land to foreign invested companies for a period of a maximum of 50 years, which may be extended to 70 years in exceptional cases (Article 126, Land Law 2014).  
- Although theoretically foreign investors may be able to get land use rights via lease with the government, in practice it is a cumbersome process for foreign investors to obtain such rights directly from the government. As a result, foreign investors often work with local partner in flexible terms with respect to land use rights. These may include sub-lease from a local landlord which obtain the land use rights from the government, or acquisition of a project or a company established by local partner which has secured land use rights.65  
- The government is responsible for obtaining rights of way, and for providing adequate appropriations to allow IAs to acquire the required right of way, site or location for any national infrastructure project (R.A. 10752, Act to Facilitate the Acquisition of Right-of-Way, section 10).  
- The IA may either require the private party to advance the funds for land acquisition or receive reimbursement through the charges to be levied on project users or any other fees. |

Source: World Bank materials, Benchmark Infrastructure Development (Indonesia, Philippines, and Australia), government websites of the benchmark countries.

From the analysis of the land acquisition framework in the benchmark countries, it is quite clear that the government is typically responsible for assisting the private partner to acquire land for a PPP project. Further, the allocation of cost of land acquisition is also clearly set out in the laws of such countries.

### Policy design considerations

The conditions, responsibility matrix and risks of acquiring the PPP project land site should be assessed as early as possible and be reflected in the PPP Contract. In the site identification and acquisition process, a number of considerations could be taken into account:

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Table 11. Site identification and acquisition considerations

<table>
<thead>
<tr>
<th>Issues</th>
<th>Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of land</strong></td>
<td>► The type of land (either private or public (includes forestry, agriculture,</td>
</tr>
<tr>
<td></td>
<td>constructible) should be determined as soon as possible tendered so as to better</td>
</tr>
<tr>
<td></td>
<td>understand the administrative process required.</td>
</tr>
<tr>
<td></td>
<td>► The status of current owners and land titles should be reviewed in order to</td>
</tr>
<tr>
<td></td>
<td>assess the likelihood and schedule for acquiring the land during the project</td>
</tr>
<tr>
<td></td>
<td>appraisal stage.</td>
</tr>
<tr>
<td></td>
<td>► Additional approvals from provincial authorities in the land acquisition</td>
</tr>
<tr>
<td></td>
<td>process may be required for projects that require access to state land - such</td>
</tr>
<tr>
<td></td>
<td>approvals should be identified early in the process.</td>
</tr>
<tr>
<td><strong>Site conditions</strong></td>
<td>► Site conditions of the land could impact the type of commitments required by</td>
</tr>
<tr>
<td></td>
<td>the market regarding the site e.g., contamination, unexploded ordnance.</td>
</tr>
<tr>
<td></td>
<td>► Connectivity and presence of ancillary infrastructure to / near project site</td>
</tr>
<tr>
<td></td>
<td>could affect the attractiveness and/or usefulness of the project.</td>
</tr>
<tr>
<td><strong>Delivery schedule</strong></td>
<td>► Certain projects may need the entire site to be delivered prior to the</td>
</tr>
<tr>
<td></td>
<td>expected construction commencement date.</td>
</tr>
<tr>
<td></td>
<td>► In other cases, site delivery can be aligned with the construction and</td>
</tr>
<tr>
<td></td>
<td>financing schedule of the project.</td>
</tr>
<tr>
<td></td>
<td>► The RGC could provide clear guidance for bidders on the status of land</td>
</tr>
<tr>
<td></td>
<td>acquisition prior to the tender process, so bidders are well informed and</td>
</tr>
<tr>
<td></td>
<td>better able to gauge delivery timelines.</td>
</tr>
<tr>
<td>**Responsibility for site</td>
<td>► The government should ensure that the responsibility for provision of the</td>
</tr>
<tr>
<td>delivery**</td>
<td>land is allocated to the authority that is best placed to acquire the land.</td>
</tr>
<tr>
<td></td>
<td>► For projects where the land and the project will be transferred to the IA at</td>
</tr>
<tr>
<td></td>
<td>expiry of the term (e.g., BOT, Build Own Operate Transfer (BOOT)), the RGC</td>
</tr>
<tr>
<td></td>
<td>could potentially acquire the land and lease / license it to the private party.</td>
</tr>
<tr>
<td></td>
<td>► For other projects, access to land could be decided by the IA on a case-by-</td>
</tr>
<tr>
<td></td>
<td>case basis, based on the overall ease of acquisition by the government vs. the</td>
</tr>
<tr>
<td></td>
<td>private sector.</td>
</tr>
<tr>
<td></td>
<td>► The cost for site acquisition could be allocated based on the specifics of</td>
</tr>
<tr>
<td></td>
<td>the project.</td>
</tr>
<tr>
<td></td>
<td>► Projects with low revenues / no revenue model (e.g., social infrastructure)</td>
</tr>
<tr>
<td></td>
<td>could have land provided free of charge to the private party. Land that will</td>
</tr>
<tr>
<td></td>
<td>be returned to the IA at the completion of the contract could also be</td>
</tr>
<tr>
<td></td>
<td>considered for having no entry cost to the private party.</td>
</tr>
<tr>
<td></td>
<td>► For other projects, particularly where there is the expectation of material</td>
</tr>
<tr>
<td></td>
<td>revenue, there may be scope for the initial capital investment to be provided</td>
</tr>
<tr>
<td></td>
<td>by the private party.</td>
</tr>
<tr>
<td><strong>Implementation considerations</strong></td>
<td>► Registration: a clear and transparent registration process of leasehold and</td>
</tr>
<tr>
<td></td>
<td>other land use rights should be made available to ensure that the responsible</td>
</tr>
<tr>
<td></td>
<td>IA and the private party can register their leasehold and other land use rights</td>
</tr>
<tr>
<td></td>
<td>ahead of construction commencement.</td>
</tr>
<tr>
<td></td>
<td>► Template: template lease and licensing agreements could be developed in line</td>
</tr>
<tr>
<td></td>
<td>with international standards in order to ensure that drafting considerations</td>
</tr>
<tr>
<td></td>
<td>do not delay project financing.</td>
</tr>
</tbody>
</table>

Source: EY PPP workshop pre-reading materials.

4.4.3 **Recommendations**

*Allocation of responsibilities in land acquisition:* The scope of land use rights is limited by the land ownership title of the lessor. As such, it is important to clearly identify the type of land titles to be used in a PPP project and the allocation of responsibilities between the IA and private partner in
acquiring land rights for the PPP project. The current intention is that the actual implementation related to land acquisition shall be the subject of the project structuring (during the FS and tendering stages) and the negotiation between the RGC and the selected private partner. The PPP Contract shall be the primary contractual document to reflect the responsibilities related to land acquisition on specific projects. It is expected that, for most transport projects like roads and/or airports etc., risks related to land will be retained by the public sector. International experience indicates that challenges in land acquisition / settlement and clearances are often the key factor affecting transport project, resulting in delays and at times cancellation of projects. Hence for transport projects, MPWT should ensure that realistic assumptions are made with respect to land availability for transport projects and include up-to-date considerations in the project planning and feasibility studies.

Registration of land rights: Project owners commonly struggle with registration of land rights or security when the project land site is registered under a soft title, and filing practices varied in different regions. This usually results from the different implementation requirements in different land offices in practice. The contracting authority should try to reduce the practical differences among land offices in different regions and thus facilitate a speedy process for registration of land rights and the perfection of security rights. The cost of any such process could be allocated in accordance with the provisions of the PPP contract.

4.5 Project preparation and procurement

4.5.1 Guidance per the PPP Law

The IA, having the competency in the relevant sector, is expected to undertake the feasibility study ("FS") of the PPP project. The purpose of the FS is to provide information on the project which the RGC can then use to make the following decisions:

► proceed with the procurement and implementation of the Project as a PPP;
► the choice of the optimal PPP model; and
► the decision to provide government support measures.

The IA and the GDPPP within the MEF are required to work together in accordance with the procedures laid down in the Procurement Manual to select a private partner for the project.

At the procurement (and contract preparation) stage of the project, the GDPPP is tasked with several activities, including:

► reviewing the draft pre-qualification documents;
► liaising with the government departments in charge of approving the government support measures;
► providing technical support to the IA and supporting the Transaction Adviser in preparing the bidding documents;
► submitting the final bid evaluation report for approval by MEF.

66 Article 10(3) of PPP Law
67 Paragraph 3.2, Chapter IV of SOP I
68 Paragraph 3.5 of Chapter VII of SOP I
69 Paragraph 5.1 of Chapter VII of SOP I
70 Paragraph 6.14 of Chapter VII of SOP I
negotiating the PPP contract with the selected private partner (along with the representatives from the IA, MEF and relevant departments of MEF),\textsuperscript{71} and

finalising and arranging for execution of the PPP contract.\textsuperscript{72}

With regard to the choice of optimal model, the LOC lists a few implementation models such as BOT, BOO and MOT. The PPP Law also lists common models for implementing PPP projects.\textsuperscript{73}

Upon being satisfied with the result of the FS, the IA would thereafter request the MEF to review the fiscal commitments and level of State financial support and approve the project.\textsuperscript{74} On receipt of this approval, the IA will initiate the process of selection of private partner for the project.\textsuperscript{75}

The selection of private partner for solicited and unsolicited projects can be implemented through competitive bidding or through direct negotiation procedures.\textsuperscript{76} The choice of bidding process is left at the discretion of IA / PPPU which may decide on what is best suited for a particular project. The first ranking bidder will be invited to negotiate the PPP contract.\textsuperscript{77}

The process of procurement for solicited bids and unsolicited bids is detailed in the Procurement Manual. As per the Procurement Manual, the entire bidding process shall be the responsibility of the concerned IA (through its duly appointed PPP Unit ("PPPU") having ‘suitably qualified’ personnel).\textsuperscript{78} The PPPU is the PPP project implementation unit of the IA, separate from the GDPPP of the MEF.

The tasks of the IA are to:

- prepare and advertise prequalification documents;
- prequalify prospective bidders;
- prepare and issue bidding documents;
- evaluate bids and select the private partner;
- conclude all financial and contractual arrangements; and
- oversee the construction of the facilities and monitor the operation and maintenance of the facilities until the end of PPP period.

The Procurement Manual states that firms and individuals shall be eligible for selection as private partners subject to conditions listed below:\textsuperscript{79}

- A firm or an individual who is blacklisted or barred from bidding or participation in any procurement activity by the Government, or any of its agencies, offices, corporations, local government units, including the Technical Secretariat of the concerned IA, as well as the foreign government/foreign or international financing institution funding the project, shall be ineligible to be awarded a contract.

- Firms shall be ineligible if, by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Government prohibits

\textsuperscript{71} Paragraph 7.2 of Chapter VII of SOP I
\textsuperscript{72} Paragraph 7.6, Chapter VII of SOP I
\textsuperscript{73} Article 24 of PPP Law, Annex 2 and Section IX, Volume 8-3 of SOP III
\textsuperscript{74} Article 10(4) of PPP Law
\textsuperscript{75} Article 10(5) of PPP Law
\textsuperscript{76} Article 17 of PPP Law
\textsuperscript{77} Article 18(1) of PPP Law
\textsuperscript{78} Section 2 of the Procurement Manual included in Volume 8-3 of SOP III. The Procurement Manual states that the IA may establish PPPU on a project-to-project basis. However, there is no further guidance on which projects compulsorily require IA to set up a PPP unit. In terms of implementing procurement process, the PPPU will be responsible for initiating bidding process along with the support of the transaction advisor.
\textsuperscript{79} Section 5 of the Procurement Manual included in Volume 8-3 of SOP III
any payments to any country, person, or entity.

► Current employees of the concerned IA, including their close relatives, shall not be proposed by any firm as a member of the Private Partner’s project team.

► Government officials and civil servants may only be hired, either as individuals or as members of the bidder’s team, if:
  o For individuals returning from a sabbatical or holiday, they are not hired by their previous employer; and
  o Their employment would not create a conflict of interest.

Procurement process for solicited projects

The guidelines in the Procurement Manual mention that the common bidding procedure should be single-stage: two envelopes with pre-qualification. However, for comparatively smaller projects the single-stage: one envelope procedure with pre-qualification may be adopted. (The Procurement Manual does not specify what constitutes ‘smaller projects’).

The prequalification bids are to be evaluated by a Bid Evaluation Committee, comprising two individuals from the MEF and three from the IA. The names of pre-qualified bidders will be published on the websites of the IA and the MEF. Only prequalified bidders will be eligible to participate in the process for selection of the private partner.

The steps involved in the procurement process for solicited projects are as follows:

► Pre-qualified bidders will be allowed to submit their bids within a period of 120 days from the date the bid documents are issued to the pre-qualified bidders, unless otherwise provided in the bid documents.

► The IA will organise a pre-bid conference and site visit.

► The BEC will evaluate the bids based on the criteria in the bid document, with the assistance of the Transaction Adviser.

► The technical and financial components of the proposal will be weighted in the manner provided in the Procurement Manual. The final results of the evaluation process will be determined by the overall weighting of the technical and financial components for each bid as specified in the bidding document.

► The BEC will prepare and submit a final bid evaluation report (which includes the technical and financial bid evaluations made by the BEC) to the Procurement Review Committee set up by the IA which will review the report and, upon its satisfaction that all procedures have been followed, invite the successful bidder to negotiate the PPP contract.

► The SPC will be incorporated by the successful bidder.
The PPPU will issue a notice to proceed once the IA selects the Independent Consultant and the Owner’s Engineer.\(^2\)

**Procurement process for unsolicited projects**

The alternative procurement methods for unsolicited proposals are (i) Direct Negotiations with the Original Proponent; (ii) Open Competitive Procurement Procedure; and (iii) Open Competitive Procurement Procedure-Swiss Challenge. Please refer to section 5.2 on unsolicited proposals.

**4.5.2 International benchmarks and considerations**

Procurement processes in some countries that have enacted procurement policies for solicited and unsolicited PPP projects are set out in the following table.

<table>
<thead>
<tr>
<th>Table 12. Procurement process in PPP projects: International benchmark countries comparable practices</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Country</strong></td>
</tr>
<tr>
<td>Indonesia</td>
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<tr>
<td></td>
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<tr>
<td>Philippines</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Vietnam</td>
</tr>
</tbody>
</table>

\(^2\) Section 78 of the Procurement Manual included in Volume 8-3 of SOP III, Section 77 of the Procurement Manual included in Volume 8-3 of SOP III
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>implementation, (collectively, “Bidding Processes”).[^93]</td>
</tr>
<tr>
<td></td>
<td>► The bidders for provision of public services shall be selected according to the above Bidding Processes.[^94] The steps for bid selection are also provided.[^95] Two-phase method with two dossiers: phase one: submission of technical and financial proposals. Technical proposals are assessed and successful bidders are invited to phase two where financial proposals are assessed.[^96]</td>
</tr>
<tr>
<td></td>
<td>► International bidding is open to all “investment projects under PPP arrangements and investment projects using land, except for cases of restricted investment stipulated by investment law.”[^97] The law lists several eligibility criteria of a bidder such as: not in / will not likely enter in, the process of dissolution; registration with the national bidding network system and so on.[^98]</td>
</tr>
<tr>
<td></td>
<td>► The BL2013 has provisions to ensure competitiveness of bidding process. It states that a bidder is required to be legally and financially independent from the investment owner, the bid solicitor (a professional agency or organisation with sufficient capability to perform bidding activities) and other bidders.[^99]</td>
</tr>
<tr>
<td></td>
<td>► All information pertaining to the procurement process such as the plan on selection of bidders, notices of invitation for expression of interest, pre-qualification, quotation and the results of selection of successful bidder etc. are required to be published on the national bidding network system and Vietnam public procurement review newspaper.[^100]</td>
</tr>
<tr>
<td></td>
<td>► The bidders are required to provide bid guarantee of a certain amount for the Bidding Process.[^101]</td>
</tr>
<tr>
<td></td>
<td>► The law sets out specific time limits for completion of bid related activities. For example, it states that the duration for preparing the bidding dossiers shall be at least 20 days for domestic bidding and 40 days for international bidding, from the first day when bid invitation dossiers are issued until day of bid closure time. Bidders are required to submit the bidding dossiers before time of bid closure.[^102]</td>
</tr>
<tr>
<td></td>
<td>► Domestic preferential treatment in international bidding is applicable to foreign bidders where: (i) in the case of supply of goods, costs for domestic production of such goods amount to 25% or more of the value of the bidding package; or (ii) in the case of provision of consulting services, non-consulting services and civil works for capital investment projects, domestic bidders (who are in consortium with the foreign bidders) take over 25 percent of the value of the bidding package.[^103] Bidders in domestic bidding to supply advisory/non-advisory services, instalment or construction are entitled to preferential treatment if they employ female and/or differently abled staff constituting 25% or more of its total employees.[^104] These aspects contribute to assess the ranking of bids.[^105]</td>
</tr>
<tr>
<td></td>
<td>► BL2013 sets out the methods to assess the bid proposal dossier and selection of winning bidder.</td>
</tr>
<tr>
<td></td>
<td>► High-level guidance is generally provided at the national level and regulations are typically specified at the individual state level.</td>
</tr>
</tbody>
</table>

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[^93]: Articles 20-25 of BL2013
[^94]: Article 53 of BL2013
[^95]: Article 54 of BL2013
[^96]: Article 31 of BL2013
[^97]: Article 15(2) of BL2013
[^98]: Article 5(1)(c), (d), (e) and (h).
[^99]: Article 6 of BL2013; Article 6(2)(a), Article 6(2)(b) and Article 6(2)(c) of BL2013
[^100]: Article 8 of BL2013
[^101]: Article 11 of BL2013
[^102]: Article 12(e) of BL2013
[^103]: Article 14 of BL2013; https://www.financierworldwide.com/vietnam-new-tendering-rules#.YV5Om9pByUk
[^104]: Article 14(3) of BL2013
[^105]: Article 14(4) of BL2013
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>▶ For example, in New South Wales (NSW), the procurement of services and/or associated infrastructure through Public Private Partnerships (PPPs) by any NSW Government agency, including State Owned Corporations (SOCs), needs to comply with:</td>
</tr>
<tr>
<td></td>
<td>▶ The National Public Private Partnership Policy and Guidelines (the National PPP Guidelines); and</td>
</tr>
<tr>
<td></td>
<td>▶ NSW-specific requirements in the NSW Public Private Partnership Guidelines (the NSW PPP Guidelines), as updated from time to time.</td>
</tr>
<tr>
<td></td>
<td>▶ Standardised guidance for implementation, including contract templates, are also provided.</td>
</tr>
</tbody>
</table>

Source: World Bank materials, Australian PPP guidance materials

The above examples all emphasise competitive processes as the natural default model, with unsolicited / sole-sourced proposals being adopted as exceptions. Generally, a non-competitive approach is only permitted where the situation meets certain restricted criteria in which competition is not feasible or would be likely to produce an unfavourable outcome.

In Cambodia, the Law and SOP adopts a similar approach by promoting the competitive model as preferred but also providing for non-competitive approaches when deemed not feasible or desirable according to identified criteria.

4.5.3 Recommendations

The framework for procurement for PPP projects is fairly robust e.g., there are clear timelines for the two stages of the bidding process, and demarcation of responsibilities of the authorities that would review, evaluate, and approve the bids. However, MEF should closely monitor the effectiveness of the procurement framework and incorporate any lessons learned during the implementation of PPP projects.

Currently, the Procurement Manual states that members of the PPPU (i.e. the PPP unit within the IA) should be ‘suitably qualified’. However, there is no guidance on the qualifications required to become a member of the PPPU. The RGC could consider providing more clarity on the qualification requirements of such members to include, for example

▶ Relevant sector experience
▶ Experience in the commercial principles of PPPs and key issues typically considered
▶ Experience in risk management for projects in general and specific procurement models including PPPs in particular
▶ Experience in key issues arising in tendering competitively for PPPs and/or in sole-sourced negotiations for PPPs, as appropriate

Such an approach could provide additional confidence to project proponents and help enhance implementation of the procurement process.

4.6 SPC matters

4.6.1 Guidance per the PPP Law and existing legislation

Registration of SPC

As noted in the legal overview in Section 4.2.1 of this Report, the PPP Law provides that an SPC may
be established to act as the private counterparty to the government in a PPP project.\textsuperscript{106} The SPC must be incorporated within 60 working days after signing of the PPP contract. The PPP Law does not provide for a special fast-track process for incorporating PPP project SPCs.

According to a recent rule implementing the process of online registration of companies, the registration of a company with the Ministry of Commerce will take approximately 8 days to complete. Therefore, under usual circumstances, the 60-day timeline should be sufficient.\textsuperscript{107}

The PPP Law currently does not provide any guidance on: (i) the structure of the SPC and relevant restrictions applicable to it; (ii) the percentage of shares transfer which may trigger regulatory approval requirement; (iii) maximum debt to equity ratio; (iv) the ease of dividend declaration and (v) profit repatriation.

\textbf{Debt to equity ratio}

The PPP Law does not prescribe any particular debt-to-equity requirements. The sub-decree implementing the Law on Investment, which has been repealed by SD 111/2005, had set out a certain debt-to-equity ratio that foreign investors had to comply with. However, that requirement has been removed under SD 111/2005.

\textbf{Change of shareholder}

The PPP Law is silent on the issue of change of shareholders in a PPP SPC post establishment. However, the Investment Law and the associated sub-decrees discuss the change of control and related aspects applicable to the investors of the SPC.

Any scheme of merger or transfer of ownership of a foreign investment project registered with the CDC needs to be approved by the CDC, 10 working days prior to the effectiveness of such arrangement.\textsuperscript{108}

For avoidance of doubt, the Cambodian laws are silent on the issue of minimum equity lock up period post establishment. For change of control in the investor, the investor is required to obtain approval from CDC.\textsuperscript{109} “Control” means holding at least 20\% of shares in the capital of the entity.\textsuperscript{110} There may arise some issues in this approval requirement for change of shareholder. For example, change of control usually means a change of shareholder with controlling power, i.e., owning more than 50\% of shares or holding material decision power over the entity. The threshold in SD 111/2005 is set at 20\%. Furthermore, it is not clear from the current laws whether, for the purpose of seeking CDC approval for change of control, the term ‘investor’ also includes the indirect and ultimate beneficial shareholder of the SPC. As a result, potential investors may face uncertainty at the time of designing their investment structure.

\subsection*{4.6.2 International benchmarks and considerations}

Current laws in some developing and mature PPP markets are set out in the following table. These countries have enacted specific laws to provide clear-cut guidance on the establishment of the type of private partner for delivering PPP projects.

\begin{center}
\textbf{Table 13. Form of Entity for PPP Project: Benchmark countries comparable practices}
\end{center}

\begin{itemize}
\item \textsuperscript{106} Article 21 of PPP Law
\item \textsuperscript{107} Article 21 of PPP Law
\item \textsuperscript{108} Section 9.1 of SD 111/2005
\item \textsuperscript{109} Section 10.3 of SD 111/2005
\item \textsuperscript{110} Section 10.4 of SD 111/2005
\end{itemize}
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| Indonesia| ► Ministry of Finance Regulation issued a regulation No. 169/PMK.010/2015 (PMK-169) dated 9 September 2015 putting a hard ceiling on the debt-equity ratio across the board at 4:111 i.e., debt cannot exceed 80%.  
► The Indonesian regulations allow the government to cooperate with a business entity for provision of infrastructure. The business entity may be a state-owned entity, regional owned enterprise, a private entity in the form of limited liability company, a foreign entity, or cooperative.  
► The business entity that conducts the PPP project is a limited liability company established by the winning bidder or directly appointed by the government. The business entity will enter into a cooperation agreement with the government contracting authority to implement the project.  
► News announcements are required when the share transfer amount to change of control. Change of specific corporate information will also require a notification to or approval from the Ministry of Law and Human Rights via the company registration system maintained by it.  
► Furthermore, acquisition, consolidation or merger between non-affiliated companies must be notified to the Business Competition Supervisory Board if it meets certain criteria, taking into account of transaction value, sales turnover, parties’ past business activities, etc. Approval from Financial Service Authority may also be required for takeovers in public companies.  
► Other regulatory approval requirement may vary, depending on the business sector and licenses held by the target company. |
| Philippines| ► There are no hard limits on the debt-equity ratio requirement. Section 4.3 of PPPGB Policy Circular No. 01A-2016 provides that the financial appraisal of the PPP project will be undertaken by the Department of Finance to ascertain the financial viability of the PPP project. The said appraisal will include a review of the debt-equity structure proposed by the project proponent.  
► The Philippine law and regulations allow any individual, partnership, corporation or firm, whether local or foreign, including consortium of local, foreign or local and foreign firms to participate in PPP projects.  
► The Philippine Competition Commission (PCC) may review acquisition transaction that have potential anti-competition effect. The company is required to notify PCC if the size of transaction and the gross revenues reach a certain threshold, and PCC will review and make a decision.  
► Other regulatory approval requirement may vary, depending on the business sector and licenses held by the target company. |
| Vietnam| ► The PPP Law of Vietnam sets out investment value threshold and capital ratio requirement for PPP project. To qualify, a project’s value must be at least VND 200 billion, except for health care and education projects, or other projects within localities with difficult socioeconomic conditions, where lower threshold may apply. Besides, the equity capital contribution of the private investors must be at least 15% of the total investment capital.112  
► According to Article 44 of the PPP Law of Vietnam, the investors of the PPP project shall establish a PPP project enterprise under the model of limited company or non-public joint stock company, with a single purpose to sign and implement the PPP project contract.  
► Vietnam issued new decree in 2020 and along with the Competition Law 2018, they set up the commission to review merger and acquisition transactions from their anti- |

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Vietnam's New Law on Public-Private Partnerships, White & Case, 2020,  
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>competitive effect, taking into account of size of transaction, market share, asset and revenue criteria, etc. There is lock-in period (3 years) requirement for founding foreign shareholders to transfer their shares in a joint-stock company.</td>
</tr>
<tr>
<td>Australia</td>
<td>As per the National PPP Guidelines, PPP contracts generally specify that the private party must obtain prior government consent to either any change in control or change in the legal or beneficial ownership of the private party or any member of the private party's group and to any change in the private party's group structure (in each case, from the situation as at contract signing). It should also be noted that the state-level government may apply a different policy for local PPP projects while taking into account the national policies.</td>
</tr>
<tr>
<td>Australia</td>
<td>Australian guidelines does not set out any minimum equity requirements.</td>
</tr>
</tbody>
</table>

Sources: Benchmark Infrastructure Development (Indonesia, Philippines, and Australia), World Bank materials

4.6.3 Recommendations

► Change of control: At present, the change of control regime envisaged under the investment laws may need some more clarity on the language.

  o The RGC may consider clarifying whether such threshold applies only to change of direct shareholder of the SPC, or it also applies indirectly to changes in its ultimate beneficial shareholder. Furthermore, the RGC may also consider clarifying whether the condition triggering the approval requirement is only linked with the criteria of 20% shareholding, or it could be triggered by any event resulting in a change of control, even if the shareholding involved in that case is less than 20%.

  o These clarifications could be made via a sub-decree. This could potentially help investors have a clearer understanding of the relevant regulatory compliance requirements while designing their investment structure.

► Timeline to incorporate the SPC: The RGC may consider providing some flexibility with respect to the timeline for incorporating the SPC, taking into account the potential time that overseas shareholders might take to prepare and execute the documents according to the requirements of the Cambodian authorities.

4.7 Tax incentives

4.7.1 Guidance per PPP Law and existing legislation

No additional incentives are provided for investors under the PPP Law. As a result, tax incentives applicable to PPP projects will be governed by the Law on Investment and Law on Taxation, with no preferential treatment compared with other types of investment.113

4.7.2 International benchmarks and considerations

The current approach in some developing and mature PPP markets with regard to the tax incentive structures in place for PPPs are set out in the following table.

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113 The Law on Investment and Law on Taxation do not distinguish tax treatment between domestic and foreign investors. The different treatment comes from whether they are deemed “tax resident” or “non-resident” under the Cambodia tax law, not for their nationality. The status of tax resident will be evaluated based on a number of factors, i.e., how long they stay in Cambodia, form of entity, source of income, etc.
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| Indonesia | There is no special tax regime for PPP projects, but they are entitled to apply for any category of the tax incentives listed below:  
  ► **Income tax holiday**\(^{114}\) - new investment or expansion projects in pioneer industries that are considered strategic for Indonesia’s economy.  
  ► Corporate Income Tax (“CIT”) holiday for a minimum of five years up to a maximum of 20 years for projects with minimum investment of IDR 500 billion (USD 35 million), which commences from the year of commercial operations and 50% reduction in CIT for subsequent two years.  
  ► 50% reduction in CIT for five years for projects with minimum investment of IDR 100 billion (USD 6.9 million) but less than 500 billion (USD 35 million) and 25% reduction in CIT for subsequent two years.  
  ► **Tax allowance**\(^{115}\) – companies with specified minimum level of capital investment in certain industry sectors or in certain geographic locations.  
  ► An investment allowance of reduction in taxable income equal to 30% of tangible fixed assets including land.  
  ► Accelerated depreciation and/or amortization.  
  ► Tax loss carry forward up to 10 years.  
  ► A reduced WHT rate to 10% on dividends payment to non-residents.  
  ► **Super tax deduction**\(^{116}\) – for projects that are not entitled for both tax holiday and tax allowance  
  ► Investment allowance equal to 60% of total investment amount of tangible assets including land which is allocated equally over 6 years starting from the tax year that commercial production commences.  
  ► Deduction of human resource development costs from taxable income.  
  ► Deduction of up to 300% from costs incurred to carry out certain R&D activities. The deduction amount is divided as follows: 100% deduction for actual costs incurred in a year and up to 200% deduction if the R&D (i) yields IP rights that may be registered in Indonesia or overseas or (ii) becomes commercially viable or (iii) is done in partnership with Government or educational institution and the IP from such R&D becomes registrable in Indonesia or abroad or becomes commercially viable.  
  ► Deduction of costs related to research and development related activities from taxable income.  

In addition, import duties exemptions on machines, goods and materials for the establishment or development of industry in the frame of investment are also available for a period of two years from the decision date. It is also understood that import duties exemption period may be extended subject to the period required for the establishment of the industry.

Indonesia’s Minister of Finance (MoF) issued Regulation Number 150/PMK.010/2018 (PMK-150) back in 2018 granting income tax holiday incentives to projects that meet the prescribed investment criteria and business activity. On 18 September 2020, the MoF issued Regulation Number 130/PMK.010/2020 (PMK-130) as the new implementing regulation to replace the Regulation Number 150 for the purpose of simplifying the tax holiday application process.

It is noteworthy that import duty exemptions were available since 2009 under MoF Regulation No. 176/PMK.011/2009.

\(^{114}\) Deloitte 2020-2021 Investment Window into Indonesia p. 122  
\(^{115}\) Deloitte 2020-2021 Investment Window into Indonesia p. 122  
\(^{116}\) Deloitte 2020-2021 Investment Window into Indonesia p. 124
### Key characteristics

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
</table>
| Philippines | There is no special tax regime for PPPs in the Philippines, but investors are entitled to apply for the following tax incentives. Please note that the list below is not exhaustive:  
► Income tax holiday from 4 to 6 years which could be extended to a maximum of 8 years.  
► Additional deduction of 50% of increment in the labour expenses or 100% if the activity is located in less developed areas from taxable income for the first five years from registration.  
► Tax and duty exemptions on imported capital equipment and spare parts.  
► 100% tax credit (i.e., tax and import duties that would have been waived on the imported capital equipment) when purchasing capital equipment domestically.  
► Exemption from Contractor's Tax.  
► Tax and import duty exemptions on Breeding Stocks and Genetic Materials.  
► Tax credit for taxes and duties on raw materials.  
► Exemption from wharfage dues and any export tax, duty, impost and fees. |
| Vietnam | There are no special incentives highlighted under the PPP Law. However, an investor and the SPC are entitled to incentives on taxes, land use fees and other incentives as prescribed by other laws and regulations on taxation, land, investment and other relevant regulations.  
► Tax incentives include income tax holidays, foreign tax credit, inbound investment incentives for sectors like high technology, education, healthcare, etc. As per Decree 218/2013/ND-CP, a newly invested PPP SPV is entitled to 4 years of corporate income tax exemption as well as reduction of 50% of tax payable for the next 9 years, starting from the first year the SPV has revenue from the project. The SPV is also eligible for a preferential tax rate of 10% for the first 15 years starting from the first year the SPV has revenue from the project. |
| Australia | There is no special tax regime or special tax incentives for PPP projects in Australia. However, Division 250 of the Income Tax Assessment Act 1997 includes tax provisions for public investment projects in terms of denying or reducing the taxpayer's capital allowance deductions in respect of relevant assets. |

Sources: Government websites of relevant benchmark countries, EY research

### 4.7.3 Recommendations

Based on our analysis, it seems that it is common for developing and mature markets to not have special tax incentives for PPP projects, but PPP projects do typically benefit from a range of incentives applied to investments generally. Based on available information, it is understood that the tax incentive regime for private investment projects is set out in general laws relating to investment and tax. The RGC intends that investment sponsors refer to these laws to prepare the financial analysis of their projects.

### 4.8 Investment protection

#### 4.8.1 Guidance per the PPP Law and existing legislation

The investment protection regime in Cambodia is mainly regulated under the Law on Investment and...
the Law on Expropriation 2010 ("Law on Expropriation").

The Law on Investment protects the property of investors by restricting the RGC from undertaking any nationalizing policy that might adversely affect such property.\textsuperscript{118} Similarly, while the Law on Expropriation restricts the RGC from arbitrarily acquiring private property, it does provide the legal framework for the expropriation of “immovable property” (or a “real right to immovable property”) by the government for the purpose of implementing public physical infrastructure projects. Fair and just compensation is required to be given to private parties in exchange for the expropriation of their assets.

Clarification may be desired for the scope of assets covered for compensation under the Law on Expropriation. As mentioned above, this law intends to deal with expropriation of “immovable property” and a “real right to immovable property”. Given the foreign ownership restriction on land rights in Cambodia, the foreign investors or the entity they own may not own the land for their project. Instead, they will normally enter into a land lease with Cambodian landlords to acquire land use rights. In other words, the foreign investors may own the plants and facilities installed on the land, but not the land itself. In the case of expropriation of the land where the project assets are located, it may not be clear if investors will be entitled to compensation when they may not be themselves the owners of the immovable property.

Immovable property may include buildings and structures constructed on the land and crops on the land, which are usually not severable from the land; however, if the rights over the land and these attachments are owned by different right holders, they may be treated separately.\textsuperscript{119} A “real right to immovable property” as defined in the Cambodia Civil Code, will include perpetual lease and security rights such as pledge, hypothec, transfer of title for security purpose. In this sense, the project investors will have a real right to immovable property if they have secured proper leasehold rights over the land.

Nevertheless, the Law on Expropriation leaves some uncertainty. It expressly provides that an owner will get compensation of land, and tenants over the land will be entitled to (i) compensation for the impact on their business operation and to additional assistance at fair and just compensation to the capital value actually invested for the business operation activities as of the date of the issuance of the declaration on the expropriation project; and (ii) allowance for disturbances as a result of the expropriation including the dismantling of structures, materials and transportation to the new relocation site. With respect to resolution of disputes arising out of expropriation of investment, the laws are silent on whether the authorities are required to mandatorily submit the matter to arbitration. The authorities may however contractually agree to bind themselves to arbitration in an agreement with the investor, e.g., the concession agreement, the PPP contract. Cambodia is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. Thus, foreign arbitral awards should be enforceable in Cambodia.

4.8.2 **International benchmark and considerations**

The current laws pertaining to investment protection in some developing and mature PPP markets are set out in the following table.

**Table 15. Investment protection: Benchmark countries comparable practices**

\textsuperscript{118} Article 16 of the Law on Investment

\textsuperscript{119} Articles 122 and 123 of Cambodia Civil Code
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
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</thead>
</table>
| Indonesia| ► The investment laws of Indonesia undertake equal treatment to both domestic and foreign investors, unless the investor is from a country which has special rights based on an agreement with Indonesia.  
► The government is not allowed to nationalize ownership rights of investors unless such an act is in compliance with the law. Compensation at market value will be provided in case of lawful nationalization.  
► Indonesia has also signed a number of investment treaties to grant protection to certain foreign investors, including protection against expropriation and discrimination, and “fair and equitable treatment.” |
| Philippines| The Philippine investment law grants free repatriation of investment and remittance of earnings for foreign investors and protect against expropriation, but does not contain several standards of protection that are often encountered in investment treaties, such as fair and equitable treatment and minimum standards of protection. It is also silent on investment dispute resolution. |
| Vietnam | ► The Law on Investment affirms that lawful investment shall not be expropriated by administrative measures, except in the case of national defence, security or other eligible national interests. In case of such expropriation, investors are entitled to compensation at the market price for their investment and properties at the time of the expropriation decision. The compensation to foreign investors will also be freely convertible into foreign currencies to be remitted out of Vietnam by the investors.  
► Vietnam has also entered into various bilateral trade agreements and bilateral investment promotion and protection agreements with other countries. Protections to investors from a contracting country are generally provided in these agreements. They include: national treatment; fair and equitable treatment and full protection and security; no expropriation except for public or national interests in accordance with its laws and regulations and in a non-discriminatory manner with prompt, adequate and effective indemnity; compensation in case of war, armed conflict, national emergency, insurrection, etc. ¹²⁰ |
| Australia | ► Australia has entered into various free trade agreements and bilateral investment treaties, which include provisions to ensure non-discrimination as well as fair and equitable treatment for investments, and restrictions and conditions on expropriation of property for foreign investors in Australia as well as Australian investors overseas. ¹²¹  
► Australian state governments generally implement a contractual right to terminate projects at their convenience (i.e., without establishing that the proponent is at fault) with full compensation to the investor. |


4.8.3 Recommendations

► Clarification on coverage of compensation: Clarification might be desirable for the scope of compensation covered for "impact on (tenant's) business operation" provided under the Law on Expropriation. Overall the Law on Investment has set out the fair principles about investment protection. However, it does not explicitly provide that it prevails over the previously enacted laws on the same subject. In case of conflict with the Law on Expropriation and other laws on the same subject, it will be good to clarify that the Law on Investment will prevail the Law on Expropriation so that investors could have a clear idea. For investors, they may want to see clear reference in the law or in the PPP agreement with the government that compensation will cover the facilities and equipment attached to the project land. This is particularly the case when investors are operating a PPP project in the capacity of lessee of the land but not the owner. If not addressed in legislation, then it may need to be addressed in project documents as part of termination provisions see section 4.5.

► Review for protection granted under international treaties: Cambodia has entered into a number of investment treaties with other countries, which may, in addition to the Law on Investment, provide other investment incentives and protections to investors from those specific countries. It might be desirable to conduct a country-by-country review and establish a database of the international treaties to which Cambodia is a party, and clarify the protections granted to investors from the countries under these treaties, compared to what is provided in domestic legislation. Such review may help RGC have a better picture about what investment schemes that it has agreed with specific countries, and also may encourage investors from those countries to invest in Cambodia if they find out they have extra protection granted to them in addition to that in the Law on Investment.
Section 5

Commercial and Financial Review
5. **Commercial and Financial Review**

This section examines the current provisions / practices on the following topics covered in the PPP Law and SOPs:

- Project identification and prioritisation
- Unsolicited proposals
- Government state support
- Revenue / benefit sharing
- Termination payments
- Management of fiscal risks
- Approval, process and conditions for external debt financing
- Security over PPP / other project assets
- Foreign exchange regulations
- Contract management

The section also compares other countries’ approaches to these topics and summarises international best practices and/or the results of the workshop discussions to make suitable recommendations for Cambodia.

5.1 **Project identification and prioritisation**

5.1.1 **Guidance per the PPP Law**

Detailed guidance on the process of screening and selecting projects for their eligibility for PPP procurement helps to ensure that the most appropriate projects are selected in a transparent, predictable and fair manner. The SOPs provide clear guidance on this process, setting out eligible sectors and the key steps involved.

The key steps are defined in SOP I, as set out in the following diagram.\(^{122}\)

**Figure 3. Steps in project identification and prioritisation**

Further information on the process map for PPP projects in SOP I is summarised in Appendix 3: Lifecycle of PPP projects.

\(^{122}\) Chapter III of SOP I
Preliminary step

This step involves the identification and prioritisation of all public investments for inclusion in the three-year Public Investment Program (PIP), which occurs as part of a broader planning process beyond PPPs. The PIP is developed and prepared by the Ministry of Planning (MOP) in collaboration with the line ministries and agencies of the Government, and approved in tandem with the Government budget cycle.

Step 1. Project identification - two-stage multi-criteria analysis (MCA)

In Step 1, a two-stage MCA is undertaken by a team from the IA, comprising at least three members of the PPP Unit / Cell / Project Management Team and chaired by its Head. The GDPPP within the MEF will provide technical support and guidance to the IA in the process. Further details of Stage 1 and 2 from the SOP are set out below.123

Stage 1 (identification of potential PPP projects)

Projects are subject to pass / fail criteria to assess whether the project meets certain criteria that are regarded as being essential for PPP procurement. If it meets all of the criteria, then it passes Stage 1 and progresses to Stage 2. The Stage 1 pass / fail criteria are set out in the following table.

Table 16. Criteria involved in Stage 1 of the project identification and prioritisation process

<table>
<thead>
<tr>
<th>Pass / fail criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project is aligned to strategic priorities on infrastructure / eligible sectors</td>
</tr>
<tr>
<td>Project has a minimum level of capital / project cost and/or is not considered too complex for procurement124</td>
</tr>
<tr>
<td>Project has relevant stakeholder support based on preliminary public consultation</td>
</tr>
<tr>
<td>Support / commitment / willingness of IA entitled to undertake the project has been confirmed to MEF</td>
</tr>
<tr>
<td>Project has no significant land acquisition, resettlement, environmental or social safeguard concerns</td>
</tr>
<tr>
<td>Project has defined delivery objectives, output specifications, and payment mechanisms</td>
</tr>
<tr>
<td>Project has PPP potential based on past experience of similar projects (nationally or internationally)</td>
</tr>
<tr>
<td>Unsolicited PPP project does not require financial support from RGC</td>
</tr>
</tbody>
</table>

Upon passing of the Stage 1 assessment, the project will undergo a more detailed assessment under Stage 2.

Stage 2 (selection of potential PPP project)

Stage 2 involves a more detailed MCA to determine if the project should be selected as a potential PPP project. The Stage 2 assessment is carried out against six criteria:

(i) market acceptability;

(ii) predictable/stable revenue collection/payment mechanisms and financial attractiveness;

(iii) economic and social desirability;

(iv) appropriate risk sharing;

(v) manageable life cycle costs; and

(vi) compliance with legal and regulatory framework.

The project is scored against criterion and must meet a minimum overall score to be selected as a

---

123 Paragraph 3 and 4, chapter III of SOP I and Article 5 of Interim Guidelines for Project Identification and Selection for PPP Projects of SOP II
124 Minimum capital and contract term— USD 10m, minimum 5 years of operation. Can bundle smaller projects together to give appropriate scale
potential PPP project. Projects are awarded scores between 1 and 10 against each of the criteria, adopting the scoring guideline set out below.

**Table 17. Scoring guidelines for Stage 2**

<table>
<thead>
<tr>
<th>Score</th>
<th>Guidelines</th>
</tr>
</thead>
</table>
| 9 - 10 | Very Good. Full achievement of criteria requirements  
        | Demonstrated strengths, no risks, weaknesses or omissions |
| 7 - 8  | Good. Substantial achievement of criteria requirements  
        | Some risks, weaknesses or omissions, which can be corrected / overcome with minimum effort |
| 5 - 6  | Fair. Some achievement of criteria requirements  
        | Some risks, weaknesses or omissions, which are possible to correct / overcome and make the project acceptable |
| 3 - 4  | Low. Minimal achievement of criteria requirements  
        | Existence of substantial risks, weaknesses or omissions, which are difficult to correct / overcome to make the project acceptable  
        | Totally deficient and non-compliant |
| 1 - 2  | Unacceptable. No achievement of criterion / criteria category requirements  
        | Existence of numerous errors, risks, weaknesses, or omissions, that are difficult to correct / overcome and make acceptable  
        | Totally deficient and non-compliant |

Once the MCA is completed, projects with a minimum score of 70% (42 / 60 marks) will be selected as potential PPP projects. The MCA assessments are also submitted to the Head of the IA for approval before submission to MEF for further consideration under Step 2 (project prioritisation).

As part of project identification and selection, the IA should also carry out Value for Money (VfM) analysis by examining whether sufficient drivers of VfM are present to justify consideration of PPP model for implementation. At the screening stage, a qualitative VfM assessment is sufficient. The detailed quantitative VfM assessment will come in subsequently during the full feasibility study. The parameters for the qualitative VfM analysis are based on the drivers of value in PPP contracts\textsuperscript{125}, including:

► Scale  
► Bundling of services  
► Possibility of whole life costing  
► Risk allocation  
► Output standards  
► Scope to innovate

**Step 2 – Project prioritisation**

In Step 2, potential PPP projects are assessed against further criteria (with sub-criteria) in a more detailed MCA. Sub-criteria are weighted by their relative importance to give a weighted evaluation score, as set out in the following table.

\textsuperscript{125} A template for the qualitative VfM assessment checklist can be found in Paragraph 3.4, Volume 7 (Value-for-Money Analysis Guidelines) of SOP II.
Table 18. Criteria / sub-criteria involved in Stage 2 of the project identification and prioritisation process

<table>
<thead>
<tr>
<th>Sub-criteria</th>
<th>Sub-criteria weight</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(i) Market acceptability (25% overall weighting)</strong></td>
<td></td>
</tr>
<tr>
<td>▶ Market demand and growth potential</td>
<td></td>
</tr>
<tr>
<td>▶ Private interest for equity and debt</td>
<td>50%</td>
</tr>
<tr>
<td><strong>(ii) Predictable/stable revenue collection/payment mechanisms and financial attractiveness (25% overall weighting)</strong></td>
<td></td>
</tr>
<tr>
<td>▶ Predictable revenue stream / payment mechanism</td>
<td></td>
</tr>
<tr>
<td>▶ Financially viability</td>
<td>30%</td>
</tr>
<tr>
<td>▶ Affordable / achievable user fees with investor return</td>
<td>30%</td>
</tr>
<tr>
<td>▶ Project is expected to be large enough to provide economies of scale and attract debt funds</td>
<td>20%</td>
</tr>
<tr>
<td><strong>(iii) Economic / social desirability (15% overall weighting)</strong></td>
<td></td>
</tr>
<tr>
<td>▶ Significant economic benefits from project</td>
<td>100%</td>
</tr>
<tr>
<td><strong>(iv) Appropriate risk sharing (15% overall weighting)</strong></td>
<td></td>
</tr>
<tr>
<td>▶ Potential of appropriate structuring allocation</td>
<td>50%</td>
</tr>
<tr>
<td>▶ Inter-ministerial and inter-agency coordination</td>
<td>50%</td>
</tr>
<tr>
<td><strong>(v) Manageable life cycle costs (10% overall weighting)</strong></td>
<td></td>
</tr>
<tr>
<td>▶ Completion / substantial completion of land acquisition</td>
<td>20%</td>
</tr>
<tr>
<td>▶ Site offers manageable challenges for Engineering Procurement and Construction (EPC) contractor</td>
<td>20%</td>
</tr>
<tr>
<td>▶ Project proposes proven technology</td>
<td>20%</td>
</tr>
<tr>
<td>▶ Environment, health, safety, gender, and resettlement</td>
<td>20%</td>
</tr>
<tr>
<td>▶ O&amp;M costs are stable and predictable</td>
<td>20%</td>
</tr>
<tr>
<td><strong>(vi) Comply with legal and regulatory framework (10% overall weighting)</strong></td>
<td></td>
</tr>
<tr>
<td>▶ Project complies with legal and regulatory framework</td>
<td>50%</td>
</tr>
<tr>
<td>▶ Regulatory and institutional frameworks are in place</td>
<td>50%</td>
</tr>
</tbody>
</table>

If the project sector is assessed to be critical, the GDPPP/MEF may overlay a ‘sector importance’ weight on the above prioritisation to reflect the RGC’s overall strategy in relation to the development of different sectors.

Following the prioritisation exercise, the GDPPP will prepare a report on the results and submit the list of the Priority PPP Projects with their ranking to the Public Investment Committee (PIC) to determine which projects will be included in the PPP pipeline for implementation in the short and medium term. IAs may have a different priority than that determined by the MEF and accordingly are able to make additional representations to the MEF for consideration.

The final list of PPP projects with the priority for short- and medium-term implementation as determined by the PIC is then submitted to the Minister of MEF for approval. The GDPPP then informs the respective IAs of the approval of Priority PPP Projects for initiating the Project Preparation and Project Appraisal phase.

### 5.1.2 International benchmarks and considerations

Some current project screening and selection practices in developing and mature PPP markets are set out below. Most countries adopt a similar MCA approach, with varying emphasis on different criteria.
Table 19. International benchmarks for guidelines on project identification and prioritisation

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| Indonesia | Indonesia’s Committee for Acceleration of Priority Infrastructure Delivery (KPPIP) adopted the following process in 2014-2015:  
  ▶ Level 1—Screening of basic project requirements  
  ▶ Level 2—A multi-criteria model to identify priority infrastructure projects amongst thousands of proposed projects. The indicators for project scoring and ranking (with associated additive weights) include:  
    ▶ Project purpose (25%)  
    ▶ Feasibility of implementation (30%)  
    ▶ Socio-economic impact (30%)  
    ▶ Environmental impact (15%)  
  ▶ Level 3—The scoring and ranking outcomes are used as a basis of a “committee discussion” to shortlist priority projects |
| Philippines | Projects are prioritised using a two-stage MCA. The first stage involves an initial screening followed by the second stage which involves a full MCA if projects achieve a minimum score for the initial screen.  
  ▶ Initial screening criteria:  
    ▶ Strategic priority aligned with Government’s Project Development Plan (PDP)  
    ▶ Project scale justifies PPP transaction costs  
    ▶ Stakeholder support  
    ▶ Commitment from Government  
    ▶ Social safeguard concerns (e.g., gender, environment) either do not exist or can be mitigated / managed  
    ▶ Defined objective and output specifications  
  ▶ Second stage MCA screening criteria:  
    ▶ Economic desirability (20%)  
    ▶ Market acceptability (20%)  
    ▶ Manageable life cycle costs (15%)  
    ▶ Predictable and stable revenue (15%)  
    ▶ Appropriate risk sharing (20%)  
    ▶ Fit in legal and regulatory framework (10%)  
  Required to score at least 50% to be potentially identified as a PPP and proceed to pre-FS. PPP Centre to provide guidance to IAs to ensure quality control in implementing the MCA full screening. Screening process reviewed annually to make adjustments and ensure relevance. |
Projects may be prioritised based on three key criteria:

- **Strategic fit**—Assesses attainment of strategic policy goals, balance between impacts, and long-term impacts
- **Economic, social and environment value**—Assesses whether project benefits outweigh costs, using Cost-benefit Analysis (CBA) and qualitative analysis
- **Deliverability**—Tests if delivery maintains strategic and economic benefits, by examining whether the project is well developed and by assessing how the initiative manages key risks and procurement model analysis

The specific details of the implementation of the prioritisation framework differs between different states and territories.

The National PPP guidelines on Procurement Options Analysis inform the shortlisting and selection of suitability for PPP procurement as part of the business case. The criteria used to assess suitability include:

- **Scale**—Project value of over AUD 50 million (~USD 38.6 million) and services can be bundled to exceed the threshold
- **Scope and outputs**—Can be defined clearly
- **Whole-of-Life opportunities**—Services can be bundled together to create a long-term operation / maintenance opportunity
- **Risk**—A significant portion of the material risks can be defined, allocated and potentially transferred to a private party


### 5.1.3 Recommendations

The SOP provides a clear MCA template for project identification and prioritisation. The additional ‘sector importance’ weight is important for MEF to prioritise projects across different sectors, noting that IAs will be providing their own project lists. Possible design considerations on MCA criteria were discussed in the workshop on PPP and financing issues. Drawing on workshop discussions and international experiences, the following considerations could be explored for inclusion.
Stage 1 (identification of potential PPP projects)

The current criteria for stage 1 broadly cover those aspects necessary for undertaking a preliminary assessment for projects to proceed to stage 2. The criteria are relatively easy to assess at low cost, ensuring that excessive resources are not expended at an early stage of the process. Further guidance could potentially be provided in relation to project development and transaction costs and the project term:

▶ Minimum project size / and transaction costs: The SOPs state USD 10m as the minimum project cost for a project to qualify for PPP procurement. Further, the project scale should not be too small and/or complicated, which could make PPP procurement infeasible. From the consultations, it is understood that USD 10m was decided as the threshold to kick-start the PPP program and develop solicited projects. MEF and MPWT could consider if the threshold mentioned in the SOP is relevant for the transport sector considering the average cost of previous procurements. Such analysis could inform project structuring while planning specific projects. This criterion could be subject to ongoing evaluation, as it can be challenging for projects at the low end of the range to justify the transaction costs involved with PPPs. Consideration could also be given to standardised models for procurement of specific project types (e.g., a standardised model for procurement of school facilities), which would lower the costs of procurement and could permit a lower threshold than more complex projects where opportunities for standardisation may be lower.

▶ Contract term: The SOPs provide that the minimum contract term of PPP contracts should be five years of operation. Consideration could be given to defining different minimum terms for different contracting models. For example, five years for pure operations and maintenance agreements and 10-15 years or more for other PPP models with significant asset financing (BOT, BTO, BOO etc.). This would help to match the contract term to the life of the financed assets, avoiding the need for government and the private sector to repay the capital required over too short a period.

Stage 2 (selection of potential PPP project) and Step 2 (project prioritisation)

Under Stage 2 of Step 1 and Step 2, additional selection and prioritisation criteria could be considered:

▶ National strategy: Based on workshop discussions and SOP terms, it is understood that the national 5-year plan (updated annually), reflecting RGC’s preferred sectors, will guide MEF’s project prioritisation. While it is included in the pass/fail test of Stage 1, higher scores could be given to projects that are more aligned to the national strategy to inform prioritisation decisions

▶ Project size: While it is included in the pass/fail test of Stage 1, consideration could be given at later stages to allocating higher scores to those projects with larger benefits in absolute and relative terms, as being more important to national development and more beneficial to society compared to the amount invested. Such projects should be more highly prioritised. It will also be beneficial to prioritise those projects that will be more attractive to foreign investors, helping to accelerate the involvement of the private sector in PPP delivery.

▶ Contracting model: As it is currently silent in the SOPs, IAs could consider deliverability and contracting models for the projects. To help drive VfM, those projects that are likely to be most suited to contracting models that involve long-term material risk transfer (e.g., Build Operate Transfer (BOT) and BLT), could be prioritised over short-term service-driven models that typically do not generate as much VfM. A more detailed VfM assessment can be undertaken at the Pre-Feasibility (Pre-FS) and Feasibility (FS) stage.
Implementation considerations

The above recommendations also apply to the transport sector. For instance, road projects could follow a consistent review and evaluation process. MPWT should be closely involved in defining some of the appropriate criteria for such transport projects.

5.2 Unsolicited Proposals (USPs)

5.2.1 Guidance per the PPP Law

As is common in other markets, unsolicited proposals are subject to specific guidance under the PPP Law and SOPs. While USPs are still required to undergo the project identification and prioritisation process as for solicited projects, to be considered eligible for procurement as a USP, the project must also offer a new concept, technology or innovation and also not require financial support from the RGC. The PPP contract is directly negotiated with the private partner and the review / due diligence is conducted in the same scope and depth as that for a solicited proposal. Post-project approval, if viability gap funding is required, the RGC may opt for competitive bidding to determine if it can obtain a lower subsidy rate. A summary of the lifecycle of USPs is set out in the following figure.

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126 Article 22 of PPP Law and Chapter VIII of SOP I
127 See section 4.1
Figure 4. Summary of USP lifecycle

| Phase I: Identification and selection of USP | Step 1: Unsolicited Proposal by private proponent  
| | Step 2: Review and in-principle approval for preparation  
| | Step 4: Negotiation and approval of FA  
| | Step 5: Undertaking of FS  
| Phase III: Project approval | Step 6: Review of FS  
| | Step 7: Approval of FS  
| Phase IV: Contracting and signing | Step 8: Preparation of the PPP contract  
| | Step 9: Negotiations, approval and signing of PPP contract  
| Phase V: Implementation and management of PPP Contract | Step 10: Management of the PPP contract  
| | Step 11: Handover  

Further details are set out in Appendix 4: Detailed lifecycle of USPs.

The SOP describes several potential methods for the procurement of USPs:128

- **Direct negotiation**: The IA and USP proponent may undertake direct non-competitive negotiations. Prior to the negotiations, it must be ensured that the financial and technical capabilities, value for money, risk management, and government support mechanisms, amongst others, should be evaluated and fulfilled in accordance with the PPP Law and SOPs. The evaluation requirements are aligned to those of solicited proposals.

- **Open competitive procurement**: The IA invites competing proposals from interested bidders. The original proponent is eligible to participate in the procurement. The original proponent is assigned additional points in the tender evaluation as compensation for activities already undertaken. The original proponent is given an opportunity to win the project by matching the highest-rated proposal. If the original proponent does not match, the IA can compensate the original proponent for their project preparation costs.

- **Swiss challenge**: The IA invites competing proposals from interested bidders. If no proposals are received within the deadline, the IA may award the contract to the original proponent. If a competing proposal is priced more favourably than the original proposal, the original proponent is given the opportunity to win the project by matching the highest-rated proposal. If the original proponent does not match, the IA can compensate the original proponent for their project preparation costs.

The specific procurement option for a given USP will be proposed by the IA to MEF, with appropriate justifications, and approved by the Prime Minister.

### 5.2.2 International benchmarks and considerations

Some current practices in developing and mature PPP markets to identify the standard practices and processes adopted for USPs are set out in the following table. All markets in the study adopt a range of eligibility criteria to promote transparency and accountability and require a competitive tender process upon project approval.

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128 Chapter XIV, Volume 8-3 (Selection of the private partners) of SOP III.
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>Unsolicited proposal guidelines are detailed in National Planning and Development Minister Regulation Number 4/2015. To be classified as an USP, the project needs to meet all of the following eligibility criteria—(1) technically integrated with sector's masterplan, (2) economically and financially viable, and (3) original proponent should have the adequate financial capability to finance project. Three main stages: Approval, competitive tender process, PPP agreement signing. Incentives that can be granted to the project proponent include: (1) purchase of the PPP initiative idea, (2) bid bonus (proponent receives a scoring advantage which is typically defined as an additional 10% added to its evaluation score), and (3) right to match. Many unsolicited proposals have taken several years to negotiate, often not reaching financial close because final agreements could not be reached. To be classified as an USP, the project is required to meet all of the following eligibility criteria—(1) involves new concept / technology, (2) not a component of an approved project, (3) no direct government, subsidy or equity is required. Satisfaction of criterion (1) requires at least one of the following attributes: Recognised process, design, methodology or engineering concept which demonstrates ability to significantly improve project delivery (i.e., reduce costs, accelerate project execution etc.). Process which the original proponent possesses exclusive rights, either worldwide or regionally. A design, methodology or engineering concept for which the original proponent possesses intellectual property rights. Competition is introduced through a Swiss Challenge which has been used in the Philippines for several years to allow third parties to make better offers for a project. The original proponent then has the right to counter match any better offers. Many unsolicited proposals have been awarded to the original proponent due to lack of competitive bids, e.g., Bulacan Airport and MRT7.</td>
</tr>
<tr>
<td>Philippines</td>
<td></td>
</tr>
<tr>
<td>Vietnam</td>
<td>The Vietnamese PPP Law provides for Government to share 50% of the excess of realised and projected revenue, over a certain threshold (125% of financial plan revenue), along with 50% of the decrease between realised and projected revenue, when revenue falls below 75% of financial plan revenue. The revenue share concept has been introduced in the PPP Law effective 1 January 2021 and has not yet been tested in the market.</td>
</tr>
<tr>
<td>Country</td>
<td>Key characteristics</td>
</tr>
<tr>
<td>-------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| Australia   | The Victorian state government has a five-stage process for USPs (referred to as market-led proposals):  
  - (1) preliminary assessment, (2) USP due-diligence and strategic assessment, (3) USP procurement preparation based on either exclusive negotiation or competitive process, (4) exclusive negotiation or limited competitive process, (5) contract award  
  - The criteria for the first two stages are:  
    - Stage one criteria: (1) USP contains sufficient / relevant information; (2) USP scope relates to the private sector developing a project / service specification and approaching the government for the proposal's approval / support; (3) consideration of the assessment of same / similar proposal(s) in the past; (4) USP has the potential to meet stage two assessment criteria below  
    - Stage two criteria: (1) meets service / project need aligned with government policies, (2) is affordable in the budget context, (3) presents value for money, (4) provides social, environmental, economic, and financial benefits, (5) provides commercial feasibility and delivery capability, and (6) provides unique features leading to outcomes that are unlikely to be obtained using competitive processes within acceptable timeframes, hence justifies exclusive negotiations  
  - The following issues are to be considered as part of criterion (6) under stage two of the innovative USP idea assessment above:  
    - Are unique characteristics present?  
    - Does the proposal provide value to the government compared with alternatives?  
    - Would the proposal result in outcomes not likely to be obtained within acceptable timeframes using standard competitive processes?  
    - Are there any other factors considered material to demonstrate unique position?  
  - Other Australian states have broadly similar approaches.  


There are several key lessons from the international experience:

- As with the approach in Cambodia, many of the USP frameworks make reference to technical and other innovations as a criterion for pursuing a USP process. In practice, this has led to somewhat convoluted arguments about what is meant by "innovation". The practical reality is that there are a number of situations in which it may be preferable to have a USP process that does not fall under the heading of innovation, such as where new infrastructure will be so tightly integrated with existing infrastructure that there is no justification for attempting to have the new project run by anyone other than the existing operator. The alternative approach is demonstrated in the Victorian guidelines, where USP projects are subject to a broader test of unique benefits, rather than just innovation.

- Swiss challenges have been subject to criticisms that they rarely result in a change in the preferred proponent or improved economics for the government. In many cases, Swiss challenges have resulted in no bids, as potential competitors appear to be unwilling to commit resources to a bidding process where the original proponent can reclaim their status by offering to reprice the project just ahead of the winning tenderer. A number of western countries do not provide for them. Similar concerns may also affect other competitive adjustments, e.g., tender scoring bonuses for the USP proponent, although the evidence is less widespread. However, it should also be noted that any attempts to further incentivise competing bids, through Swiss challenges or otherwise, can also lead to reduced interest on the part of original proponents, adversely impacting the generation of "innovative" project ideas from the market.
Allowing USPs to be considered on their individual merits, without an overall alignment to plans for the sector, has a significant potential to lead to duplicated projects and wasted resources, particularly in sectors such as transport, where integration across transport modes can deliver major benefits to users at lower cost. While consideration can still be given to innovative or unconventional ideas, consistency with the administering authority’s plans for the sector should inform the evaluation, and the costs, benefits and consequences of deviations clearly understood.

Several jurisdictions (the Philippines, Nigeria etc.) prohibit government support for unsolicited proposals. Others, including Colombia and Peru, treat USPs that do not require government support differently. In Colombia, whether or not a USP requires government support affects the incentive mechanism during procurement, with the USP proponent earning a bonus of 3% to 10% in the proposal scoring if the project requires government support, and the right to match if the project does not require government support. Additionally, government support is capped at 20% of a project’s total investment costs. Such a pre-defined cap creates certainty and allows for some financial support for potentially beneficial projects (although still with a risk of discouraging the development of some projects that may need higher levels of support).

5.2.3 Recommendations

The current PIP in Cambodia is mostly comprised of USPs with the RGC regularly receiving USP applications, making them an important driver of infrastructure development.

The requirement in the SOPs that USPs meet the requirements for solicited proposals, means that many of the potential difficulties from USPs in other markets are avoided, in that USPs still have to be assessed as meeting sector needs, have stakeholder support, be adequately defined, etc., as discussed in section 5.1.

It may be desirable for MEF and MPWT to collaborate further to develop the preferred approach for the transport sector.

5.3 Government Support Mechanisms (GSMs)

5.3.1 Guidance per the PPP Law

The PPP Law and SOPs detail the types of government support available for PPPs. It is understood that GSMs may be funded through appropriations from national / sub-national budgets, Official Development Assistance (ODA) support and/or the budgets of state-owned enterprises. The different types of government support contemplated under current provisions are set out in the following diagram and range from financial support to in-kind contributions.
The GDPPP within the MEF is responsible for evaluating the financial, commercial and other non-technical analyses to review the FS assessment of the quantum of government support required for the project. In addition, the GDPPP will coordinate with the relevant general departments and ministries/agencies to seek their review and endorsement, where required. It is also responsible for overall PPP-related Fiscal Commitments and Contingent Liabilities (FCCL) management.130

The PPP Law and SOPs state the eligible sectors and projects that can be implemented as PPPs and the high-level eligibility criteria for various GSM mechanisms.131 GSMs are also evaluated at various stages of the project lifecycle:

- Stage III Project Selection and Budgeting / Step 5: Coordination of the Government Support Instruments
- Stage IV: Project Procurement and Contracting / Step 10: Clearance of the Final PPP Contract
- Stage V: Project Implementation and Monitoring / Step 11: Management of the PPP Contract

The feasibility study is required to recommend the type of government support needed for the project.132

5.3.1.1 Direct fiscal payments

Direct fiscal commitments include Viability Gap Funding (VGF) and Availability Payments (AP).

Viability gap funding

VGF is a capital subsidy that is payable if the SPC achieves pre-determined construction milestones. The guidelines describe VGF as a government subsidy to private parties, which reduces the capital expenditures of projects while enhancing financial viability.133 VGF is to be administered per performance milestones after construction start and can be provided for up to two years after construction completion. Until RGC has established a dedicated VGF fund and related VGF procedures, an application for VGF support for a project shall be made following the specified SOP procedures.

VGF can be provided in projects where high capital expenditure results in un-bankable or unaffordable business cases.134 The payment milestones need to be clearly defined.

Subsequent decrees / circulars are expected to specify the procedures for establishing and managing the VGF fund.135

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130 Paragraph 2.5, Chapter V of SOP I
131 Articles 5 and 6 of the PPP Law specify eligible sectors and projects that can be implemented as PPPs. Volume 10 (Government Support Measures) of SOP II provides high-level eligibility criteria for various GSM mechanisms
132 Paragraph 2.5 of SOP I
133 Article 13.1 of the PPP Law and paragraph 2.7, Volume 10 (Government Support Measures) of SOP II
134 Paragraph 2.7, Volume 10 (Government Support Measures) of SOP II
135 Article 15 of PPP Law
The Template BOT Contract provides a placeholder to allow IAs to implement VGF in PPP projects and includes guidance that VGF should be contributed only after equity has been drawn and on a pro-rata basis with project debt.¹³⁶

**Availability payments (APs)**

APs are paid by a government to a private party for the availability of a service or asset at a contractually specified quality, starting with the commencement of operations (i.e., after the completion of any necessary construction) and generally concluding after a fixed term. They cover all costs, including operating costs, debt service and equity returns. Availability must be capable of being measured and there should be penalties for non-availability or failure to achieve specified Key Performance Indicators (KPIs).¹³⁷

APs may be suitable for PPPs where it is not possible / desirable to collect revenues or service charges from end users (e.g., members of the public) due to the nature of the facility / service, so that in effect the state is the purchaser of the service or are insufficient. In some cases, the state may also be the end-user.

APs are long-term budgetary commitments and must receive approval under the SOP procedures. A payment guarantee may be given to back up an AP. The guidelines highlight AP as one of three methodologies that may be used to make payments to private parties: a right to receive revenues (i.e., User Fees), AP, and a hybrid mechanism combining the two.¹³⁸

### 5.3.1.2 Guarantees

SOP II provides guidelines for payment guarantees on IA obligations.¹³⁹ The provisions include backstop guarantees on government contingent liabilities, performance guarantees, sovereign and political risk guarantees, and other guarantees. Under the current drafting, guarantees are not intended to be the default provision for required support, but an exception employed when they are necessary to make the project financeable.¹⁴⁰ Guarantees are intended to be for contingent risks and not a method for making payments that form an expected part of the project economics (e.g., monthly availability payments). The guidelines, currently under development, are also expected to include guarantee limits.¹⁴¹

Guarantees require the approval of MEF and RGC. The need for guarantees should be identified as early as possible, ideally during the FS stage. The approval process is expected to be similar, irrespective of the type of guarantee.

**Payment or performance guarantees**

Payment or performance guarantees provide payments when the IA or other public entities do not fulfil their obligations under the PPP contract or relevant agreements.¹⁴² Such obligations could include off-take purchase agreements (e.g., power purchase agreements or bulk water off-take agreements) or availability payments. Such payment guarantees may cover periodic payment commitments or compensation related to termination as specified in the relevant PPP contract.

**Sovereign or political risk guarantees**

Sovereign or political risk guarantees support compensation to the PPP company if governmental or

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¹³⁶ Clause 4 of Template BOT Contract
¹³⁷ Paragraph 2.4, Volume 10 (Government Support Measures) of SOP II
¹³⁸ Article 13.2 of PPP Law and paragraph 2.3.3, Chapter I of SOP I
¹³⁹ Paragraph 3.2.3, Volume 10 (Government Support Measures) of SOP II
¹⁴⁰ Paragraph 2.5, Volume 10 (Government Support Measures) of SOP II
¹⁴¹ Volume 11 (Procedural Guidelines on Risk Management of Fiscal Commitments for PPPs) of SOP II
¹⁴² Paragraph 2.5, Volume 10 (Government Support Measures) of SOP II
political events negatively impact the PPP project or related investments.  

5.3.1.3 Investment incentives

Investment incentives provided under current provisions include taxation, security rights in project assets, government obligations, and currency convertibility and repatriation.

Taxation

Tax incentives are available to all infrastructure PPPs, subject to compliance with requirements of the Law on Investments. The following tax incentives are available to projects that have received a Final Registration Certificate according to the Law on Investments (also termed as Qualified Investment Projects (QIPs)):

- Tax holidays—Available for a maximum of nine years for QIPs; Duration of tax holiday is computed as trigger period plus three + three years (trigger period is the earlier of the first year of profit or three years from final certificate date).
- Losses carried forward—Losses incurred in QIP operations can be carried forward for five years.
- Accelerated depreciation allowance—For QIPs not utilising tax exemptions, depreciation of 40% shall be allowed.
- Customs duty exemptions—100% exemption on import of production equipment for QIP.
- Value Added Tax (VAT) exemption—Infrastructure QIPs not exempted from VAT, except those in Law on Taxation.
- VAT exemption (user) charges—No exemption provided.
- Lower tax on interest—Not applicable for domestic loans, but foreign loans are subject to 14% withholding tax.
- Lower tax on dividends—Domestic Investors receive 20% advanced tax on dividends, whereas foreign Investors obtain 20% advanced tax on dividends and 14% withholding tax.

Security rights in project assets

The private partner may establish security rights on the asset(s), including security over the movable or immovable asset(s) relating to the project owned by the private partner, security on revenue / accounts receivable of the private partner, for the operation of the project asset or provision of services, and a mortgage of land-use rights in accordance with applicable laws and regulations. In addition, investors may establish security rights on their shares in the PPP SPC. Establishment, registration and perfection of security rights is required to be in line with the terms and conditions in the PPP contract and in accordance with Cambodian laws and regulations.

Government obligations

RGC may undertake certain obligations to ensure that the project is financially feasible, has access to
finance and is capable of undergoing construction and operations in line with the planned schedule.\textsuperscript{148}

These obligations include:

- Government guarantees to the private partner.
- Direct agreements between IA and lenders for acknowledging IA obligations as stipulated in the PPP contract.
- Direct agreements between the competent authority and the lenders for acknowledging the obligations or roles of the competent authority relating to the implementation of the PPP contract.
- Assurances of the availability of public services needed by the private partner to perform its obligations under the PPP contract.
- Other government obligations as stipulated in the PPP contract.

The approval and implementation of all government obligations under the project framework shall be in accordance with the applicable laws and regulations of Cambodia.

**Currency convertibility and repatriation**

The PPP Law states that the private partner shall have the right to buy foreign currencies through the banking system and to remit these currencies abroad for commercial transactions, capital transactions and other transactions relating to investments in PPP projects.\textsuperscript{149} Other transactions include:

- Payment for imports of goods and services from abroad.
- Repayments of principal and interest on international loans.
- Payments for license fees and management fees to overseas entities.
- Payments for leases of equipment and machinery from abroad, remittances of capital, profit, revenues from investment liquidation, and of other lawful income. These provisions are applicable only for foreign investors.

Foreign exchange activities shall be conducted in accordance with the applicable laws and regulations of Cambodia.

5.3.1.4 **Asset / land contributions**

The SOPs allow for land and/or operational assets to be provided at zero / nominal cost to reduce capital costs / provide additional income sources for the project:\textsuperscript{150}

- Land support: The RGC can provide land to the SPC to reduce the private investment requirement for the project. In selected cases, the use of state land for a PPP can be provided at no cost or nominal cost, especially when the PPP will be transferred to the IA at the end of the PPP contract. In high priority cases, it is permitted for the IA to incur land acquisition costs and then provide the land on a nominal lease basis to the PPP project for the duration of the PPP project.
- Other asset support: The government can provide existing or operational facilities to be managed by the SPC, in addition to the core infrastructure facility to be created under the PPP contract. Asset contributions may be permitted to enhance the overall financial viability of the composite PPP. Subject to applicable sector laws and regulations, IAs are encouraged to explore options

\textsuperscript{148} Article 34 of PPP Law
\textsuperscript{149} Article 36 of PPP Law
\textsuperscript{150} Paragraph 2.3, Volume 10 (Government Support Measures) of SOP II
after consulting with sector and local regulatory agencies for bundling existing or operating assets with new facilities to be constructed, to enhance the overall financial viability of the proposed PPP.

However, the applicability of support via land and other assets to an SPC depends on the availability of land and the applicable laws and regulations in the relevant sector and/or relevant local area regulations under which the PPP project falls. Therefore, the IAs are required to consult with sector and local regulatory agencies, to determine the practicality of the provision of land and other asset support to PPP projects during the FS stage.

5.3.2 International benchmarks and considerations

Based on the discussions during the workshop on PPPs and related financing issues, it is understood that sub-decrees will be developed to further describe the implementation and execution of GSMs. In designing these sub-decrees, MEF could consider additional guiding principles to support the implementation of GSMs as set out below:

Eligibility and sizing of support

Many jurisdictions provide caps to provide guidance for implementing agencies. Such caps are usually set at the sector level or policy level. The caps usually range around 50%, with the intention to balance the risk between making the project financially viable and adequate level of risk transfer to the private sector. Some benchmarks are set out in the following table.

<table>
<thead>
<tr>
<th>Table 21. International examples of caps on VGF construction grant</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Country</strong></td>
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<tr>
<td>India</td>
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<tr>
<td>Indonesia</td>
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<tr>
<td>Philippines</td>
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<tr>
<td>South Korea</td>
</tr>
<tr>
<td>Vietnam</td>
</tr>
<tr>
<td>Australia</td>
</tr>
</tbody>
</table>

In several emerging economies, caps on VGF limits are introduced perhaps to standardise the requests from implementing agencies and streamline the review of the project pipeline for approval and/or implementation prioritisation. A review of India’s awarded PPPs between 2005 and 2015 indicated an average VGF contribution of ~16.7% of the aggregated project cost, far lower than the 40% cap. Fiscal limits set out in PPP regulations can also impact on the level of government support that may be available and the selection of projects to be delivered (please refer to section 5.7 for more details). Appendix 5 sets out International examples of eligibility criterion for government support.

While limits may be helpful to guide thinking, they have the potential to be limiting for projects which may need more funding to be deemed viable – in which case a cap (particularly a low cap) could eventually lead to a project being delayed and/or shelved. They may also potentially bias decision-

making towards revenue risk projects.

At least part of the rationale for setting a VGF limit is that a very high proportion of VGF can indicate that the risk allocation is not balanced. For example, if 90% of a project was to be funded by VGF, then the government should perhaps consider whether the private sector’s contribution of 10% is worth giving up significant control over the project and whether 100% public funding might be a better approach.

It should also be noted that thresholds can often be circumvented by unbundling a large project into a public component and a private component, in which the latter has only a relatively small proportion of VGF. In such circumstances the rule can lead to a suboptimal organisation of the project, if the unbundling is not, absent the desire to manage VGF thresholds, the best option for procurement.

Overall, there are advantages and disadvantages to imposing hard caps, which explains the variability in the approach and the magnitude of the cap across different markets. They can be circumvented, sometimes to the detriment of good decision-making, but they can avoid very high levels of support that the public and other stakeholders may find difficult to understand or accept. In emerging markets, during the initial years of implementing a PPP program, a cap in the policy may allow for smoother implementation and decision-making for the implementing agencies considering PPPs. Such a cap should be set at a reasonably high level, e.g., 50%, to provide for a base level of private capital to justify a role for the private sector. Any such cap should allow for adequate flexibility to consider any exceptions as needed (at an appropriate level of decision-making) so that projects that merit consideration are not necessarily ruled out based on the threshold.

**Payment guarantees / creditworthiness of government counterparty**

International precedents indicate that an IA's obligations are typically backed by a central agency with a role in fiscal management (e.g., MEF). In some cases, guarantees can be provided by external agencies like the World Bank or ADB. For example, WB provided a partial risk guarantee of USD 50m to the Lao Nam Theun 2 Power Project, while ADB provided a similar guarantee for up to USD 150m for Indonesia’s Riau Natural Gas Power Project. Most of such guarantees have been seen in power and utilities sectors and there have been limited precedents in the transport sector. Many governments have had to put such measures for support in place, particularly in the early stages of developing their PPP markets. However, as countries have matured in the implementation of their PPP programmes, the need for explicit guarantees has reduced in line with growing confidence in IA performance. Comparable practices in some other countries are set out in the following table.
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Indonesia</strong></td>
<td>Article 17 of the Presidential Resolution 38 (PR 38), which is equivalent to a PPP Law in Indonesia, explicitly identifies the provision of government guarantees for infrastructure projects. The article also expressly states that further regulations about the forms, procedures, and mechanisms for government guarantees shall be regulated by the Finance Minister. To support the financial liabilities of PPP projects, the Ministry of Finance established the Indonesia Infrastructure Guarantee Fund (IIGF) in December 2009. The IIGF guarantees to cover a procurement agency's financial obligations under a PPP contract, including financial obligations resulting from a breach of contract, delays in obtaining permits and licenses, and early termination or project default due to government action / inaction such as: expropriation, currency inconvertibility and non-transfer, force majeure, changes in law etc.</td>
</tr>
<tr>
<td><strong>Philippines</strong></td>
<td>The Amended BOT Law / 2012, an equivalent to a PPP Law, does not specify any principles and guidance in relation to the provision of government guarantees. It only explicitly states that government guarantees shall not be provided for unsolicited proposals. While the BOT Law provides for several forms of government support or contribution such as government guarantees or direct government subsidies to a PPP project, none of the PPP projects awarded since 2010 have benefited from guarantees.</td>
</tr>
<tr>
<td><strong>Vietnam</strong></td>
<td>Article 62 of Law No. 64/2020/QH14 (PPP Law) identifies the use of state capital for a PPP project. State capital is intended: 1. To support construction of the facility or infrastructure system. 2. To make payment to the PPP project company for the provision of public goods or services. 3. To pay the cost of compensation, land acquisition, support and resettlement, or support on constructing a temporary facility. 4. To pay the revenue shortfall. 5. Other expenditures like expenses of the competent agency / appraisal council of a PPP project. The amount of state capital for a PPP cannot exceed 50% of the total investment of the project. The quantum of state capital required is also an evaluation parameter amongst proposals during the bid evaluation stage of the procurement.</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td>Australian federal, state and territory governments have typically maintained credit ratings sufficiently high enough not to require financial guarantees for their PPPs. Other than New South Wales, it is unusual for any guarantee to be provided. However, NSW has specific legislation governing the provision of government guarantees. High-level guidance relating to the availability of government guarantees in the state of New South Wales has been specified within the GSF Act 2018 published by the Treasury.</td>
</tr>
</tbody>
</table>

Source: The Public-Private Partnership Law Review, EY analysis

Additional information on approvals, processes and conditions to provide government guarantees is detailed in section 5.7. The key lessons from the experience of these other countries suggest that at least during the initial phase of a country’s PPP programme, the role of the government in providing a robust framework for inducing and mobilising investment through the provision of guarantees, either on their own account or from MDBs, could play a significant role in attracting private sector investment. Cambodia could also consider incorporating a company or financial institution under the aegis of the government to assume an apex role in the financing and development of infrastructure

projects in the country.

Based on Cambodia’s legal framework, any guarantee needs to be approved in the form of a law and published in the Royal Gazette and the National Assembly of Cambodia official website. Such a process typically takes between three to eight months. MEF could consider further options for clarifying the criteria for eligibility and streamlining the overall process, while maintaining appropriate safeguards.

5.3.3 Recommendations

Design considerations were discussed during the workshop on PPP and financing issues. MEF recognises the importance of government support and is considering further provisions to review and enhance the SOPs.

- On balance, the current regulations provide considerable clarify and flexibility for the provision of government support to PPPs. Drawing on international experience, MEF could adopt additional eligibility criteria to select / prioritise projects based on the value and proportion of GSM needed for projects during the project identification and feasibility stage.

- Closely monitoring implementation should help identify trends in the value and proportion of support on projects. It would be generally expected that PPPs of a similar nature / sector would typically benefit from comparable levels of government support. For each project, the specific level of government support should be evaluated based on project feasibility, risk allocation, demand / supply projections, strategic importance and market appetite. MPWT could consider a sector-wide limit for the transport sector while evaluating the upcoming project pipeline in Cambodia. The MEF and MPWT could work together to develop guidelines, evaluation templates, etc., that are sector-specific (e.g., for roads) to help team members working on specific projects adopt a streamlined approach for project identification, assessment, and evaluation.

5.4 Revenue / benefit sharing

5.4.1 Guidance per the PPP Law

Revenue risk sharing has become an important element of developing and structuring PPPs, as it reduces the risk of excessive unplanned gains being realised by the private sector, without the Government also being able to benefit from them. They can also assist investors on the downside, reducing their risks and encouraging more aggressive bidding.

The PPP Law and SOPs contemplate the possibility of revenue / benefit sharing mechanisms in the PPP Contract, but do not provide detailed guidelines beyond a placeholder for demand risk in the Template BOT contract.\(^{153}\)

5.4.2 International benchmarks and considerations

Several markets provide for contracting parties to share upside benefits and downside risks at a pre-determined proportion based on either project revenue or equity returns. Revenue / benefit sharing mechanisms adopted in some developing and mature PPP markets are set out in the following table.

\(^{153}\) Paragraph 3.5.2 of SOP I, Volume 12 (PPP Contract Management Guidelines) of SOP II, Clause 5.4 of Template BOT Contract
Table 23. International benchmarks for guidelines on revenue / benefit sharing

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| Chile       | ▶ The Ministry of Public Works has offered Minimum Revenue Guarantee (MRG) bands as high as 80% - 85% of expected revenue, with the Ministry of Public Works paying the MRG amount if the actual annual revenues fall below the MRG level.  
▶ Revenue sharing is set at Government receiving 50% of revenues in excess of what is needed for an equity IRR of 15%.  
▶ Minimum revenue and traffic guarantee schemes are available for PPP projects, in particular for toll motorways and airports.  
▶ Limits / conditions have been not stipulated, but are negotiated on a project-specific basis.  
▶ Surplus revenue over the guarantee amount is shared between the Government and the private partner. |
| Türkiye     | ▶ The Vietnamese PPP Law provides for Government to share 50% of the excess of realised and projected revenue, over a certain threshold (125% of financial plan revenue), along with 50% of the decrease between realised and projected revenue, when revenue falls below 75% of financial plan revenue. Further details are provided in Appendix 6.  
▶ The revenue share concept has been introduced in the PPP Law effective 1 January 2021 and has not yet been tested in the market. |
| Vietnam     | Two risk-sharing schemes were introduced for BTO projects in 2015:  
▶ BTO risk-sharing projects:  
  ▶ The Government and private partner share investment / operating costs at a certain ratio, and both share excess profits or losses; Hence, the Government shares investment risk rather than just the revenue risk.  
  ▶ If investment costs are split equally, the private partner can receive a portion of operating costs from the Government when user demand is insufficient.  
  ▶ When demand exceeds contracted forecast, the Government receives a partial return of the private partner’s profits.  
▶ BTO-adjusted projects:  
  ▶ The Government and concessionaire share excess profits on a fixed 70:30 ratio  
  ▶ A threshold for support is pre-determined based on an agreed minimum yearly operations cost.  
  ▶ If actual operations revenue is higher than the threshold, any shortfalls in revenue relative to plan are solely borne by the private party.  
  ▶ If actual operations revenue is lower than the threshold, the government provides financial support.  
  ▶ BTO-adjusted projects are considered useful for environmental infrastructure, including sewage and wastewater disposal. |
| Republic of Korea | Source: Revenue Risk Sharing for Highway Public-Private partnership Concessions, US Department of Transportation; State Guarantees in PPPs, European PPP Expertise Centre; Revenue Risk Sharing for Highway Public-Private partnership Concessions, US Department of Transportation; EY research  
As seen above, revenue / benefit sharing is generally coupled with downside revenue protection or a minimum revenue guarantee. Compared to a traditional concession with full revenue risk transfer, minimum revenue guarantees are expected to generate more efficient risk pricing and likely additional private sector interest leading to more competition as it can protect the investor from uncontrolled revenue risks.  
Under a minimum revenue guarantee, the government sets a floor, below which relief is provided in case revenues fall below the floor value. The minimum revenue guarantee may be sized in different ways. For example, it could be based on absolute revenues, user charges, or provided through direct subsidies. While minimum revenue guarantees are generally tested and settled on an annual basis, it is possible to include clawback provisions where the Government is repaid for its earlier contributions |
if the project's revenues exceed forecasted revenues at a later date. Upside revenue sharing helps avoid excessive returns for the concessionaire or SPC, which could come at the expense of users. For example, under toll concessions, higher than anticipated traffic growth could result in very high financial returns for the SPC without any benefit to the Government or end-users. For avoidance of doubt, minimum revenue guarantees are not intended to be the primary source of revenues but are intended to provide relief in cases where demand falls below anticipated levels, and hence is conceptually different from an availability payment structure, where the government bears demand risk. An AP is sized to cover debt service, operations and maintenance costs and equity return, while a minimum revenue guarantee is typically sized to provide revenue payment based on the financial plan.

From a design perspective, lenders / investors generally seek continuity and consistency in policy. Hence MEF could consider providing some standardised direction. To support MEF’s thinking, some policy design considerations are set out below.

Protection

The threshold for revenue sharing is usually set at a level that incentivises the PPP company to outperform minimum obligations. A ‘cap and collar’ mechanisms potentially achieve a balance between risk sharing, incentivising better performance and sharing any windfall gains. The investor retains all risks of performance within the downside and upside bands. The usual upside benefit-sharing standard is 50:50 in most jurisdictions. In most jurisdictions, for downside risks below a pre-specified threshold, relief is provided but not shared with the private sector, as in principle the private sector would have already incurred losses. However, in Vietnam the shortfall in revenue is also expected to be shared on 50:50 basis as set out in
Table 23. The mechanism proposed in Vietnam has not yet been tested and remains to be seen if the private sector would accept the structure as bankable.

**Basis of calculating the benefit-sharing**

MEF / GDPPP could consider developing a standardised guidance on the mechanism for computing benefit sharing. While gross revenue, net revenue or return on investment may be used as a basis to calculate benefit-sharing, depending on risk allocation, gross revenue methods are typical in regional precedents. While a gross revenue method appears to be simple, in practice, careful consideration and analysis would be necessary to determine the cap and collar thresholds taking into account various project-specific factors. The revenue / benefit share thresholds are also often subject to negotiations with bidders to account for various downside / upside scenarios.

**Alternatives to cash sharing**

Finally, MEF / GDPPP could also consider sharing benefits in alternate ways which do not necessarily involve a cash impact. For example, the IA could reduce user tariffs in response to increased demand allowing end-users to benefit from the project directly. Alternatively, once the revenue / return target has been met, the contract may be terminated, or revenues could be shared with the Government for the remainder of the contract period. This approach could potentially limit the PPP company from enjoying excessive returns. In some jurisdictions, the PPP contract allows for the contract duration to be extended to allow the private sector to recover their investment when there is lower than anticipated demand. A variable contract duration mechanism was used for highway projects in Chile. Such models are not very common and relatively hard to implement.

The case study below illustrates the design considerations on sharing upside benefits / demand risks and the basis used to compute the sharing. More details and examples on revenue / sharing mechanisms adopted in transport projects can be found in Appendix 7: Case studies on revenue / benefit sharing.

**Case study: Incheon Bridge project**

The Incheon Bridge project (in the Republic of Korea) involved the construction and operation of a 21km cable-stayed bridge under a 30-year BTO concession, with a total cost of USD 2,000m. The project terms provided a minimum revenue guarantee, where the concessionaire was guaranteed 80% of annual revenue in case toll revenues are below a threshold, up to 15 years after operations start. The terms also provided a surplus revenue funding, where revenue in excess of 120% of financial plan revenue from year 15 onwards would be paid to the government. The minimum revenue guarantee was over and above a construction subsidy of KRW 733.5b (USD 660m) or 48.3% of project cost.

In 2013, although the project was profitable, toll revenues had been below estimated levels. To guarantee the minimum revenue, Ministry of Land, Infrastructure and Transport (MOLIT) paid KRW 13.8b (USD 145m) to the concessionaire.

**5.4.3 Recommendations**

Design considerations on revenue / benefit sharing were discussed during the workshop on PPP and financing issues. MEF is considering revenue sharing mechanisms that may be based on gross revenue or payback period. The PPP contract may also provide for a non-financial option to extend the concession period.

Benefit sharing with minimum revenue guarantees provides better revenue risk protection to developers in extreme downside revenue cases, without unexpected windfall gains. A number of cash-based and non-cash based options can be considered while structuring projects. Factors like the
underlying risk profile of the project, the sector maturity and market appetite influence the revenue / benefit sharing and downside risk structuring mechanism. A highly restrictive revenue sharing mechanism could disincentive an SPC from outperforming its obligations under a PPP contract. For example, if a PPP contract is terminated once the financial plan return is achieved, a private partner may not be incentivised to provide better value for the project. At the same time, extending the concession duration for a shortfall in revenues may not provide the desired level of protection for an SPC to meet its financial obligations.

Thus, any mechanism proposed should be tested in the market for bankability considering the project fundamentals and business case assessment. A combination of cash and non-cash based alternatives may also be evaluated. A rigid structure could result in reduced interest in projects from the private sector, or cause the private sector to price the risk and deliver a sub-optimal proposal for the implementing agency.

The overall revenue risk protection will ultimately depend on the revenue level that the implementing agency guarantees. Compared to a traditional toll concession with full revenue risk transfer, such mechanisms should generate more efficient risk pricing and likely additional private sector interest, leading to more competition. As a result, such revenue-risk sharing mechanisms may generate VfM compared to a full revenue risk transfer by improving project bankability. For instance, in a roads project, the level of confidence in the underlying demand / traffic forecast and MPWT’s wider policy considerations will inform the thresholds for the revenue sharing mechanisms to be implemented.

Broad directional guidance could also allow implementing agencies to customise the approach for all projects by sector. For example, all toll road projects should potentially follow a similar structure unless there are improvements based on experiences in executed projects. It was suggested that the guidance be provided at the policy level rather than allowing IAs to determine their own mechanisms. It is also important to consider revenue / benefit sharing measures in tandem with other commercial issues to design the appropriate thresholds for a project / sector. However such mechanisms should not be developed in isolation, without adequate consultation with respective implementing agencies. MPWT’s input based on previous experience on roads projects may be particularly useful to understand actual vs plan performance and thus provide valuable insights to inform aspects like future traffic demand, and market confidence.

For ease of implementation in projects, MEF / GDPPP could consider the following:

► **Protection:** Consider a ‘cap and collar’ mechanism to introduce revenue / benefit sharing in PPP contracts, subject to applicability to specific projects. If minimum revenue guarantees are provided, thresholds may need to be carefully defined considering the demand projections in the feasibility study. Gross revenues are typically used as the basis for implementing revenue / benefit share, but would need careful consideration and structuring to ensure project bankability.

► **Alternatives to cash sharing:** While alternate instruments may be tested, it is unlikely that the market would welcome a non-cash solution in the short-term. However, as the PPP market matures, the MEF may explore such measures.

### 5.5 Termination payments

#### 5.5.1 Guidance per the PPP Law

The PPP Law, SOPs and the Template BOT Contract address termination and recognise that termination is a key element of the risk allocation in a PPP contract and crucial to making a PPP
project bankable.\textsuperscript{154}

**PPP Law**

The PPP Law and SOPs require PPP contracts to specify circumstances for early termination and the rights and obligations of the contracting parties in different termination scenarios based on the nature of the project and international best practice.\textsuperscript{155}

**SOPs**

The SOPs provide principles to guide the development of early termination provisions.\textsuperscript{156} During Stage II: Project Appraisal stage, the appraisal documents, which include the complete feasibility study, the approval of the government support document and the procurement documents, are required to set out the termination payment terms being considered for assessment by the GDPPP.

**Template BOT Contract**

**Triggers for termination**

Clauses 19 and 20 of the draft Template BOT Contract provide draft provisions addressing termination, including the grounds for termination and compensation to be paid by either the IA or SPC for termination by the implementing agency, termination by the concessionaire or termination for prolonged force majeure events. The detailed grounds for termination are specified as set out in the following table:

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\textsuperscript{154} An example form of contract has been included in Annex A of Volume 8 of the SOPs. This is referred to as ‘Template BOT Contract’ across this report.

\textsuperscript{155} Article 42 of PPP Law

\textsuperscript{156} Paragraph 3.3.4, Volume 6 (Interim Financial Analysis Guidelines) of SOP II
### Table 24. Triggers for termination under the Template BOT contract

<table>
<thead>
<tr>
<th>Termination grounds</th>
<th>Possible triggers for termination</th>
</tr>
</thead>
</table>
| **PPP company (SPC) events of default / termination (Clause 20.1.2)** | The IA may terminate the PPP contract for any prolonged occurrence of SPC events of default upon the prolonged occurrence (which are not remedied during the remedy period (if any)). SPC events of default may include:  
- Abandonment of the project  
- Excessive unavailability of the asset and/or contracted services  
- Unacceptable quality of the asset and/or contracted services  
- A serious service failure  
- Breach of a contractual representation or warranty  
- Fraud, collusion or misleading conduct relating to project delivery  
- Failure to achieve completion by the specified longstop date  
- Insolvency of the SPC  
- Failure of the PPP company to pay any sum due to the IA  
- Failure to comply with any permits and/or insurance requirements  
- A serious act of corruption  
- Failure to comply with any written suspension of work order issued by the IA  
- Equity divestment, assignment or disposal in terms other than those agreed under the PPP contract  
- Failure to report related party transactions under the PPP contract  
- Severe sustained breach of any other obligation under the PPP contract |
| **IA events of default / termination (Clause 20.3.2)** | The SPC may terminate the PPP contract for the prolonged occurrence of IA events of default (which are not remedied during the remedy period (if any)). IA events of defaults may include:  
- Material misrepresentation, omissions, or inaccuracy in warranties made by the IA in the PPP contract, which results in material adverse effects on the benefits of the sponsor, the SPC’s ability to perform its obligations or its rights under the PPP contract  
- Material breach by the IA of its obligations which materially prevents the PPP company from performing its obligations  
- Confiscation, sequestration, or expropriation by the authority which affects the PPP company’s ability to perform its obligations  
The current draft the Template BOT Contract allows for the provision to be amended on a case-by-case basis |
| **Force Majeure (Clause 19.1)** | Either party may terminate the PPP contract for any prolonged occurrence of specific events which prevent the affected party from performing its obligations:  
- Epidemic, plague, or quarantine  
- Act of war (whether declared or undeclared), invasion, armed conflict or act of a foreign enemy, blockade, embargo (including any consequential unavailability or shortage of fuel or materials), revolution, riot, insurrection, civil commotion, or act of terrorism, or politically motivated sabotage or kidnapping, in each case outside or inside Cambodia  
- Explosion, accident, fire, radioactive contamination or ionising radiation or chemical contamination which (in each case) is not caused by a Government Event or does not constitute a Government Event  
- Earthquake, tsunami, lightning, typhoons, landslide, storm, cyclone, tornado, floods or other unusually severe weather conditions or any other act of nature |

Source: Template BOT Contract

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157 Clause 17.2 of the Template BOT Contract defines a Government Event to include several events such as the revocation of any government authorisation where the Concessionaire has complied with applicable requirements and deadlines for the maintenance or renewal of that government authorisation, any failure or delay to perform, breach of, or default under, any Project Document (other than this Agreement) by any Relevant Authority which is party thereto for any reason other than due to a default of the Concessionaire or a Force Majeure Event or similar event under such Project Document etc.
Compensation on termination

In the Template BOT contract, termination is contemplated to be the last resort. Upon the occurrence of a ground for termination, the affected party (either the IA or SPC) shall send a written notice to the other party and the Lenders (in case of SPC events of default) notifying them of the occurrence of the default, setting out in reasonable detail the circumstances and requesting the defaulting party to remedy / cure the event. If the default has not been remedied / cured within the relevant remedy / cure period, the affected party may serve a termination notice to the defaulting party. The PPP contract shall be terminated after a pre-determined number of days following the termination notice.158

The compensation on termination principles are set out in the following table:

**Table 25. Compensation on termination under the Template BOT Contract**

<table>
<thead>
<tr>
<th>Termination grounds</th>
<th>Compensation mechanism on termination</th>
</tr>
</thead>
<tbody>
<tr>
<td>PPP company (SPC) events of default / termination (Clause 20.2)</td>
<td>Before construction completion, the IA shall pay the lower of:</td>
</tr>
<tr>
<td></td>
<td>➢ The Works Value, which is equal to:</td>
</tr>
<tr>
<td></td>
<td>➢ Design and construction contract value</td>
</tr>
<tr>
<td></td>
<td>➢ Less the cost to complete, which is equal to:</td>
</tr>
<tr>
<td></td>
<td>➢ The costs that the IA would incur to select another alternative investor,</td>
</tr>
<tr>
<td></td>
<td>➢ Plus the costs to complete the project,</td>
</tr>
<tr>
<td></td>
<td>➢ Plus any other losses that the IA would incur due to the termination,</td>
</tr>
<tr>
<td></td>
<td>➢ Less any insurance proceeds available to the SPC from its insurance policies.</td>
</tr>
<tr>
<td></td>
<td>➢ Less any damages recoverable by law</td>
</tr>
<tr>
<td></td>
<td>➢ Any principal amounts outstanding under the financing documents as at the date of termination by the IA (including any break costs, early prepayment fees and other termination charges as may be applicable) and any interest accrued but unpaid as at the date of termination,</td>
</tr>
<tr>
<td></td>
<td>➢ Less account balances at the date of termination,</td>
</tr>
<tr>
<td></td>
<td>➢ Less insurance proceeds available to the SPC.</td>
</tr>
<tr>
<td></td>
<td>On or after construction completion, the IA shall pay:</td>
</tr>
<tr>
<td></td>
<td>➢ All principal amounts outstanding under the Financing Documents including any break costs, early prepayment fees and other termination charges as may be applicable) and any interest accrued but unpaid as at the date of termination,</td>
</tr>
<tr>
<td></td>
<td>➢ Less insurance proceeds available to the SPC,</td>
</tr>
<tr>
<td></td>
<td>➢ Less the amount of the construction performance bond,</td>
</tr>
<tr>
<td></td>
<td>➢ Less net account balances,</td>
</tr>
<tr>
<td></td>
<td>➢ Less all and any losses that the IA determines it is reasonably likely to incur, including but not limited to costs of retendering, costs incurred for remediation / renewal of any defective works, etc.,</td>
</tr>
<tr>
<td></td>
<td>➢ Less any amount of unfunded equity that has been committed to the SPC and is shown to be available for use in the base case model.</td>
</tr>
<tr>
<td></td>
<td>Bidding costs are not reimbursable in the event of termination due to SPC default. Prior to termination, the lenders also have step-in rights to remedy the SPC default and/or find an alternate party.</td>
</tr>
</tbody>
</table>

---

158 Please refer to Clauses 20.1.3, 20.1.4, 20.1.5, 20.3.3, 20.3.4, and 20.3.5 for more details
Termination grounds | Compensation mechanism on termination
---|---
IA events of default / termination *(Clause 20.3.2)* | The IA shall pay compensation which is equal to:
- Equity return at the date of termination calculated as:
  - Between contract signing and the construction completion date - nominal base case after-tax internal rate of return up to the termination date.
  - After effective date – a reasonable forecast of distributions likely to be made to shareholders based on the historical performance and current projected revenue.
- Plus all net amounts (following application of any rights of set-off), including any interest, properly due and payable under any contracts (including without limitation employment contracts) entered into by the SPV in connection with the project, to discharge its obligations,
- Plus all principal amounts outstanding under the financing documents including any break costs, early prepayment fees, and other termination charges as may be applicable) and any interest accrued but unpaid as at the date of termination,
- Plus bidding costs,
- Less account balances,
- Less insurance proceeds available to the SPC.

Force Majeure *(Clause 19.7)* | The IA shall pay compensation for any uninsurable force majeure events:
- The aggregate of all outstanding amounts payable by the SPC under the financing documents as of the date of termination, including principal, accrued interest, fees, break costs and other penalties due to the Lenders,
- Plus equity actually contributed to the SPC as the date of termination except for any such amounts which stand to credit the SPC’s accounts and which have not been expended or irrevocably committed,
- Less any insurance proceeds available to the SPC.

Source: Template BOT Contract

The provisions also provide that an independent appraiser would be responsible for estimating the amount payable in case any calculation is required to be undertaken to determine compensation.\(^{159}\)

5.5.2 **International benchmarks and considerations**

Termination payment guidelines adopted in some developing and mature PPP markets are set out in the following table. All markets in the study use standardised guidelines regarding the triggers for termination and compensation mechanisms.

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\(^{159}\) Clauses 20.11.1 of Template BOT Contract
Table 26. International benchmarks for guidelines on early termination provisions

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>▶ The law specifically enables compensation payment to the private partner in case of early termination due to the following:</td>
</tr>
<tr>
<td></td>
<td>▶ Public sector default or termination for reasons of public interest</td>
</tr>
<tr>
<td></td>
<td>▶ Private sector default</td>
</tr>
<tr>
<td></td>
<td>▶ Force majeure</td>
</tr>
<tr>
<td></td>
<td>▶ The law also enables compensation payment to the private partner due to:</td>
</tr>
<tr>
<td></td>
<td>▶ Material adverse government action</td>
</tr>
<tr>
<td></td>
<td>▶ Change in law</td>
</tr>
<tr>
<td></td>
<td>▶ PPP regulations (both old and new) require that PPP contracts include a procedure for determining the grounds for and the consequences of termination or force majeure, as well as a mechanism for allowing variations.</td>
</tr>
<tr>
<td></td>
<td>▶ For energy projects, the provisions for termination and rights and rights for compensation (e.g., price adjustments) are regulated under the Ministry of Energy and Mineral Resources (MEMR) Regulation No. 10 of 2017, and amended by MEMR Regulation No. 10 of 2018 (on the principles of power purchase agreements).</td>
</tr>
<tr>
<td></td>
<td>▶ For other sectors, there are no standard termination and compensation regime. The project contracts are negotiated on a project-by-project basis.</td>
</tr>
<tr>
<td></td>
<td>▶ Government support cover early termination costs</td>
</tr>
</tbody>
</table>


161 Public Private Partnerships: Infrastructure Projects Plan in Indonesia 2020, Bappenas, 2020 [link](https://www.bappenas.go.id/files/PPP%20Book/PPP%20BOOK%202020%20Kepmen%20PPN%20No%2022%20dan%2061%20Tahun%202020.pdf)
<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| Philippines | ▶ The BOT Law (Republic Act No. 6957) and the BOT Regulations recognise early termination and provide mechanisms to address termination issues. The following events may lead to termination:  
  ▶ SPC default such as failure of concessionaire to satisfy the conditions precedent under the contract, abandonment, poor performance, insolvency etc.  
  ▶ IA default  
  ▶ Force majeure events  
  ▶ Material adverse government action (MAGA) event where the parties are unable to agree to a MAGA compensation  
  ▶ Circular No. 06-2015 provides detailed formulas for calculating the termination payment for each termination event.  
  ▶ If the Government terminates for no fault of the SPC, the Government shall compensate the SPC for its actual expenses incurred (which include outstanding debt adjusted for any cash balances, breakage costs) in the project as of termination including a reasonable rate of return thereon not exceeding that stated in the contract, adjusted for any relief covered under insurance. The return on equity is estimated based on the forecasted equity rate of return (EIRR) at the date of signing the PPP contract,  
  ▶ For prolonged force majeure events, where the failure is not remediable or cannot be remedied within a reasonable period of time, the Government shall pay the depreciated book value of the assets in place right before the force majeure event, adjusted for any relief covered under insurance and cash balances. The settlement also compensates for half of any contractual breakage costs. In addition, the cost of restoring the assets to the condition they were prior to the force majeure event (the portion of the cost not covered by insurance) is also deducted from the termination payment.  
  ▶ For SPC default, apart from forfeiting the performance bond, the implementing agencies may take over the facility or allow the lenders to step in and exercise their rights under the financing agreements with respect to the project. The compensation on termination shall be the outstanding senior debt used to fund the assets, subject to any caps set in the contract, at the time of termination and as may be allowed under the law. Equity claims are forfeited.  
  ▶ If the Government terminates for no fault of the SPC, the Government shall compensate the SPC for its actual expenses incurred (which include outstanding debt adjusted for any cash balances, breakage costs) in the project as of termination including a reasonable rate of return thereon not exceeding that stated in the contract, adjusted for any relief covered under insurance. The return on equity is estimated based on the forecasted equity rate of return (EIRR) at the date of signing the PPP contract,  
  ▶ For prolonged force majeure events, where the failure is not remediable or cannot be remedied within a reasonable period of time, the Government shall pay the depreciated book value of the assets in place right before the force majeure event, adjusted for any relief covered under insurance and cash balances. The settlement also compensates for half of any contractual breakage costs. In addition, the cost of restoring the assets to the condition they were prior to the force majeure event (the portion of the cost not covered by insurance) is also deducted from the termination payment.  
  ▶ For SPC default, apart from forfeiting the performance bond, the implementing agencies may take over the facility or allow the lenders to step in and exercise their rights under the financing agreements with respect to the project. The compensation on termination shall be the outstanding senior debt used to fund the assets, subject to any caps set in the contract, at the time of termination and as may be allowed under the law. Equity claims are forfeited.  

162 The Partnerships Law Review Public-Private partnership Law Review, Law Business Research, 2015,  
Vietnam

- Termination provisions will be based on the PPP contract
- Early termination of PPP contract shall apply in the following cases:
  - Project is affected by force majeure events, in which the parties have taken remedial measures but could not ensure the continuous implementation of PPP contract
  - For interests of the nation, assurance of requirements on national defence, security, or state secrets
  - When the SPC is insolvent due to bankruptcy
  - When one of the contracting parties seriously violates the performance obligations of the contract
  - Changes in law
- In cases of early termination due to SPC default, the implementing agency shall work with the lender to select an alternate investor. If an alternate investor has not been selected, the implementing agency shall temporarily be responsible for operating and maintaining the facility. The alternate investor is expected to settle the compensation obligations of the SPC.
- For early termination due to government default or voluntary government termination, the termination compensation shall be allocated from state capital.
- There is no description of the compensation to be provided.

Australia

- Australian PPPs usually contain a detailed regime for default (and related cure rights) and termination. Termination triggers include:
  - For SPC default, a process of escalating remedies is adopted with termination applicable only for the most serious defaults.
  - Compensation to an SPC for termination for default will usually be calculated based on the fair market value of the project (valued either through re-tender, or by an independent valuer if there is no liquid market for the project), after taking due account of the costs incurred by the Government as a result of the termination.
- The government often has a right of termination “for convenience”, in which case the compensation is typically more generous than for other termination scenarios and may include an amount to compensate the SPC for lost future profits. Compensation on termination includes repayment of project debt, reasonable return on equity, compensation for any termination of financing agreements breakage costs, redundancy payments for termination of subcontracts and employees, adjusted for any insurance proceeds and outstanding liabilities.
- For force majeure events, the compensation will typically be sufficient to at least cover debt repayment, and in some projects has included partial compensation to equity investors.

As seen above, the mechanisms to address termination provisions are largely consistent across jurisdictions and cover similar grounds for termination and compensation principles, although Vietnam is still developing the principles and mechanisms for compensation under its new PPP Law. Developed markets have gone further (and have more experience) in compensating bidders for so-called termination for convenience. They also more clearly define the principle that termination for PPP Company default should be assessed on the basis of the value of the Project to the Government at termination. This fairly avoids “punishing” the investor, but also avoids the Government taking on additional financial costs as a result of termination.

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163 Vietnam PPP Law and General PPP Decree.
Triggers for termination

In many emerging markets, additional rights of termination are granted to the SPC for:

- Contracting Authority default;
- Prolonged material adverse government action (MAGA) (referred to as “Government Events” in the Template BOT Contract);
- Changes in law (that cannot be adequately addressed by relief or compensation, see below) (of sufficient materiality to damage the project); and
- Termination by the IA for public policy reasons.  

Although the SOPs do not detail the grounds for termination, the Template BOT Contract does provide the grounds for termination under each category. The Template BOT Contract does not currently provide a right of termination for Government Events or Changes in Law.

Government Events

Government Events or MAGA can cause delay or prevent the SPC from performing its obligations, have a material adverse financial impact on the private partner and are within the government’s control or are best managed by the IA as compared to the private partner. Such events are also referred to as “political risk” or “political force majeure”.

In more developed markets, private partners accept contracts with no explicit provisions for MAGA as MAGA risks are likely to be limited or considered manageable. There is often only compensation for project-specific changes in law, but no right of termination. While the current position in the Template BOT Contract may be acceptable in mature markets, the inclusion of a right to terminate by the SPC on these grounds is often seen in emerging economies. The specific drafting varies across jurisdictions. For example, in the Philippines, termination rights are achieved by defining protracted MAGA as an IA default. In some jurisdictions, the SPC may only be entitled to termination following MAGA-style events through voluntary termination by the IA. The provisions in the Template BOT Contract could be further enhanced to include the right to terminate for prolonged Government Events lasting longer than a certain period (generally 6 to 12 months). Consistent with the allocation of risk for Government Events to the IA, the compensation on termination could be determined under the same principles of IA default as set out in Clause 20.3.2 of the Template BOT Contract.

Changes in Law

All contracting parties under a PPP Contract are expected to abide by the prevailing laws and regulations. However, in long-term PPP contracts, changes in the law may occur, introducing unanticipated impacts on the SPC’s ability to perform, which were unforeseen at the start of the contract. The risk of changes in law refers to the risk of changes that may affect the project outcome, impacting on the costs (capital costs by means of new investments) or current operating costs (higher maintenance costs or higher operating costs). Changes in law are typically identified under three broad categories as described below.

- Discriminatory changes in law: These are changes in law are discriminatory to the project because they apply to the specific PPP projects and not to similar projects, or to the private

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partner and not to other entities. Discriminatory change in law risk is allocated to the implementing agency as these cannot be predicted or managed effectively by the private partner.

- **Specific changes in Law:** These are changes in Law specifically impacting the provision of services similar to the PPP project services or the shareholders providing such services, as typically defined in the PPP contract. Specific change in law risk is allocated to the implementing agency as the private partner cannot predict or manage these effectively. This allocation also helps alleviate the private partner’s concern that laws may be passed in the future that can signal out specific a PPP or private operator.

- **General changes in law:** These are general changes in law that require the private partner to incur capital expenditure after construction completion during the operating period to ensure compliance. Subject to any tests for materiality (in terms of cost impact on the project), this risk may also be allocated to the implementing agency on the basis that this approach is likely to offer better value for money as the private partner has no means of absorbing potentially significant costs once a project is operational and may otherwise factor in unnecessarily high contingencies.

- **Any other changes in law:** These are all other changes in law, including those that trigger capital expenditure during the construction period (but excluding the categories above). The risk of these changes is allocated to the Private Partner throughout the duration of the PPP Contract because the Private Partner can manage and should absorb any price implications.

Without specific contractual provisions to provide relief, a change in law risk would lie entirely with the private sector, the pricing of which could impact the value for money of the project.

In emerging markets, the allocation of change in law risk has a material impact on bankability. It could be particularly relevant in jurisdictions where changes in law are less predictable or more likely due to underdeveloped or less stable legal or regulatory frameworks or where PPPs are in the early stages of development. The Template BOT Contract provides a mechanism to estimate relief or compensation for Change in Law expenditure.

A further consideration could be made to include a right to terminate if the parties are not able to reach a consensus on the relief and/or compensation required. Of course, such termination may only be invoked in cases where there is a serious or sustained financial or other impact on the project being able to meet its objectives. The PPP contract could set a threshold to determine materiality as a trigger for termination. Consistent with the allocation of risk for Government Events to the IA, the compensation on termination could be determined under the same principles of IA default as set out in Clause 20.3.2 of the Template BOT Contract.

### Notice, cure and termination

Termination is typically costly to both contracting parties due to the often very high transaction costs involved. If project operations are affected, then there can also be a significant interruption to services relied on by the public.

Termination negotiations can also invite significant scrutiny from public agencies, along with disputes or legal challenges. A government with a reputation for unfairly using termination as a way of extracting benefits from a project may find that bidders are less interested in future PPPs. Accordingly, and as currently stated in the Template BOT Contract, the termination of a PPP contract is regarded as a high-risk scenario with uncertain costs and outcomes. Therefore, it is usually only considered a last resort after other reasonable alternatives such as negotiations, implementation of cure periods, Key Performance Indicator (KPI) adjustments, penalties, etc., have been exhausted.

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typical process of escalating remedial action is set out in the following diagram.

**Figure 6. Process of escalating remedial action in PPPs**

This process is consistent with the Template BOT Contract. For example, upon the occurrence of an SPC default, the IA shall send a written notice to the SPC and the Lenders notifying them of the occurrence setting out in reasonable detail the circumstances of the SPC default and requesting the SPC to remedy the SPC default within an applicable remedy period (if any). By the time the notice has been issued, it is likely that the project is underperforming and would incur loss of revenue / penalties under the KPI regime. If the SPC default is not remedied within the remedy period, and if the Lenders have not appointed an alternate party by exercising their step-in rights, only then will the IA be entitled to terminate the PPP contract.

A case study on the termination of a PPP contract is set out below. More details and examples on termination events and the compensation mechanism adopted in each event can be found in Appendix 8: Case studies on termination payments.

**Case study: East-West Link (EWL) project**

The EWL project was a proposed 18km-long freeway standard road connection between the Eastern Freeway and the Western Ring Road in Melbourne, Australia. The project was procured under a Design Build Finance Maintain Operate (DBFMO) concession at a cost of around AUD23 billion in September 2014. The project was voluntarily terminated by the government in June 2015 (less than a year after award).

An audit by the Victorian Auditor General Office (VAGO) found that the EWL business case did not provide a robust basis for investment and that key decisions during the project planning, development and procurement phases were driven by an overriding sense of urgency to sign the contract before the November 2014 state election. The likely net benefits of the project were not sufficiently demonstrated and the failure to properly resolve project risks before entering contracts exposed the state to additional financial risk.

The new government was also not provided with updated, comprehensive information on the impacts of completing the project versus the option of cancelling it. Consequently, there were some concerns around the quantum of termination payment and if it provided undue windfall gain to the contractors. At the point of termination, the concessionaire had incurred approximately USD 850m in expenditure on the planning, development, procurement of the project. While the compensation for such expenses was estimated at USD 850m, the compensation was expected to be partially offset by future proceeds from sale of project properties which was estimated at USD 247m.

5.5.3 **Recommendations**

The current provisions are expected to provide comfort to the contracting parties since it covers key aspects such as circumstances for early termination, rights and obligations, and the calculation of termination payments and, as such, are a good starting point for further development. The Template BOT Contract acknowledges that termination is the last resort option and reflects the concerns raised

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169 Clause 20.1.3 of Template BOT Contract
170 Clause 20.1.4 of Template BOT Contract. Step in rights for lenders are covered under Clause 21.
by participants in the Workshop around the need for standardised contract guidance to define and calculate the compensation amount for termination events.

A few suggestions may be considered for further development, such as including a right for termination for prolonged Government Events and Change in Law, which are generally included in PPP contracts in emerging economies:

► At the moment, there is no right to terminate for Government Events (allowed for in, e.g., Philippines) or Change in Law (allowed for in, e.g., Vietnam) in the Template BOT Contract. However, there are precedents in the region where such provisions could include a right to terminate. It is suggested that these provisions be explored further, potentially after obtaining market feedback from specific PPP projects

► MEF could further strengthen the sound application of termination provisions, including how other contract enforcement mechanisms should be pursued first, by providing IAs with support and training in the management of termination.

5.6 Contract preparation

5.6.1 Guidance per the PPP Law

Risk allocation

The need to optimally allocate risk between contracting parties, with risks being borne by the party most suited to manage each risk, is set out in the SOP. The appropriate PPP model should reflect the risk allocation. The SOP also provides a general risk matrix which may be used to allocate risks and determine the appropriate PPP model. Some of the key risks mentioned include land risks, site risks, political risks, design and construction risks, operational risks, revenue risks, sponsor and financial risks and force majeure risks. The list of risks and their typical allocation under the SOPs is set out in Appendix 9.

PPP contract formulation guidelines and templates

The contract preparation principles are detailed within the PPP Law. The contract that will be agreed by RGC and the private partner should be prepared based on project features set out in the FS. The contract is expected to be an arm's length agreement between the IA and private partner. The PPP contract shall specify the risk allocation between contracting parties, allowing RGC to benefit from VfM and the private partner to benefit from maintaining a reasonable return, subject to project performance. Key provisions are discussed below:

► PPP contract form: The PPP contract should be based on an appropriate PPP model based on the project's features and requirements. The model should be selected by the IA and MEF based on the results of the FS. Common PPP models include BOT, BLT, BTO, BOOT, BOO, DBFOM and O&M.

► Service charges and fees: The PPP contract should stipulate the charges and fees collectable by the private partner under the project framework and the adjustment formulas. The private partner should have the rights to collect / receive revenues from fees and charges, and the rights to amend them in accordance with the terms and conditions stipulated in the PPP contract and/or ancillary agreement(s).

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172 Paragraph 1.4.6, Volume 5 (Interim Feasibility Study Guidelines) of SOP II
173 Chapter VII of PPP Law
Assignment of rights and obligations: Assignment of private partner rights and obligations to third parties should be approved by RGC in line with the provisions in the PPP contract, except for step-in rights.

Step-in rights: Contracting parties may agree on step-in rights in favour of the lenders to the project and/or RGC. The step-in rights receiver may receive / renew rights and obligations per the PPP contract to ensure continued performance of the private partner’s obligations.

Amendments / additions to PPP contract: Conditions and procedures for contract amendment should be specified. MEF is required to review / agree on contract amendment cases per applicable laws and regulations prior to signing the amendment agreement. Conditions that may lead to a contract amendment include changes in laws / legislation, changes in size / output specification of the project construction, changes in service fees, changes in demands, force majeure or other circumstances per the contract.

Dispute resolution: The contract should define the mechanism for resolving disputes between the IA and Private partner.

Governing law: The contract is required to be governed by the laws and regulations of Cambodia. For ancillary agreements relating to the implementation of any PPP contract, to which a public entity of RGC is not a party, the Private Partner is able to select which law will apply.

SOP II describes key commercial principles in the PPP contract, which should be based on the chosen PPP model and risk allocation. The key commercial principles are set out below.

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contracting parties</td>
<td>To identify contract parties and any other relevant party (if there exists a SPC, the contracting party would be the SPC instead of the private partner)</td>
</tr>
<tr>
<td>Contract duration</td>
<td>To state the contract tenure</td>
</tr>
</tbody>
</table>
| Responsibilities of the parties | To detail responsibilities of contracting parties, based on the phases below:  
   - Upon contract signing, but before construction commencement  
   - From construction commencement until construction end  
   - From operations commencement until contract expiry / termination  
   - Upon contract expiry / termination                                                                                                                                                                           |
| Private partner rights    | To detail private partner rights relating to site access, usage of existing assets, adoption of structural changes to existing assets, etc.                                                                                                                                     |
| Project ownership and assets | To detail ownership of existing assets, ownership of new / upcoming assets, and transfer timeline of ownership of project assets                                                                                                                                 |
| Payment terms             | To specify the payer and payee, sum to be paid, when payments are to be made, how such payments are to be adjusted, and the accounts from which payments should be routed                                                                                                                                 |
| Performance management framework | To detail output standards, framework to measure actual performance against standards, and consequences of performance being short of output standards                                                                                                                              |
| Dispute management framework | To detail guidance on dispute events and dispute resolution mechanisms                                                                                                                                                                                                     |

174 Paragraph 1.15.11, Volume 5 (Interim Feasibility Study Guidelines) of SOP II

175 Volume 9 (PPP Contract Template) of the SOPs sets out a template for BOT contracts
PPP project KPIs

The SOP states that the PPP contract should specify output standards and KPIs of the private partner based on the characteristics of the project sector. IAs are required to ensure that output standards and KPIs are consistent with national standards and across all projects in a sector. Additionally, having a Contract Management Plan (CMP) in place would help to ensure that services are delivered in accordance with the agreement’s KPIs and other requirements, with penalties or additional payments applied accordingly.

KPIs are expected to differ across the construction and operations periods. Key aspects to be covered by the KPIs in the construction and operations periods are set out in the following table.

Table 28. KPIs monitored by PMU

<table>
<thead>
<tr>
<th>Project stage</th>
<th>Aspects to be covered by KPIs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction stage</td>
<td>▶ Physical progress of project construction</td>
</tr>
<tr>
<td></td>
<td>▶ Financial progress</td>
</tr>
<tr>
<td></td>
<td>▶ Safety requirements</td>
</tr>
<tr>
<td></td>
<td>▶ Disruptions to users</td>
</tr>
<tr>
<td></td>
<td>▶ Instances of regulatory non-compliance</td>
</tr>
<tr>
<td>Operations stage</td>
<td>▶ Project performance</td>
</tr>
<tr>
<td></td>
<td>▶ Usage of facility (e.g., traffic)</td>
</tr>
<tr>
<td></td>
<td>▶ Project revenues (e.g., tolls)</td>
</tr>
<tr>
<td></td>
<td>▶ Quality of service</td>
</tr>
<tr>
<td></td>
<td>▶ Availability of facility (e.g., number of available lane-days annually)</td>
</tr>
<tr>
<td></td>
<td>▶ Number of service disruptions (e.g., number of disruption lane-days annually)</td>
</tr>
<tr>
<td></td>
<td>▶ Number of user complaints</td>
</tr>
<tr>
<td></td>
<td>▶ Percentage of consumer complaints resolved</td>
</tr>
</tbody>
</table>

---

176 According to the Template BOT contract, the Authority expects to benefit from any gain created by a refinancing during the contract term. The percentage share of the refinancing gains has not been specified.

177 Paragraph 5.1, Volume 12 (PPP Contract Management Guidelines) of SOP II
### 5.6.2 International benchmarks and considerations

#### Risk allocation

The Philippines and Indonesia have published risk allocation guidelines, the Generic Preferred Risk Allocation Matrix (GPRAM) and the IIGF risk allocation guidelines, respectively, to guide their procurement agencies on effective risk allocation principles between contracting parties. Both guidelines provide rationale regarding proposed risk allocation and mitigation strategy to streamline comprehension and execution for users. Australia details commercial principles and risk allocation guidance within the National PPP Guidelines which provides comprehensive guidance for PPP project preparation.

#### PPP contract formulation guidelines and templates

Some PPP contract preparation guidelines adopted in developing and mature PPP markets are set out in the following table. Several markets provide standardisation of PPP contracts, either through sample contracts or contractual guidelines.

**Table 29. International benchmarks for guidelines on contract preparation**

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Zealand</td>
<td>▶ The New Zealand Treasury has developed a standard PPP Project Agreement based on international principles, precedents, and relevance to the local market. The standard contract seeks to ensure value for money, optimal risk transfer, and standardisation.</td>
</tr>
<tr>
<td></td>
<td>▶ The contract offers standardisation by providing general commercial principles and model terms to guide development of PPP contracts.</td>
</tr>
<tr>
<td></td>
<td>▶ It is expected that terms specific to individual projects / sectors will be discussed in schedules to the contract. For project-specific schedules, the Treasury PPP Team provides examples.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Key guidance to enable concerned parties to agree on certain areas that can follow a standard approach without extended negotiations, to reduce procurement costs and time, is provided to standardise PF2 contracts includes:</td>
</tr>
<tr>
<td></td>
<td>▶ Approach for structuring key terms in PF2 contracts and allocating risks between contracting parties.</td>
</tr>
<tr>
<td></td>
<td>▶ Provisions to be included into the PF2 contracts either on a required basis (situations where exact wording should be used) or on a recommended basis (situations where drafting should be adapted to various sectors).</td>
</tr>
<tr>
<td></td>
<td>▶ Gaps to be filled to standardise contracts; For further standardisation, the following documents are provided: standard form services output template, pro forma payment mechanism, and PPP shareholder arrangements.</td>
</tr>
<tr>
<td>Philippines</td>
<td>▶ Sample PPP contracts for projects in urban mass transit, solid waste management, bulk water supply, and information and communications technology have been made available.</td>
</tr>
<tr>
<td></td>
<td>▶ Volume 2 of the PPP Manual also provides comprehensive key considerations for the PPP contract design which can be adopted by the IA in drafting the PPP contracts for their respective projects.</td>
</tr>
</tbody>
</table>


#### PPP project KPIs

Current provisions on the SOP offer brief guidance on the need for output standards and KPIs, which are expected to be compliant with national standards and consistent across projects in the same
sector. The SOP only states some key aspects to be covered by the KPIs during construction and operations.

Since PPP contracts are reliant on service output, a few guiding principles on clear identification of output-based KPIs could also be considered. PPP contracts could identify output-based KPIs using the following SMART principles which are often referred to in PPP contract development.

- **Specific**: specify the aims of the KPIs.
- **Measurable**: ensure that reliable data exists, are easily collected, and can be accessed on a timely basis to be useful.
- **Achievable**: The target performance levels should be challenging, but not impossible to reach (conversely, if a programme always exceeds its targets, the targets are probably not sufficiently ambitious).
- **Relevant**: The KPI targets support the fundamental objectives of the project or activity.
- **Time-bound**: There is a clear deadline for when the target should be achieved.

These principles generally lead to KPIs that support value for money, innovation, risk transfer, minimum service quality, and whole life asset performance using a clear framework and effective association of performance criteria to the payment mechanism.

### 5.6.3 Recommendations

#### Risk allocation

Successful PPP procurement depends on the IA’s ability to properly identify, analyse and allocate project risks. The allocation of risks to the party best able to manage them helps the government to attain value for money outcomes and the private partner to obtain reasonable returns. Inappropriate risk allocation may create financial implications for the public sector and/or may lead to failure in achievement of project objectives.

The SOPs detail a general risk allocation framework which may provide contracting parties with comfort and guiding principles to develop an optimal risk allocation. The framework may also consider standardizing the allocation of certain risks to the parties best suited to undertake them. Further consideration could also be undertaken on adopting sector-specific standard risk allocation frameworks and guidelines for commonly used contracting options. For instance, BOT risk allocation frameworks could be provided for road projects and BLT risk allocation frameworks could be provided for social sector projects such as education and healthcare. Sector-specific guidance and frameworks could enable the relevant IAs to better allocate and manage sector-specific risks and challenges. For example, if the private partner cannot estimate road project demand with a certain degree of certainty, it may not be able to mitigate such risks effectively through commercial management practices. Hence, transferring demand / traffic risk to the private partner may not deliver value for money in this case.

Additionally, there are other risks that could be incorporated, as set out in the following table.
Table 30. Risks that could be included within the SOP guidance

<table>
<thead>
<tr>
<th>Risk</th>
<th>Description</th>
<th>Consequence</th>
<th>Preferred allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other finance-related risk</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign exchange risk</td>
<td>Risk that exchange rates move adversely, affecting the private partner’s ability to service foreign debt</td>
<td>Inability of private partner to service foreign debt</td>
<td>Given that the exchange rate fluctuates, such risks could be shared between both parties by indexing some payments to foreign exchange movements</td>
</tr>
<tr>
<td>Currency convertibility and repatriation</td>
<td>Risk that the international private partner is unable to convert and/or repatriate domestic funds abroad</td>
<td>Inability to covert / repatriate the fund abroad will disincentivise foreign investors from committing to the project</td>
<td>Government (as has more experience and information regarding factors influencing currency convertibility and repatriation)</td>
</tr>
<tr>
<td>Interest rate risk</td>
<td>Risk of interest rate movement</td>
<td>Huge interest risk fluctuations (i.e., increase) which will affect the repayment amount</td>
<td>Private partner (as they control the selecting and arranging of long-term financing at fixed interest rates)</td>
</tr>
</tbody>
</table>

**PPP contract formulation guidelines and templates**

The current SOP offer detailed guidelines and a Template BOT Contract as a means to standardise PPP contracts. This is well-aligned with the guidance offered in several countries and also addresses some of the concerns raised by participants during the Workshop on PPP and financing issues related to the lack of standardised guidance.

As seen globally, certain provisions may evolve with the progression of Cambodia’s PPP programme. To ensure that the contractual guidelines and the Template BOT Contract enable the delivery of effective PPP contracts, MEF could closely monitor the development of PPP projects and periodically review and update the guidelines and templates based on lessons from precedent projects and evolution of national standards.
PPP project KPIs

Current provisions provide brief guidance on the drafting of output standards and KPIs, and key aspects to be covered by the KPIs during construction and operations. Further consideration could be undertaken on adopting output-based KPI principles to ensure effective association of performance criteria to the payment mechanism to directly incentivise performance:

- Output-based KPIs focus on outcomes instead of inputs and should be flexible enough to evolve with changes in service / asset requirements and expectations over time.
- Performance measures should be achievable, such that the private partner is not incentivised or penalised for usual expected performance levels of the asset.
- Where possible, KPIs should be developed to be aligned with existing reporting and monitoring systems. For example, in road projects, data collection on road congestion should be consistent with the IA’s overall road network management approach, such that the performance data is measurable and easily usable.

5.7 Management of fiscal risks

5.7.1 Guidance per the PPP Law

The SOPs provide detailed guidelines on the role of entities and procedures in the management of the PPP related fiscal commitments of RGC. The MEF will be responsible for the review and recommendation of fiscal commitments and state support for PPP Projects for the Prime Minister’s approval. MEF will set and approve budgetary ceilings for managing exposure to fiscal commitments for PPPs which will be stipulated in the Public Debt Management Strategy and will approve annual budgetary allocations for fiscal commitments. All new fiscal commitments are required to fall within ceilings established and notified by MEF. The GDPPP is responsible for assessing the fiscal implications and risks to Government whereas the General Department of International Cooperation and Debt Management (GDICDM) is responsible for preparing and monitoring the implementation of the Public Debt Management Strategy and for reviewing, validating and recommending fiscal support for each project. The GDPPP will also be responsible to make requests to the contingency fund account, keep a record of all guarantees, maintain information required from time to time, review fiscal commitments on an annual basis etc.

Further procedures and mechanisms for the management of RGC’s fiscal risks have been summarised in Appendix 10: Procedures and mechanisms for management of RGC’s PPP related fiscal risks.

The SOP also describes the IA’s responsibilities in managing fiscal commitments:

- Forecast of direct commitments;
- Monitoring and reporting of risks that may give rise to contingent liabilities;
- Budgeting of the expected fiscal expenditures; and
- Administration of the payments.

The Central Public Private Partnership Unit will review the PPP Contract Management Plan and monitor the performance of the project.

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178 Chapter V of SOP I
179 Volume 11 (Procedural Guidelines on Risk Management of Fiscal Commitments for PPPs) of SOP II
180 Volume 11 (Procedural Guidelines on Risk Management of Fiscal Commitments for PPPs) of SOP II
181 Volume 12 (PPP Contract Management Guidelines) of SOP II
5.7.2 International benchmarks and considerations

Fiscal risk management guidelines adopted in developing and mature PPP markets are set out in the following table. Several markets have established limits to annual PPP related fiscal obligations and have adopted guidelines to ensure timely reporting and monitoring of such obligations.

Table 31. International benchmarks for management of fiscal risks

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>The UK has three different ceilings for managing its overall debt and the liabilities from PPP projects. These include:</td>
</tr>
<tr>
<td></td>
<td>▶ An overall ceiling of net debt to GDP ratio of 40%, which takes into account long term direct liabilities and contingent liabilities (including from PPPs) that are expected to materialise.</td>
</tr>
<tr>
<td></td>
<td>▶ A national level ceiling of 2% of the annual spending for PFI (Private Finance Initiative, a form of PPP) Unitary Charges (i.e. Availability Payments).</td>
</tr>
<tr>
<td></td>
<td>▶ An individual departmental spending limit on PFI ranging from 6 – 7% of the total annual spending of the relevant department.</td>
</tr>
<tr>
<td></td>
<td>The UK also has a robust framework for monitoring and managing contingent liability and the UK parliament must be notified of any contingent liability (for example, resulting from PPP contracts) unless such liability is below GBP 300,000.</td>
</tr>
<tr>
<td></td>
<td>▶ No ceilings on fiscal liabilities have been set to date.</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Per the Law on Public Investments, any budgets allocated to specific projects and not disbursed within the specified timeframe may be withdrawn by the government and re-approval of payments / budgets will be required for the same projects.</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>▶ Annual government payments on PPP projects is limited to less than 2% of the total government expenditure (similar to that of UK).</td>
</tr>
<tr>
<td>Peru</td>
<td>▶ Peruvian law limits the government’s outstanding obligations to 7% of GDP.</td>
</tr>
<tr>
<td></td>
<td>▶ To ensure the capping of outstanding obligations, the total present value of the PPP portfolio is computed annually, is incorporated in the public debt report, and is sent to the Congress.</td>
</tr>
<tr>
<td></td>
<td>▶ Each sector is required to separately manage project risks / commitments. Hence, estimated payments are budgeted and accounted for by relevant line ministries.</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>▶ The budget law restricts direct liabilities arising from PPPs to 20% of state revenues.</td>
</tr>
<tr>
<td>Brazil</td>
<td>▶ A similar limit applies to regional authorities.</td>
</tr>
<tr>
<td></td>
<td>▶ Government obligations are restricted to 1% of federal government revenue in any given future year and to 5% of subnational government revenue.</td>
</tr>
</tbody>
</table>

Source: EY analysis, ADB, World Bank, UNESCAP

While current provisions in the SOPs detail guidelines on the procedures in fiscal risk management process, there are a few additional guiding principles on the implementation of fiscal risk management that could be considered. These are discussed below.
Accounting of fiscal commitments

Design considerations for the monitoring of fiscal commitments could include accounting of fiscal commitments based on their nature:

- **Short-term direct liability**: Short-term direct liabilities such as VGF could be treated as short-term debt service. Additionally, budgetary approvals could be set out clearly within the policy, but flexibility should be provided for relatively minor changes in amount and timing of individual projects without the need for subsequent reapproval and reconfirmation.

- **Long-term direct liability**: Potentially treat long-term direct liabilities such as availability payment obligations similar to long-term debt service (could account for these liabilities in a rolling budget).

- **Contingent liability**: Potentially estimate contingent liabilities on a periodic basis and create a contingency line in the budget / separate fund for meeting contingent liabilities (already included in SOP). Potentially adopt the PPP Fiscal Risk Assessment Model (P-FRAM) developed by the World Bank and IMF to estimate and account for contingent liabilities. 182

Management of fiscal liabilities at different levels

The current regime also holistically accounts for fiscal costs across various projects. Adopting a clear fiscal management process could allow the RGC to monitor and manage the financial implications of such risks and be better prepared to meet financial obligations. Most countries’ fiscal management processes require a robust framework for identifying and estimating the costs from PPP projects, controlling costs and risks from PPPs, and reporting of costs and risks. Fiscal liabilities could be managed at different micro and macro levels:

- **In national accounts**: The financial liabilities from PPP projects should be accounted for in the calculation of the overall debt to GDP ratio. For the calculation of debt to GDP ratio, a policy level decision is required to be made on whether the contingent liabilities taken into account should be limited to those that are considered probable, or a present value of all contingent liabilities which is a more conservative approach. 183

- **At the IA level**: Potentially include a cap on the annual spending limits for PPPs (by way of APs) for each IA.

- **Management and monitoring**: Potentially include some responsibilities for IAs / specialist agencies to monitor the fiscal commitments at a project and portfolio level, report fiscal commitments to MEF as part of their regular financial reporting, and budget for direct and contingent fiscal liabilities

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183 Countries have adopted different policies on this issue, including (i) contingent liabilities limited to those that are probable (UK approach, which is consistent with the International Public Sector Accounting Standards 19), or (ii) contingent liabilities represented as a present value of all contingent liabilities (Peru approach)
5.7.3 Recommendations

Design considerations were discussed during the workshop on PPP and financing issues. It is acknowledged that provisions on management of fiscal commitments are still a work in progress. As part of the drafting, MEF / GDPPP could consider including standard accounting approaches for fiscal commitments based on whether they are short-term, or long-term or contingent. Standard accounting approaches ensure that the RGC has better visibility on future payments. Some initial considerations have been set out in section 5.7.2.

To manage financial implications of fiscal risks and meet financial obligations, fiscal liabilities could be managed at different micro and macro levels such as in national accounts, at the IA level, and in the contract management and monitoring process, as discussed above. From the workshop, it is understood that at the national level, a cap of 10% of national revenue is being explored on the government guarantees relating to contingent liabilities. In addition, MEF / GDPPP could consider inserting a cap on each IA’s annual spending limits on PPPs to better manage fiscal liabilities at the IA level. These need not necessarily fixed limits, but could trigger additional reporting and approvals to raise the visibility where commitments are higher than expected.

Volume 12 of SOP II requires the IAs to be involved in monitoring and reporting of fiscal commitments of PPP projects. Noting this may be the first time IAs will need to get involved in this responsibility, MEF / GDPPP may need to provide more guidance and assistance to the IAs.
Section 6

Environment and social considerations
6. Environmental and social considerations

6.1 Management of Environmental and Social (E&S) risks

6.1.1 Current approach

Environment

Cambodia has a fairly robust environmental regulatory framework. Article 59 of the 1993 Constitution of the Kingdom of Cambodia entrusts the state to preserve and protect the environment. This responsibility is supported by a number of national environmental laws and supporting decrees, plans and prakas (declarations), including:

- Royal Decree on the Protection of Natural Areas (1993)
- Law on Environmental Protection and Natural Resource Management (1996)
- Sub-Decree No. 72 on the Environmental Impact Assessment Process (1999)
- Sub-Decree on Water Pollution Control (1999)
- Control of Air Pollution and Noise Disturbance (2000)
- Law on Forestry (2002)
- Law on Disaster Management (2015)
- Sub-Decree on Community Forestry Management (2003)
- Cambodia Climate Change Strategic Plan 2014-2023
- The National Environment Strategy and Action Plan 2016-2023
- Prakas No. 376 on General Guideline for Developing Initial and Full Environmental Impact Assessment Reports (2009)
- Prakas No. 021 on Classification of Environmental Impact Assessment for Development Project (2020)

The Ministry of Environment (MOE) is currently revising Cambodia’s environmental laws with the drafting of an Environmental and Natural Resources Code (ENR Code, also referred to as the Environment Code or EC).

The current legal framework regulates the responsibility of the RGC towards abating potential social impact of projects. For example, the Expropriation Law permits RGC to acquire land for public interest provided just and market-based compensation is provided in advance to the affected parties. This applies to land acquisition for PPP projects as well.

Further, the SOP\textsuperscript{185} states that the environment and social impact assessments, undertaken during the FS of the project should be guided by data provided by the General Department of Resettlement.

\textsuperscript{184}Constitution and rights: Royal Kingdom of Cambodia, ODC, 2021, \url{https://opendevelopmentcambodia.net/topics/constitution-and-rights/}
\textsuperscript{185}SOP Volume 1 (Policies and Procedures)
(GDR) on the estimated cost of land acquisition and resettlement process. The GDR will review the FS at an early stage and provide its suggestions as to how best to align the project goals with minimum social and environmental impacts. Thus, at the institutional level, there are substantial checks in place which a project needs to pass before receiving social clearance.

There is particular guidance for land acquisition in case of externally financed projects. The SOP states that, for externally financed PPP projects, the land acquisition and resettlement process will be carried out in accordance with the principles mentioned in the SOP for land acquisition and resettlement (SOP-LAR). Article 2 of the SOP-LAR states that the principles therein apply to all ‘externally financed projects in Cambodia’ which implies that PPP projects may also be included in its ambit.

The SOP-LAR sets out:

► The requirements for externally financed projects to abide by the land acquisition and resettlement laws of RGC (so that, e.g., expropriation of land for public interest, payment of compensation, etc., must be undertaken in compliance with the Expropriation Law).
► Roles and responsibilities of key ministries and agencies such as the MEF, GDR, the line ministries etc. in carrying out social impact assessments and developing a resettlement and compensation plan for persons/communities that may be adversely impacted by a project.
► Principles for (i) government’s entry into binding contracts on compensation with affected persons, and (ii) managing the expenditure associated with implementing the resettlement plan, including, inter alia, payment of such compensation.

Cambodia has aligned with multilateral action on climate change and, under the United Nations Climate Change (UNFCC) secretariat’s Paris Climate Agreement, has submitted its plans for climate action under the updated Nationally Determined Contribution (NDC) for Cambodia. The Cambodia Sustainable Development Goals (CSDGs) are the nationalised framework for Cambodia based on the United Nations Development Programme (UNDP) Sustainable Development Goals (SDGs). The SDGs, also known as the Global Goals, were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity. With reference to the SDGs, and in particular SDG13 related to Climate Action, Cambodia has proposed a greenhouse gas (GHG) mitigation contribution for the period 2020 – 2030, conditional upon the availability of support from the international community. However, the identification and assessment of climate risks related to infrastructure development, a carbon pricing mechanism or similar measures are yet to be formally included in the environmental regulatory framework.

**Land**

The Constitution of the Kingdom of Cambodia sets out two basic principles for land acquisition. The first is Article 44 which states that the “right to confiscate properties from any person shall be exercised only in the public interest as provided by law and shall require fair and just compensation in advance”. Articles 73 and 74 of the Constitution provide for special consideration and support to vulnerable people including mothers and children, the disabled and families of combatants who sacrificed their lives for the nation.

The responsibilities under the Constitution are supported by national law, as follows:

**Law on Land (2001)**

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186 Cambodia’s Updated Nationally Determined Contribution, RGC, 2020, [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Cambodia%20First/20201231_NDC_Update_Cambodia.pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Cambodia%20First/20201231_NDC_Update_Cambodia.pdf)

The Law on Land (referred to as the Land Law) defines the regime of ownership for immovable properties in Cambodia for the purpose of guaranteeing the rights of ownership and other rights related to immovable properties and establishes a modern system of land registration that guarantees the rights of people to own land. Based on the 1993 Constitution, it defines the regime of ownership of immovable properties, such as land, trees and fixed structures. The rights and responsibilities of the government with respect to eminent domain are specified in the Land Law. The government can acquire private land for public purposes but has to pay fair and just compensation in advance of the land acquisition. Article 5 of the law states that no person may be “deprived of his or her ownership unless this action is for the public interest”. The law recognizes that deprivation of ownership opens a right to “payment of just and fair compensation in advance”. The Constitution states that “the right to confiscate possessions from any person shall be exercised only in the public interest” and opens a right to just compensation. However, there are currently no laws and regulations that govern the process of acquisition and the determination of just compensation deprived of his ownership, unless it is in the public interest.

The Land Law has created a legal mechanism called Social Land Concession (SLC) to transfer parts of state land to landless and land-poor families for residential and/or family farming purposes. Local SLC programs are initiated at commune level while national SLC programs relate to larger operations. Whilst Indigenous Peoples (IP) are not explicitly included in the above two articles under the Constitution, they are however included in the Land Law.

Of particular relevance to linear infrastructure projects such as transport infrastructure (e.g., road corridors, rail corridors), Prakas No. 6 entitled “Measures to Crack Down on Anarchic Land Grabbing and Encroachments” establishes the principle of Right of Way (ROW). In support of this Prakas, the MEF issued Decree No. 961 in April 2000 prohibiting compensation for structures and other assets located in the ROWs.

Circular No. 02 issued by the Royal Government of Cambodia on Illegal Occupation of State Land dated February 26, 2007, states that while occupation of land as a form of possession became illegal after August 30, 2001, there is a need for the state to undertake SLCs for poor people and disadvantaged groups to meet their needs for land deriving from population growth, demobilization of soldiers, and land loss due to natural disasters. Generally, illegal state land holders, especially land speculators, are not entitled to compensation (Para 6.1 in Circular No. 02). In practice, illegal state land holders, e.g., those who occupy state land or have constructed without permits or have encroached on demarcated land for ROW, would not be entitled to compensation, but may receive preferential treatment to obtain an appropriate amount of land for their livelihood.

The government approved and issued Sub-Decree No.115 dated May 26, 2016, regarding the upgrading of the Resettlement Department to the GDR. This is more of a procedural instrument which outlines the roles and responsibilities of the GDR in respect of the preparation and implementation of Land Acquisition and Resettlement Plans (LARPs) and in coordinating the implementation of the LARP at the project level.

In practice, an IP Plan or Resettlement Policy Framework (RPF) may be required to address gaps or establish equivalence between the Cambodian law and any applicable international standards adopted by the project, e.g., IFC Performance Standards (IFC PSs), World Bank Environment and Social Framework (ESF).

Gender issues

Cambodia has established a national institutional framework for the promotion of gender equity comprising Ministry of Women’s Affairs (MOWA), the Cambodia National Council for Women, the Technical Working Group on Gender, gender mainstreaming action groups in the government line ministries, and Women and Children’s Consultative Committees (WCCCs) at all levels of subnational government. WCCCs were established by a decree of the Ministry of Interior in 2009. In 1992, the
government ratified the Convention on the Elimination of All Forms of Discrimination against Women with no reservations. The government passed the Law on the Prevention of Domestic Violence and Protection of the Victims in 2005, and the Law on the Suppression of Human Trafficking and Sexual Exploitation in 2008. Cambodia’s Constitution references the treaty on women’s rights in Article 31 and prohibits discrimination against women in Article 45. However, no law clearly and comprehensively defines discrimination, and criminal law does not ban all forms of discrimination. Cambodia has a domestic violence law which urges the prevention of violence within households and between spouses, but does not outlaw domestic violence. Indeed, gender was among the top five themes for key recommendations made to Cambodia in the 1st and 2nd United Nations Human Rights Council’s Universal Periodic Review (UPR) cycles, in 2009 and 2014, respectively.188

While Cambodia has indicated a willingness to work toward gender-mainstreaming, most of the responsibility at the national level for any gender-related action is assigned to the MOWA, which does not receive the financial and technical resources necessary to fully implement these actions. Additional support to MOWA and other ministries to increase the mainstreaming of gender equality within other parts of government, together with capacity development to enable them to carry out their functions, are needed to support the consideration of gender-related issues in infrastructure development.

Environmental and social assessment during project planning and delivery

The legal requirements for the assessment of environmental impacts of infrastructure projects in Cambodia are specified in Chapter III of the Law on Environmental Protection and Natural Resource Management (EPNRM Law) and the Sub-Decree No. 72 on Environmental Impact Assessment (EIA Sub-Decree). As per the provisions of EPNRM Law, all investment project applications proposed by the state require an Initial Environment Impact Assessment (IEIA) or alternatively a full Environment Impact Assessment (EIA) report, depending on the project complexity and potential for environmental impacts. In addition, the EIA Sub-Decree requires an EIA to be carried out for all public and private projects or activities including infrastructure and other activities mentioned in the sub-decree.

In relation to transport infrastructure, the EIA Sub-Decree requires EIAs for the construction of bridges (weighing 30 tonnes and more) and national roads (of at least 100 km) while construction of road-side rest and service areas (less than 12 m high or less than 8,000 m² in floor area) do not require an EIA.

Prakas No. 21 serves as a further update to the EIA Sub-Decree and provides a classification of impact assessment requirements for development projects.189 In particular, the Prakas aims to classify investment projects into those that will be subject to an initial environmental impact assessment (“IEIA”) or full environmental impact assessment (“Full EIA”) based on the nature and/or scale of the project, and others that are only required to prepare an Environmental Protection Contract (“EPC”) based on a lower impact on the environment. The Prakas is applied to all proposals of development projects, including existing and on-going projects of private individuals and private companies, joint-venture companies, public companies and government ministries and agencies.

The various categories of environmental studies for development projects under the Prakas comprise:

- EPC: The project owner shall prepare an EPC if the project falls into the category that may cause a minor impact on the environment and society as mentioned in the Annex of the Prakas No. 021

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IEIA: The project owner is required to prepare an IEIA report if the project may cause medium impact on the environment and society.

Full EIA: The project owner is required to prepare a Full EIA report if the project may cause serious impact on the environment and society.

However, there is no published guideline within Cambodia governing the impact assessment ratings, hence the severity of the impacts is subject to MOE’s assessment on a case by case basis.

The recent Prakas No. 376 aims to provide general guideline on the development of IEIA and Full EIA Reports.190 The process for EIA clearance as provided in the Prakas is set out in the following diagram.

Figure 7. Process for EIA Clearance in Cambodia191

The MOE/PDE’s assessment of IEIA/EIA involves technical review (with NGOs, research institutions etc.) and a multi-stakeholder consultation with other ministries and relevant stakeholders. For transport infrastructure, the ministries involved in the assessment may include:

- Ministry of Public Works and Transport,
- Ministry of Environment,
- Ministry of Agriculture, Forestry and Fisheries,
- Ministry of Water Resources and Meteorology,
- Ministry of Land Management and Urban Planning, and
- Ministry of Economy and Finance.

It can be seen that the EPNRM Law and EIA Sub-decree provide a comprehensive framework for conducting EIAs for development projects. However, the sub-decree includes an exemption for EIAs for special and crucial projects approved by RGC, which could potentially lead to some major projects.


lacking an assessment of environmental risks.

The involvement of international private sector parties in PPPs could potentially reduce the risks associated with the exemption of certain projects from EIA requirements, due to the adoption of international E&S frameworks requiring Environment and Social Impact Assessments (ESIAs) prepared to international standards, which are typically more robust than domestic EIAs.

A significant potential area for enhancement in Cambodia’s EIA process is the current lack of scope for a robust assessment of social considerations, such as gender, land acquisition and resettlement, indigenous peoples and worker safety and health. Again, this issue may be mitigated in part by the adoption of international E&S frameworks by international private sector parties investing in projects.

Aware of the challenges faced by EIA practitioners in the country, MOE has drafted new set of environmental impact and social assessment requirements to align more closely with international E&S standards in the form of an ENR Code (EC). It is anticipated that the ENR Code (EC), once adopted, will set out new procedures and more stringent requirements for assessment of the E&S impacts of development projects, including consideration of public participation, climate change and sustainable approaches. The draft ENR Code (EC) is a key step towards environmental governance reform for sustainable development, as referenced in Cambodia’s National Environment Strategy and Action Plan 2016-2023, however its promulgation into national law is as yet pending.

It is anticipated that the local regulators in Cambodia may require some capacity building in order to apply the E&S framework within the ENR Code (EC), given the broader and more stringent scope in terms of requirements, as well as environmental and social aspects covered.

**Sustainable Development and Climate**

Cambodia’s National Council for Sustainable Development (NCSD) is an inter-ministerial policy making body created established in 2015, bringing together 36 ministries and agencies and the 25 capital and provincial governors. It is chaired by the MOE with the Prime Minister as Honorary Chair. Its mission is to promote sustainable development and ensure an economic, environmental, social and cultural balance in Cambodia.

The NCSD has developed the National Environment Strategy and Action Plan 2016-2023 (NESAP) which forms a roadmap for sustainable development in Cambodia.192 NESAP identifies priority policy tools and financing options for sustainable natural resource management and environmental protection, and includes strategic objectives such as ‘To promote inclusive, safe, resilient and sustainable cities and human settlements’.

The Climate Change Action Plan (CCAP) for the Transport Sector 2014-2018 states that transport infrastructure is vulnerable to climate change and is also a major source of GHG emissions.193 The CCAP identifies measures that will promote both transport sector development and effective climate change responses to be implemented in the sector during the plan period. The CCAP has two main strategic priorities: to promote climate resilience in the transport infrastructure and to promote low-carbon consumption for GHG reduction in transport sector.

The CCAP establishes the following actions:

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To develop national road construction and maintenance design standards for national and provincial roads, taking into account climate change impact,

To repair and rehabilitate existing road infrastructure,

To build capacity and strengthen institutions to address climate change impacts,

To raise public awareness about climate change caused by GHG emissions from the transport sector,

To enhance the maintenance and inspection of vehicles,

To promote integrated public transport systems in main cities,

To establish green belts along major roads for climate change mitigation, and

GHG mitigations for urban transport, including mass transit and cycle systems.

Cambodia has conducted preliminary studies on Payment for Ecosystems Services (PES), covering carbon pricing issues. The NCSD is currently developing the regulatory framework to clarify rules and procedures regarding the implementation of carbon offset projects activities in Cambodia. However, the country has yet to approve regulations for climate risk, carbon pricing or carbon offset mechanisms.

6.1.2 International benchmarks and considerations

A robust PPP framework enables consideration of E&S risks throughout the project lifecycle, such as when identifying, selecting, prioritising, preparing, procuring and implementing PPP projects.


The ESF has been applied to all new World Bank investment project financings since October 2018. The ESF offers broad and systematic coverage of E&S risks. It makes important advances in areas such as transparency, non-discrimination, public participation, and accountability—including expanded roles for grievance mechanisms.

The ESF comprises:

- World Bank’s Vision for Sustainable Development;
- World Bank’s Environmental and Social Policy for Investment Project Financing (IPF), which sets out the requirements that apply to the Bank;
- The 10 Environmental and Social Standards (ESS), which set out the requirements that apply to Borrowers;
- Bank Directive: Environmental and Social Directive for Investment Project Financing; and
- Bank Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups.

Adopting the ESF on PPP projects enables the World Bank and Borrowers to better manage E&S risks and to improve development outcomes, particularly in less-regulated areas such as public participation, accountability and grievance management, as well as for emerging risks such as climate change.
Other international standards for consideration of E&S in development projects include the International Finance Corporation (IFC)'s Environmental and Social Performance Standards (PSs), the Asian Development Bank’s Environmental and Social Safeguards and the Equator Principles (EPs).

- The IFC PSs define IFC clients’ responsibilities for managing their environmental and social risks. The 2012 edition of IFC's Sustainability Framework, which includes the PSs, applies to all investment and advisory clients whose projects go through IFC's initial credit review process after January 1, 2012.

- ADB’s safeguard policy aims to help developing member countries address environmental and social risks in development projects and minimise and mitigate, if not avoid, adverse project impacts on people and the environment.

- The EPs is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making. The EPs apply globally, to all industry sectors and to five financial products: 1) Project Finance Advisory Services, 2) Project Finance, 3) Project-Related Corporate Loans 4) Bridge Loans and 5) Project-Related Refinance and Project-Related Acquisition Finance.

With reference to Table 3 in Section 2.1 of this Report, for example, the Bavet PV Solar Farm Project and North Phnom Penh-Kampong Cham Transmission Line risks were assessed in accordance with ADB’s E&S requirements.

With regards to E&S, key areas where PPPs can support the E&S agenda are in improving disclosure of E&S information related to projects and prioritisation of projects. A brief summary of available WB tools for improving public disclosure of PPP transactions and prioritising infrastructure in the private sector is provided as follows:

**Frameworks for Disclosure in Public-Private Partnership Projects**

Recognising a gap in literature and guidance on policy and practice in PPP disclosure and a wide gap in the understanding of the mechanics of disclosure by practitioners within governments and the private sector, the WB developed a Framework for Disclosure in Public-Private Partnership Projects to provide technical guidance on the systematic and proactive disclosure of information. The framework is embedded in the findings of a global review of PPP disclosure frameworks and practices in transacted PPP contracts in various jurisdictions. The framework suggests a holistic approach to disclosure through predefined standards, tools, and mechanisms, allowing for increased disclosure efficiency.

The Framework is accompanied by two additional documents, Jurisdictional Studies and Good Practice Cases. These documents provide background and information that complement the goals of the Framework. Governments can use the draft Framework for Disclosure in PPP Projects tool to create their disclosure policies and practices. Although this Framework is now being piloted in some countries of Latin America, it is currently unknown whether it will be used in Cambodia.

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195 IFC Performance Standard, IFC, 2021, [https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFCExternalCorporateSite/SustainabilityAtIFC/Policies-Standards/Performance-Standards/](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFCExternalCorporateSite/SustainabilityAtIFC/Policies-Standards/Performance-Standards/)

ADB Safeguards, ADB, 2022, [https://www.adb.org/who-we-are/safeguards/main](https://www.adb.org/who-we-are/safeguards/main)


Other frameworks for disclosure of E&S risks are highlighted in the following table:

<table>
<thead>
<tr>
<th>Country</th>
<th>Key characteristics</th>
</tr>
</thead>
</table>
| **Financial Stability Board (International)** | Task Force on Climate-related Financial Disclosures[^198]  
▶ The Financial Stability Board, an international body that monitors and makes recommendations about the global financial system, created the Task Force on Climate-related Financial Disclosures (TCFD) to improve and increase reporting of climate-related financial information  
▶ The TCFD has developed a framework to help public companies and other organizations more effectively disclose climate-related risks and opportunities through their existing reporting processes |
| **Australia** | Australia Sustainable Finance Initiative[^199]  
▶ The Australian Sustainable Finance Institute (ASFI) brings together leaders spanning Australia’s major banks, superannuation funds, insurance companies, financial sector peak bodies and academia to develop a Sustainable Finance Roadmap, in consultation with diverse sectors and stakeholders.  
▶ The Roadmap makes a total of 37 recommendations in relation to aligning Australia’s financial system with a sustainable, resilient and prosperous future for all Australians.  
▶ Financial institutions are to report according to TCFD on an ‘if not, why not’ basis.  
▶ Guidance for nature-related financial disclosures are to be aligned to Australia’s biodiversity challenges. |
| **UK** | UK Government Green Finance Strategy[^200]  
▶ The UK has developed a Green Finance Strategy to align private sector financial flows with clean, environmentally sustainable and resilient growth, supported by Government action, and to strengthen the competitiveness of the UK financial sector.  
▶ Actions include establishing a joint taskforce with UK regulators, chaired by Government, which will examine the most effective way to approach disclosure, including exploring the appropriateness of mandatory reporting.  
▶ While the focus of the Green Finance Strategy is on private financial flows, the strategy recognises that the financial risks and opportunities of climate change are relevant for the public sector as well as industry. The UK’s CDC and UK Export Finance has committed to making climate-related financial disclosures in their accounts in line with the TCFD recommendations. |
| **Singapore** | The Monetary Authority of Singapore’s has issued Guidelines on Environmental Risk Management, which set out[^201]  
▶ MAS’ expectations on environmental risk management for all banks, merchant banks, and finance companies.  
▶ Key issues to be addressed, including governance and strategy; risk management; and disclosure of environmental risk information.  
▶ Disclosure requirements, which should be in accordance with well-regarded international reporting frameworks, such as the TCFD recommendations. |

In order to improve disclosure of E&S risks in the private sector financing of transport infrastructure in Cambodia, these frameworks and the concepts within them could be adopted to provide a systematic structure for proactively disclosing relevant E&S information. Certain E&S topics could be disclosed

throughout the PPP lifecycle, such as climate risk, while the disclosure of information related to other E&S topics may be more relevant at discrete stages of the PPP process. For example, Environmental, Health and Safety (EHS) management plans or E&S Action Plans (ESAP) would be most relevant at the procurement stage, while EHS performance would relate to the contract management stage.

Infrastructure Prioritisation Framework (IPF)

The Infrastructure Prioritisation Framework (IPF) is a multi-criteria decision support tool that considers project outcomes along two dimensions – social-environmental and financial-economic. When large sets of small- to medium-sized projects are proposed, resources for implementation are limited, and basic project appraisal data (but not full social cost-benefit analysis) are available, the IPF tool can be used to inform the selection of projects by combining selection criteria into social-environmental and financial-economic indices.

6.1.3 Recommendations

While it is evident that Cambodia has in place a regulatory framework to assess environmental risks associated with potential PPP projects in the country, there remain aspects that RGC could further develop to ensure consideration of broader environmental and social risks, including social assessments, emerging areas such as climate risk assessment, and disclosure of E&S risks. International approaches could be adopted to provide a systematic structure for proactively assessing E&S and climate risks and disclosing relevant information. The TCFD recommendations on climate-related financial disclosures, for example, are widely adoptable and applicable to organizations across sectors and jurisdictions including PPP projects in Cambodia. It may be beneficial to clarify on the requirements and timeline for implementation of the revised EC, such that PPP projects can be planned with the new requirements in mind. MOE should closely monitor the effectiveness of the revised EC and incorporate any lessons learned during the implementation of PPP projects. In terms of disclosure of risks, this is recommended to be encouraged throughout the PPP lifecycle. For example, disclosure of EIA/ESIA, resettlement and climate risk assessments would be relevant at the planning stage, Environmental, Health and Safety (EHS) management plans, E&S Action Plans (ESAP) or climate adaptation plans would be relevant at the procurement stage, while EHS performance review and E&S Monitoring Reports would be relevant during the contract management stage.

6.2 Sustainable development as a driver for increasing investment in infrastructure

6.2.1 Current approach

The Sustainable Development Goals (SDGs) are an ambitious call to action to end poverty, protect the planet and improve the lives and prospects of everyone, everywhere. These are a universal set of 17 Goals, each with a number of concrete targets and indicators, that UN member states are expected to use to frame their agendas and company policies up to 2030.

The 17 Goals were adopted by all UN Member States, including Cambodia, in 2015, as part of the 2030 Agenda for Sustainable Development (the 2030 Agenda) which set out a 15-year plan to achieve the Goals.

The agreement on a new sustainable development agenda expresses a consensus by the UN Member States that the SDGs can only be achieved with involvement of the private sector working alongside Governments, Parliaments, the UN system and other international institutions, local

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authorities, civil society, the scientific and academic community – and all people. Under the 2030 Agenda, governments “...call on all businesses to apply their creativity and innovation to solving sustainable development challenges”.

Since the initial agreement in 2015, numerous financial institutions, multilateral development banks and private sector companies have committed to the SDGs and developing projects necessary to achieve the Goals.

**Figure 8. Sustainable development goals**

![Sustainable Development Goals](image)

Source: UNDP Sustainable Development Goals

While the SDGs are not legally binding, countries are expected to take ownership and establish a national framework for achieving the 17 Goals. Implementation and success will rely on countries’ own sustainable development policies, plans and programmes. Countries have the primary responsibility for follow-up and review, at the national, regional and global levels, with regard to the progress made in implementing the Goals and associated targets over a 15-year period. Actions at the national level to monitor progress will require quality, accessible and timely data collection and regional follow-up and review.

The 17 SDGs and their 169 targets are intended to stimulate action in areas of critical importance for humanity and the planet. Goals and targets of specific relevance for the transport sector include:

- **SDG 3.6** - By 2020, halving the number of global deaths and injuries from road traffic accidents.
- **SDG 11.2** - By 2030, providing access to safe, affordable, accessible and sustainable transport systems for all and improving road safety, notably by expanding public transport and with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons.

Within Cambodia, the Cambodia Sustainable Development Goals (CSDGs) are the nationalised framework for Cambodia based on the Global SDGs. The CSDGs platform is a UN joint initiative with [UN Sustainable Development Goals](https://sdgs.un.org/goals) and [Transforming our world: the 2030 Agenda for Sustainable Development](https://sdgs.un.org/2030agenda).
technical lead by UNDP Cambodia Accelerator Labs, in collaboration with Ministry of Planning, Institute of Technology of Cambodia, and Impact Hub Phnom Penh to raise awareness of the CSDGs, to support the CSDGs progress and implementation and to accelerate impact of grassroots initiatives that contribute to the CSDGs implementation.

6.2.2 International benchmarks and considerations

Role of PPP in sustainable development

Encompassing sustainable development in areas such as good health and well-being, education, clean water and sanitation, affordable and clean energy and climate action, most of the SDGs imply improvements in infrastructure. However, the implementation of the 2030 Agenda and achieving the SDGs faces significant immediate challenges. In particular, the financing required for new infrastructure is significant, estimated as amounting to about $5 trillion per year globally. Given limited government resources and the gap between needed and actual investment, a considerable amount of private finance will be required to fill this gap. PPP has been seen as a possible modality through which to attract these additional resources, as well as to accelerate sustainable development in major areas of E&S concerns such as Climate and Gender Equality, which are intrinsically linked to all other SDGs.

SDG Goal 9, for example, is to build resilient infrastructure, promote sustainable industrialisation and foster innovation. Under SDG Goal 9, specific targets are set, as follows:

► Develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all.

► Promote inclusive and sustainable industrialisation and, by 2030, significantly raise industry’s share of employment and gross domestic product, in line with national circumstances, and double its share in least developed countries.

► Increase the access of small-scale industrial and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets.

► By 2030, upgrade infrastructure and retrofit industries to make them sustainable, with increased resource-use efficiency and greater adoption of clean and environmentally sound technologies and industrial processes, with all countries taking action in accordance with their respective capabilities.

► Enhance scientific research, upgrade the technological capabilities of industrial sectors in all countries, in particular developing countries, including, by 2030, encouraging innovation and substantially increasing the number of research and development workers per 1 million people and public and private research and development spending.

► Facilitate sustainable and resilient infrastructure development in developing countries through enhanced financial, technological and technical support to African countries, least developed countries, landlocked developing countries and small island developing States.

► Support domestic technology development, research and innovation in developing countries, including by ensuring a conducive policy environment for, inter alia, industrial diversification and value addition to commodities.

► Significantly increase access to information and communications technology and strive to provide

universal and affordable access to the Internet in least developed countries by 2020.

**Figure 9. Specific targets for sustainable development goals**

![Figure 9. Specific targets for sustainable development goals](image)

Source: UNDP Sustainable Development Goals

When there is institutional capacity to create, manage and evaluate PPPs effectively, PPPs can bring greater efficiency and innovation to the development of quality, reliable, sustainable and resilient infrastructure. The SDGs may help encourage the private sector to increase financing of public services infrastructure in less developed countries, which is important as involving the private sector can not only help increase the stock of infrastructure assets, but it can also strengthen their resilience, raise E&S standards, and facilitate a more robust pace towards sustainable development.

6.2.3 **Recommendations**

**Capacity building in E&S and sustainable development**

The PPP framework can play a role in strengthening the consideration of E&S risks and sustainable development at each stage of the project lifecycle:

- **Identification and selection**: Identification, assessment and mitigation planning of E&S risks at every stage of the project planning process, such as at the identification, project selection and project prioritisation stage.

- **Procurement**: Structuring of contracts to ensure E&S risks are properly allocated and therefore considered and costed as part of the bidding process.

- **Contract management**: Transparency on E&S reporting and disclosure during the construction and operations, to include disclosure of E&S performance and progress against established commitments.

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207 Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation, UN, 2020, [https://sdgs.un.org/goals/goal9](https://sdgs.un.org/goals/goal9)
In order to realise the potential benefits of including E&S considerations in PPPs, it is necessary to have the institutional capacity to create, manage, and evaluate them. Cambodia, as discussed in Section 6.1, has a framework in place for environmental assessment of projects. However, there are opportunities to further strengthen institutional capacity to manage E&S considerations and ensure that SDGs are fully reflected in the process of identifying, preparing and implementing (via technical capability building in sustainable approaches) infrastructure development. This will be increasingly important for Cambodia’s ministries, provincial regulators, NGOs, CDC and others involved in the project approval process, if private sector participation and financing of infrastructure is to raise E&S standards throughout the project development lifecycle and make demonstratable progress towards achieving the SDGs.

Harnessing international approaches to E&S assessment in PPP projects

While Cambodia’s national environmental policy, legal and institutional frameworks are comprehensive, the EPNRM Law and the EIA Sub-decree were passed more than twenty years ago and would benefit from revisions to meet current international E&S standards, specifically in areas such as the assessment of biodiversity impacts, land acquisition and resettlement, cultural impacts, gender and grievances. In addition to revising the regulatory requirements, the capacity of local regulators to manage E&S aspects and provide oversight of the implementation of Environmental and Social Action Plans (ESAP), Environmental and Social Management Plans (ESMP) or similar during the construction phase would require strengthening, particularly for larger infrastructure projects.

PPPs could act as catalysts to fast-tracking the implementation of Cambodia’s proposed ENR Code, which is expected to strengthen E&S standards in the country by enabling larger projects with private sector support to lead on implementation of the new local requirements, as well as meeting applicable international E&S requirements.

International approaches for E&S assessment such as the World Bank’s ESF, the IFC PSs or the EPs are recommended to be deployed on infrastructure projects with both local and foreign PPP financing, as a tool for assessing and managing E&S risks in infrastructure projects. For the purposes of mitigating risk in the private sector financing of transport infrastructure, projects at various stage of the PPP lifecycle, e.g. the planning, procurement or contract management stages, could be classified as High Risk, Substantial Risk, Moderate Risk or Low Risk under a broad and strategic E&S risk management approach, aligned with WB guidance or other similar approaches.208 The primary aim of the risk classification would be to ensure that projects with high E&S risks that are unlikely to be avoided, reduced or mitigated are flagged for further detailed impact analysis early in the PPP process. This approach could greatly benefit local regulators and EIA practitioners in terms of knowledge transfer (e.g., particularly in areas such as climate, sustainable solutions, land acquisition and resettlement, disclosure) and building institutional capacity in effective public participation in E&S aspects of the project lifecycle.

Some typical E&S risks encountered during the project lifecycle from identification and selection, approvals, procurement and contracting, implementation and management of contract are summarised in the following table.

Table 33. International benchmarks for disclosure of E&S risk

<table>
<thead>
<tr>
<th>E&amp;S Risks and Considerations</th>
<th>Project identification and selection</th>
<th>Project preparation and appraisal</th>
<th>Project approval</th>
<th>Project procurement and contracting</th>
<th>Implementation and management of PPP contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land acquisition, involuntariness</td>
<td>Ability to conduct independent</td>
<td>Potential need for additional</td>
<td>E&amp;S commitments, capacity or</td>
<td>Construction phase risks e.g., labour and</td>
<td></td>
</tr>
</tbody>
</table>

Many tools are available for strengthening PPP processes. With regards to E&S, key areas that PPP can support the E&S agenda are in improving disclosure of E&S information related to projects and prioritisation of projects. Adoption of tools such as the WB’s Framework for Disclosure in Public-Private Partnership Projects and Infrastructure Prioritisation Framework (IPF) as well as other similar tools should be considered, where appropriate. The RGC could consider incorporating a climate assessment into the ESIA requirements for proposed infrastructure developments to evaluate exposure to the following physical climate hazards:

- Inland flooding (i.e., riverine and precipitation flooding)
- Coastal flooding from sea level rise and storm surge
- Tropical cyclones / typhoons
- Heat stress
- Wildfire
- Water stress and drought

Implementing agencies should undertake detailed assessments of the environmental and social considerations during the feasibility stage to ensure the technical design requirements and project performance standards incorporate sustainable development objectives.

<table>
<thead>
<tr>
<th>Disclosure</th>
<th>E&amp;S obligations under the PPP contract (e.g., E&amp;S Action Plan, E&amp;S Management Plan)</th>
<th>E&amp;S disclosure by bidders</th>
<th>working conditions related to road construction transient workforce</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Disclosure of studies such as EIA/ESIA, Climate Change Risk Assessment (CCRA)</td>
<td>E&amp;S Performance Metrics</td>
<td>Operational risks e.g., community health and safety, road user safety aspects</td>
</tr>
<tr>
<td></td>
<td>Disclosure of terms of reference for E&amp;S studies (EIA/ESIA)</td>
<td>E&amp;S Monitoring Reports</td>
<td>Physical climate risks e.g., extreme storm events impacting on road operations (tree falls, loss of power to roadside lighting)</td>
</tr>
<tr>
<td></td>
<td>Stakeholder Engagement</td>
<td>Stakeholder Reports</td>
<td>Limited state budget or capacity to manage E&amp;S aspects and provide oversight of E&amp;S compliance durin g construction-phase, especially at provincial level</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>resettlement and associated compensation</th>
<th>E&amp;S studies (EIA/ESIA) e.g., road alignment passes through conflict zone with potential constraints on independent survey teams</th>
<th>E&amp;S assessments prior to granting of approvals e.g., for cumulative and indirect risks and impacts, if not addressed by the E&amp;S studies</th>
<th>performance of the bidders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biodiversity e.g., road alignment passes close to or through protected or ecologically sensitive areas</td>
<td>Transitional climate risks e.g., market shifts away from carbon intensive infrastructure</td>
<td>Limited capacity of local government to review and critique E&amp;S studies and establish robust conditions of approval</td>
<td>working conditions related to road construction transient workforce</td>
</tr>
<tr>
<td>Physical climate risks e.g., longer-term shifts in climate patterns such as sea level rise or more frequent inland inundation influencing the selection of road alignment</td>
<td></td>
<td></td>
<td>Operational risks e.g., community health and safety, road user safety aspects</td>
</tr>
</tbody>
</table>

E&S Performance Metrics
E&S Monitoring Reports
Stakeholder Reports
Appendices
7. Appendices

7.1 Appendix 1: Materials provided by MEF GDPPP

<table>
<thead>
<tr>
<th>Category</th>
<th>Documents received</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction of CPU and Draft PPP Law</td>
<td>▶ Slide pack prepared by CPU, introducing the CPU as well as the Draft PPP Law</td>
</tr>
</tbody>
</table>
| Draft PPP Law | ▶ Draft PPP Law (English version)—Draft as of 05 Jan 2021  
▶ Draft PPP Law (Khmer version)—Draft as of 05 Jan 2021  
▶ Law on Concession (English version)  
▶ Law on Concession (Khmer version)  
| PPP Law | ▶ PPP Law (Khmer version) dated 18 November 2021 |
| Draft SOP for PPP Law | ▶ PPP SOP Volume I (Policies and Procedures)  
▶ PPP SOP Volume II (Guidelines) |
| Previous studies / surveys / assessments undertaken on PPPs | ▶ Gap analysis report by ADB—Strengthening Fiscal Governance and Sustainability in Public-Private partnerships |
| PPP transaction details for transport projects in Cambodia | ▶ Document comprising of the allocation of responsibility for the Phnom Penh-SHV Expressway Project |
| Existing internal risk matrix used by RGC | ▶ Internal risk matrix of MEF |
| Public Investment Programme (PIP) | ▶ Public Investment Programme (3-year rolling) 2021 to 2023 |
| Logistic Master Plan | ▶ Interim master plan on intermodal transport connectivity and logistics system (adopted by the National Logistics Council in January 2020) |

209 As per direction of MEF in June 2022, references to CPU have been amended to GDPPP in the final version of the report.
## Appendix 2: List of institutions for transport sector

<table>
<thead>
<tr>
<th>No.</th>
<th>Required approvals, permits, licenses</th>
<th>Relevant Government Agencies</th>
<th>Estimated Timeline</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Approval on concession over the Project and the terms of the concession agreement</td>
<td>Royal Government of Cambodia (RGC)</td>
<td>1 to 6 months</td>
</tr>
<tr>
<td>2.</td>
<td>Grant of exclusive or non-exclusive Land Use Rights (Depends on terms of the concession agreement)</td>
<td>Royal Government of Cambodia (RGC)</td>
<td>1 to 2 months</td>
</tr>
<tr>
<td>3.</td>
<td>Approval of the use of right of way</td>
<td>Ministry of Public works and Transport (MPWT)</td>
<td>1 to 3 months</td>
</tr>
<tr>
<td>4.</td>
<td>Company Registration</td>
<td>Ministry of Commerce (MOC)</td>
<td>1 to 2 months</td>
</tr>
<tr>
<td>5.</td>
<td>Company - Tax Registration</td>
<td>General Department of Taxation (GDT)</td>
<td>1 month</td>
</tr>
<tr>
<td>6.</td>
<td>Company -Labor Registrations</td>
<td>Ministry of Labour and Vocational Training (MLVT)</td>
<td>1 month</td>
</tr>
<tr>
<td>7.</td>
<td>Social security registrations with the National Social Security Fund</td>
<td>National Social Security Fund (NSSF)</td>
<td>1 to 2 months</td>
</tr>
<tr>
<td>8.</td>
<td>Approval of the location of the registered office</td>
<td>Relevant Provincially/ Municipality</td>
<td>1 to 3 months</td>
</tr>
<tr>
<td>9.</td>
<td>Visas, Work Permits and Travel Authorizations</td>
<td>Ministry of Labour and Vocational Training (MLVT)</td>
<td>1 to 2 months</td>
</tr>
<tr>
<td>10.</td>
<td>Qualified Investment Project (QIP)</td>
<td>Council for the Development of Cambodia (CDC)</td>
<td>2 to 3 months</td>
</tr>
<tr>
<td>11.</td>
<td>Approval of master list</td>
<td>Council for the Development of Cambodia (CDC)</td>
<td>1 month</td>
</tr>
<tr>
<td>12.</td>
<td>Import and Export license</td>
<td>General Department of Costumes and Exercises of Cambodia (GDCEC)</td>
<td>1 to 2 months</td>
</tr>
<tr>
<td>13.</td>
<td>Road license</td>
<td>Ministry of Public Works and Transport (MPWT)</td>
<td>1 to 3 months</td>
</tr>
<tr>
<td>14.</td>
<td>Approval on a full environmental impact assessment report</td>
<td>Ministry of Environment (MOE)</td>
<td>1 to 6 months</td>
</tr>
<tr>
<td>15.</td>
<td>Environmental Protection Agreement</td>
<td>Ministry of Environment (MOE)</td>
<td>1 month</td>
</tr>
<tr>
<td>16.</td>
<td>Construction Permit</td>
<td>Ministry of Land Management, Urban Planning and Construction (MLMUPC) / Relevant Municipality / Provincially.</td>
<td>3 to 6 months</td>
</tr>
<tr>
<td>No.</td>
<td>Required approvals, permits, licenses</td>
<td>Relevant Government Agencies</td>
<td>Estimated Timeline</td>
</tr>
<tr>
<td>-----</td>
<td>--------------------------------------</td>
<td>-----------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>17.</td>
<td>Opening site permit</td>
<td>Ministry of Land Management, Urban Planning and Construction (MLMUPC) / Relevant Municipality / Provinciaity</td>
<td>1 to 2 months</td>
</tr>
<tr>
<td>18.</td>
<td>Closing site permit</td>
<td>Ministry of Land Management, Urban Planning and Construction (MLMUPC) / Relevant Municipality / Provinciaity</td>
<td>1 to 2 months</td>
</tr>
</tbody>
</table>
7.3 **Appendix 3: Lifecycle of PPP projects**

The following diagram depicts the lifecycle of solicited and unsolicited PPP projects.²¹⁰

---

²¹⁰ Appendix 1 of SOP 1 and paragraph 2.2, chapter VIII of SOP I
7.4 **Appendix 4: Detailed lifecycle of USPs**

The various phases and steps in an USP lifecycle are summarised below.211

<table>
<thead>
<tr>
<th>Phase I: Identification and selection of USP</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1: Unsolicited Proposal by private proponent</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Submission of unsolicited proposal to the IA must be accompanied with a pre-FS</td>
</tr>
<tr>
<td></td>
<td>The unsolicited proposal may come from or outside of the Potential PPP Projects List</td>
</tr>
<tr>
<td></td>
<td>If project is not from the Potential PPP Project List, it must be included in the Public Investment Program or in an approved sector Master Plan</td>
</tr>
<tr>
<td>Step 2: Review and in-principle approval for preparation</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If project is from the PPP Project List, it does not require MCA and the IA can submit a proposal to seek MEF’s endorsement</td>
</tr>
<tr>
<td></td>
<td>If project is outside the PPP Project List, it will be subject to MCA per pre-FS results, before it is sent for MEF’s endorsement</td>
</tr>
<tr>
<td></td>
<td>Upon MEF’s endorsement, the IA and MEF will jointly submit a proposal to the head of RGC for in-principle approval to proceed to preparation stage</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase II: Project preparation</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 3: Preparation and review of Framework Agreement (FA)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The draft FA will set out the timeline for completion of FS, the review and approval process, key terms and conditions of PPP contract, the validity period and other rights and obligations of contracting parties</td>
</tr>
<tr>
<td></td>
<td>The draft FA will have to be approved by IA and MEF prior to conduct negotiations with the private party</td>
</tr>
<tr>
<td>Step 4: Negotiation and approval of FA</td>
<td></td>
</tr>
<tr>
<td></td>
<td>During negotiations, if there are major changes sought by the private party, GDPPP will compile a report on the fiscal, potential risks and other implications based on the review from relevant MEF departments / other RGC agencies and submit to MEF for a decision</td>
</tr>
<tr>
<td></td>
<td>Upon agreement of terms and conditions, the FA is signed between the IA and private party, and counter-signed by MEF</td>
</tr>
<tr>
<td>Step 5: Undertaking of FS</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The private party will conduct a detailed FS and submit the FS report along with a financial / commercial proposal</td>
</tr>
<tr>
<td></td>
<td>The FS must be completed and submitted to the IA within the timeframe stipulated in the FA</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase III: Project approval</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 6: Review of FS</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The review / due diligence of feasibility report is conducted similar to that of solicited proposals, as depicted in step 6 of Chapter V of SOP I</td>
</tr>
<tr>
<td></td>
<td>The GDPPP and IA will ensure that the FS report complies with the FA, and will ensure that it is reviewed by other relevant central ministries and agencies, and approvals (where required) are obtained before preparing the report for MEF</td>
</tr>
<tr>
<td>Step 7: Approval of FS</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Upon review, the head of the IA will endorse the feasibility report and seek the approval of MEF. The approval process is similar to that of solicited proposals, as depicted in step 6 of chapter V of SOP I</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase IV: Contracting and signing</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 8: Preparation of the PPP contract</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The IA and MEF will prepare a draft PPP Contract (private party may prepare the contract sometimes). The preparation is done similar to that of solicited proposals, as depicted in step 9 of chapter VI of SOP I</td>
</tr>
<tr>
<td></td>
<td>GDPPP will seek confirmation of relevant agencies and endorsement of Minister of MEF before confirming the contract with the IA</td>
</tr>
<tr>
<td></td>
<td>Thereafter, the IA will review and agree on the position of the RGC on the contract</td>
</tr>
<tr>
<td></td>
<td>The transaction advisor will prepare a negotiating strategy based on the outcome of meetings with the IA and MEF</td>
</tr>
<tr>
<td>Step 9: Negotiations, approval and signing of PPP contract</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The IA and private party will conduct negotiations similar to that outlined in step 11 of chapter VI of SOP I</td>
</tr>
<tr>
<td></td>
<td>If an agreement cannot be reached, the negotiating team will submit a memorandum the IA and MEF for their decision on the next steps</td>
</tr>
<tr>
<td></td>
<td>Thereafter, the IA and MEF will submit a memorandum highlighting options for the head of RGC and implement the final decision (competitive bidding may be conducted in exceptional cases)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase V: Implementation and management of PPP Contract</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 10: Management of the PPP contract</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The PPP contract should be implemented / managed similar to solicited proposals, as depicted in step 12 of chapter VII of SOP I</td>
</tr>
<tr>
<td>Step 11: Handover</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The project should be handed over in a manner similar to that of solicited proposals, as depicted in step 13 of chapter VII of SOP I</td>
</tr>
</tbody>
</table>

---

211 Chapter VIII of SOP I
### 7.5 Appendix 5: International examples of eligibility criterion for government support

<table>
<thead>
<tr>
<th>Criteria</th>
<th>India</th>
<th>Philippines</th>
<th>Indonesia</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Eligibility criteria</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sectors eligible</td>
<td>Specified in VGF guidelines. India does not have a PPP law</td>
<td>Governed by the relevant PPP law / decree</td>
<td>Governed by the relevant PPP law / decree</td>
</tr>
<tr>
<td>Economic feasibility</td>
<td>Project to be economically feasible (target not specified)</td>
<td>Project to be economically feasible with economic return of more than 15%</td>
<td>Project to be economically feasible</td>
</tr>
<tr>
<td>Minimum project size for VGF</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Total project costs must be at least USD 6.9m</td>
</tr>
<tr>
<td>Demand risk transfer</td>
<td>Demand risk must be transferred to private partner</td>
<td>Demand risk must be transferred to private partner</td>
<td>Demand risk must be transferred to private partner</td>
</tr>
<tr>
<td>Maximum VGF/construction subsidy per project</td>
<td>40% of total project costs</td>
<td>50% of total project costs</td>
<td>49% of total project costs</td>
</tr>
</tbody>
</table>

**Disbursement criteria**

| Conditions to be fulfilled                          | 100% equity needs to be contributed before disbursement of VGF       | VGF must be disbursed within 2 years of contract signing or is withdrawn | Upon achieving agreed construction milestones per VGF award letter |
|                                                     | VGF disbursed in proportion to remaining debt                        | No equity nor debt-related conditions unless specifically stated in contract | At least 20% of equity and first tranche of debt has been contributed |
| Disbursement period                                 | Construction phase                                                  | Construction and operation phase                 | VGF disbursed in proportion to remaining debt subject to fulfilling all the above criteria |
| Frequency                                            | Per concession agreement terms                                       | Per concession agreement terms                   |                                                  |
| Disbursement form                                   | Monetary support only                                               | Monetary support only                            | Monetary support only                           |

Sources: India—Scheme and guidelines for financial support to PPPs, published by Ministry of Finance, dated 2013; Philippines—Guidelines on VGF for PP projects dated March 2015, PPP Governing Board; Indonesia—Ministry of Finance Reg 223/2012; EY research
Appendix 6: Simplified representation of revenue / benefit sharing concept in Vietnam

The Vietnamese regulation provides for the Government to share 50% of the excess of realised and projected revenue over 125% of financial plan revenue. The regulation also provides for the Government to share 50% of the decrease of realised and projected revenue below 75% of financial plan revenue. The following diagram depicts a simplified representation of the revenue / benefit sharing concept in Vietnam.

- **Concession agreement**
- **Example 1**
- **Example 2**

---

**Example 1**

- **Actual Revenue < Financing Plan Revenue**
- **Private sector loss**: 7.5
- **Government contribution**: 60
- **Actual revenue**: 60
- **Government contributes 50% of shortfall below 75, i.e. 50% of 15 = 7.5**
- **PPP Company receives 60 + 7.5 = 67.5**
- **PPP Company loss is 25 + 7.5 = 32.5**

---

**Example 2**

- **Actual revenue > Financing Plan Revenue**
- **Unshared revenue**: 125
- **Government receives 50% of revenue above 125, i.e. 2.5**
- **PPP Company receives 125 + 2.5 = 127.5**
## Appendix 7: Case studies on revenue / benefit sharing

The following table depicts illustrations of revenue / benefit sharing mechanisms adopted in transport projects in Republic of Korea and Australia.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Incheon Bridge</th>
<th>Sydney Harbour Tunnel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Republic of Korea</td>
<td>Australia</td>
</tr>
<tr>
<td>Sector</td>
<td>Transport—bridge</td>
<td>Transport—tunnel</td>
</tr>
<tr>
<td>Project cost (USD m)</td>
<td>2,000</td>
<td>573</td>
</tr>
<tr>
<td>PPP contracting mode</td>
<td>BTO</td>
<td>BOOT</td>
</tr>
<tr>
<td>Contracting parties</td>
<td>Authority—Ministry of Land, Infrastructure and Transport (MOLIT) Private—KODA (Incheon Bridge Co., Ltd.)</td>
<td>Authority—Roads &amp; Traffic Authority (RTA) Private—Sydney Harbour Tunnel Company</td>
</tr>
<tr>
<td>Description</td>
<td>The project involved the construction and operation of a 21km cable-stayed bridge, under a 30-year concession</td>
<td>The project involved the development of a 2.3km, 4-lane, under-water tunnel running below Sydney Harbour, under a 36-year concession</td>
</tr>
<tr>
<td>Revenue / benefit sharing mechanism</td>
<td>Minimum revenue guarantee</td>
<td>Ensured Revenue Stream (ERS)</td>
</tr>
<tr>
<td></td>
<td>Concessionaire is guaranteed 80% of the annual revenue in case toll revenues are below a threshold, up to 15 years after the start of operations</td>
<td>RTA makes monthly payments in the form of ERS to the concessionaire to meet its financial obligations in relation to tunnel operations</td>
</tr>
<tr>
<td></td>
<td>In 2013, despite operations being profitable, toll revenue was less than estimated and per the PPP contract terms, MOLIT paid the PPP Co KRW 13.8b (USD 145m) as a minimum revenue guarantee payment</td>
<td>ERS calculated from a formula based on theoretical traffic volumes, a toll, bridge toll collection costs, actual tunnel toll revenues and a weighted index</td>
</tr>
<tr>
<td></td>
<td>Surplus revenue refunding</td>
<td>The ERS effectively guarantees all of the debt service and market (traffic) risk</td>
</tr>
<tr>
<td></td>
<td>Revenue in excess of 120% of financial plan revenue from year 15 onwards to be paid to the Government</td>
<td>Given the risk allocation, the project was financed mostly with debt—bonds issued by the Project Co. to the private sector of USD 487m, shareholder’s loan (repaid in 1992) of USD 40m, and an interest-free subordinated loan (net bridge revenue loan) provided by the RTA of USD 223m</td>
</tr>
</tbody>
</table>

Sources: PPP Best Practice (APEC) 2015; Infrastructure Public-Private partnership Case Studies of APEC Member Economies (APEC) 2014; Global Infrastructure Hub; EY research
## Appendix 8: Case studies on termination payments

The following table depicts cases of termination event and compensation upon termination for transport projects in Australia, USA, and the UK.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>East West Link</th>
<th>South Bay Expressway (SBX)</th>
<th>Nottingham Express Transit (NET)—Line 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
<td>United States of America</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Sector</td>
<td>Transport—road</td>
<td>Transport—road</td>
<td>Transport—rail</td>
</tr>
<tr>
<td>Project cost (USD)</td>
<td>17b*</td>
<td>658m</td>
<td>380m</td>
</tr>
<tr>
<td>PPP contracting mode</td>
<td>DBFMO</td>
<td>BTO</td>
<td>PFI</td>
</tr>
<tr>
<td>Termination year</td>
<td>2015</td>
<td>2010 - 2011</td>
<td>2011</td>
</tr>
<tr>
<td>Contracting parties</td>
<td>Authority—Linking Melbourne Authority&lt;br&gt;Private—Stella EWL Finance Pty. Ltd.</td>
<td>Authority—State of California&lt;br&gt;Private—California Transportation Ventures Inc.</td>
<td>Authorities—Nottingham City Council and Nottinghamshire County Council&lt;br&gt;Private—Arrow Light Rail Ltd (bought over by Tramlink Nottingham)</td>
</tr>
<tr>
<td>Description</td>
<td>The construction of a 18km-long freeway road network which would connect the Eastern Freeway, Tullamarine Freeway, Port of Melbourne and the Western Ring Road</td>
<td>The construction of a 9.2mile southern extension of SR 125, extending from San Miguel Road in Bonita to SR 905 in Otay Mesa, under a 35-year concession</td>
<td>The construction of a 14km tram system from the centre of Nottingham to Hucknall with a spur to Phoenix Park. NET has a fleet of 15, spanning over 5 park rides and 23 tram stops</td>
</tr>
<tr>
<td>Termination event</td>
<td>Voluntary termination by the Government since the business case of the project failed to provide a strong basis for the Government to invest</td>
<td>PPP company event of default from project company insolvency due to poor traffic and cost overruns</td>
<td>Voluntary termination for public interest&lt;br&gt;NET Line 1 was awarded to Arrow Light Rail Ltd. in 2000. At the time of development of NET Line 2, the tender for the development of Line 2 included the takeover of Line 1&lt;br&gt;The tender was awarded to Tramlink in March 2011. Consequently, the Line 1 contract with Arrow Light Rail was voluntarily terminated</td>
</tr>
</tbody>
</table>
### Criteria

<table>
<thead>
<tr>
<th>Compensation upon termination</th>
<th>East West Link</th>
<th>South Bay Expressway (SBX)</th>
<th>Nottingham Express Transit (NET)—Line 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; Termination compensation was estimated at USD 850m*, which included expenditure on the planning, development, procurement and termination of the project.</td>
<td>&gt; Upon termination, the project was sold to San Diego Association of Governments (SANDAG). The termination payment was computed based on discounted value of future cash flows of the project. SANDAG planned to increase future revenues through lower tolls and cancellation of capacity additions.</td>
<td>The project was constructed and was operating satisfactorily at the time of termination. The compensation process involved:</td>
<td></td>
</tr>
<tr>
<td>&gt; The compensation was expected to be partially offset by future proceeds from the sale of properties acquired for the project. The Department of Treasury &amp; Finance (DTF) estimated that these properties can be resold for around USD247m*</td>
<td>&gt; Compensation obtained by project company was valued at USD 341.5m (based on discounted cash flows), significantly greater than the road’s book value of USD 287m</td>
<td>&gt; Detailed assessment / agreement of condition of assets</td>
<td></td>
</tr>
<tr>
<td>&gt;</td>
<td>&gt;</td>
<td>&gt;</td>
<td></td>
</tr>
</tbody>
</table>

* Note: Amounts converted from AUD to USD based on conversion factor of 1 AUD = 0.77 USD  
Source: Bursa Malaysia, IJ Global, EY research
## Appendix 9: List of typical risks in PPP projects and their typical allocation

<table>
<thead>
<tr>
<th>Risk</th>
<th>Description</th>
<th>Consequence</th>
<th>Preferred allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Site risks</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Land acquisition and resettlement</td>
<td>Land access and use rights of the project site are not obtained timely and in expected conditions</td>
<td>Additional construction time and cost</td>
<td>Government (unless project is realised on site chosen and acquired by private partner)</td>
</tr>
<tr>
<td>Ground conditions</td>
<td>Discovery of unexpected adverse ground conditions</td>
<td>Additional construction time and cost</td>
<td>Private partner (potentially up to a specific amount, with government undertaking remaining costs)</td>
</tr>
<tr>
<td>Approvals</td>
<td>Essential approvals are not obtained timely or are subject to unexpected conditions</td>
<td>Additional construction time and cost</td>
<td>Government (unless project is realised on site chosen and acquired by private partner or approval delays are due to private partner negligence)</td>
</tr>
<tr>
<td><strong>Political risks</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discriminatory / specific change of law (incl. tax)</td>
<td>Unanticipated change in law / policy, directed at the project or services specifically, and which has adverse cost or revenue impacts to private partner</td>
<td>Additional capital and/or operating costs / reduced revenues</td>
<td>Government (unless costs can be passed to end-users)</td>
</tr>
<tr>
<td>General change in law</td>
<td>Unanticipated change in law / policy, which is general, and which has adverse cost or revenue impacts to the private partner</td>
<td>Additional capital and/or operating costs / reduced revenues</td>
<td>Private partner (unless private partner, due to the contract, cannot respond to the change in law in a manner similar to the average company in the economy and is hence affected significantly more than the average company in the economy)</td>
</tr>
<tr>
<td>IA default</td>
<td>IA failing to meet payment obligations</td>
<td>Revenue loss</td>
<td>Government</td>
</tr>
<tr>
<td>Risk</td>
<td>Description</td>
<td>Consequence</td>
<td>Preferred allocation</td>
</tr>
<tr>
<td>------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Regulatory consent</td>
<td>Regulator revokes operating permit and imposes conditions on pricing / other project aspects / services, which were unexpected in the private partner’s business plan</td>
<td>Additional costs / revenue loss</td>
<td>Private partner (unless an unanticipated change in regulation arises)</td>
</tr>
<tr>
<td>Design and construction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Design risks</td>
<td>Infrastructure design is incapable of delivering services at expected cost / quality</td>
<td>Additional operating costs and/or lower service quality resulting in revenue loss</td>
<td>Private partner</td>
</tr>
<tr>
<td>Construction risks</td>
<td>Events during construction which deter facility being delivered on time and on cost</td>
<td>Additional construction time and cost</td>
<td>Private partner</td>
</tr>
<tr>
<td>Operational risks</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Input quantity, quality and price</td>
<td>More-than expected input costs and less-than expected quality / quantity</td>
<td>Additional operating costs and/or lower service quality resulting in revenue loss</td>
<td>Private partner</td>
</tr>
<tr>
<td>Output quality and quantity</td>
<td>Output is produced at inadequate quality / quantity</td>
<td>Revenue loss</td>
<td>Private partner</td>
</tr>
<tr>
<td>Interface risk</td>
<td>Contracted services delivery adversely impacts core service delivery (or vice-versa) in an unexpected manner</td>
<td>Higher costs of contracted and/or core services</td>
<td>Private partner (unless government has made unexpected changes)</td>
</tr>
<tr>
<td>Revenue risks</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tariff adjustment breach</td>
<td>Regulatory authority fails to approve tariff adjustments expected in private partner’s business plan</td>
<td>Revenue loss</td>
<td>Government</td>
</tr>
<tr>
<td>Demand risk</td>
<td>Service demand is lower than expected in the private partner’s business plan (for user-pays projects)</td>
<td>Revenue loss</td>
<td>Private partner (if demand risk is large, government may reduce / eliminate revenue risk at contracting stage through an availability- payment scheme)</td>
</tr>
<tr>
<td>Network connectivity risk: complementary route</td>
<td>Complimentary government network (on which project relies) is not provided</td>
<td>Demand and revenue loss (for projects involving payments in function of usage)</td>
<td>Government</td>
</tr>
<tr>
<td>Risk</td>
<td>Description</td>
<td>Consequence</td>
<td>Preferred allocation</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Network connectivity risk: competing route</td>
<td>Increase competition for facility by creating / extending / repricing competing network</td>
<td>Demand and revenue loss (for projects involving payments in function of usage)</td>
<td>Private partner (unless competing network changes arise from unexpected / discriminatory acts of government)</td>
</tr>
<tr>
<td>Sponsor and financial</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial risks</td>
<td>Debt and/or equity needed by private partner is not available / insufficient / not in required condition</td>
<td>Delays and increased costs</td>
<td>Private partner (unless government bears interest rate risk till financial close)</td>
</tr>
<tr>
<td>Sponsor risks</td>
<td>Private partner lacks financial, managerial, or technical capability to render the services</td>
<td>Service cessation to government and potential equity / debt investment loss</td>
<td>Government (cessation services) and private partner (investment loss)</td>
</tr>
<tr>
<td>Force majeure</td>
<td>Damages to infrastructure and/or temporary or permanent inability for private partner to offer contracted services</td>
<td>Asset loss / damage, service discontinuity for government, and revenue loss for private partner</td>
<td>Private partner (asset and revenue loss) and government (service interruption)</td>
</tr>
</tbody>
</table>
Appendix 10: Procedures and mechanisms for management of RGC’s PPP related fiscal risks

Following are some procedures established for management of fiscal commitments of RGC:\(^{212}\)

**Budgetary ceilings for fiscal commitments**

- The MEF minister as the Public Debt Management Committee chair must approve the budgetary ceilings for fiscal commitments for PPPs.
- The budgetary ceilings for each policy period shall be incorporated in the corresponding period’s policy guidelines for public debt management and public debt management strategy.
- The MEF shall periodically notify budgetary ceilings on managing exposure to fiscal commitments; Approvals for all new fiscal commitments will need to satisfy the condition that the overall budgetary ceilings notified by MEF are not breached by approving any new fiscal commitment for PPPs.

**Setting of guarantee fees**

- A guarantee fee shall be applied to PPP projects or to the IA in cases where an explicit risk-variable specific guarantee is provided.
- The guarantee fee shall be payable at the rate approved by the MEF, on the present value of the guaranteed amount on risk specific guarantees, as per the accepted financial model of the project and approval by the MEF.
- The guarantee fee shall be calculated and paid in advance on an annual / semi-annual basis, as approved by MEF.
- In case of late payment of guarantee fee, the project company must pay interest on the late payment and the applicable interest rate shall be 150% of the average interest rate for six-month term deposits multiplied by the number of days of late payment.

**Claims on government support mechanisms / guarantees**

- Mechanism for Invoking claims against the IA / RGC shall be specified in the respective contractual documents.
- Project company claims shall be validated by a third party or dispute resolution process, as stated in contractual documents.
- Upon submission of validated claims to MEF, the GDPPP shall review the claim report and seek approval of the Prime Minister. Once approved, GDPPP will proceed per payment procedures of MEF. During invocation of a guarantee / contingent liability, the obligation is discharged per provisions set out in the SOPs. \(^{213}\)

**Fiscal risk and budgeting**

- MEF makes suitable annual budgetary allocations to deal with future payments related to government support mechanisms and fiscal commitments for PPPs, per the following guidelines:
- Annual budgetary allocations shall be made for payments due in the next financial year on direct commitments and all called-up portions of guarantees and contingent liabilities.
- A contingent liability reserve fund shall be established where an amount equal to a specified

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\(^{212}\) Paragraph 3, Volume 11 (Procedural Guidelines on Risk Management of Fiscal Commitments for PPPs) of SOP II

\(^{213}\) Paragraph 3.3, Volume 11 (Procedural Guidelines on Risk Management of Fiscal Commitments for PPPs) of SOP II
percentage of the present value of outstanding risk-variable specific guarantees shall be credited on an annual basis

► An account shall be created in the national budget to manage the contingent liability reserve fund

► MEF shall issue instructions for effective reporting / management of contingent liability reserve fund

► The PPP project using risk-variable specific guarantees shall undertake accounting to report operations and results, undertake annual audit reports to check / verify the legality and reality of project financial report, and verify that resources are being used efficiently by the project pursuant to applicable procedures, regulations, policies, financial and accounting regime

**Monitoring of fiscal commitments**

► The GDPPP is responsible for monitoring progress of government support mechanisms and fiscal commitments and shall provide annual reports to the approving body, per the following guidelines:

► The GDPPP shall review all PPP Projects with government support mechanisms and fiscal commitments on an annual basis

► The monitoring or review undertaken will examine whether the PPP project company is discharging its financial and commercial obligations as per terms of the agreements

► The GDPPP shall be responsible to keep records of all guarantees, keep records of levy and recovery of guarantee fee, keep records of all payments and receipts in relation to the guarantees, retain information required for guarantees, keep records of annual reviews, and prepare a report to the GDPPP, Inter-Ministerial Committee (IMC) and the approving body for an annual review