



Policy Brief

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Advancing Public-Private Partnerships in the Philippines

A thriving PPP initiative hinges on a robust legal framework, effective governance, and institutional preparedness. The proposed Public Private Partnership Act (SBN 2233) seeks to establish and institutionalize these requirements, ensuring the efficient execution of PPP projects and driving economic growth.

The role of public-private partnerships (PPP) in driving economic growth is well-documented. PPP has been a viable tool to bring in additional investments particularly for infrastructure development. It allows the government to secure not only the financing for its infrastructure needs but also the much-needed expertise and technology from the private sector. This reduces the burden on the public coffer and helps ensure the efficient and effective delivery of infrastructure projects and services to the people.

Republic Act (RA) 6957 or the Build-Operate-Transfer (BOT) law, was enacted in 1990, and was regarded as a first of its kind in the Southeast Asian region. According to the World Bank (WB), from 1990 until the first half of 2022, total private sector investment in the Philippines' PPP program amounted to US\$53.15 billion or about 85.0 percent of total private sector investments in the infrastructure sector. PPP boosts the infrastructure investments in the country which is driven primarily by government spending. From 2015 to 2021, out of the PhP6.4 trillion in total infrastructure investments, PhP5.6 trillion was due to actual government disbursements thru the national budget while the balance of PhP839.7 billion came from the private sector, with PPPs being the preferred mode of participation. For the same period, disbursements from official development assistance (ODA) loans for infrastructure projects amounted to PhP241.2 billion.

Given the narrower fiscal space in the aftermath of the COVID-19 pandemic, the Marcos Jr. administration has repeatedly emphasized that the PPP procurement mode will have a larger role in its Build, Better, More infrastructure program. With some projects carried over from the previous administration, the program is estimated to cost around PhP8.7 trillion. It includes 197 big-ticket infrastructure flagship projects (IFPs), 48 of which are slated for funding via PPP and hybrid PPP. The said IFPs are expected to result in more business investments and create more quality jobs for Filipinos.

A successful PPP program, however, requires a clear legal and regulatory framework, strong governance arrangements, and institutional readiness. Stakeholders have been lamenting that there are ambiguities in the existing law including the unclear allocation of risks and responsibilities among PPP players that cannot be remedied merely through amendments in its implementing rules and regulations (IRR). Moreover, other critical challenges such as the bureaucratic and time-consuming process of project approval, procurement and implementation, inadequate government capacity to manage PPPs, political and policy risks, stakeholder engagement and transparency issues, need to be addressed as they contribute to significant delays and inefficiencies in executing PPP projects.

This Policy Brief aims to provide an overview of the current PPP landscape in the Philippines, show its importance in advancing economic growth and infrastructure development, discuss the features as well as the issues with the existing BOT Law and the proposed legislation on PPP. The latter sections of the brief will focus on comments and recommendations to further improve the proposed PPP Act.



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Overview of the Current PPP Landscape in the Philippines

Historical context. Section 20, Article II of the 1987 Philippine Constitution clearly defined the “indispensable role of the private sector” in achieving the development goals of the country. In 1987, Executive Order (EO) No. 215 was issued by President Corazon C. Aquino which allowed private companies to construct and operate vital energy infrastructure services to address the then ongoing power shortage. In 1989, the first BOT agreement in the country between the National Power Corporation and Hopewell Energy Management Ltd. was signed. This resulted in the construction of a power station in Navotas.

The following year, RA 6957 entitled, “An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for other Purposes,” also known as the BOT Law of 1990 was enacted. It allowed government agencies, including government-owned and controlled corporations (GOCCs) and local government units (LGUs) to enter into contract with the private sector in the implementation of infrastructure projects through the BOT and Build-Transfer-and-Operate (BTO) schemes. The BOT Law was recognized by the Asian Development Bank (ADB) as a pioneering legislation in Asia for private sector participation in infrastructure projects.

In 1993, President Fidel V. Ramos issued Memorandum Order No. 166 directing the Coordinating Council on the Philippine Assistance Program (CCPAP)¹ which was under the Office of the President (OP) to establish and operate a One-Stop BOT Center. In 1994, the BOT Law was amended through RA 7718 and the CCPAP was mandated to take the lead in the coordination and monitoring of PPP projects. RA 7718 expanded the PPP modalities and allowed the participation of the private sector in non-traditional infrastructure sectors such as education, health, and agriculture. It also broadened the coverage and included government financing institutions (GFIs) and state universities and colleges (SUCs) to the list of PPP implementing agencies (IAs). The amendatory law likewise clarified the treatment of unsolicited proposals² from the private sector.

By virtue of Administrative Order (AO) No. 67 issued by President Joseph E. Estrada in 1999, the CCPAP-BOT Center was reorganized into the Coordinating Council for Private Sector Participation (CCPSP). CCPSP was eventually converted into the BOT Center through EO No. 144 of President Gloria Macapagal-Arroyo in 2002 and was transferred under the Department of Trade and Industry. During the administration of President Benigno S. Aquino III, the BOT program evolved into the broader PPP program and became a vital component of the infrastructure agenda. Under EO No. 8 of 2010, the BOT Center was reorganized into the PPP Center and was attached to the National Economic and Development Authority (NEDA). Its main duties are the promotion of PPP policy and technical assistance in the formulation, implementation, and monitoring of PPP projects. The PPP program was designated as a cornerstone strategy for national development, aiming to accelerate infrastructure development and sustain economic growth.

The Duterte administration initially expressed commitment to the PPP program. However, citing concerns about the delays associated with PPP projects and the availability of cheap foreign aid, it shifted its focus to ODA and the national budget as the primary source of infrastructure funding. A “hybrid PPP scheme” was also introduced wherein the completion of the construction phase was taken care of by the public sector, while operation and maintenance are left to the private partners (Ito, 2018).

Under the current Marcos administration, the PPP program has regained prominence in the infrastructure agenda. Efforts are underway to amend the BOT Law through proposed PPP bills in the Senate. Additionally, the administration promptly addressed private sector concerns by issuing new implementing rules and

¹ Administrative Order (AO) No. 105 issued by President Corazon Aquino created the Coordinating Council on the Philippine Assistance Program (CCPAP). The said agency was mandated to take the lead role in mobilizing aid or support from the international community for the country’s achievement of its growth and development objectives.

² An unsolicited proposal (USP) is made by a private sector proponent to an implementing agency at its own initiative without a formal solicitation from the government.

regulations (IRR) and revised joint venture (JV) Guidelines while awaiting the passage of the proposed amendments to the PPP Law.

Legal frameworks. There are four main components that collectively form the legal and regulatory frameworks facilitating PPP implementation in the Philippines and enabling private sector participation across various sectors and levels of government.

First is the BOT Law of 1990 and its 1994 amendatory law which cover projects implemented by the national government agencies (NGAs), SUCs, GOCCs, government corporate entities (GCEs), government instrumentalities with corporate powers (GICPs), government financial institutions (GFIs), and water districts, as well as LGUs. Its IRR has already undergone revisions several times -- in 1998, 1999, 2006, 2012, March 2022, and the latest was in September 2022.

Second is EO No. 423 which was issued in 2005. It mandates the NEDA, in consultation with the Government Procurement Policy Board (GPPB), to issue guidelines for JV involving SUCs, GOCCs, GCEs, GICPs, GFIs, and water districts. A JV is an arrangement whereby a private sector entity or entities and the government agree to contribute capital, services, assets or a combination of any to undertake an investment activity. Under the 2013 revised JV guidelines, the Office of the Government Corporate Counsel (OGCC) and the Governance Commission for Government-Owned and/or Controlled Corporations (GCGs) will also have to be consulted by the NEDA prior to the revision of the guidelines. The latest changes to the JV guidelines which required regulatory approval for tariff rate and toll adjustments were approved by NEDA last April 25, 2023.

Third, LGUs are given the option to adopt the Amended BOT Law/NEDA JV Guidelines or develop their own local PPP Codes/JV Codes, as provided for by the 1991 Local Government Code. Currently, 196 LGUs have reported having their own local PPP Codes/JV Codes, although further verification is ongoing as reporting is voluntary.

Fourth, select GOCCs such as the Bases Conversion and Development Authority, Tourism Infrastructure Economic Zone Authority, and the National Housing Authority are granted by their respective charters, to establish their own JV guidelines when engaging in PPPs.

Table 1. Number of awarded national and local PPP projects by contractual arrangement, 2010-2022³

Implementing Agency	Contractual Arrangement		
	BOT Variants	Joint Ventures	Special Charters
Awarded National PPP Projects			
NGAs	23	1	0
GOCCs	46	6	3
NGAs/GOCCs (as co-grantors)	2	2	5
Total	71	9	8
Awarded Local PPP Projects			
LGUs	32	31	0
Local water districts	0	58	0
Total	32	98	0

Source: PPP Center (data as of 31 December 2022)

Table 1 summarizes the legal frameworks used for awarding national and local PPP projects for the period 2010-2022. Out of the 88 awarded national PPP projects, 71 utilized the BOT Law for contractual arrangements. Of the awarded national PPP projects, 39 are found in the power sector. This is to be expected given the decades-long use of PPPs to attract private investments in the said sector. In the case of awarded

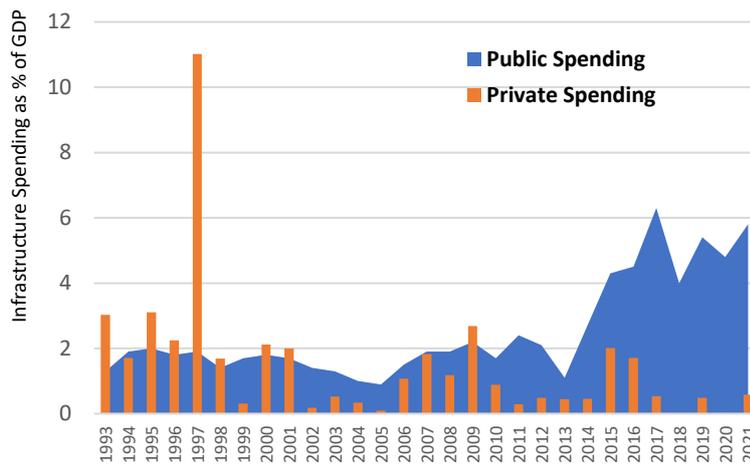
³ Database is based on available information and submissions by national implementing agencies. For PPPs done under special charters, these use different frameworks such as Supplemental Toll Operation Agreements, National Water Crisis Act and the Bases Conversion and Development Act.

local PPP projects, 66 out of the 122 projects are in the water sanitation sector with JVs being the most preferred mode of procurement.

Some PPP projects were also implemented by virtue of special law or issuances. According to the PPP Center, these projects include the privatization of the (1) Metropolitan Waterworks and Sewerage System (MWSS) under RA 8041 (Water Crisis Act); (2) the power plants constructed under EO No. 215, series of 1987; (3) Skyway Stage 3 Project (an extension of the existing JV agreement between Philippine National Construction Corporation (PNCC) and Citra Lamtoro Gung Persada; and (4) North Luzon Expressway-South Luzon Expressway Connector Extension Project which is a JV agreement between PNCC and Manila North Tollways Corporation.

The current state of the PPP program. The private sector has played a significant role in financing infrastructure development in the country. In the first half of 1990s for instance, private sector investments either matched or surpassed infrastructure investments made by the government.⁴ At that time, the Ramos administration tapped the BOT Law to address the power crisis and signed 27 PPP projects in the electricity sector worth US\$6.41 billion. The huge jump in private infrastructure spending in 1997 is attributed to the US\$7.47 billion in investments from Manila Water and Maynilad which won the concession to operate Metro Manila’s water distribution services.

Fig. 1 Infrastructure Spending in the Philippines, as % of GDP, 1993-2021



Source: WB Private Participation in Infrastructure (PPI)

From 1991 to the first semester of 2022, US\$53.2 billion or 85.0 percent of the total US\$62.639 billion in private investments in the infrastructure sector was invested in PPP projects (Fig. 2) while US\$9.48 billion went towards non-PPP projects. More than half of the 153 projects implemented are in greenfield projects (construction of new facilities) while the rest are in brownfield projects (rehabilitation/improvement of existing facilities).⁵ Bulk or 65.0 percent of the projects are found in the electricity sector while at far second and third were the road and water/sewerage projects.

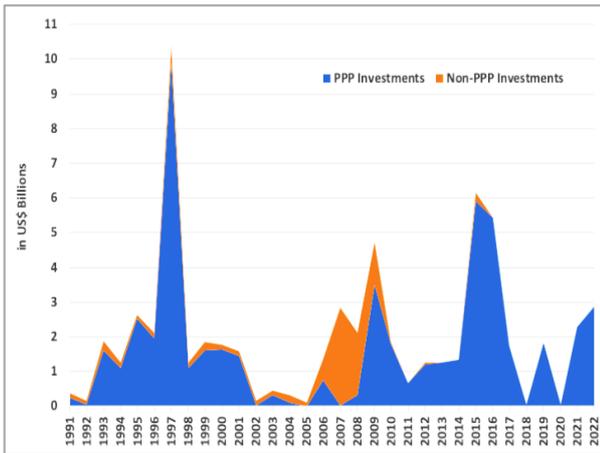
It is important to emphasize that most of these infrastructure projects would not have been accomplished without private sector participation. With the robust infrastructure program from 2016 to 2021 costing Php6.7 trillion and generating an estimated 9 million jobs for the period, this will likely be sustained with the private sector having a bigger role in the infrastructure program. Upon the end of the contract, these

⁴ This cover both PPP and non-PPP projects.

⁵ Greenfield projects include BOT, Build-Lease-Transfer, Build-Own-Operate. Examples of brownfield projects are Rehabilitate-Operate-Transfer, Rehabilitate-Lease-Transfer, and Build-Rehabilitate-Operate-Transfer.

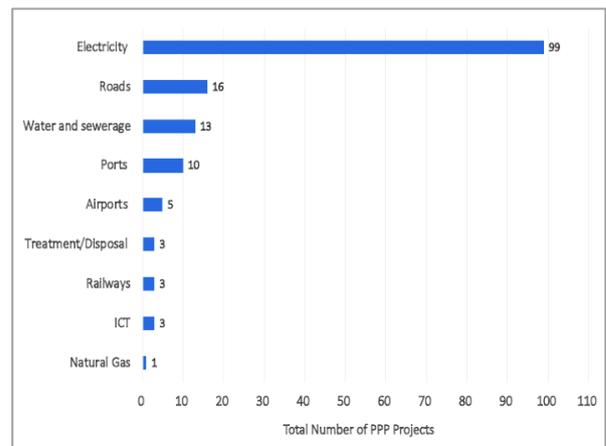
projects would be turned over to the government that may be privatized later on, as in the case of the powerplants.⁶

Fig. 2: Private Infrastructure Spending via PPP and non-PPP, 1991 to 2022 1st Semester



Source: WB Private Participation in Infrastructure (PPI)

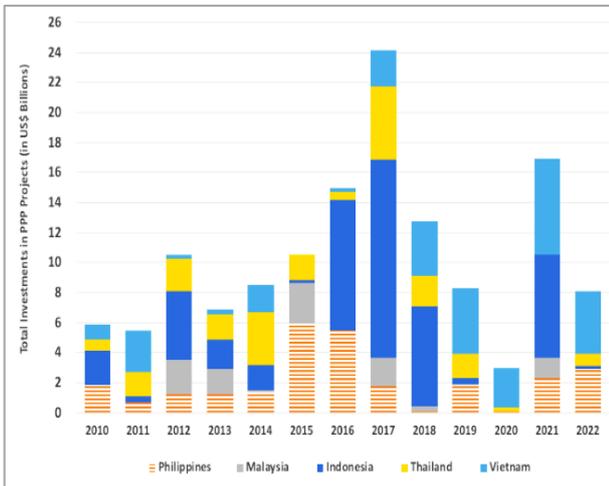
Fig. 3: Number of PPP projects by sector, 1991 to 2022 1st Semester



Source: WB Private PPI

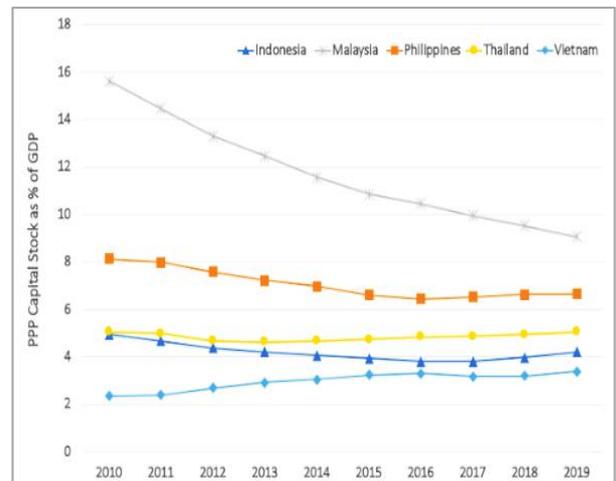
It can be observed though that while the Philippines was one of the first among developing countries in Asia to use BOT or PPP schemes for infrastructure development, it is increasingly being eclipsed by its ASEAN neighbors in attracting PPP investments. Across the region, the Philippines still has the second highest PPP capital stock among the five southeast Asian economies, however, it is in danger of losing this position as more PPP investments have been going to the other countries in recent years. At 6.66 percent of GDP in 2019, the PPP Capital Stock of the Philippines has not yet recovered from its slow decline beginning in 2010 when it was at 8.13 percent of GDP.

Fig. 4: Investments in PPP Projects, Key ASEAN Countries 2010 to 2022, First Semester



Source: WB PPI

Fig. 5: PPP Capital Stock as % of GDP, Key ASEAN Countries 2010 to 2019



Source: IMF Investment and Capital Stock Database

For the period 2018-2022, total PPP investment in the Philippines amounted only to US\$7.09 billion. In contrast, Indonesia saw US\$14.10 billion in total PPP investments while Vietnam recorded US\$21.25 billion. A further cause for concern for the Philippines is the percentage of canceled/distressed projects—reaching almost 12 percent of total investments as compared to 1.58 percent and 0.59 percent in Thailand and Vietnam, respectively.

⁶ Based on data from the Power Sector Assets and Liabilities Management Corporation, as of June 2023, it generated PhP62.82 billion in revenues from the privatization of generation assets that were turned over to it by the private sector upon conclusion of their respective PPP contracts.

Table 2. Private Participation in PPP Infrastructure, Key ASEAN Countries

	Indonesia	Malaysia	Philippines	Thailand	Vietnam
Legal basis for PPP	2015 PPP Law	2009 PPP Guidelines	1994 Amended BOT Law	2013 PPP Act	2015 Vietnam PPP Decree
Number of PPP projects	138	118	153	180	149
Total PPP investment, 1991 -2022 (in US\$ billions)	70.14	48.45	53.15	42.16	35.14
Total PPP investment, 2018-2022 (in US\$ Billions)	14.10	1.86	7.09	4.75	21.25
Sector with largest share	Electricity	Electricity	Electricity	Electricity	Electricity
Number of PPP projects cancelled/ under distress	12	21	10	3	2
Total investment in cancelled/ distressed projects (in US\$ billions)	6.55	12.95	6.35	0.67	0.21
Share of cancelled/distressed projects to total investment (in %)	9.33	26.72	11.94	1.58	0.59

Source: World Bank PPI Database; Verougstraete (2017)

Even as the Philippines continue to perform well in global surveys assessing the level of PPP-readiness and regulatory framework, this failed to translate into higher infrastructure investments for the country.⁷ In a survey of ASEAN economies, Zen (2019) identifies the factors that handicap PPP programs—(i) poor project pipelines, (ii) ineffective legal systems, (iii) lack of public sector capacity to assess risk sharing and incentives and to negotiate deals, and (iv) lack of supportive financial markets. Previous studies on PPP implementation in the Philippines (Canlas et al., 2008; Llanto, 2007; JICA, 2013; Rosales, 2017; Ito, 2019) have likewise identified persistent issues that remain unresolved, contributing to the waning interest in the country's PPP program.

Issues and Challenges on the PPP framework and implementation in the Philippines

Investor confusion in PPP frameworks. The current BOT Law is not the sole legal framework for PPPs, and this at times, can lead to investor confusion. Prospective investors lament that they find it cumbersome to familiarize themselves with various PPP frameworks, depending on the government agency implementing the project. Additionally, the recent changes in the PPP framework, such as the creation of the PPP Center and the Project Development and Monitoring Facility (PDMF), were enacted through Executive Order No. 8, series of 2010. Because it lacks the full backing of an actual law, it is subject to modification or even abolition by new administrations. To provide permanence to the current institutional set-up, a new law must be passed.

Limited flexibility in approval thresholds. The current BOT Law, with its last significant amendment dating back almost thirty years, faces a notable challenge in keeping its approval thresholds aligned with present-day economic realities. The referenced project cost thresholds for determining whether projects fall under NEDA-Investment Coordination Committee-NEDA (NEDA-ICC) or NEDA Board approval might no longer accurately reflect the current economic landscape. This underscores the need for adjustments in the approval thresholds to ensure the law's relevance.

Inconsistent policy on unsolicited proposals. The handling of unsolicited proposals has posed a significant challenge within the framework of the current BOT Law in the Philippines. There has been inconsistency in policy across different administrations, leading to ambiguity and investor uncertainty. During the Aquino administration, unsolicited proposals were discouraged due to governance concerns. However, under the

⁷ In the 2018 Infrascope study by The Economist Intelligence Unit, the Philippines ranked second among 19 economies surveyed in Asia and got an overall score of 81/100. It was the only mature economy for PPPs together with Thailand and China.

Duterte administration, there was a more receptive approach, particularly in the context of the Build, Build, Build program. It's important to note that these policy shifts occurred without any corresponding amendments to the BOT Law itself, compounding the uncertainty for investors and further complicating the regulatory landscape related to unsolicited proposals. This inconsistency has created a need for clearer and more stable guidelines to provide investors with confidence and predictability in considering unsolicited proposals.

Limited competition in unsolicited proposals. The current framework for unsolicited proposals, particularly under Section 4-A, grants Original Proponents certain rights, including the ability to match lower proposals submitted by other proponents within a tight thirty-day window. This provision has faced criticism and calls for change, with experts considering it "anti-competitive" (World Bank, 2018; IMF, 2019).

Using the Philippines as an example, the WB study highlights that the short preparation time severely discourages private entities from submitting competing bids, as these may be matched by the Original Proponent through a "Swiss Challenge" method. Ideally, private entities would require at least three to six months (depending on project complexity) to develop a robust competing proposal. In contrast, challengers in the Philippines are only given sixty (60) working days from the issuance of the tender to submit their bids. This imbalance places challengers at a disadvantage, as Original Proponents always have the option to match proposals, even if challengers meet the tight submission deadlines. Addressing this issue is crucial to fostering a more competitive and equitable environment for unsolicited proposals in the country.

Ensuring sanctity of PPP contracts. Consistency in honoring PPP contracts is vital to maintaining trust and encouraging private sector participation. In the Philippines, there have been instances where adjustments in tariffs and tolls specified in contracts were disregarded by IAs and regulators. The examples often cited are the delayed toll increases by NLEX despite pending applications since 2010 and the unapproved increase in Manila Water and Maynilad tariff rates which prompted the said companies to bring the issue to the international arbitration. These cases underscore the need for consistent adherence to contracts to build trust and facilitate the sustained engagement of the private sector.

Weak technical capacity for PPP project preparation. The deficiency in qualified personnel within IAs has been a longstanding concern for PPP project identification and preparation (Canlas, et al. 2006; Llanto, 2008; Ito, 2019; ADB, 2020). In 2013, a study by the Japan International Cooperation Agency (JICA) underscored the absence of dedicated PPP units within most IAs, impeding effective project preparation, bid document evaluation, and PPP project assessment. The study stressed the necessity of creating specialized units within IAs, composed of experts from diverse backgrounds, to ensure proficient handling of PPP projects.

While the PPP Center offers the PDMF to aid IAs in project identification and preparation, including the engagement of consultants and technical advisors, this ideally should serve as a short-term measure. IAs should aspire to enhance their technical capacities to independently perform these functions, thereby relieving pressure on the PDMF and the PPP Center. The current shortfall in technical capacity within IAs is the primary reason behind the absence of a robust pipeline of PPP projects ready for bidding. The issue became more evident during the Aquino administration when its 2011 target of having 10 PPP projects engaged that year was only realized in 2015 (Ang, 2015). If IAs lack the capacity to identify and prepare projects, it raises concerns about their ability to monitor and evaluate projects effectively. Additionally, the reliance on unsolicited proposals, criticized for their perceived lack of competitiveness, is a consequence of the advantages automatically granted to Original Proponents, who often secure these projects.

Addressing Right-of-Way (ROW) delays The PPP Center underscores the significance of early land acquisition by IAs to avert additional costs and delays. For instance, the prolonged construction of the 4km long Muntinlupa-Cavite Expressway which took nearly four years to complete could have been avoided had ROW issues been timely addressed. Other major projects, such as the Cavite-Laguna Expressway (CALAX) and Light Rail Transit 1 Extension projects, encountered significant delays due to similar ROW issues. CALAX, originally slated for completion in 2020, is now projected to finish in 2024, with costs escalated by 40 percent. As of

April 2, 2023, the Cavite portion of the CALAX project has achieved less than 70 percent ROW acquisition, as reported by the Private Proponent. Efficient ROW acquisition and the timely relocation of utilities are imperative to mitigate such setbacks.

Challenges in foreign participation in PPP projects. Until the enactment of RA 11659 (Amendments to the Public Service Act) in 2022, foreign companies seeking involvement in PPP projects related to public utilities such as airports, toll roads, and railways, were required to establish JVs or consortia with Filipino-owned firms due to restrictions imposed by the 1987 Constitution. Based on the Constitution, only corporations organized under Philippine laws and holding at least 60 percent Filipino ownership were eligible to own public utilities in the country. These restrictions not only deterred foreign firms seeking majority control of these companies but also favored large conglomerates with access to substantial financial resources that met the 60 percent ownership requirement mandated by the constitution.

A notable case involving foreign participation in PPP projects was the Ninoy Aquino International Airport Terminal 3 project, where criminal cases were filed against Fraport AG Worldwide Services, Inc. and Philippine Air Terminals Co. for purported Anti-Dummy Law violations. This case had a significant impact on trade and investment relations between Germany and the Philippines. A similar situation loomed for the GMR Megawide Cebu Airport Corp, a JV between Megawide Corp. and India-based GMR Corp., the winner of the 25-year concession to operate the Mactan-Cebu International Airport. However, these cases were dismissed with the passage of the Public Service Act amendments, resolving a long-standing challenge in foreign participation in Philippine PPP projects.

Broadening the spectrum of PPP financing.

The Philippines currently upholds restrictions that prohibit insurance companies and pension funds from participating in the financing of PPP projects, a divergence from practices observed in other countries like Indonesia. This distinction carries significance, given the long-term nature of liabilities associated with pension funds and insurance companies. Their investment profile naturally aligns with infrastructure projects, enabling these financial institutions to diversify their portfolios and counteract the effects of rising inflation (Shindo, 2021 and ADB PPPLRC).

Strengthening safeguards in PPP schemes for ICT projects.

In a 2005 Sectoral Performance Audit report evaluating information and communication technology (ICT) projects under the BOT program, the Commission on Audit (COA) raised concerns about the suitability of the Build-Own-Operate (BOO) scheme for ICT initiatives due to the absence of project continuity. Notably, it highlighted specific cases such as the Land Transportation Office’s Information Technology Project and the Land Registration Authority’s Land Titling Computerization Project. Under these projects, private proponents were only obliged to surrender the database to the IAs at the conclusion of the 10-year concession period, while the IT facilities and application systems, financed by IT fees from users, would remain under the ownership of the proponent. The COA warning has proven prescient, particularly in the case of the Land Transportation Office (LTO), which now confronts delays in implementing its Land Transportation Management System. These delays have been attributed to the protracted turnover of the database by its previous IT service provider (Gulla, 2023). Ensuring appropriate safeguards within PPP schemes for ICT projects is essential to address such challenges and protect the continuity of critical information systems.

Table 3. Possible Sources of Financing for PPP projects in Indonesia and the Philippines

	Indonesia	Philippines
Private developers	Yes	Yes
Construction contractors	unavailable	Yes
Institutional/financial/private equity investors	Yes	Yes
Pension funds	Yes (indirectly thru bond purchases)	No
Insurance companies	unavailable	No
Banks	Yes	Yes
Nonbanking financial corporations/financial institutions	Yes	No
Donor agencies	Yes	Yes
Government agencies and state-owned enterprises	Yes	Yes

Source: ADB PPP Monitor

Mitigating risks arising from contingent liabilities. As per findings from an Organization for Economic Cooperation and Development (OECD) study, the Philippines has historically exhibited a tendency to offer generous government guarantees in past PPP contracts, potentially resulting in substantial contingent liabilities. Notable examples include the Metro Rail Transit line 3, where the government guaranteed a 15 percent internal rate of return on a dollar basis to benefit the private proponent, the Metro Rail Transit Corporation. Additionally, the "take-or-pay" format in the power purchase agreements with independent power producers (IPPs) during the Ramos administration guaranteed payment for the energy supplied, even if unused. These practices have posed concerns regarding the excessive risk taken on by the government and the associated fiscal implications.

Recognizing the imperative need for effective monitoring of these contingent liabilities, the Development Budget Coordination Committee (DBCC) established a Technical Working Group (TWG) on Contingent Liabilities in 2015. Comprising of the Bureau of the Treasury (BTr), Department of Finance (DOF), Department of Budget and Management (DBM), and the PPP Center, the group administers a risk management program funded by unprogrammed appropriations. The program's overarching objective is to address both direct and contingent liabilities arising from PPP projects. Remarkably, as per the BTr report, no claims have been paid from the risk management program to date.

According to the 2021 Annual Report of the BTr, the national government (NG) bore contingent liabilities amounting to Php30.25 trillion by the end of 2020. Within this substantial sum, guarantees on public-private partnership (PPP) projects represented Php311.80 billion, constituting 1.7 percent of the total. The PPP Center has consistently provided updates on the estimated project cost of awarded PPP projects, which surged from Php1.07 trillion in 2010 to Php2.33 trillion in 2022.

Table 4. Summary of Contingent Liabilities of National Government (in PhP Billions)

Particulars	2020	% of Total	% of GDP
Direct Guarantees on GOCC Loans	458.35	1.5%	2.6%
PPPs	311.80	1.0%	1.7%
Social Security Institutions	9,935.68	32.8%	55.4%
Government Service Insurance System	2,042.25	6.7%	11.4%
Social Security System	6,767.25	22.4%	37.7%
PhilHealth	1,126.18	3.7%	6.3%
Military and Uniformed Personnel (MUP) Obligations	9,617.03	31.8%	53.6%
TOTAL	30,258.54	100.0%	168.7%

Source: 2021 BTr Annual Report released on July 2022

Promoting transparency and accountability through legal provisions. In contrast to global best practices recommended by the World Bank's Benchmarking Infrastructure Development report, the current BOT Law lacks provisions mandating IAsto comprehensively disclose PPP contracts. This disclosure should encompass a contract summary, the complete contract, its annexes, appendices, and any subsequent amendments, making them accessible online or through official channels such as the official gazette. Additionally, assessments conducted by IAs as part of their project preparation and identification functions are not made available online.

The only relevant provision within the Amended BOT Law concerning public disclosure and transparency pertains to the requirement for all government agencies, including LGUs and GOCCs, to publish their list of priority projects, which may be considered for private sector participation through the BOT framework, in national and potentially international newspapers with general circulation. Addressing these transparency and accountability gaps is vital for aligning the country's PPP framework with international best practices.

Some Comments and Recommendations on the Salient Features of the Proposed Measure (SBN 2233)

There are currently eight (8) proposed bills filed in the 19th Congress to formalize the PPP Act. As of 25 September 2023, Senate Bill No. (SBN) 2233, which is the subject of Committee Report No. 71. is awaiting Third Reading approval. The counterpart legislation, House Bill No. 6527, was transmitted to the Senate on 14 December 2022.

The key elements of this proposed legislation seek to: (1) rectify the ambiguities present in the existing law governing PPPs; (2) address the bottlenecks and challenges impeding the successful implementation of PPPs; and (3) cultivate a more competitive and supportive environment conducive to the growth of PPPs. This legislative initiative is a critical step toward enhancing the regulatory framework for PPPs in the Philippines.

1. Addressing the ambiguities in the existing legal and regulatory framework governing PPPs

Establishing the PPP Law as the overarching legal framework. The proposed SBN 2233 establishes the PPP Law as the comprehensive legal framework for all PPP projects involving IAs and private proponents at the national and local levels, including JVs. Additionally, the bill repeals any existing PPP/JV codes/regulations issued by the LGUs and GOCCs that conflict with its provisions. Establishing the PPP Law as the overarching legal framework, as proposed in SBN 2233, brings the advantage of streamlining PPP projects with consistent rules across national and local levels, including JVs, while removing conflicting regulations issued by LGUs and GOCCs. However, centralizing power in this manner may limit local flexibility and responsiveness to specific regional needs and contexts, potentially compromising the adaptability of PPP projects.

Approval process for national PPP projects. SBN 2233 introduces changes to the approval process for national and local PPP projects. For national projects costing below PhP2.5 billion, the heads of IAs or their governing boards will serve as the approving body. Projects ranging from PhP2.5 billion to PhP5.0 billion will be approved by the NEDA -ICC. National projects exceeding PhP5.0 billion will require NEDA Board approval upon favorable recommendation from the NEDA-ICC.

For local PPP projects, regardless of cost, approval will be granted by the respective local Sanggunians, respecting their local autonomy. If NG funds are needed, the NEDA-ICC will have to approve the support but not the project itself. To ensure alignment with national and regional master plans, LGUs must obtain endorsement from the NG through the regional development councils. SBN 2233's adjusted approval process for national and local PPP projects offers advantages by establishing a clear hierarchy based on project scale, simplifying decision-making. Local PPP projects respecting local autonomy and ensuring alignment with national and regional plans enhances regional coordination. However, the tiered approval process may introduce delays that impact project efficiency and timelines.

2. Addressing the bottlenecks and challenges affecting implementation of PPPs

Issuance of franchise and regulation of tolls, fares, rentals, and other charges. Section 13 of the bill states that once a PPP contract is signed between the IA and the private proponent, the regulator, upon application by the private proponent, shall grant the franchise to operate the facility and collect the specified tolls, fares, fees, rentals, and other charges outlined in the contract. It further specifies that the initial tolls/fares, fees, and other charges, as well as any adjustments, must receive approval from the appropriate regulator before the project bidding process. If the regulator fails to act on any application related to payments to the Private Proponent and the proposed project parameters, terms, and conditions within sixty (60) calendar days of receiving the application, the initial tolls/fares, fees, and other charges and adjustments will be deemed approved by the regulator. Moreover, during the implementation of the PPP project, the regulator is expected to uphold the approved initial/fares, fees, and other charges, unless extraordinary circumstances specified in the PPP contract occur. If the regulator fails to uphold the approved charges as stipulated in the contract, the Private Proponent is entitled to recover the difference through measures permitted in the contract.

The provisions outlined in Section 13 of the bill regarding the issuance of franchises and the regulation of tolls, fares, rentals, and other charges introduce advantages by providing a structured approach that promotes efficiency in project execution, granting franchises promptly, and allowing for adjustments without undue delays. However, this streamlined approach may raise concerns about potential inadequate regulatory oversight, as initial tolls, fares, fees, and charges are deemed approved if not acted upon within 60 calendar days, possibly affecting accountability in regulating these aspects of PPP projects.

Mandatory inclusion of dispute avoidance and alternative dispute resolution (ADR) mechanisms in PPP contracts. Section 14 of the proposed measure requires that all PPP contracts should include provisions on the use of dispute avoidance and Alternative Dispute Resolution (ADR) mechanisms. It grants contracting parties the complete freedom to choose which ADR mechanisms and venue shall govern their dispute, as well as the rules and procedures to be used.

The mandatory inclusion of dispute avoidance and Alternative Dispute Resolution (ADR) mechanisms in PPP contracts, as stated in Section 14 of the proposed measure, offers advantages by ensuring that these provisions are consistently integrated into PPP agreements, enhancing dispute resolution efficiency. This section also grants flexibility to contracting parties, enabling them to select the specific ADR mechanisms, venues, rules, and procedures that best suit their dispute resolution needs. However, while this flexibility promotes tailored dispute resolution, it may potentially lead to variation in ADR processes across different PPP contracts, potentially complicating dispute resolution efforts.

Limitations on judicial actions on PPP processes. All courts, except for the Supreme Court, are prohibited from issuing temporary restraining order, preliminary injunction, preliminary mandatory injunction, temporary environmental protection order, or similar temporary or provisional reliefs or remedies, against any IA or the PPP Center that restrains, prohibits or compels the following offices to do the following: bidding, rebidding, or declaration of failure of bidding of any PPP Project; awarding of any PPP contract; acquisition, clearance, development of the ROW, site or location of any PPP Project; construction, operation and maintenance of any PPP Project; commencement, execution, implementation, termination or rescission of any PPP contract; and undertaking or authorization of any other lawful activity necessary for such PPP Project or contract. This covers cases to be filed by any person, including those filed by other bidders.

Limiting judicial actions on PPP processes, as outlined in this provision, brings advantages by streamlining project timelines, ensuring continuity in project execution, and preventing undue delays caused by court orders. By restraining the issuance of temporary restraining orders and similar reliefs, it fosters an environment conducive to efficient PPP project implementation. However, this limitation may raise concerns about accountability and transparency, as it potentially curtails the ability to seek legal recourse in case of disputes or irregularities, which could impact the balance of power between the involved parties.

3. Fostering a more competitive and enabling environment for PPPs

Consideration of unsolicited projects. A major reform being introduced under Section 10 of SBN 2233 is the removal of all preconditions set forth in the Amended BOT Law that private proponents must meet prior to submission of an unsolicited proposal. Unsolicited proposals may now be eligible for payment of ROW costs and contributions of assets, properties, and rights, provided that the government receives fair compensation equal to or higher than the costs incurred for ROW-related payments, assets, properties, and rights.

IAs can consider unsolicited proposals that involve ROW acquisition, including properties owned by the original proponent, as long as advance payment for ROW costs is prohibited and comprehensive ROW and resettlement plans are submitted. If the IA has already incurred development costs for the PPP project within the past three years (i.e., feasibility studies/business cases, and surveys) the private proponent must reimburse the IA for documented development costs, regardless of the funding source (i.e., national budget, grant, or other funds).

In addition, while the current law states that projects included in the government's List of Priority Projects are not eligible to be accepted as unsolicited proposals, section 10 subsection b of SBN 2233 allows unsolicited proposals for projects found in the list of PPP projects that will be prepared by IAs as part of their development plans, strategies, and investment programs. The consideration of unsolicited projects under Section 10 of SBN 2233 introduces advantages by simplifying the preconditions for private proponents to submit such proposals, potentially encouraging more innovative project ideas. The option for private proponents to pay ROW costs and contribute assets and properties enhances the feasibility of such proposals. However, this approach may raise concerns regarding cost recovery for IAs and the potential for unsolicited projects to align with government priorities, particularly if reimbursement for development costs and inclusion in the List of Priority Projects are not adequately addressed in specific cases, potentially affecting overall project alignment and accountability.

Comparative challenge for unsolicited proposals. Section 10, subsection (h) of SBN 2233 stipulates that unsolicited proposals must undergo a comparative challenge within a reasonable and fair period, not exceeding one year, as proposed by an IA, and approved by the approving body. Furthermore, it introduces a bonus system wherein the financial proposal of the Original Proponent automatically receives a bonus, ranging from 5 to 10 percent, as approved by the approving body. This bonus is granted while awaiting comparative proposals from potential challengers. If the advantage of the Top Challenger's proposal falls within the approved percentage range of the Original Proponent's proposal, the Original Proponent has the right to match the financial proposal of the Top Challenger within 30 days. However, if the advantage of the Top Challenger's proposal exceeds the approved percentage of the Original Proponent's proposal, the Top Challenger will be awarded the project.

The comparative challenge introduced under Section 10, subsection h of SBN 2233 presents advantages by establishing a structured process to assess unsolicited proposals, ensuring fairness, and stimulating competition. The bonus system offers an incentive for the Original Proponent, potentially encouraging innovative and cost-effective proposals. However, it may raise concerns about potential delays in project selection, especially if the Top Challenger's proposal is significantly better. In such instances, the extended evaluation process required to consider the significantly superior proposal might impact project timelines and execution efficiency.

Moreover, dealing with unsolicited proposals presents a host of challenges, from the sheer volume of proposals to coordination difficulties and a lack of public capacity for evaluation. Concerns are raised about the potential misuse of unsolicited proposals to bypass competitive bidding and promote non-transparency.

Instead of further favoring Original Proponents with bonuses and the right to match, it's advisable to encourage competition by adopting the best-and-final offer method involving the Original Proponent and the Top Challenger. The elimination of the right to match option, as recommended by the IMF, can promote a more competitive bidding process for unsolicited proposals, addressing their relatively higher failure rates compared to solicited projects. This change aligns with the goal of improving transparency and fairness in PPP processes.

Investment recovery scheme. Section 18 outlines the methods by which the Private Proponent can recover investments and earn a reasonable profit. These include the following options or a combination thereof: 1) Revenue-based scheme where Private Proponents are authorized to charge and collect reasonable tolls, fares, fees, rentals, and other charges from the public, as permitted in the contract; and 2) Availability-based scheme where IAs commit to making predetermined payments, which are not derived from charges paid by the users of the works or services. Additionally, non-monetary payments such as commercial development rights or granting portions of reclaimed land may be allowed, subject to fair valuation. The allowable rate of return for the Private Proponent shall be specified in the IRR.

The Investment Recovery Scheme in Section 18 offers flexibility for Private Proponents, allowing them various means to recover investments and turn a reasonable profit. This flexibility can attract private investment in infrastructure projects. However, it raises concerns about potential costs for the public and demands transparent evaluation mechanisms to ensure fairness and accountability.

Creation of the PPP Risk Management Fund. The bill proposes the creation of the PPP Risk Management Fund which shall be tapped for the payment of contingent liabilities arising PPPs based on the contract terms signed by the IAs with Private Proponents. The target amount for the Fund shall be determined by the DBCC and shall form part of the Unprogrammed Appropriations of the annual budget. Moreover, the current TWG on Contingent Liabilities created under DBCC Resolution No. 2015-2 is institutionalized and will remain in charge of monitoring government obligations on liabilities that have materialized and other unforeseen risks that may arise from PPP projects, and to develop guidelines to access the said Fund.

The creation of the PPP Risk Management Fund, as outlined in the bill, provides a structured approach to managing contingent liabilities arising from PPP projects, enhancing financial security. The inclusion of the inter-agency technical working group ensures diligent monitoring and risk assessment. However, its effective implementation will depend on robust guidelines and transparency in accessing the fund.

Institutionalization of the PDMF. To be managed by the PPP Center as a revolving fund, the PDMF shall be used for the procurement of advisory and support services related to the preparation, structuring, evaluation, procurement, probity management, financial close, and monitoring of implementation of PPP Projects. Funding for the PDMF may come from the following sources: general appropriations act, ODA, or other sources, subject to applicable laws, rules, and regulations. To ensure the fund's sustainability, the PPP Center shall be allowed to recover amounts disbursed and to receive fees subject to guidelines set by the PPP Governing Board. The PDMF Committee is likewise institutionalized and shall be tasked to formulate, prescribe, and recommend policies, procedures, and guidelines for the use of the PDMF and recovery of costs charged to the Fund. This Committee shall be chaired by the NEDA with the DOF as Vice Chairperson, the DBM as member and the PPP Center serving as its secretariat. The representatives sitting on the Committee shall be Assistant Secretary-level at minimum.

The institutionalization of the PDMF under the management of the PPP Center provides a sustainable financial mechanism for vital advisory and support services in PPP projects. The diversified funding sources enhance the fund's resilience, and the oversight by the PDMF Committee ensures responsible utilization. However, prudent guidelines and transparent cost recovery procedures will be crucial for its effective operation.

The sustainability of the PDMF is a crucial consideration to ensure its effectiveness in supporting PPP projects. Section 26 of SB No. 2233 outlines various funding sources for the PDMF, which is a positive step. However, there's a need to explore additional measures to strengthen the fund's sustainability further. To enhance the sustainability of the PDMF, it is advisable to impose an obligation on the winning bidder of PPP projects to reimburse the PDMF for the expenses incurred during project preparation. This reimbursement mechanism will help offset costs, reducing the burden on other funding sources, and contributing to the long-term viability and effectiveness of the PDMF.

Project supervision and monitoring. Section 16 of the bill assigns to IAs the responsibility for the overall supervision of the PPP project and the submission of periodic monitoring reports, executed under oath, to the appropriate agencies. The PPP Governing Board is assigned to set the framework for monitoring the compliance of the parties to the PPP contracts, report the progress of PPP projects and their expected benefits and outcomes, and determine the appropriate penalties for non-compliance of parties to reportorial requirements.

The PPP Center is tasked with the coordination and monitoring of PPP projects. IAs are required to submit to the PPP Center all executed PPP contracts, information on the status of projects implemented by, as well

as copies of all unsolicited proposals and related documents received by the IA, and loan or financing documents of the Private Proponent for the PPP project.

Project supervision and monitoring under Section 16 of the bill clearly delineate responsibilities among the IAs, the PPP Governing Board, and the PPP Center. While IAs oversee project supervision and report to appropriate agencies, the PPP Center plays a vital role in coordinating and monitoring PPP projects. The bill promotes transparency by requiring IAs to provide essential project-related documents. However, the effectiveness of this framework will rely on strong enforcement mechanisms and cooperation between the involved parties.

Moreover, the absence of a provision for third-party monitoring and evaluation in SBN 2233 is a notable drawback, particularly considering the potential conflict of interest issues that may arise due to the PPP Center's role in project identification and preparation. Moreover, the capacity of the COA to conduct impact evaluations and ex-post assessments is a valid concern, raising questions about the effectiveness of the proposed framework.

To address these limitations, adopting the practice of independent ex-post evaluations conducted by third-party evaluators from various sectors is crucial. These evaluators, including those from academia, civil society, and professional associations, can offer impartial assessments of BOT projects, ensuring that development outputs align with expectations. Furthermore, fostering a pool of highly qualified PPP procurement specialists can enhance the technical capacity of IAs. Empowering the PPP Center to collaborate with other government agencies, including the Department of the Interior and Local Government (DILG) and the Union of Local Authorities of the Philippines (ULAP), and working with the DOF-Bureau of Local Government Finance (BLGF) to integrate PPP projects into finance-related continuing professional education, can strengthen PPP expertise at both the national and local levels. These steps will contribute to more effective project evaluation and implementation.

Establishment of PPP units within IAs. Under section 28, the heads of IAs “may establish a PPP unit, an ad hoc body, or assign responsibility to an appropriate unit to act as its PPP unit which shall plan, oversee, and monitor PPP projects”. This PPP unit shall be headed by a senior official and shall include technical, finance, and legal personnel as its members. The said unit shall provide reports to the head of the IA and the PPP Center and shall comply with other reporting and monitoring processes and procedures as may be required by the PPP Center. The PPP Center is required to provide technical assistance and capacity development to the PPP units.

The establishment of PPP units within IAs is a positive step toward enhancing the efficient planning, oversight, and monitoring of PPP projects. By having dedicated teams with technical, financial, and legal expertise, IAs can better manage these projects. Furthermore, the provision for technical assistance and capacity development from the PPP Center ensures these units have the necessary skills. However, there may be concerns about potential bureaucracy and overhead costs associated with creating and maintaining these units, which should be carefully managed.

Also, the need for enhancing the expertise within IAs is evident in addressing PPP project management challenges. However, the proposed bill's allowance for voluntary and ad hoc creation of PPP units doesn't provide adequate incentives for IAs to invest in necessary expertise, potentially undermining institutionalization. A stronger focus on fostering dedicated and permanent PPP units within key IAs is essential, supporting comprehensive business case studies, feasibility study evaluations, and improved project management for successful PPP initiatives.

Lastly, while advocating for permanent PPP units, it is essential to address potential oversight and conflict of interest concerns. Granting IAs the authority to approve PPP projects may raise conflict-of-interest issues and require careful monitoring. Additionally, ensuring that competent staff within IAs can effectively take

over functions performed by the ICC-NEDA without weakening NEDA's oversight functions is crucial. Striking a balance between empowering IAs and maintaining checks and balances is key to a robust PPP framework.

Reportorial requirements and public disclosure of PPP Contracts. SBN 2233 has two provisions concerning reportorial requirements to be complied by the PPP Center. Section 24 provides that the PPP Center is tasked “to provide regular monitoring and status reports on the implementation of all PPP programs and projects entered into by the IAs, including potential public interest concerns and violations of the PPP Act, to the OP, the Congress of the Philippines, relevant oversight committees and agencies, and publish the same in the official website of the PPP Center unless otherwise prohibited by existing laws, rules and regulations”. Section 28 subsection *b* provides a deadline for the submission of the report and that such report shall be submitted to the President of the Philippines, the Senate President, the Speaker of the House of Representatives, and the Chairpersons of the Committee on Public Works. The bill likewise provides that unless prohibited by existing laws, rules and regulations or said disclosure of contracts may pose threats to national security or public safety, the IAs and the PPP Center shall make available copies of PPP contracts through their respective websites.

Requiring regular reports and public disclosure of PPP contracts enhances transparency and accountability, enabling public scrutiny and oversight of these projects. This can help prevent corruption and ensure that PPP programs align with public interest. However, while these measures promote openness, there may be concerns about the potential administrative burden and privacy issues related to the release of sensitive contract details, particularly if they touch on national security or public safety. Striking the right balance between transparency and security is crucial.

Furthermore, adopting language similar to RA 8182 (ODA Act of 1996) can enhance the proposed bill, facilitating comprehensive annual reports that identify project delays, bottlenecks, cost overruns, and viability. Moreover, aligning the submission deadline with NEDA's ODA reports provides up-to-date information for policymakers. A robust disclosure and transparency framework is vital for public interest, enabling effective monitoring of decision-making processes by IAs and project implementation by proponents. Notably, the Philippines excels in several thematic areas related to PPPs but lags behind in procurement, especially in publishing PPP contracts.

The proposed bill should integrate language from RA 8182 to specify the content and submission deadline for annual reports. This alignment with NEDA's approach will enhance the usefulness of the reports for policymakers. Additionally, the bill should be strengthened to ensure greater transparency in PPP procurement, particularly by publishing PPP contracts. These recommendations aim to bolster the public's ability to monitor and assess PPP projects effectively.

Creation of a Joint Congressional Oversight Committee. Section 33 requires the creation of a Joint Congressional Oversight Committee that will oversee monitoring the implementation of the PPP Law. It shall have five (5) members each from the Senate and House of Representatives to be designated by the Senate President and the Speaker of the House of Representatives, respectively. The Committee shall be jointly chaired by the respective Chairpersons of the House Committee on Public Works and Highways, the House Committee on Appropriations, the Senate Committee on Public Works, and the Senate Committee on Finance.

Establishing a Joint Congressional Oversight Committee strengthens the checks and balances in the PPP implementation process by involving both legislative chambers. This ensures robust scrutiny and accountability. However, potential challenges could include coordination and the risk of political interference. Striking a balance between oversight and efficient project execution will be critical.

On institutionalizing capacity building of LGUs. A 2016 ADB study highlighted that the lack of technical and financial resources hinders LGUs from effectively implementing PPP projects. The PPP Center should

collaborate with various government agencies, such as the DILG and the ULAP to provide training and capacity-building programs for LGUs.

In line with these findings, it is advisable to consider the following recommendations outlined in the ADB study. Firstly, establishing a dedicated facility for project development, monitoring, and implementation that specifically caters to lower-tier LGUs. Another approach could involve integrating PPP training into the Continuing Professional Development courses offered by the BLGF. Additionally, the European Chamber of Commerce of the Philippines recommended subjecting all PPP projects, whether national or local, to NEDA approval for projects with a cost of PhP2.5 billion and above, as this helps address the technical capacity challenges faced by local Sanggunians in understanding PPP projects.

Conclusion

The proposed PPP Act, SBN 2233, presents an opportunity to address the long-standing issues in public-private-partnerships in the country. As the said reform can potentially chart a transformative course for infrastructure development in the Philippines, the provisions of the bill must, hence, be carefully considered. For instance, the establishment of PPP units within IAs must transcend voluntarism, as dedicated and permanent units fortified with technical, legal, and financial proficiency hold the key to unlocking the full potential of PPP projects. Also, while the current proposal introduces innovative mechanisms like the "right to match," policymakers are urged to consider the International Monetary Fund's note of caution that it may compromise competition. The absence of provisions for third-party monitoring and evaluation such as those from the academe, civil society, or professional evaluators is also regrettable as it could strengthen accountability and ensure the fulfillment of development objectives.

Moreover, transparency and reportorial obligations must be strengthened in a manner akin to RA 8182 (ODA Act of 1996) to enhance the monitoring and evaluation of PPP projects for policymakers and the public. Empowering the PPP Center to collaborate with government agencies and lower-tier LGUs, bolstered by tailored training and capacity-building efforts can bridge existing gaps in the technical understanding of PPP processes while innovative financing mechanisms can help ensure the sustainability of the PDMF. The creation of a Joint Congressional Oversight Committee is likewise a crucial step towards overseeing and guiding the PPP Law's implementation. By weaving these suggestions into the fabric of Senate Bill No. 2233, policymakers have the unique opportunity to steer PPP governance towards a future characterized by transparency, inclusivity, and a strong commitment to development objectives.

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