

**DRAFT REGULATION ON PILOT INVESTMENT IN THE FORM PUBLIC-PRIVATE PARTNERSHIP (PPP)**

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<i>No.</i>	<i>Issues</i>	<i>Draft PPP Regulation</i>	<i>Comments</i>
1.	“State participation” to the Project	<p><b>Art 2.5:</b> The State can participate in either or any combination of the following forms:</p> <ul style="list-style-type: none"> <li>(i) State capital</li> <li>(ii) Investment incentives</li> <li>(iii) Investment subsidies</li> <li>(iv) Financial regimes</li> </ul> <p>“State participation” shall be counted into the total invested capital of the project but shall not be part of equity capital of the Project Company (i.e. no entitlement to economic interest of the project).</p>	<p>“State participation” is distinguished from any contribution to equity capital of the Project Company. However, it is not clear how State-owned enterprises (SOEs) could (i) participate in a PPP project and (ii) contribute to the equity capital of the Project Company. Apart from “State capital” as further defined, the other forms of “State participation” should be clarified in terms of (i) specific form and (ii) calculation for value. For instance, how a tax incentive could be counted into the 30% cap of State participation.</p>
2.	Definition of State capital	<p><b>Art 2.6:</b> State capital shall include:</p> <ul style="list-style-type: none"> <li>(i) State budget</li> <li>(ii) Official development aids</li> <li>(iii) Government bonds</li> <li>(iv) Government-guaranteed loans</li> <li>(v) State loans for investment and development</li> <li>(vi) Capital of State-owned companies for investment and development</li> <li>(vii) Other capital which results in State loans.</li> </ul>	<p>It is questionable as how SOEs could participate to PPP projects. State capital includes “capital of State-owned companies for investment and development.” Does this bar SOEs from participating to PPP projects?</p>
3.	“Special regime”	<p><b>Art 2.7 and Art 10.2:</b> Special regime is Government guarantee and undertaking (GGU) based on negotiation between the private investors and the authorized State</p>	<p>The form of Government guarantee and undertaking (GGU) is available to PPP projects as proposed by the Authorized State Agency and approved by the</p>

		agency including (i) foreign exchange regime (availability of foreign currency and assurance of exchange rate) (ii) assurance of risks (which are beyond the investor's control) Special regimes are different from State participation	Government. Detail is not provided for the scope of GGU and it is questionable on how the investors could propose and negotiate GGU.
4.	Criteria of pilot PPP projects	<b>Art 5:</b> The criteria are: (i) Importance and large-scale (to meet urgent demand for economic development) (ii) Good likelihood of investment return to the investor through the collection of end-users' fees. (iii) Advantages from the private sector in terms of technology, management expertise, technical capability and financial capability. (iv) Other criteria as decided by the Prime Minister.	It is questionable how such a less comprehensive legal framework at the pilot stage could back up large scale projects.
5.	Costs of project preparation	<b>Art. 6:</b> These costs will be covered by the State, save that the selected investor is required to reimburse the cost of preparation of Feasibility Study to the State.	The current practice is that development costs are incurred by the investor and then capitalized into the project. It is questionable on how this would change the current practice and how any of the development costs as incurred by the investor could be capitalized.
6.	Cap on "State participation"	<b>Art 8.2:</b> The State participation shall not exceed 30% of the total invested capital of the project save for special cases as approved by the Prime Minister.	Under the BOT regulations, the threshold on public funding is 49%. However, this new 30% cap does not cover equity capital in the Project Company. This cap should be clarified for each form of "State capital" as mentioned above.
7.	Allocation of State	<b>Art 9:</b> The allocation of State capital for the State	The Law on Budget is not clear as to how State budget

	capital to the Project	participation to the Project shall be carried out in compliance with the Law on Budget and relevant regulations.	capital could be poured into a privately promoted project.
8.	Purposes for use of State capital	<b>Art 9.1:</b> State capital shall be used for: (i) Construction of auxiliary works (ii) Payment of site clearance expenses (iii) Payment (in part) of the project investment costs.	The two first items are similar to what are provided under the current BOT regulations. Item (iii) is new and not clear on terms and conditions of financing.
9.	Projects proposed by the investors (unsolicited projects)	<b>Art 12 and Art 13:</b> Projects shall be mainly proposed by the authorized State agency.  Investors are not encouraged to self-propose projects.	According to the draft PPP regulation, investors may propose projects which are not within the announced list but if approved, the proposed project will then be included into the announced list for the tender process.  Unlike the current BOT regulations, the draft PPP regulation is restrictive on unsolicited projects.
10.	The Project Company	<b>Art 22:</b> It refers to the Law on Investment and the Law on Enterprises for establishment and operation of the Project Company.	It is not clear the role of the Project Company and its rights and obligation in development, financing and operation of the Project.
11.	General Comment		The draft PPP regulation is silent on many issues to support the development, financing and operation of a PPP project (land, lender rights, securities interest, project counterparties, governing law of project documents, dispute resolution, etc).