



Technical Assistance Report

Project Number: 49271-001
Regional–Capacity Development Technical Assistance (R-CDTA)
April 2016

Enhancing Public–Private Partnership Project Development through Legal Support for ADB Transaction Advisory Services in Asia and the Pacific

This document is being disclosed to the public in accordance with ADB's Public Communications Policy 2011.

Asian Development Bank

ABBREVIATIONS

ADB	–	Asian Development Bank
DMC	–	developing member country
IDC		indefinite delivery contract
OGC	–	Office of the General Counsel
OPPP	–	Office of Public–Private Partnership
PPP	–	public–private partnership
TA	–	technical assistance
TAS	–	transaction advisory services

NOTE

In this report, “\$” refers to US dollars.

Head Director	R. Kaga, Office of Public–Private Partnership (OPPP) T. Koike, OPPP concurrently Technical Advisor (PPP)
Team leader Team members	S. Sampath, Principal Public–Private Partnership Specialist, OPPP A. Abon, Public–Private Partnership Officer, OPPP M. Day, Counsel, Office of the General Counsel (OGC) A. Germa, Operations Assistant, OPPP P. Halady, Public–Private Partnership Specialist, OPPP I. McDermid, Counsel, OGC K. Yalung, Public–Private Partnership Analyst, OPPP

In preparing any country program or strategy, financing any project, or by making any designation of or reference to a particular territory or geographic area in this document, the Asian Development Bank does not intend to make any judgments as to the legal or other status of any territory or area.

CONTENTS

	Page
CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE AT A GLANCE	
I. INTRODUCTION	1
II. ISSUES	1
A. Support for Infrastructure Development	1
B. Support for Public–Private Partnership Development	1
III. THE CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE	2
A. Impact and Outcome	3
B. Methodology and Key Activities	3
C. Cost and Financing	3
D. Implementation Arrangements	3
IV. THE PRESIDENT’S DECISION	5
APPENDIXES	
1. Design and Monitoring Framework	6
2. Cost Estimates and Financing Plan	8
3. Outline Terms of Reference for Consultants	9

CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE AT A GLANCE

1. Basic Data		Project Number: 49271-001	
Project Name	Enhancing Public–Private Partnership Project Development through Legal Support for ADB Transaction Advisory Services in Asia and the Pacific	Department /Division	OPPP/OPPP
Country	REG	Executing Agency	Asian Development Bank
2. Sector	Subsector(s)	ADB Financing (\$ million)	
✓ Multisector	ADB's corporate management, policy and strategy development		1.30
		Total	1.30
3. Strategic Agenda	Subcomponents	Climate Change Information	
Inclusive economic growth (IEG)	Pillar 1: Economic opportunities, including jobs, created and expanded	Climate Change impact on the Project	Low
4. Drivers of Change	Components	Gender Equity and Mainstreaming	
Private sector development (PSD)	Promotion of private sector investment	No gender elements (NGE)	✓
5. Poverty and SDG Targeting		Location Impact	
Project directly targets poverty and SDGs	No	Rural	Medium
		Urban	Medium
6. TA Category:	B		
7. Safeguard Categorization	Not Applicable		
8. Financing			
Modality and Sources		Amount (\$ million)	
ADB		1.30	
Capacity development technical assistance: Technical Assistance Special Fund		1.30	
Cofinancing		0.00	
None		0.00	
Counterpart		0.00	
None		0.00	
Total		1.30	
9. Effective Development Cooperation			
Use of country procurement systems		No	
Use of country public financial management systems		No	

I. INTRODUCTION

1. The Strategy 2020 of the Asian Development Bank (ADB) identifies private sector development and private sector operations as drivers of change in Asia and the Pacific.¹ Under the Strategy 2020, ADB is expanding work with the private sector to generate greater economic growth in the region. Public–private partnerships (PPP) are seen as important to achieve this objective; thus, the Strategy 2020 emphasizes the promotion of PPPs in all of ADB’s core operations.

2. The proposed capacity development technical assistance (TA) will directly contribute to pillar 3 of ADB’s Public–Private Partnership Operational Plan, 2012–2020 by supporting ADB’s transaction advisory services (TAS).² Following the Midterm Review of Strategy 2020, ADB’s Office of Public–Private Partnership (OPPP) was established, hosting a newly centralized TAS function.³ TAS provides transaction advice directly to its developing member countries (DMCs), including legal support requiring specialized legal consultants in the form of international and local law firms. Concept clearance for this TA was received on 26 November 2015. The design and monitoring framework is in Appendix 1.⁴

II. ISSUES

A. Support for Infrastructure Development

3. ADB’s DMCs across Asia and the Pacific are in need of significant infrastructure investment; however, several challenges exist:

- (i) traditional sources of infrastructure finance are strained;
- (ii) public budgets are overstretched, with little room for additional spending on infrastructure;
- (iii) debt markets are retreating as banks (particularly those in Europe), which used to play a leading role in structured finance, are still recovering from the global financial crisis and adjusting to tighter regulatory requirements, including Basel III;
- (iv) multilateral development banks, including the World Bank and ADB, have limited capital that is insufficient to meet the infrastructure needs of the region, estimated by ADB at \$8 trillion from 2010 to 2020;
- (v) overseas development assistance has played a relatively modest role, having provided only 2.5%–3.0% of total investments in infrastructure; and
- (vi) developing country capital markets lack the depth and breadth to provide the kind of long-term financing required for infrastructure development and investment.

B. Support for Public–Private Partnership Development

4. PPP is viewed as one solution to the region’s infrastructure financing needs by supporting public spending with private sector capital. While official flows, combined with

¹ ADB. 2008. *Strategy 2020: The Long-Term Strategic Framework of the Asian Development Bank, 2008–2020*. Manila.

² ADB. 2012. *Public–Private Partnership Operational Plan, 2012–2020*. Manila. Pillar 3 of the PPP Operational Plan refers to project preparation and development activities.

³ ADB. 2014. *Midterm Review of Strategy 2020: Meeting the Challenges of a Transforming Asia and Pacific*. Manila.

⁴ The TA first appeared in the business opportunities section of ADB’s website on 2 December 2015.

domestic resources, will remain vital contributors to infrastructure investment in developing countries, increasing private sector finance could help fill the investment financing gap and drive an expansion in infrastructure investment that could stimulate growth and address key development issues such as food insecurity, access to energy, and other key services. There is ample private sector capital or commercial debt available to finance well-prepared projects with a bankable risk profile. However, during the cycle of infrastructure projects becoming infrastructure assets, projects often show a gap in terms of (i) adequacy and quality of investment preparation, and (ii) early stage investment and development.

5. ADB supports the development of PPP capability in its DMCs by providing loans and technical support to develop internal capacity, PPP laws, institutional strength, capital markets, and other structures required for PPPs to be viable. ADB has also supported individual project preparation indirectly through TA.

6. The Midterm Review of Strategy 2020 envisions ADB becoming a more active project developer in addition to its established role as a project financier. It also emphasizes the need to provide transaction advice to DMC clients on developing bankable infrastructure projects and bringing private sector participation to those projects. OPMP provides TAS as a fee-based service, allowing OPMP to avoid crowding out private sector advisors (which also charge fees). Through TAS, ADB seeks to help DMCs deliver modernized and efficient infrastructure services. ADB's strategic support promotes and supports PPP development in these countries, and addresses the gap between public sources of funding and infrastructure needs.

7. Since its inception in September 2014, OPMP has undertaken significant marketing efforts jointly with ADB's regional departments and resident missions, resulting in the development of a pipeline of possible PPP infrastructure transactions in Asia and the Pacific for which OPMP would be able to provide TAS. While ADB's TAS teams will bring together internal specialists with commercial skills and sector expertise, ADB will need to retain external specialists and consultants to support the TAS teams, particularly legal services firms with specialized skills to advise on and structure PPP projects for successfully tendering these projects.

III. THE CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE

8. The TA will provide specialist legal support for OPMP's TAS transactions. Typical activities of a legal nature that form part of TAS include (but are not limited to) legal due diligence, risk allocation, transaction structuring, drafting of bid documents including instructions to bidders, concession agreement, and negotiating with potential bidders on transaction terms. The outputs will focus on information needed by the DMC client to develop bankable PPP projects. Based on the initial size and term of the TA and the costs of hiring from a limited pool of international law firms with highly specialized experience in project finance and PPP, including in the developing markets, it is expected that the TA can support two to three TAS transactions. In most cases, ADB will require the support of a reputable international law firm suitably partnered with a local law firm.

9. ADB expects that in entering into a TAS mandate with its DMC clients, ADB will be appointed the lead or co-lead mandated advisor for the specific PPP project. In turn, ADB will engage law firms on a project-by-project basis. The TAS mandate will require that the collective mandated advisory team owes an exclusive duty of care to the DMC client in ensuring that a bankable transaction is prepared. Each law firm, however, will provide its outputs directly to ADB in its capacity as the mandated advisor, and thus, will owe its exclusive duty of care to

ADB. While law firms will deliver outputs and owe a duty of care to ADB, their support will be provided for the ultimate benefit of the DMC client.

A. Impact and Outcome

10. The impact will be increased delivery of infrastructure for poorly serviced populations in DMCs. Successful PPP transactions that are supported by the TA will demonstrate ADB's TAS capability and provide model cases for future projects.

11. The outcome will be an increase in the number of awarded PPP transactions, which will be assessed by the completion of contract negotiations and DMC client acknowledgement of a signed concession agreement for projects that have TAS mandates.

B. Methodology and Key Activities

12. The TA will provide legal support for OPPP's TAS operations. The outputs of the TA will be (i) legal and other transaction supports provided as required by TAS mandates and (ii) model PPP concession agreements and other relevant agreements developed. By delivering these outputs, DMCs will have project agreements, which can serve as templates for future projects and case studies on how to achieve international best practice.

C. Cost and Financing

13. The TA is estimated to cost \$1,300,000, which will be financed on a grant basis by ADB's Technical Assistance Special Fund (TASF-others). The cost estimates and financing plan are in Appendix 2. It is expected that the TA will be expanded with additional financing from development partners, based on the growth of OPPP's TAS business. ADB will discuss with each DMC client whether to reimburse ADB for costs incurred under the TA, if reimbursement by the DMC client is legally and administratively permissible under applicable law and permitted under the applicable TA framework agreement between ADB and the DMC. If the DMC client agrees to reimburse ADB for its costs under the TA, ADB and the DMC will enter into a separate memorandum of understanding that will document the terms of the reimbursement arrangements, including the amount and timing of payments, the terms and conditions of the relevant TA framework agreement, and the TA letter between ADB and the DMC client. If there is no reimbursement arrangement, ADB will not recover costs incurred as part of fees payable under the terms of the TAS mandate, but ADB may seek reimbursement, if permitted under applicable law, from private sector participants under the terms of the relevant concession agreement.

D. Implementation Arrangements

1. Engagement of Consultants

14. ADB expects to engage international and national legal expertise for TAS mandates secured by OPPP. ADB's recruitment of the law firms will comply with ADB's Guidelines on the Use of Consultants (2013, as amended from time to time).

15. Given the highly specialized nature of the legal services ADB generally will require for PPP transactions, ADB expects to prequalify a panel of suitable international law firms through IDC. Such IDC will need to be set up in close consultation between OGC and OPPP. Typically, the call down IDC assignment will be awarded on a competitive basis using either quality- and

cost-based selection (90:10) or fixed budget selection. The expertise of the law firm may also be drawn on a single-source selection basis where unique qualifications and/or a natural continuation of previous work carried out by the firm will warrant such engagement, subject to approval of ADB's Operations Services and Financial Management Department.

16. The value and the duration of each assignment for the law firm or firms will depend on the nature of the underlying TAS mandate secured by ADB. Costs would be difficult to estimate without the context of the actual PPP project. However, based on OPPP's and OGC's most recent experience under existing TAS mandates, it is envisaged that the TA will cover two to three PPP projects. OPPP is currently seeking further TAS mandates, including (among others) in the power and transport sectors in Southeast Asia, the transport sector in East Asia, and the healthcare sector in Central and West Asia. If OPPP successfully receives any one or more of those or any other future TAS mandates, the TA would support the legal costs associated with those mandates.

2. Other Matters

17. **Executing and implementing agencies.** Services provided to DMC governments under this TA will be subordinate to and delivered through an ADB TAS mandate. OPPP will be the executing agency and implementing agency. As part of every TAS mandate entered into by OPPP, it will seek the assistance of the DMC agencies managing the PPP process. Within ADB, OPPP will work closely with regional departments to benefit from sector expertise and coordinate with various DMC agencies. OPPP will coordinate with relevant regional departments and resident missions, as they have sector expertise, country knowledge and relationships, and a local presence. OPPP will also work and coordinate with OGC to identify and recruit an international law firm for a particular PPP project for which legal support is required by ADB's TAS team. OPPP and OGC will supervise and monitor the legal consultants to ensure the adequacy of each law firm's outputs.

18. **Recipient government inputs.** Recipient governments are expected to provide counterpart staff, office space, and other support, as articulated in the TAS mandate between ADB and the relevant government agency. Prior to entering into a TAS mandate, ADB will consult with the government counterpart about the use of this TA and other forms of support, as well as the form and quantity of counterpart funding that may be required.

19. **Monitoring and evaluation.** The TA will be monitored and evaluated based on the implementation of activities and satisfactory delivery of outputs following the agreed time line and budget allocation. To support monitoring and evaluation (and when commercially practicable), consultants will submit an inception report, quarterly progress notes, a midterm report, a draft final report, and a final report to ADB. Because the provision of TAS will require OPPP to have frequent interactions with consultants hired under this TA, there will be regular monitoring of overall TA progress, assessment of performance, and confirmation of the relevance of the TA. Any knowledge products created by the TA will be provided to the DMC client and to ADB for dissemination to the government and other stakeholders as appropriate, while respecting project confidentiality restrictions.⁵

⁵ Through TAS, OPPP is providing a service to ADB's DMCs. Thus, TAS mandates will typically have a confidentiality clause that may restrict OPPP's ability to share information provided by a DMC client to OPPP with certain third parties or even inside ADB.

20. **Timing.** The TA will be implemented from 31 March 2016 to 31 March 2019 on an as-needed basis. Closing of the TA is anticipated by 31 September 2019. Further specifics on the TA scope will be determined when TAS mandates, which require this TA are awarded to OPPP.

21. TA proceeds will be disbursed in accordance with ADB's *Technical Assistance Disbursement Handbook* (2010, as amended from time to time).

IV. THE PRESIDENT'S DECISION

22. The President, acting under the authority delegated by the Board, has approved the provision of technical assistance not exceeding the equivalent of \$1,300,000 on a grant basis for Enhancing Public–Private Partnership Project Development through Legal Support for ADB Transaction Advisory Services in Asia and the Pacific, and hereby reports this action to the Board.

DESIGN AND MONITORING FRAMEWORK

Impact the TA is Aligned With			
Increased delivery of infrastructure for poorly serviced populations in DMCs (Project defined)			
Results Chain	Performance Indicators with Targets and Baselines	Data Sources and Reporting Mechanisms	Risks
Outcome Awarded PPP transactions increased	Concession agreement for up to two transactions by June 2019 (Baseline 2016: 0)	DMC client acknowledgement of signed concession agreement	Government reduces support for PPPs Political uncertainty slows decision making or completion of transactions
Outputs 1. Legal and other transaction support provided as required by transaction advisory services (TAS) mandates 2. Model PPP concession agreements and other relevant agreements developed	1. TA recommendations endorsed by DMC clients (Baseline 2016: 0) 2(a). 1 draft Concession agreement for each transaction submitted to DMC client (Baseline 2016: 0) 2(b). At least 20 hours of knowledge transfer for each transaction. (Baseline 2016: 0)	1. DMC client acknowledgement of outputs and milestones achieved 2. TA progress reports	Change in government policy and leadership that may compromise support for PPP or the transactions.
Key Activities with Milestones 1. Legal and other transaction supports provided as required by transaction advisory services (TAS) mandates 1.1 Hire legal consultants for first transaction by May 2016 1.2 Draft concession agreement for first transaction by November 2016 1.3 Complete support for bidding process for first transaction by May 2017 1.4 Complete support for negotiation and concession award for first transaction by May 2018 2. Model PPP concession agreements and other relevant agreements developed 2.1 Draft concession agreement for first transaction by November 2016 2.2 Complete support for negotiation and concession award for first transaction by May 2018 2.3 Conduct workshop with ADB and DMC client based on second transaction experience by January 2019			
Inputs ADB: \$1.3 million			
Assumptions for Partner Financing Not applicable.			

ADB = Asian Development Bank, DMC = developing member country, PPP = public-private partnership, TA = technical assistance.
Source: Asian Development Bank estimates.

COST ESTIMATES AND FINANCING PLAN
(\$'000)

Item	Amount
Asian Development Bank^a	
1. Consultants	
a. Remuneration and per diem	1,028.0
b. International and local travel	84.0
2. Training, seminars, and conferences ^u	47.0
3. Miscellaneous administration and support costs ^c	47.0
4. Contingencies	94.0
Total	1,300.0

^a Financed by the Asian Development Bank's Technical Assistance Special Fund (TASF-others).

^b This category includes international and local travel costs for Asian Development Bank staff and consultants as resource persons. This will also include venue, meals, and beverages (including liquor) for networking activities.

^c Printing, translation, and communication.

Source: Asian Development Bank estimates.

OUTLINE TERMS OF REFERENCE FOR CONSULTANTS

1. Technical advisory services mandates will typically require the services of an international law firm and a local law firm. Both will have similar terms of reference, though tasks will be divided based on international matters versus local matters.

2. **Legal advisor** (48 person-months). The legal advisor will be a law firm with substantial experience in public–private partnership transaction advisory in both developed and developing markets, including preparing and negotiating all project agreements to a high standard, as well as drafting concession agreements in multiple sectors and international project finance. The legal advisor must have previous experience in the drafting of sector-specific concession agreements and other related project agreements, including in markets where no precedent for such documentation exists. The legal advisor can include international and/or local counsel as required by the transaction, and is likely to include three individuals (partner, senior associate, and associate) per transaction. Working under the overall guidance of the Asian Development Bank (ADB) as the mandated advisor, the responsibilities of the legal advisor will include the following:

- (i) conduct legal due diligence on the project for the benefit of the government and/or ADB;
- (ii) advise and assist the government and ADB in addressing all legal matters that arise during the structuring of the public–private partnership transaction, prebidding and bidding processes, and negotiations with the bidders;
- (iii) assist the government and ADB in proposing contractual drafts of the project agreements to reflect the final negotiated and agreed position;
- (iv) provide support, as necessary, for the negotiation process;
- (v) assist the team coordinator in submitting technical assistance reports;
- (vi) attend to all other matters of a legal nature relating to the transaction for which ADB is the mandated advisor; and
- (vii) provision of other transaction support services as required, such as translation, data room management, advertising and promotion of transactions, and other forms of support.