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DRAFT

VGF TEMPLATE AGREEMENT

AKLA General Comment: While we do not find an issue with a single agreement being stipulated for the Capital and Operational VGF, the general practice has been to execute an Equity Funding & Utilization Agreement for the Capital VGF and an Operational VGF Agreement (e.g., a MRG Agreement) for the Operational VGF. Structurally, the matter is dealt on a transaction-to-transaction basis.

Further, from a standardization perspective, the Concession Agreement should not set out the detailed modalities and processes for the Capital and Operational VGF. These matters are of prime importance for lenders (who normally are engaged post signing of Concession Agreement). Based on our experience, broad parameters for the Operational and Capital VGF are set out and are later detailed in EF&U Agreements along with MRG / Operational VGF Agreements.

1. Definitions

1.1. "Affiliate"

refers to a person which, alone or together with any other person, is effectively Controlled by, or effectively Controls, or is under common and effective Control with another person;

1.2. "Applicable Laws"

all federal, provincial and local laws of Pakistan and all orders, rules, regulations, by-laws, ordinances, statutory notifications or orders, executive orders, decrees, policies, judicial decisions, notifications or other similar lawful directives made pursuant thereto issued by any executive, administrative, legislative or judicial authority or any one or more of them, as may be amended or substituted from time to time;

1.3. "Capital VGF"

means the viability gap funding support to be provided, or caused to be provided by the Grantor to the Concessionaire for funding construction works in the amount of the Capital VGF Aggregate Amount in accordance with the terms of this Agreement;

AKLA Comment: Retention and certain other required construction works related payments are made after Commercial Operations Date. Usually, construction period in a concession agreement ends at Commercial Operations Date.

1.4. "Capital VGF Disbursement Schedule"

means the schedule, including terms and conditions, for the disbursement of Capital VGF contained in Annex 1: Capital VGF Disbursement Schedule;

AKLA Comment: Based on successful PPP precedents in Pakistan (specifically sub-sovereign / provincial projects in the road sector), it has been observed that the VGF amounts required for upfront funding of project costs for a project are released and placed into a designated account of the government agency for which an escrow arrangement and / or standing instructions are stipulated. Further, such account is typically charged in favor of the lenders/financiers of the project. Such funds are usually released upon satisfaction of

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disbursement conditions, which include the funding notices being verified by the independent engineer and independent auditor.

Unlike the afore-stated, practice has been established in sub-sovereign / provincial PPP transactions, in a certain federal PPP project, the entire Capital VGF has been injected up front in the concessionaire – a practice that we feel is not an optimal arrangement for the government.

1.5. “Capital VGF Aggregate Amount”

is the aggregate amount of PKR [Insert Amount] (inclusive of taxes) to be paid, or caused to be paid by the Grantor to the Concessionaire as Capital VGF in accordance to the Capital VGF Disbursement Schedule and the terms of this Agreement;

1.6. “Concessionaire”

is [Insert Name of Winning Bidder];

1.7. “Control”

means, for purposes of defining an Affiliate, the power to direct or cause the direction of the management policies and actions of a body corporate whether through:

- (a) ownership of at least fifty percent (50%) plus one (1) share of the total outstanding voting shares;
- (b) ownership of at least twenty percent (20%) of the outstanding voting shares and (a) possession of voting rights through voting trusts or other voting agreements over a certain number of shares, such that the total number of shares owned or over which it has voting rights is equivalent to at least fifty percent (50%) plus one (1) share or (b) the ability to elect a majority of the members of the board of directors; or
- (c) a legal agreement.

In determining ownership of the shares in a corporation, shares held both directly and indirectly will be counted.

1.8. “Financiers”

Refers to all Persons, banks, financial institutions and other finance-providers for the time being, providing, raising or making available, directly or indirectly, finance or refinance (and, for the avoidance of doubt, finance and refinance shall not include amounts subscribed by Affiliates, Shareholders, and Affiliates of Shareholders providing indebtedness on subordinated terms) for the Project through the Financing Agreements, and shall include their respective successors-in-title and assigns, and the term “Financiers” also includes a consortium of Financiers, if any;

1.9. “Financing”

the financing provided by the Financiers to the Concessionaire pursuant to and in accordance with the Financing Agreements;

1.10. “Financing Agreements”

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refers to the agreements between the Concessionaire and the Financiers for funding by the Financiers, the Financing component of the costs of the [Required Construction Works];

Rebel Comment: Required Construction Works needs to be defined in the main provisions of the contract based on the description of the Project, but attention should be paid to exclude any ancillary works that are not required for the Project (e.g. non-core assets).

AKLA Comment: Agreed. In our experience these are the works directly related to the concession asset. We assume this will be defined in the Concession Agreement.

1.11. **“Grantor”**

Refers to [insert contracting agency or authority];

1.12. **“Operational VGF”**

means the viability gap funding support to be provided, or caused to be provided by the Grantor to the Concessionaire during the Operations Period in the amount of the Operational VGF Aggregate Amount in accordance with the terms of this Agreement;

AKLA Comment: Based on precedent transactions successfully consummated in the province of Sindh, it is pertinent to highlight that amounts analogous to the Operational VGF under the instant Concession Agreement are typically placed in designated accounts maintained by the procuring agency / provincial government, charged in favor of the lenders / financiers of the project, for which an escrow agreement or standing instructions are in place. The amounts standing to credit in such designated accounts are released upon satisfaction of disbursement conditions including inter alia issuance of relevant certificates from the independent auditor (in consultation with, if required, the independent engineer). Needless to state, a SBLC mechanism can also be adopted (as is the case in this agreement) to secure the Operational VGF payments. The quantum / value of each SBLC needs to be commercially discussed.

1.13. **“Operational VGF Aggregate Amount”**

is the aggregate amount of PKR [Insert Amount] (inclusive of taxes) to be paid, or caused to be paid by the Grantor to the Concessionaire as Operational VGF in accordance to the Operational VGF Disbursement Schedule and the terms of this Agreement;

1.14. **“Operational VGF Disbursement Schedule”**

means the schedule, including terms and conditions, for the disbursement of operational VGF contained in Annex 2: Operational VGF Disbursement Schedule

AKLA Comment: Refer to our comments on Capital VGF Disbursement Schedule. Usually for disbursements of Operational VGF, various calculations, etc., need to be made (for e.g., in case of MRG types of VGF) and certificates are issued.

1.15. **“Operational VGF Financial Instrument”**

shall have the meaning attributed thereto in Section 2.3.2;

AKLA Comment: The quantum / value of this instrument should be discussed. Please note that subject to the quantum / value of this instrument being agreed / discussed, this instrument also

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secures the termination payments to be paid by the agency on termination. In a recent GoS project, the value of this instrument is fifty percent (50%) of debt – a value more than the aggregate Operational VGF.

1.16. “Operational VGF Financial Instrument Issuing Bank”

means any scheduled bank having a long-term credit rating of at least ‘AA’ as rated by JCR VIS or PACRA in Pakistan (for avoidance of doubt, this does not exclude Financiers who meet the criterion stated in this Section 1.16);

1.17. “Operational VGF Final Funding Date”

means the date of the last scheduled payment in the Operational VGF Disbursement Schedule

1.18. “Project Agreements”

means this Concession Agreement and each other contract entered into or to be entered into by the Concessionaire in connection with the project including inter alia, the Equity Funding & Utilization Agreement [if applicable];

1.19. “Scheduled Capital VGF Disbursement Amount”

refers to the individual Capital VGF Disbursement Amounts numbered in Annex 1: Capital VGF Disbursement Schedule, which are inclusive of taxes, to be credited to the Special Purpose Account [or Class B Equity Account or as appropriate] in accordance with the terms of this Agreement;

1.20. “Scheduled Operational VGF Disbursement Amount”

refers to the individual Operational VGF Disbursement Amounts numbered in Annex 2: Operational VGF Disbursement Schedule, which are inclusive of taxes, to be credited to the [Special Purpose Account] in accordance with the terms of this Agreement;

1.21. “Shareholders”

members, as such term is defined in the Companies Act, 2017, of the Concessionaire

1.22. “Special Purpose Account”

means the financial account established by the Concessionaire specifically for the purpose of receiving VGF disbursement.

Rebel Comment: This account can be re-labeled according to the specific VGF type or purpose

2. Viability Gap Finding and Utilization

2.1. General Provisions

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2.1.1. The Parties hereby acknowledge and agree that:

2.1.1.1. The Grantor shall fund the Capital VGF Aggregate Amount in **the [Special Purpose Account or Class B Subscription Account]** according to the Capital VGF Disbursement Schedule [in accordance with the terms of the Project Agreements] to fund the estimated cost of the Required Construction Works

Rebel Comment: For direct grants, the Capital VGF should be paid into the Special Purpose Account while if structured as equity or other instrument, the Capital VGF should be transferred to the Class B Subscription Account or the appropriate account as applicable.

AKLA Comment: Class B Subscription Account is to be defined in the main body of the Concession Agreement, which may be in the nature of a deposit account denominated in Pakistani Rupees that is opened and established by the Concessionaire at a designated branch of a bank notified to the Grantor, and in which all amounts funded by the Grantor towards Class B Equity from time to time shall be credited. The afore-stated equally applies to where VGF is structured as sub-debt and is credit to a sub-debt account of concessionaire.

2.1.1.2. The Grantor shall fund each Operational VGF Installment Amount in the Special Purpose Account according to the Operational VGF Disbursement Schedule in accordance with the terms of this Agreement

AKLA Comment:

This structure assumes that Operational VGF will not be pre-funded in an account of the agency and disbursed from there. Instead, funding of the Capital VGF is a contractual commitment secured by the financial instrument.

Based on the firm's experience in past and precedent transactions, it may be advisable to consider having the Operational VGF Aggregate Amount funded at the outset to a designed account maintained by the Grantor. All disbursements of the Operational VGF from such designated account shall be subject to and in line with the standing instructions issued for such account by the Grantor. This is in addition to any SBLC / financial instruments being established.

2.1.1.3. The Capital VGF and Operational VGF shall, in each case, be utilized by the Concessionaire in accordance with the terms of the Project Agreements.

Rebel Comment: Project Agreements include Equity Funding & Utilization Agreement.

2.1.2. The following conditions precedent shall generally apply to the disbursement of Capital VGF and/or Operational VGF, in addition to any requirements set forth in the Capital VGF Disbursement Schedule and/or Operational VGF Disbursement Schedule:

2.1.2.1. Establishment of relevant project accounts and issuance of standing instructions for such accounts by the Concessionaire;

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- 2.1.2.2. Establishment of relevant designated account and issuance of standing instructions for such account by the Grantor;
 - 2.1.2.3. The non-occurrence and non-subsistence of a Concessionaire Event of Default;
 - 2.1.2.4. Issuance of funding notices subject to certification from the independent auditor and independent engineer that the identified disbursement conditions set forth in the Capital VGF Disbursement Schedule and/or Operational VGF Disbursement Schedule have been met.
- 2.1.3. The Grantors shall have the right to require submission of accounts of the Concessionaire to verify utilization of the Capital VGF [and/or Operational VGF] on a monthly basis.

AKLA Comment: Usually we have not observed such need for monitoring of the utilization of Operational VGF to be disbursed by the agency, though the lenders do monitor such disbursements.

Consider including the concept of 'Utilization Notice' in respect of Capital VGF, whereby each utilization in respect of the Capital VGF shall be subject to issuance of the relevant utilization notice by the Concessionaire in accordance with the terms and conditions of the Concession Agreement and, issuance of the utilization notice may be subject to identified conditions precedent. This system is enshrined in the EF&U Agreement developed by AKLA, which are now seen as market standards.

- 2.1.3.1. The Grantor shall pay the Capital VGF and Operational VGF
 - 2.1.3.1.1. free of any restriction or condition except as provided in the Project Agreements
 - 2.1.3.1.2. free and clear of, and without any deduction or withholding on account of any Tax (except to the extent required by Applicable Laws);
 - 2.1.3.1.3. without deduction or withholding (except to the extent required by Applicable Laws);
- 2.2. Capital VGF
- 2.2.1. The Grantor hereby acknowledges and agrees that it shall fund the Capital VGF in the Special Purpose Account [or Class B Subscription Account, as applicable] according to the Capital VGF Disbursement Schedule provided, that the Concessionaire shall only be entitled to utilize the Capital VGF according to the terms of the Capital VGF Disbursement Schedule [or Equity Funding and Utilization Agreement, if applicable];
 - 2.2.2. Disbursement of Capital VGF
 - 2.2.2.1. The Grantors shall disburse each of the Scheduled Capital VGF Disbursement Amounts according to the Capital VGF Disbursement Schedule as and when due, but no later than thirty (30) days from receiving a request from the Concessionaire along with the following information:

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2.2.2.1.1. documentary evidence that the Concessionaire has raised and spent the total amount of Equity as prescribed in the Equity Documents [excluding Class B Equity, if applicable];

Rebel Comment: In general, Capital VGF should be provided after the Concessionaire's equity has been spent and raised so that the initial risk is absorbed by equity.

2.2.2.1.2. an estimate of the capital required for the next stage/ milestone as per the Works Timetable, for which the next tranche of Capital VGF is scheduled and requested;

2.2.2.1.3. documentary evidence of the actual amount drawn by the Concessionaire and disbursed by the Finance Parties in accordance with the Finance Documents in relation to the construction timetable of the Required Construction Works;

2.2.2.1.4. such accounts of the Concessionaire as the Grantors may from time to time require to verify utilization of the Capital VGF; and

2.2.2.1.5. such other information as the Grantors may reasonably request in relation to the Required Construction Works, including in relation to the progress of the Required Construction Works, or any disbursement made or expenditure incurred in respect of the Required Construction Works

2.2.2.2. In the event that the applicable milestones and conditions set out for the Scheduled Capital VGF Disbursement Amount are unmet, whether fully or partially, the Grantor reserves the right to delay and/or withhold, fully or partially, the Scheduled Capital VGF Disbursement Amount. The Grantor shall not unreasonably delay or withhold payment of the Scheduled Capital VGF Disbursement Amount once the Concessionaire is able to provide evidence that the conditions for the Scheduled Capital VGF Disbursements have been fully met.

AKLA Comment: As observed in successfully consummated precedent transactions, disbursements analogous to Capital VGF and Operational VGF are subject to satisfaction of conditions precedent and receipt of relevant certifications by the government / procuring agency from independent engineer / independent auditor. Such amounts are released from the designated accounts in accordance with the standing instructions issued for each such account upon receipt of relevant notices and / or documents. Accordingly, the additional procedural formalities vis-à-vis delay / withholding payments have not been observed in precedent transactions. Be that as it may, any standardization effort needs to be built on the detailed mechanisms already developed.

2.2.2.3. The use of the Concessionaire of the Scheduled Capital VGF Disbursement Amount violating the prohibited uses set forth in the Capital VGF Disbursement Schedule shall serve as grounds for termination under Concessionaire Event of Default.

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Rebel comment: While the mechanism is designed to minimize the opportunity for misappropriation of funds, such a clause simply enforces that VGF should only be used for the directed purpose, and any violation of this principle should be severely handled.

2.2.2.4. In the event of occurrence of a Concessionaire Event of Default, disbursement of the Capital VGF shall be suspended until such Concessionaire Event of Default has been cured by the Concessionaire.

2.2.2.5. In the event Grantors incur delay in the disbursement of Capital VGF, the Grantors shall be liable for the payment of interest on the sum due from the date Capital VGF Disbursement is due until the actual date of payment at the [**Late Payment Rate**]. The Concessionaire's failure to meet the relevant timelines in relation to the Required Construction Work as a result of the Grantors' delay in disbursing the Cash Support shall not constitute a [**Delay**] under this Concession Agreement.

Rebel Comment: The Late Payment Rate should be defined in the main body of the Concession Agreement. Late Payment Rates can be based on KIBOR, or relevant market reference rates, in order to address AKLA comment below that justification should be provided and should not be construed as penalization. Delay should also be defined, this essentially waives any liability for liquidated damages due to delays in construction works

AKLA Comment: No additional procedural formalities vis-à-vis imposition of late payment rate are observed in precedent transactions. Please note that while there is no prohibition under local laws on charging late payment rates, however, justification of the actual rate is required, so that the same is not construed to be a penalization, and will have to be determined on a case to case basis;

2.3. Operational VGF

2.3.1. The Grantor hereby acknowledges and agrees that:

2.3.1.1. it shall fund the Operational VGF in accordance with the terms of this Agreement in order to provide viability gap funding support to the Concessionaire during the Operations Period;

2.3.1.2. shall fund the Operational VGF according to the Operational VGF Disbursement Schedule in the Special Purpose Account; provided, that the Concessionaire shall only be entitled to utilize the Operational VGF according to the terms of the Operational VGF Disbursement Schedule;

2.3.1.3. the aggregate Operational VGF funding obligation of Grantor shall be in the amount of the Operational VGF Aggregate Amount;

2.3.1.4. in order to securitize its obligation to fund the Operational VGF Aggregate Amount in terms of this Agreement, the Grantor shall provide, or cause to be provided, the Operational VGF Financial Instrument to the Concessionaire as a Condition Precedent of the Project Agreements;

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2.3.1.5. the obligation of Grantor to fund the Operational VGF Aggregate Amount shall terminate on the Operational VGF Final Funding Date on which date the Operational VGF Financial Instrument shall be returned by the Concessionaire to the Grantor subject to such encashments as are contemplated in Section 2.3.2.2 of this Agreement

2.3.1.6. In the event of occurrence of a Concessionaire Event of Default, disbursement of the Operational VGF shall be suspended until such Concessionaire Event of Default has been cured by the Concessionaire.

2.3.2. Operational VGF Financial Instrument

2.3.2.1. Issuance

2.3.2.1.1. The Grantor hereby agrees and undertakes to provide and maintain a standby letter of credit in the form and manner set out in Sections 2.3.2.1.2 to 2.3.2.1.4 (to be issued by the Operational VGF Financial Instrument Issuing Bank) for the aggregate amount of the succeeding [specify #] Scheduled VGF Disbursement Amounts set forth in the Operational VGF Disbursement Schedule

Comment: Specify the number of forward-looking disbursements that the VGF Financial Instrument should cover. Previous contracts have required the stand-by letter of credit to be the full amount of the operational VGF for the period of the contract. This does not provide the best value-for-money for government but may be needed for bankability.

2.3.2.1.2. The Grantor hereby agrees and undertakes that the Operational VGF Financial Instrument shall be issued on its behalf. The Operational VGF Financial Instrument issued on behalf of the Grantor and shall be fully secured by the Grantor as a principal debtor and not as surety without any recourse to the Concessionaire, its assets or properties. All costs, expenses, fees and other charges of any nature associated with the issuance, maintenance and encashment of the Operational VGF Financial Instrument shall be borne solely by the Grantor.

2.3.2.1.3. The Operational VGF Financial Instrument shall be issued in the form and substance acceptable to the Concessionaire and the Operational VGF Financial Instrument Issuing Bank shall be acceptable to the Concessionaire and the Financiers.

AKLA Comment: Please note that the financiers are not a party to the Concession Agreement. However, since the instrument is issued prior to financial close, the lender approval can be stipulated and sought.

2.3.2.1.4. The Operational VGF Financial Instrument shall be unconditional, irrevocable, encashable in accordance with the terms thereof and shall be payable within

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three (03) days of the first written demand without any prior notice, reference or recourse to Grantor or any other entity. The Grantor hereby agrees to the terms of encashment of the Operational VGF Financial Instrument issued on its behalf, as set out in this Section 2.3.2.2 "Encashment" and in the Operational VGF Financial Instrument.

Rebel Comment: The number of days payable should be set based on what is acceptable to investors, but manageable by the Grantor.

2.3.2.2. Encashment and Disbursement

2.3.2.2.1. Without prejudice to or in any way limiting any other provisions of this Agreement, the Operational VGF Financial Instrument may be encashed in accordance with this Agreement in the following circumstances:

2.3.2.2.1.1. pursuant to the requirements and schedule for disbursement set forth in Annex 2: Operational VGF Disbursement Schedule;

2.3.2.2.1.2. pursuant to Section 2.3.2.4.1.2; and

2.3.2.2.1.3. pursuant to Section 2.3.2.4.1.3

2.3.2.3. In the event that the applicable milestones conditions set out for the Scheduled Operational VGF Disbursement Amount are unmet, whether fully or partially, the Grantor reserves the right to delay and/or withhold, fully or partially, the disbursement of the Scheduled Operational VGF Disbursement Amount. The Grantor shall not unreasonably delay or withhold disbursement of the Scheduled Operational VGF Disbursement Amount once the Concessionaire is able to provide evidence that the conditions for the Scheduled Operational VGF Disbursements have been fully met.

2.3.2.4. The use of the Concessionaire of the Scheduled Operational VGF Disbursement Amount violating the prohibited uses set forth in the Operational VGF Disbursement Schedule shall serve as grounds for termination under Concessionaire Event of Default.

Rebel Comment: There are usually less restrictions on Operational VGF than Capital VGF, so this clause may not be as commercially relevant.

2.3.2.4.1. Amount, Validity Period, and Related Matters

2.3.2.4.1.1. The Parties acknowledge and agree that the Grantors shall issue, or cause to be issued, the Operational VGF Financial Instrument within [six (6)] Months of the Effective Date.

AKLA Comment: Usually this is a condition precedent to financial close.

2.3.2.4.1.2. The Parties acknowledge and agree that the Operational VGF Financial Instrument shall be established and shall be valid, at the time of issuance, until the Operational VGF Final Funding Date. In the event the Operational VGF Financial Instrument expires prior to the Operation VGF Final Funding Date, the Grantor shall extend the validity of the

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Operational VGF Financial Instrument, at least ninety (90) days prior to its expiry, so as to keep it valid and enforceable until the Operational VGF Final Funding Date. In the event of failure by the Grantor to keep the Operational VGF Financial Instrument valid until the Operational VGF Final Funding Date, the Concessionaire shall have the right, the later of ninety (90) days before the Operational VGF Instrument is scheduled to expire and of the issuance of the first written demand to encash the Operational VGF Financial Instrument to its full outstanding value. All proceeds from encashment of the Operational VGF Financial Instrument pursuant to this Section 2.3.2.4.1.2 shall be credited to the Special Purpose Account.

2.3.2.4.1.3. In the event of failure by the Grantor to fund the Operational VGF in the Special Purpose Account according to the Operational VGF Disbursement Schedule in accordance with the terms of this Agreement, the Concessionaire shall have the right, upon thirty (30) days of the issuance of the first written demand to encash the Operational VGF Financial Instrument to the extent of the portion of the Operational VGF that has not been disbursed according to the Operational VGF Disbursement Schedule. All proceeds from encashment of the Operational VGF Financial Instrument pursuant to this Section 2.3.2.4.1.3 shall be credited to the Special Purpose Account.

2.3.2.4.1.4. Pursuant to encashment in Section 2.3.2.4.1.3, the Grantor has the obligation to ensure that the value of the standby letter credit of Operational VGF Financial Instrument is maintained according to Section 2.3.2.1.1. In the event of encashment, the Grantor is obligated to replenish the Operational VGF Financial Instrument to the value as specified in Section 2.3.2.1.1.

2.3.2.4.1.5. In the event the Grantors incur delay in the disbursement of Operational VGF, the Grantors shall be liable for the payment of interest on the sum due from the date Operational VGF Disbursement is due until the actual date of payment at the *[Late Payment Rate]*.

Rebel comment: While the design of an Operational VGF Financial Instrument reduces the risk of late payments, the provision should still be in place if the Grantor is not able to fund the financial instrument.

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Annex 1: Capital VGF Disbursement Schedule

#	Capital Disbursement Amount	VGF	Milestones	Conditions	Prohibited Use
1	[PKR]		<i>Examples:</i> <i>Time-based triggers: 1st anniversary after Commencement of Operations, 3 months after Commencement of Operations</i> <i>Results-based triggers: 100% of subscribed equity is fully paid in, Commissioning of Works etc</i>	<i>Examples:</i> <i>Shall not exceed 50% of the debt disbursed by the Financing Parties</i>	<i>Exmples:</i> <i>Payment of Dividends, Re-payment of principal and interest of shareholder debt and interest, Payment for Construction Overruns</i>
2					

Comment: We propose using a table to summarize schedules and conditions which provides flexibility to set terms and conditions for specific disbursement amounts, and more straightforward for investors. Examples are illustrative only and dependent on specific project negotiations.

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Annex 2: Operational VGF Disbursement Schedule

#	Operational VGF Disbursement Amount	Milestones	Prohibited Use
1	[PKR]	<i>Examples:</i> <i>Time-based triggers: 1st anniversary after Commencement of Operations, 3 months after Commencement of Operations</i> <i>Results-based triggers: Upon reaching volume / traffic of XX</i>	<i>Examples:</i> <i>Payment of Dividends, Re-payment of principal and interest of shareholder debt and interest</i>
2			

Comment: Examples are illustrative only and dependent on specific project negotiations.