

Legal Development to Promote Public-Private Partnerships System

Sie Sein¹

Abstract

Public-private partnerships are legally based on the long term agreement between the government agencies and private party to develop infrastructure of the State. Until 2018, the Union of Myanmar Government governed the public-private partnerships project by the Myanmar Investment Law, 2016 and notifications prescribed from time to time. For the purpose of strengthening, the development of projects that will enable the Myanmar Sustainable Development Plan, the Project Bank notification was approved in November 2018 by the President Office of the Union of Myanmar to create clearer and more transparent pathway investors interested in public-private partnerships in Myanmar. The research method based on in-depth interview both not line access and in-personal. First data was extracted from the Foreign Investment Law, 2012, Myanmar Citizens Investment Law, 2013, and Myanmar Investment Law, 2016. Secondary sources were the documentary analysis of governmental and nongovernmental report from the Ministry of the Planning and Finance and official newspapers. The research objectives are to promote the transparency processes of public-private partnerships projects and to develop the infrastructure by using public-private partnerships contract effectively. The research question is whether the project bank notification is actually efficiency instructions for public-private partnerships projects.

Key words: Public-private partnerships, project bank, Myanmar Sustainable Development Plan

Introduction

Public-private Partnerships are not a new one. Public-private partnerships have existed since the Roman Empire. According to Ceasar Augustus's records, there had tolls on the little Saint Bernard' Pass. The Roman Empire permitted a tolls concession to the Salassi tribe to maintain the pass and provide guidance and carrier across the mountain range. In the United States, a steamboat line between New York and New Jersey in 1808 was built by public-private partnership and many railroads in 1815. In Myanmar, public-private partnerships system had been practiced since 1996. After gaining independence, the Government has been the principal provider of infrastructure. Nowadays, the Government permitted the private sector to invest in infrastructure. In other word, the Government shares the risk and the allocation of finance to reduce the burden of State's budget. Being the developing country, Myanmar, the need of Myanmar's infrastructure is vast and the public investments and official development assistance (ODA) will not be sufficient to fill the widening investment gap. Therefore, the private capital to investments in infrastructure projects is one of the attracting programs of the government. The word Public-Private Partnerships has become popular among the policymakers, the government officials, the parliamentarians, the private sector and the civil society.

Definitions of Public-Private Partnerships

There is no uniform definition for public-private partnerships. The definition varies on a country-by-country, sector-by-sector and project-by-project basis². The term 'public-private partnership' has originated in the United States, initially relating to joint- and private-sector funding for educational programs, and public-private joint ventures for urban renewal in 1960³. The various definitions of the term 'public-private partnership (PPPs)' are as follows:

- 1) World Bank 2007 defines public-private partnerships broadly as 'an agreement between government and a private firm under which the private firm delivers an asset, a service,

¹ Lecturer, Department of Law, University of Mandalay

² Understanding Options for Public-Private Partnership in Infrastructure, World Bank, 2010, p-5

³ .ER.Yescombe, Public private partnerships Principle of Policy and Finance, 2007,pg-1

or both, in return for payments contingent to some extent on the long-term quality or other characteristics of outputs delivered’⁴.

- 2) World Bank 2014 defined as: “A long-term contract between a public party and a private party for the development and/or management of a public asset or service, in which the private agent bears significant risk and management responsibility through the life of the contract, and remuneration is significantly linked to performance, and/or the demand or use of the asset or service”⁵.
- 3) According to HM Treasury (2000), ‘public-private partnerships’ (PPPs) is an arrangement that brings public and private sectors together in long-term partnership for mutual benefit. Public-private partnerships as defined here have the following key elements:
 - a) a long-term contract (a ‘PPP Contract’) between a public-sector party and a private-sector party;
 - b) for the design, construction, financing, and operation of public infrastructure (the ‘Facility’) by the private-sector party;
 - c) with payments over the life of the PPPs Contract to the private-sector party for the use of the Facility, made either by the public-sector party or by the general public as users of the Facility; and
 - d) with the Facility remaining in public-sector ownership, or reverting to public-sector ownership at the end of the PPPs Contract.⁶
- 4) Public-Private Partnerships (PPPs) means an investment mechanism based on a contractual agreement between an Implementing Government Agency and a private party for providing a public asset or infrastructure or service that includes but is not limited to financing, designing, implementing, managing, and/ or operating infrastructure facilities and services traditionally provided by the public sector in an effort to reduce the Government's capital and operating expenditures while improving the quality of assets and services.⁷

According to the definitions mentioned above, public-private partnerships (PPPs) are a long term contractual agreement between the Government agency and the private party to invest in infrastructure.

Criteria of Public-Private Partnerships (PPPs)

Although there is no uniform definition, the criteria of public-private partnerships (PPPs) are generally same. The contracts by public-private partnerships must be fulfilled the following points.

- a) Decentralization of government;
- b) Separating responsibility for the purchase of public services from that of their provision;
- c) Performance-based measurements for public services;
- d) Contracting-out public services to the private sector;
- e) Privatization of public services.

The other alternative names of PPPs are:

- a) Private Participation in Infrastructure (PPI)
- b) Private-Sector Participation (PSP)
- c) Privately-Financed Projects (PFP)
- d) Private Finance Initiative (PFI)

⁴ Public-Private partnership reference guide V.2.0, 2007

⁵ Ibid

⁶ ER.Yescombe, Public private partnerships Principle of Policy and Finance, 2007,pg-3

⁷ Section 1 (n) of Project Bank Notification,2/2018

Types of Public-Private Partnerships (PPPs)

The various scholars categorize the contract of the public-private partnerships depending on their definitions and ideas. Therefore, the contracts public-private partnerships are different from country by country. In the Union of Myanmar, types of public-private partnerships include but shall not be limited to the following⁸:

(1) **Availability payment** means a payment mechanism to the private sector for a type of PPP Project whereby the public sector pays the private partner a pre-established, maximum period payment to design, build, finance, operate and/ or manage Project facilities; the scope of services for the private sector would not include numbers of customers/ users and demand risks, fare collection; the private partner is compensated for both capital and operating costs; the private partner is evaluated each period on the availability of facilities and services and performance; each periodic payment is adjusted to reflect deductions for non-compliance with pre-established service levels and credits for enhanced performance.

(2) **Build-Own-Operate (BOO)** means a Build-Own-Operate contract to build, operate, and maintain a facility; after the completion of the facility, the investor shall own and has the right to commercially operate such facility in perpetuity unless by mutual agreement the Government decides to purchase the asset at the end of a specified period of time.

(3) **Build-Operate-Transfer (BOT)** means a Build-Operate-Transfer contract to build a facility; after the completion of the constructed facility, the investor shall have the right to commercially operate such facility for a fixed term; at the end of such term, the investor (s) shall transfer the facility to the Government.

(4) **Build-Transfer-Lease (BTL)** means a Build-Transfer-Lease contract to build a facility, transfer its ownership to the Government after the facility's construction, and after the private investor having executed its right to operate the facility for a specified period of time, leases the facility to the Implementing Government Agency from whom lease payments are made to the investor for a period of time specified in the BTL contract.

(5) **Build-Transfer-Operate (BTO)** means a Build-Transfer-Operate contract to build a facility; after the completion of the constructed facility, the investor shall transfer such facility to the Implementing Government Agency and shall have the right to commercially operate such facility for a fixed term.

(6) **Operation and Management (O&M)** means an Operate-Manage contract to commercially operate part of a facility or the entire facility for a fixed term, where the private sector operator would not have any investment responsibility.

(7) **Other Forms of PPP** means forms of PPPs other than the above and may also include but not be limited to Design-Build-Operate and Design-Build-Finance-Operate-Transfer contracts. In addition, Production Sharing Contracts (PSCs) and Joint Venture agreements between usually the ministries concerned and private companies can be considered PPPs as they use project financing financial structure and special purpose vehicles (SPVs) to implement investment projects.

Investment in Infrastructure Projects by Public-Private Partnerships

The following sectors are permitted to invest by public-private partnership.

⁸ Section 1 (n) of Project Bank Notification, 2/2018. The project bank notification is issued by the Office of the President of the Republic of the Union of Myanmar on 30 November 2018. The aim of this notification is to implement the strategies and action plans set out in the Myanmar Sustainable Development Plan and to apply concrete procedures in the development and implementation of the Projects in the Project Bank.

1. Agriculture;
2. Generation, transmission and distribution of electric and thermal power;
3. Processing, storage, transportation, transmission and distribution of oil and natural gas;
4. Automobile, railway, water, air, urban transport;
5. Roads and railway (including bridges and tunnels);
6. Public utilities and public services;
7. Medical, medico-preventive and other healthcare services;
8. Education, upbringing, culture and social services;
9. Mobile and stationary telecom services,
10. Tourism, recreation and sports;
11. Water resources and waste water;
12. Solid waste management;
13. Mining and other forms of mineral extraction (upon approval from the Pyidaungsu Hluttaw);
14. Survey, implementation and monitoring of hydropower projects work such as civil and mechanical work, power supply, power stations, and electricity supply enterprises;
15. Other sectors, involving the provision of services to a wide range of consumers⁹.

Legal Framework for Public-Private Partnerships

After gaining independence, all investments in infrastructure carried out by the government. At the same time, the State's budget cannot allocate these infrastructure sectors because of facing with budgetary stringencies. Therefore, the public did not use completely and sufficiently the basic infrastructure i.e. electricity, water, and so on.

In the Union of Myanmar, the public-private partnerships system has practiced since 1996. It has been already known as BOT (Build-Operate-Transfer) and they were concentrated on road and power sectors. Most of the PPPs during State Peace and Development Council and the previous government were based on unsolicited proposals and bilateral negotiations instead of going through competitive bidding process¹⁰. Consequence of these PPPs' projects has spoiled public trust in private investments in infrastructure projects.

After 1996, the governments have turned to the private sector in order to join private finance and achieve better value for money. The private sector entities have entered into the long-term contractual agreements with the government agencies to construct or manage public sector infrastructure facilities, or to provide services to the community.

The public-private partnerships projects are welcomed by the Union of Myanmar Government to reduce the Union of Myanmar Government's financial burden and the tax burden¹¹. Until 2008, the Union of Myanmar Government governed the PPPs project through the Foreign Investment Law, 2012¹² and Myanmar Citizens Investment Law, 2013¹³.

⁹ Ministry of Planning & Finance, 2016; Myanmar PPP Document, draft for consultation

¹⁰ Ibid

¹¹ Are PPPs the answer to Myanmar's financial constraints? ,CCI france Myanmar, French Myanmar Chamber of Commerce & Industry, 21-8-2019

¹² The foreign investment law was enacted on 30 November, 1988. The aim and objective of this Law are prescribed in the clause of the preamble of this Law. The aim and objectives was to promote all round development of national economy and to ensure mass participation with maximum utilization of the faculties of people and induce foreign investment on the basis of equality and mutual benefit.

¹³ After the enactment of the Foreign Investment Law in 2012, the Myanmar Investment Law was enacted in 2013 to promote foreign and local investment equally. Its objective is to establish a level-playing field for local and foreign investment by promoting a legal framework and incentives for investment by the Union of Myanmar government.

On 2 November 2012, Myanmar's new Foreign Investment Law was enacted by replacing the previous Union of Myanmar Foreign Investment Law of 1988. According to this Law, the investment may be carried out in any of the following forms:

1. one hundred per cent foreign capital on the business permitted by the Commission;
2. a joint venture between a foreigner and a citizen or the relevant Government department and organization; and
3. the contract which approved by both parties¹⁴.

The Myanmar Ministry of National Planning and Economic Development (the NPED) has limited the percentage for investments in certain restricted areas¹⁵ where a joint venture with a Myanmar citizen¹⁶ or entity will be required. For instance, the Law, 2012 prohibits investments in agriculture sector, factories that produce or businesses that use hazardous chemicals, and activities that can affect public health or cause damage to the natural environment and ecosystem. Activities caused great effect on the conditions of security, economic, environmental and social interest of the Union, - and citizens shall be submitted to the Pyidaungsu Hluttaw through the Union of Myanmar Government before a permit is granted¹⁷.

The Union Government guarantees:

1. No nationalization within the term of the contract or the extended term if such term is extended¹⁸.
2. No suspension any investment business before the expiry of the permitted term without any sufficient cause¹⁹.
3. Disbursement his rights in the category of foreign currency in which such investment was made²⁰.

According to the Myanmar Citizens Investment Law, 2013, any type of economic activities may be applied for investment, except other restricted or prohibited businesses under this law, or any existing Law.²¹ The types of investment are as follows:

1. one hundred percent investment by a citizen
2. a joint venture between a citizen and relevant government department, government organization
3. contracts
4. contract between a Citizen and Union, carrying out mutual agreement system including BOT, BOO²²

The Union of Myanmar Government guarantees:

1. No nationalization²³;
2. Paying back the foreign loan to the relevant bank in accord with the stipulation²⁴; and
3. No suspension of investment without any sufficient cause²⁵.

¹⁴ Sec.9 of the Foreign Investment Law, 2012

¹⁵ In the restricted areas, the foreigner investors are prohibited by the Foreign Investment Rules, 11/2013. This rules are prescribed by the Ministry of National Planning and Economic Development with the approval of the Union of Myanmar Government under Sec.56(a) of the Republic of the Union of Myanmar Foreign Investment Law. (21/2012)

¹⁶ Sec.5 of the Foreign Investment Rules, 2013

¹⁷ Sec.11 of the Foreign Investment Rules, 2013

¹⁸ Sec.28 of the Foreign Investment Law, 2012

¹⁹ Sec.29 of the Foreign Investment Law, 2012

²⁰ Sec.30 of the Foreign Investment Law, 2012

²¹ Sec. 5 of the Myanmar Citizens Investment Law, 2013

²² Sec.8 of the Myanmar Citizens Investment Law 2013.

²³ Sec.21 of the Myanmar Citizens Investment Law, 2013

²⁴ Sec.22 of the Myanmar Citizens Investment Law, 2013

In 2016, the Union of the Government of Myanmar enacted a new Myanmar Investment Law. The Myanmar Investment Law came into effect on 18 October 2016 and replaced the previous Foreign Investment Law 2012 and the Citizens Investment Law 2013. The Myanmar Investment Rules 2017 came into force on 30 March 2017. According to the Myanmar Investment Rules 2017, Myanmar Investment Commission issued the list of restricted investment activities:

1. Investment activities allowed to be carried out only by the Union
2. Investment activities that are not allowed to be carried out by foreign investors
3. Investment activities allowed only in the form of a joint venture with any citizen owned entity or any Myanmar citizen
4. Investment activities to be carried out with the approval of the relevant ministries

Besides, the Myanmar Investment Commission issued two notifications: Classification of Promoted Sector (Notification 13/2017) and List of Restricted Investment Activities (Notification 15/2017). By enacting the new laws from time to time and issuing these notifications, the Union of Myanmar Government welcomed the private investor to invest in infrastructure. For example, the electric power system is the investment activity allowed to be carried out only by the Union. But the Ministry of Electric Power signed a BOT contract with Sembcorp Utilities Consortium, Comprised of Sembcorp Utilities Pte Ltd and MMID Utilities Pte Ltd from Singapore for 22 years in April 2015²⁶.

Although there is no law of public-private partnerships, some of the laws relating to PPPs projects are the Company Law, Investment Law, Contract Act, Land Acquisition Law, Arbitration Law, the rules and regulations of the related Ministries. The main government agencies relating to PPPs project are the Ministry of National Planning and Economic Development (MNPED), the Myanmar Investment Commission (MIC), the Directorate of Investment and Company Administration (DICA), which issue permits for the investment approval.

In 2018, the significant change for the public-private partnerships system is the introduction of the Notification of Project Bank, 2018. Until Project Bank Notification was provided in November 2018, Myanmar did not have clear regulatory framework for implementing PPPs. This project bank notification 2/2018 was issued by the office of the president office on 30th November 2018 and it set forth guidelines and procedures for developing projects in line with strategies and action plans in Myanmar Sustainable Development Plan (MSDP), using multiple financing mechanisms including public private partnership.²⁷

According to the Project Bank Notification, 2018, Project Bank means an interactive, web-based, publicly accessible database or project information bank that includes Projects that Implementing Governing Agencies perform to develop to implement the MSDP and its Strategic Action Plans²⁸. In this Notification, there includes more detailed definitions. For example, Pre-Feasibility Study means a comprehensive study of a range of options for the viable delivery of a Project, including an assessment of the technical, financial, legal, environmental and social viability of the Project²⁹. The definition is good and clear because of studying this situations in order to be a successful and effective project.

²⁵Sec.23 of the Myanmar Citizens Investment Law, 2013

²⁶ Public-Private Partnership Stories, Myanmar: Myingyan IPP, International Finance Corporation, World Bank Group, 2017,p-1

²⁷ MONITORING REPORT OF SELECTED PPPs IN MYANMAR, p-7

²⁸ Sec1(n) Project Bank Notification, 2018

²⁹ Sec1(k) Project Bank Notification, 2018

The purpose of the Project Bank is described in Sec.2 of this Notification. The purpose is to strengthen the development of Projects that will enable the Government to effectively implement the MSDP, including:

1. by publishing government plans for the priority projects needed to achieve national development objectives in a predictable and transparent way and
2. by developing procedures to ensure that Projects are well coordinated and facilitated among the MOPF and IGAs.

The main target groups are Ministry of Planning and Finance and its PPP Center which are mainly responsible for PPPs. The PPP Center is also the important center for PPPs project. PPP Center Means a specialized unit formed within the Ministry of the Planning and Finance. The PPP Center shall be established within the Ministry of Planning and Finance and shall be responsible for identifying Projects that are capable of being delivered by PPP from those Projects submitted for inclusion in the Project Bank. The Ministry of Planning and Finance's responsibilities shall be included but not be limited to:

1. facilitating the identification and development of PPP Projects;
2. managing aspects of the Project Bank relevant to PPP Projects;
3. developing requirements, guidelines, templates and procedures to be used in the identification, preparation, bidding and management of PPP Projects;
4. monitoring and reporting on the implementation of PPP Projects and
5. investigating and recommending PPP policy reforms³⁰

To be the responsible investments, environmental and social impact studies and aspects for proposed Projects including PPP Projects shall comply with regulations set out by the Ministry of Natural Resources and Environmental Conservation³¹. The project-affected persons are resettled and paid compensation by the applicable regulations and standards.³² The Government and the private partner may be responsible for paying a prompt, fair and adequate compensation, in line with international best practice,³³

The responsibilities of the Ministry of the Planning and Finance play the important role for the project bank development. The responsibilities of the Ministry of the Planning and Finance for the Project Bank shall be included but not be limited to:

1. establishing the Project Bank;
2. determining Projects to be included in the Project Bank;
3. making the Project Bank accessible via an interactive, web-based, publicly accessible database;
4. updating the Project Bank on a quarterly basis and
5. ensuring consistency with regard to the application of and adherence to this Notification by all stakeholders and presenting to the NECC in this regard from time to time.

The salient point is the contractual requirements. A PPP contract may be included but not be limited to the following:

1. amount of investment;
2. conditions precedent;
3. responsibilities and liabilities;
4. rights and obligations of the Union or State or Region Governments;
5. rights and obligations of the private partner;
6. risk allocation;

³⁰ Sec.11 Project Bank Notification, 2018

³¹ Sec.37 Project Bank Notification, 2018

³² Sec.38 Project Bank Notification, 2018

³³ Sec.39 Project Bank Notification, 2018

7. incentives;
8. dispute resolution;
9. effectiveness and key performance indicators;
10. financing;
11. insurance;
12. term;
13. minimal performance standards;
14. performance monitoring;
15. termination;
16. early termination and extension;
17. amendments;
18. force majeure;
19. tax and duties;
20. auditing;
21. change in law;
22. effective date;
23. contract term;
24. guarantee and representation and
25. renegotiation.³⁴

With regard to the unsolicited proposal, the provisions are provided in Sections 23 to 28. According to section 25, provisions in this section shall not be applicable to the unsolicited proposals for the development of Greenfield projects in the energy and mining sector. When the unsolicited proposal is submitted to a relevant government agency, the project may be referred to the PPP Center.³⁵

Hence, it can be considered clear and comprehensive regulatory framework for implementing PPPs in Myanmar: PPP units with standards and processes to implement PPPs, unsolicited PPP proposals, sources of funds for PPPs, environmental and social aspects for PPPs, contractual requirements for PPPs, monitoring and supervision for PPPs and transferring SEEs in part or whole to private sector through equalization or PPP mechanisms and the means of dispute resolution.

Conclusion

To sum up, the Project Bank Notification is the significant development for the public-private partnerships system in Myanmar. The notification mandates the creation of a centralized government unit for supervising public-private partnership projects. Other key provisions relate to the procedure for obtaining government support, including financing, for supervising public-private partnership projects. According to Project Bank notification, implementing government agencies (IGAs) must identify strategic projects which will contribute to Myanmar Sustainable Development Plan (MSDP) into public, ODA and bankable PPPs. Afterwards, solicited proposals must be passed through bidding process although there are rules for unsolicited ones. Therefore, with the increase in number of PPPs in the pipeline, government is also strengthening PPP regulatory framework, public financial management and PPP process management capacity of line ministries albeit, and a lot of capacity enhancement in IGAs needs to be conducted.

Acknowledgement

I would like to express my heartfelt gratitude to Dr Thwin Pa Pa, Head of Department of Law, University of Mandalay for her encouragement and permission.

References

³⁴ Sec.41 Project Bank Notification, 2018

³⁵ Sec.24 Project Bank Notification, 2018

Laws and Notifications

1. Foreign Investment Law 2012
2. Myanmar Citizens Investment Law 2013
3. Myanmar Investment Law, 2016
4. Project Bank Notification, 2018

Books

1. ER.Yescombe, Public private partnerships Principle of Policy and Finance, 2007
2. Public-Private partnership reference guide V.2.0, 2007
3. Understanding Options for Public-Private Partnership in Infrastructure, World Bank, 2010

Reports

1. MONITORING REPORT OF SELECTED PPPs IN MYANMAR, Sandhi Governance Institute
2. Ministry of Planning & Finance, 2016; Myanmar PPP Document, draft for consultation

Articles

1. Are PPPs the answer to Myanmar's financial constraints? ,CCI france Myanmar, French Myanmar Chamber of Commerce & Industry, 21-8-2019
2. Public-Private Partnership Stories, Myanmar: Myingyan IPP, International Finance Corporation, World Bank Group, 2017

Interviews

Interviewing with Directorate investment and Company Administration, Mandalay
Interviewing with Ministry of Electric Power, Lomg Lon, Tanintharyi Division