

PUBLIC-PRIVATE PARTNERSHIPS AND URBAN INFRASTRUCTURE DEVELOPMENT IN SOUTHEAST ASIA

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ABSTRACT

Public-private partnerships (PPPs) are arrangements between government and private sector entities for the purpose of providing public infrastructure, community facilities and related services. PPP infrastructure development can take place at a regional level on a large scale, such as a cross country tunnel construction or on a small scale at an urban level such as city waste water treatment and sewerage rehabilitation. The purpose of this article is to identify issues and challenges in the area of public-private partnerships for infrastructure provision and finance at the urban and national levels in Southeast Asia. More thought will be given to discuss essential features of regulatory and legal frameworks required to support public and private sectors to effectively deliver urban infrastructure services. These include building legal frameworks and institutions at the outset; introducing sound regulations to protect private sector investment; using contractual safeguards against potentially disputable matters; and implementing governance and accountability frameworks. It also offers some insights into the regulatory and surveillance machinery required at a national-urban PPP setting to ensure effectiveness, fairness and openness for executing urban infrastructure development projects. Reviews of impediments to successful PPPs have indicated several prevailing issues and challenges. Urban local authorities often encounter overlapping regulations and still need adequate clarity on their roles and authority levels. For central governments, there is a real need for a comprehensive and consistent regulatory framework and a more streamlined process for implementation of PPP projects.

Keywords - ASEAN Countries, Public-Private Partnerships, Urban Infrastructure Development

INTRODUCTION

In Southeast Asian countries, urban areas have been developed with rapid economic growth and expansion of population. The economy of Southeast Asian Nations (ASEAN) experienced an average growth of 5.9 percent from 2003 to 2008 (The

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ASEAN Secretariat, 2009). The total population in 2008 was about 580 million and projected to rise to 650 million by 2020, with more than half living in urban areas (United Nations, 2007). The urban population in the region has been steadily increasing from 31.6 percent of the total population in 1990 to about 47 percent in 2008 (The ASEAN Secretariat, 2009). However, due to this rising population in major cities, the development of urban infrastructure and public services such as sewage systems, wastewater treatment facilities, and public transportation network has become insufficient and less effective, causing serious problems to the quality of life of residents and obstructing the sustainable growth of the ASEAN countries.

Since introduction of decentralization efforts in several ASEAN countries in 1990s, many local governments have been responsible for the delivery of urban services. However, their finances and administrative autonomy remain a challenging issue. The ability of local governments to raise revenue and provide adequate services continues to deteriorate as city populations grow while their administrations are still trapped in the bureaucratic traditions and have less capable staff.

Facing budgetary constraints and recognizing their inability to provide infrastructure services efficiently, governments in many countries have been rapidly adopting neo-liberal approaches and a market-based economy. This has led to radical changes in the characteristics and the respective roles of the public and private sectors. Coping with the new market economy requires governments to reduce the size of the public sector and give a greater role to a more dynamic private sector under public-private partnership schemes.

The purpose of this article is to identify issues and challenges in the area of public-private partnerships for infrastructure provision and finance at the urban and national levels in Southeast Asia. More thought will be given to discuss essential features of regulatory and legal frameworks required to support public and private sectors to effectively deliver urban infrastructure services.

PRIVATE PARTICIPATION IN URBAN INFRASTRUCTURE DEVELOPMENT IN ASEAN - SOME LESSONS LEARNED

Public-private partnerships (PPPs) are arrangements between government and private sector entities for the purpose of providing public infrastructure, community facilities and related services. PPP infrastructure development can take place at a regional level on a large scale, such as a cross country tunnel construction or on a small scale at an urban area such as city waste water treatment and sewerage rehabilitation. These partnership arrangements can provide a broad umbrella to shelter and protect the public interest while bringing investment potential and added value from the private sector.

Governments in the ASEAN countries have used the public-private partnership mechanism extensively, partly because they suffer from budgetary constraints and that the private sector can step in to undertake projects with its technical expertise and resources to secure financing. This unfolds in the critical case of urban infrastructure development, where in exchange for a building license, the private investor promises to

build public infrastructure like roads and sewer systems that the local government cannot effectively accomplish. In addition, decentralization has significantly empowered and given autonomy to local governments to control and supervise their private partners' performance by utilizing or manipulating the permit or licensing system. Therefore, the success or failure of urban development relies to some extent on whether the private investor rights, as derived from government licenses and permits, are secure in order for the investors to continue to invest at adequate levels to support the urban infrastructure development projects.

Some success stories of PPPs in ASEAN countries are in urban water supply and distribution. Traditionally, the public sector has been responsible for the management of water services, but in recent times, it has been argued that it lacks the capability that is needed to provide efficient services in a time of increasing demand. The provision of water supply by several municipal governments has been marred by inefficiencies, especially due to low coverage, high non-revenue water (NRW) levels, intermittent supply, and poor water quality. Greater involvement of the private sector in water supply and distribution, through innovative approaches like Public-Private Partnerships (PPPs) has become one of the solutions. Examples include the private sector participation in urban water supply through the concessions in metropolitan Manila and Jakarta, which have been in place for almost a decade, serving a population of 20 million people.

In Manila, two concessions were awarded in 1997 to cover two areas. The Western concession, operated by Benpres-Suez was the larger and covered most developed portions of the city, with a total population of about 7 million people. The smaller Eastern concession, operated by Ayala-United Utilities covered about 4 million residents. Even though the implementation of the two concessions faced major difficulties from the beginning caused by the Asian financial crisis, access to piped water in Manila later expanded significantly during the decade. From 1997 to 2006, the zone coverage significantly expanded from 67 percent to 86 percent for the Western concession and from 49 percent to 94 percent for the Eastern concession (Philippe, 2009) whereas the average water coverage for the national urban area grew moderately from 46 percent to 58 percent. An estimated 4 million people gained access to piped water in Manila during the period 1997–2006.

Access to piped water in Jakarta was even lower. Before the two concessions, Suez for the Western zone and Thames Water for the Eastern zone, were awarded in 1998, water supply covered on average 30 percent of the population. Many city dwellers obtained water from private wells. Between 1998 and 2005, the two concessionaires added 210,000 water connections to the system, providing access for an additional 1.7 million people. Access to piped water in Jakarta's Western zone went up from 32 percent to 50 percent, and from 57 percent to 67 percent in the Eastern zone (Philippe, 2009) whereas national urban water coverage stagnated at a low 30 percent in the same period. However, it was difficult to expand more access to water supply in Jakarta. Many households were unwilling to pay a connection fee plus periodic bills because they had already invested in pumping equipment and were not paying any extraction charge for the water they were getting from their wells.

The performance of PPPs in water supply and distribution in Indonesia and the Philippines has demonstrated achievable success, with more expansion of coverage, improved operational efficiency, and better quality of service. Despite some problems, the concessionaires have obtained very encouraging results. They have successfully re-tendered and are now gaining considerable success in the area of high non-revenue water (NRW) management.

It is vital for a successful PPP to have an effective procurement and financing strategy in place, including regulatory frameworks that identify roles and responsibilities for the local governments and the private partners at the outset. There are some lessons learned from the PPP urban infrastructure development projects in countries such as Malaysia and Thailand indicating failures, mainly because of the lack of adequate guarantees for the long-term investment return and the impact of political intervention at the local governmental level.

PPP failures caused by economic risks and inadequate financial guarantees

Examining experience in more details shows that there are a number of features that raise the risk profile of urban infrastructure development for private investors. An urban sewerage rehabilitation project illustrates some of the PPP pitfalls caused by economic risks and inadequate financial guarantees. In Malaysia, the provision of sewerage services was privatized to Indah Water Konsortium (IWK) in 1993. This Malaysia example is interesting in that the sanitation program, while providing a core urban infrastructure service, has been managed through a national program. The central government has provided grants for sewerage infrastructure. There were 144 local authorities in the country and IWK has taken over the management and provision of sewerage services in 84 local authorities (Abidin, 2004). This project arose from concerns over local governments' weak technical and financial capability in the face of poorly maintained facilities and rising demands for better sewerage services. An unsolicited proposal was brought to the central government, and approved rapidly, in 1994. Investments and the level of service improved dramatically in the immediate term. As the demand for effective sanitation increased, IWK turned to other private companies to build wastewater management systems. However, even before the economic crisis in 1997, consumers objected to the tariffs imposed (Annex 2006). IWK faced problem with revenue collection because many consumers refused to pay at the imposed rates. Consumers felt that the tariffs charged were too high. They perceived that the price of a public utility had increased following the transfer of the service from the government to the private sector. The tariff structure originally stipulated in the agreements was then suspended without compensation for the private investors, and a new tariff structure was established in 1997. In addition, IWK discovered that the rehabilitation required more investment than anticipated. As a result, the government felt obliged to provide substantial financial support to IWK, including a long term soft loan package. In conclusion, although the government succeeded in attracting private involvement, the structure of guarantees provided, and the underestimated risks involved in the project were such that both the capital mobilized and the physical achievements of the projects were much less than originally expected.

PPP failures caused by undue political intervention

Experience in ASEAN countries has revealed that the PPP landscape can be hampered significantly by undue political intervention in the policy decision process. For example, politicians have made promises to support the development of a particular project but continued lobbying against the development of a similar project backed by the opposing politicians. Such political competition may produce unhealthy result for the economic functioning of a city.

A prime example of this is in the transport sector in Bangkok (Valentine, 2008). There are two rail systems currently operating in the city. The first one owned by the Bangkok Metropolitan Authority (BMA) is the BTS Sky-train which began its operation in 1999 under the PPP concession of Build-Operate-Transfer (BOT) model managed by the Bangkok Mass Transit System (BTS) Public Company. The second one is the underground electric mass rapid transit system called the MRT (Mass Rapid Transit) which was operated by the Mass Rapid Transit Authority (MRTA), a State-Owned-Enterprise under the supervision of the Ministry of Transportation. The BTS Sky-train is managed by a local government authority within the central Bangkok area whereas the MRTA is authorized to operate the underground MRT Systems within the Greater Bangkok area and the nearby provinces. In 2008, the BTS and its expansion plans were attached to local politicians who were in fierce contest with their opponents in the central government, who favored the other rail MRT line. These opponents considered that the best way to promote the extensions for the MRT concessions was to prohibit the extensions of the BTS network.

This political tension has caused expansion to both the public rail MRT and BTS systems to serve the residents of Bangkok extremely slow in developing. It has obviously led to negative implications for the city's infrastructure development in terms of mobilizing finance and accelerating private participation on project investments.

ESSENTIAL FEATURES OF REGULATORY AND LEGAL FRAMEWORKS TO SUPPORT PRIVATE PARTICIPATION IN INFRASTRUCTURE DEVELOPMENT

The infrastructures mainly needed by developing countries to support their economic activities are those related to transportation, energy, water, and most recently, telecommunications. However, high capital investment costs and lack of technology can impede infrastructure development. Many developing countries cannot afford such development without affecting other economic activities. Considerable attention has been paid to enforce regulations for promotion of private involvement in public infrastructure services, with a view to encouraging private firms to participate and thereby mobilize private capital into public work projects. Improvement of program performance, cost efficiencies, better service provision, and appropriate allocation of risks and accountabilities have also been identified as factors opening avenues for public-private partnership in designing, constructing, operating, maintaining and financing infrastructure development through management and lease contracts,

concessions and divestitures. There are some enabling factors of regulation that are essential for private investment in infrastructure development. These include the setting of a regulatory framework and institutions at the outset; sound regulations to protect private sector investment; contractual safeguards against potentially disputable matters; and governance and accountability frameworks.

Institutional and regulatory setting

Regulation is a key element to maintain a competitive market discipline on public infrastructure services. While many governments in developing countries have already signed their first demonstration public-private partnership contracts, most have not yet designed the legal and regulatory framework for monitoring the performance of private contractors and for ensuring contractual compliance. Experience in these countries confirms the importance of putting a sound regulatory framework in place before implementing public-private partnership programs (IP3, 2000). A regulatory system should be established as soon as possible to define clear rules for financial performance, provide practical experience to the staff responsible for their implementation, and provide assurance to the private sector that the regulatory system includes protection from expropriation, arbitration of commercial disputes, and respect for contract agreements. In turn, the regulatory system will increase benefits to the government by achieving better and more informed decision making, improved performance, and by raising efficiency and accountability (The World Bank, 1994).

Investment protection

Investor security is critically important. Regulation is also useful in protecting the interests of private investors by preventing direct or indirect expropriation of investment capital. For example, regulation in public-private partnerships can act as a buffer against political interference from governmental bodies in pricing decisions. This buffer function is particularly important, as government objectives for political or social reasons may act as a disincentive to investment and, indeed, may not even be in the consumer interest (The World Bank, 1994). In developing countries with limited histories of private participation, investors with doubts about the safety of investments will either require very high returns or not invest. The only way for these countries to be successful in attracting private capital is to establish a regulatory regime that reduces this risk and protects private sector investment (Pongsiri, 2005).

Contractual safeguard

The financial and other resources of private and state enterprises are always limited. Projects developed as public-private partnerships are mostly based on risk sharing and a security package of interrelated contracts between the two parties (IP3, 2000). Consequently, many developing and emerging market economies require effective models on how best to design and establish legal frameworks for contract compliance and performance monitoring for public-private partnerships. On the one hand, the private sector needs a great deal of certainty and protection against unforeseeable changes, as the economic and financial costs of poorly designed, drafted and negotiated agreements are tremendous and can jeopardize entire public-private partnership

programs (Pongsiri, 2003). The establishment of a transparent and sound regulatory framework is a necessary precursor to private sector participation in a public private partnership. On the other hand, governments need regulation to ensure that essential partnerships operate efficiently and optimize the resources available to them in line with broader policy objectives, ranging from social policy to a policy for environmental protection (The World Bank, 1994: 57-9). However, over regulation and contractual safeguards can restrain economic growth and hinder the private sector's ability to remain competitive in the market (Lundqvist, 1988).

Governance and accountability framework

Private investors will be kept away and will seek a more hospitable place to invest if regulation is unlimited in scope, unclear in operation, inclined toward micro-management, and lacks good governance. The regulatory regime must be limited, transparent, fair and consistent, and the government must always keep its promises. Private investors are cautious not only of expropriation but also of many small regulatory actions that together constitute incremental expropriation, taking away the private partner's option of legitimate recovery of costs and of profits proportional to the risks undertaken. Private investors must be convinced that the government, as a prudent partner, will commit to good governance to protect private investments and will not use regulation as a direct or indirect mechanism for "administration expropriation". Even if public-private partnerships appear to reduce costs, they cannot be defined as a success, if their regulation results in the need for more government oversight and expensive monitoring (Sparer, 1999).

Public-private partnerships also involve sharing or transferring a measure of responsibility and control of operations. This may cause shifts in accountability arrangements, creating new responsibility hierarchies and reporting requirements for public sector managers. While governments have been largely preoccupied with political accountability through the electoral process, public-private partnerships open new channels of accountability. In arrangements where the government still retains ultimate or partial accountability, government partners must ensure the respective accountability of their partners through the use of sound formal agreements (Pongsiri, 2002).

There are also new accountability demands on the private participants in a partnership, as they are required to disclose information about partnership related activities, including expenditures to their partners and the public (Pongsiri, 2004). Problems that arise as a result of shifts in accountabilities can be avoided, if appropriate arrangements are put in place toward clear governing regulations. According to the government's viewpoint, a well-defined regulatory framework is essential, if the private partners ideologically and financially oppose seeing themselves as having additional accountabilities to the public interest (Hassan, 1996; Colton *et.al.*, 1997).

REGULATORY AND LEGAL CONSIDERATIONS AT A NATIONAL-URBAN PPP SETTING

Although the concept of public-private partnerships is becoming increasingly common as a means of delivering urban infrastructure services, the level of private sector involvement is not yet sufficient in ASEAN countries. More importantly, a well-defined regulatory framework for partnerships is more an idea than a reality at present. What most public and private organizations have found instead is that the implementation of a regulatory framework in their partnerships has apparently created a number of prevailing issues that are in need of clarification.

PPPs bring multiple benefits to the stakeholders involved. However, there are operational, political and financial risks that are borne by local governments and the private companies involved in urban development PPPs. Therefore, central governments and local authorities need to ensure that a regulatory and legal framework shall be made available to permit, facilitate and secure private investment in public work projects. There are some issues and challenges at the national-urban PPP setting that need to be addressed to provide sustainable participation by the private sector.

Overlapping regulation and unclear roles at the urban PPP setting

Urban PPPs are a commercial transaction between an urban local government and a private party whereby the private organization performs an urban function for or on behalf of the local government. The private sector, acquiring managerial work or using urban property for its own commercial purposes, assumes substantial financial, technical and operational risk, and receives a financial benefit in respect of the project. Several PPP projects have clearly demonstrated how effective combinations of private and public financing and enterprise can significantly strengthen urban service provision and improve the well-being of people in urban areas, rural cities and towns. Some other benefits to an urban local government are transfers of technology, employment benefits, and capacity building.

Urban authorities are important in the creation or enhancement of this enabling environment for PPPs in cities and towns. In many countries these authorities have significant governmental autonomy under Private Participation in Public Infrastructure Development Acts or similar regulations. They can enter into PPP contracts without needing consent from the central government, as long as the costs of the contract can be covered by the urban budget. Effective decentralization is therefore a precondition for PPP development at the urban level. This means that local authorities must have their own resources and taxation authority, and the ability to formulate, negotiate, award, implement, supervise, and monitor PPP projects.

Although urban local officials in general do not have the power to influence positive changes in the country's investment climate, they still need adequate clarity on their roles and authority levels, not just to sign contracts, but also to undertake all the other tasks related to maintaining the partnership. These would include financial, legal, and other areas of public administration. However, in some countries, there is confusion and inconsistencies in the regulatory frameworks of central government that inhibit urban

government actions to attract capital investment. One of the biggest challenges facing urban officials is the legacy of complex and interlinked regulation that often involves inherent confusion and duplication. For example, in South Africa, the urban infrastructure development projects are governed by the Municipal Systems Act (MSA) whereas urban PPPs are regulated by the Municipal Finance Management Act (MFMA). Both the MSA and the MFMA require project feasibility studies to be undertaken before urban local authorities can proceed with a PPP (Levinsohn and Reardon, 2007). Although the studies required by each Act are similar, there are discrepancies that can cause confusion. A local authority is faced with the challenge of having to satisfy the requirements of both Acts, which is often perceived to be a difficult task. Consequently, some urban authorities and the private sector tend to avoid using PPPs as a model for infrastructure development in the local government sphere because of the cumbersome, complicated, time consuming and inter-related regulatory frameworks required to implement a PPP. In order to accelerate service delivery, urban authorities and the private sector decide to shift to other alternative models such as conventional procurement and turnkey methods which do not constitute a formal PPP.

In Thailand, the frameworks underpinning the PPP activities are derived from the Act on Private Participation in State Undertaking B.E. 2535 (1992). However, the institutional regulatory framework for infrastructure provision and management is a fragmented hierarchy where many different bodies across several sectors have assumed the various responsibilities of regulation (Valentine, 2008). Certain PPP projects at an urban level are covered by their own regulations because the 1992 Act does not prescribe the methodology for project valuation or procurement methods. It also does not provide a methodology to share the risks and burdens with the private sector when projects are not commercially viable. The regulation thus becomes less effective and lends itself to frequent clarification and interpretation on several aspects (Susangarn, 2007).

Many countries have adopted special arbitration mechanisms at an urban level to solve technical, contractual and labor disputes. The arbitration panels can include members of the public and the private sectors with supporting guidelines for conflict resolution. This would minimize difficulties and tensions that sometimes arise. If there are no special arbitration mechanisms, urban authorities themselves need to perform the roles of various regulatory authorities, including judicial bodies, when disputes arise. In some contracts involving international partners, there can be special clauses for court jurisdiction which can be outside of the host country. This is sometimes favored by foreign investors, who are unfamiliar with or distrusting of local judicial objectivity and processes. As such, urban officials need to understand the implications of these clauses in potential contracts and agreements.

Comprehensive and consistent regulatory framework at the national PPP setting

At national level, there must be legal, regulatory and administrative processes that uphold and respect foreign investors. A comprehensive and consistent framework of PPP regulation is very important as it provides a reference point for the main actors in

the partnership. There is also a real need for consistency in national PPP policies over the long term regardless of changes that may occur in political regime.

In Thailand, all PPP projects are governed under the Act on Private Participation in State Undertaking B.E. 2535 (1992). The Act was intended to provide appropriate scrutiny processes for large PPP projects to ensure that the projects are viable and contracts are carried out through proper procedures. It was designed at the time of enactment to prevent corruption in granting the rights to private investors for operation or use of state properties, rather than to delineate the necessary components of sound regulatory and institutional framework for PPP projects. As a result, the 1992 Act has provided the governmental authorities with inadequate contents and an unclear governing framework (Susangarn, 2007). There is a need for an Amendment to provide a broader definition of the PPP concept and a more streamlined process for implementation of PPP projects.

A central feature of PPPs is the contractual arrangement. These contracts are often highly technical, cumbersome, and have significant legal, financial and technical implications. The regulatory framework enforced by the central government thus requires a comprehensive guideline for procurement, regulation of prices, conditions of arbitration, including the handling of labor disputes. Other related contractual issues that may have an impact on the contracting private parties at national level are exchange rates, ability to transfer profits, taxation, labor laws and insurance. In some countries, the level of decentralization provides the urban officials adequate authority over the PPP without sufficient understanding. Confusion on authority, functions and decision making within the local government and among several relevant central government agencies can make the design, procurement and implementation of PPP projects difficult.

It is necessary for the central government to enforce a clear regulation on when and how urban or local governments need consultation with existing regulatory authorities at national level, and how the central government should take part in contractual matters such as the issues related to pricing and dispute resolution. A good example is South Africa, which has a national framework of laws, regulation and administrative processes guiding urban governments on the use of PPPs (PPP Manual, South Africa 2004), or Germany that has a unit for the coordination of PPP design and management in the country (PPP Coordination Unit, Germany, 2006). The primary goal of the PPP Coordination Unit is to establish a regulatory framework for public authorities (at the national and urban level) related to the application of a range of PPP instruments to implement national and urban development strategies; deliver support for PPP projects market development; and provide consulting services to local authorities.

Legal provisions and procedures related to private sector participation in Southeast Asian countries are complex, numerous, scattered over many different instruments and have no fixed time frame for completion (UNESCAP 2006). To address these problems, several governments have established specialized units and devised suitable legal instruments to reduce the level of uncertainty surrounding public-private partnership projects and increase investor confidence. The Build Operate Transfer Centre (BOTC) in the Philippines and the National Committee for the Acceleration of Infrastructure

Provision Policy (KKPPI) in Indonesia were established to serve as catalysts for the promotion and implementation of private sector participation projects.

With the national PPP regulation and Coordination Unit in place, there is still a need for the central government to support capacity development for local authorities to manage the PPP process and have a better understanding of the nature of PPP agreements. Governments in South Africa and Germany as well as many others countries maintain websites that clearly demonstrate national frameworks to guide PPP development. Other initiatives include central and local government created associations and institutions in and outside of the state to discuss, evaluate and in some cases promote a more active participation of the private sector. It is most advantageous to combine the PPP experience at the central government with local government knowledge of the needs and priorities of its constituency. When borrowing is involved, central government should be consulted as subsequent future liabilities concern the whole nation.

CONCLUSIONS

Like other developing countries, the fiscal pressures of local governments in ASEAN are more intense, and the prospect of shifting investment responsibility to private infrastructure providers has played a more significant role in the increased acceptance of private sector involvement in urban infrastructure development. Partnership enhances the strengths of both the public and private sectors in pursuing urban infrastructure service delivery. However, the public sector still maintains an obligation to act in the public interest in the delivery of public goods, whilst private firms also expect more governmental binding agreements and regulations to prevent administration expropriation and to secure long-term maximization of profits. As a result, public-private partnerships are still subject to extensive and complicated bodies of legal doctrine and to legal enforcement mechanisms.

Most developing countries still need to have the regulatory and surveillance machinery in place at both national and urban levels to ensure effectiveness, fairness and openness of their public-private partnership schemes. They have embraced the PPP concept at the national level as a key strategy in overcoming some of the infrastructure backlog at the urban level. For some countries, decentralization of PPP implementation may lead to confusion and inconsistencies in the frameworks of national government that inhibit urban authority action and private sector interest. From the perspective of international investors, countries perceived to have inconsistent regulatory and legal frameworks are considered unattractive to capital investment. The regulatory framework needs to be consistent and harmonized in order to reduce confusion resulting from interpretation of sub-national governments that can affect PPP transactions.

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