



**LEGAL PROBLEMS ON THE INVESTMENT IN STATE
UNDERTAKING UNDER THE PRIVATE INVESTMENT
IN STATE UNDERTAKING ACT B.E. 2556**

BY

MISS NATCHA KHIANGPRAKHONG

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS
IN BUSINESS LAW (ENGLISH PROGRAM)**

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2015

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ENTITLED

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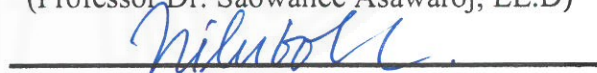
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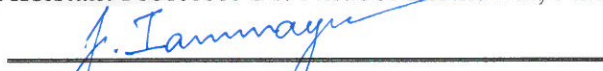
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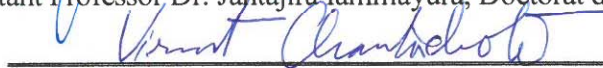
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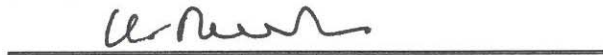
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Thesis Title	LEGAL PROBLEMS ON THE INVESTMENT IN STATE UNDERTAKING UNDER THE PRIVATE INVESTMENT IN STATE UNDERTAKING ACT B.E. 2556
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ABSTRACT

Due to the executive power contained in the three powers of state according to the theory of Separation of Powers approached by Montesquieu, the government has a duty to deliver public service to response public interest. However, the public services mostly are large projects and required substantial amount of money. The public private partnership (PPP) has been introduced to many countries as a resolution to deliver public service.

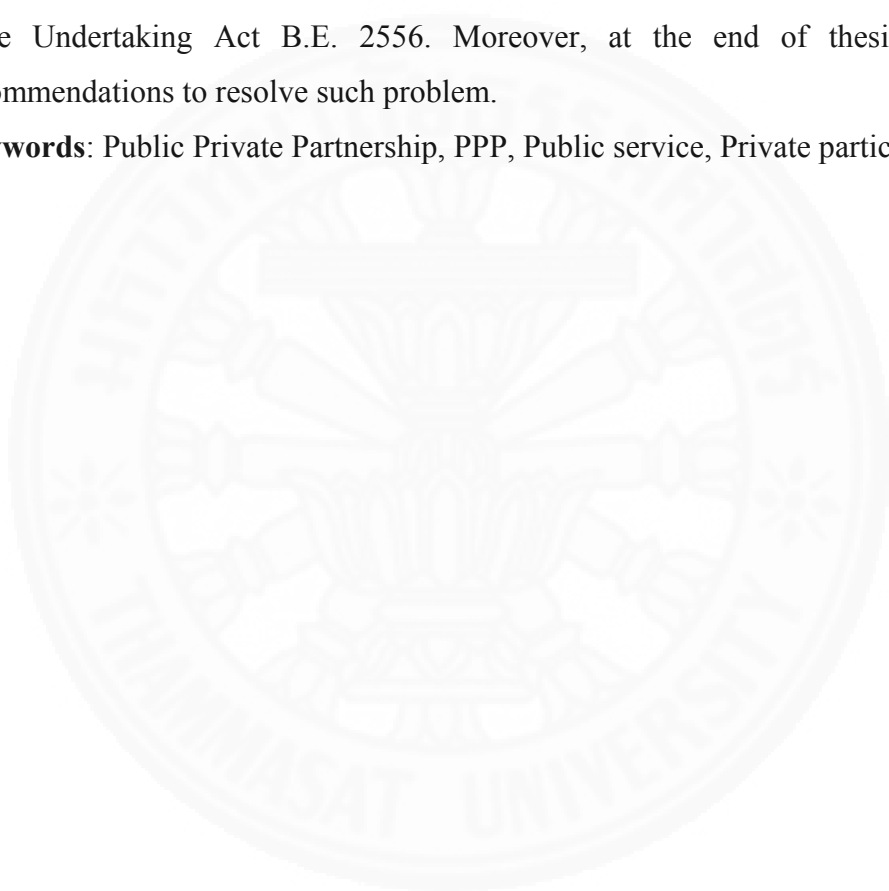
In respect of Thailand, the PPP has been known for a long time since the era of King Rama V, but no official laws and regulations until the year 1992. The Private Participation in State Undertaking B.E. 2535 was enacted to regulate the PPP in Thailand. However, after having been effective for over twenty years, it appeared that there were a number of problems occurring in applying this Act. One of the most important problems was the scope of private participation in state undertaking. This is due to the definitions provided in the Act are wide and ambiguous. It causes confusion for both governmental agencies and investors to apply this Act.

As a consequence, the new law called Private Investment in State Undertaking B.E. 2556 has been enacted and effective, but the problem on the scope of

private participation in state undertaking has not been resolved. Therefore, the same problem is still ongoing.

This thesis will present you the overview of the PPP in global aspect and two examples foreign countries' PPP laws which are the Republic of Korea and the United States. Besides, it also provides the details and analysis of the problems regarding the scope of private participation/investment in state undertaking in both the Private Participation in State Undertaking Act B.E. 2535 and the Private Investment in State Undertaking Act B.E. 2556. Moreover, at the end of thesis, there are recommendations to resolve such problem.

Keywords: Public Private Partnership, PPP, Public service, Private participation



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This thesis is not the first, but hardest of mine. Any mistakes, if occurred, are merely on my own.

Natcha Khiangprakhong
Thammasat University
2016

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LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
PPP	Public Private Partnership
GDP	Gross Domestic Product
PPSU Act	Private Participation in State Undertaking B.E. 2535
PISU Act	Private Investment in State Undertaking Act B.E. 2556
US	United States
UK	United Kingdom
PFI	Private Finance Initiatives
PICKO	Private Infrastructure Investment Center of Korea
PIMAC	Public Private Infrastructure Investment Management Center
MOSF	Ministry of Strategy and Finance
DEDPI	Detailed Engineering and Design Plan for Implementation
BTO	Build-Transfer-Operate
BTL	Build-Transfer-Lease
BOT	Build-Operate-Transfer
BOO	Build-Own-Operate
NPM	New Public Management
GAO	US Government Accountability Office
LAX	Los Angeles International Airport
SEPO	State Enterprise Policy Office
PPISA	Promotion of Private Investment in State Affairs Division
PTT	Petroleum Authority of Thailand

Symbols/Abbreviations	Terms
BMA	Bangkok Metropolitan Administration
TOT	Telephone Authority Organization of Thailand
SRT	State Railway of Thailand
EGAT	Electricity Generating Authority of Thailand
GLO	Government Lottery Office
AOT	Airport Authority of Thailand
NBIA	New Bangkok International Airport Company Limited
MOA	Memorandum of Association
CAT	Communication Authority of Thailand
MWA	Metropolitan Waterworks Authority
DBD	Department of Business Development
LPG	Liquid Petroleum Gas
TTM	Trans-Thailand-Malaysia
EXAT	Expressway Authority of Thailand
IEAT	Industrial Estate Authority of Thailand
GPO	Government Pharmaceutical Organization
MRT	Mass Rapid Transit Authority of Thailand

CHAPTER 1

INTRODUCTION

1.1 Introduction

In the past, European countries were in the Dark Age where the kingdoms were ruled under the catholic religion; as a result, people were obsessed by the Christian belief. However, after the beginning of renaissance, there were many scientists and scholars revealing the theories to prove the unreality of such belief. This controversy of the belief also arose in political aspect as a numbers of scholars approached the new and unique theories to impact political situation.¹ There were some groups of scholars agreed that the state existed from people gathering to response the mutual desire called “Common Good”, “Public Interest” and “General Will”.²

The power of the state actually consists of the legislative, executive and judicial powers in accordance with the theory of Separation of Powers approached by Montesquieu. Regarding executive power acting by the government and its agencies, it is under government’s duty to provide public service in order to response the public interest following to the theory of the Common Good. In this sense, the parliament with legislative power enacted the law to impose the duty of the government to conduct public interest. In the meantime, the government themselves has a duty to comply with the law by taking an action or assigning other persons to do so. Consequently, members of the state can examine and control the transparency through judicial function.³

Boramanan explained the meaning of public service concluded from the French Supreme Administrative Court (Conseil d’Etat) that it is the activities concerning public interest conducted by juristic person in public law and shall be subject to administrative

¹ ดิเรก ควรสมาคม, กฎหมายมหาชนแนวประยุกต์, (กรุงเทพฯ: วิญญูชน), พิมพ์ครั้งที่ 1, 2553, หน้า 112 (Direk Kuansamakom, **the Applied Public Law**. 112 (1st ed. 2010)).

² สมยศ เชื้อไทย, กฎหมายมหาชนเบื้องต้น, (กรุงเทพฯ: วิญญูชน), พิมพ์ครั้งที่ 5, 2552, หน้า 135 (Somyod Cheuthai, **Introduction of Public Law**. 135 (5th ed. 2009)).

³ Kuansamakom *supra* note 1 at 127.

law and jurisdiction of administrative court. According to such explanation, it can be concluded that the public service must consists of three factors as follows:⁴

1. Objective: it must be an activity relating to public interest;
2. Structure: it must be conducted by the juristic person in public law and a private entity where the state has designated as a public service provider on its behalf; and
3. Legal System: it must be subject to administrative law system and under administrative court jurisdiction.

Moreover, the public service can be categorized into two types as follows.

1. Administrational Public Service or Basic Function

This kind of services are relating to country defense and safety. There is no fee to utilize these services. The examples of basic function service are military, police, diplomatic and national treasury.⁵

2. Industrial and Commercial Public Service

The industrial and commercial public services are the provision of service by the government with the same objectives as the private sector. To illustrate,, they can generate profit, have flexible operation as well as collect fee from the customers who become their financial sources. The examples of this type of service are electricity, water supply, and telecommunication.⁶

The government was under duty to provide such services in the previous day; however, due to advance economic development, the state has to decentralize to municipal government in order to ensure the provision of public service in nationwide. There are a number of services the government has assigned the local government to conduct such as sanitation service, waste treatment and central market. In addition to municipal government, the central government has also established the state owned

⁴ นันทวัฒน์ บรมานันท์, กฎหมายปกครอง, (กรุงเทพฯ: วิญญูชน), พิมพ์ครั้งที่ 4, 2557, หน้า 335 (Nanthawat Boramanan, **Administrative Law**, 335 (4th ed. 2014)).

⁵ Kuansamakom *supra* note 1 at 128.

⁶ Boramanan *supra* note 4 at 342-346.

enterprise to provide some infrastructure services such as electricity, water supply and telecommunication on the ground that the operation of the state owned enterprise is more flexible.⁷ Moreover, since some services are required large capital investment and advance technology as well as labor capital, the government does not have to operate all public services by themselves. They may assign such responsibility to private sectors while the government only undertakes, regulates or standardizes such public service.⁸

There are several means of private participation in delivering public service such as privatization and public private partnership (the “PPP”) In respect of privatization, it involves the whole or partial sales of shares or assets in the entity owned by the public sector. This is commonly used in privatizing the sectors which are not traditionally considered as public service such as airport. However, if the privatization occurs in the infrastructure sector, the regulatory arrangement generally required. Apart from privatization, the PPP recently has been one of the most favorable forms in worldwide regarding private sector participation. This is because the PPP possesses plenty of advantages such as allocation of obligations, and risks from public to private sector. The participated private party usually comes with full expertise and experience in a particular sector as well as financial sources. As a result, the private sector can be a pivotal part to contribute the achievement of the government to provide public service.

As of early 1792, the United States allowed private sector involvement in highway projects well-known as the Philadelphia and Lancaster Turnpike in Pennsylvania.⁹ The first wave of PPP in Canada was delivered in the 1990s such as the Highway 407 long-term lease in the Greater Toronto Area, the development of the Brampton and Royal Ottawa Hospitals in Ontario.¹⁰

⁷ Kuansamakom *supra* note 1 at 128.

⁸ นันทวัฒน์ บรมานันท์, มาตรฐานใหม่ของการจัดทำบริการสาธารณะระดับชาติในประเทศไทย, (กรุงเทพฯ: ศาลรัฐธรรมนูญ), พิมพ์ครั้งที่ 1, 2555, หน้า 108 (Nanthawat Boramanan, **New Standard of National Public Service Provision in Thailand**. 108 (1st ed. 2014)).

⁹ Chasity H. O’Steen and John R. Jenkins, “*We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era*”, **41 Stetson L. Rev.** 249, 2 (2015).

¹⁰ Matti Siemiatycki, “*Public-Private Partnerships in Canada: Reflection on twenty years of practice*”, **Canadian Public Administration** Vol. 5, No.3, 343, 345 (2015).

Additionally, the United Kingdom has developed the most advanced PPP program. Due to its financial crisis in September 1992 known as ‘Black Wednesday’, the UK government established the English Private Finance Initiatives (PFI) and then was rebranded as PPP in 1997.¹¹

Turning to Asian countries, the Republic of Korea (the “South Korea”), at the end of the 1990s, on the account of rapid economic growth, the need for infrastructures dramatically increased while the country was severely deficiency of public facilities. In the late 1997, the growing trend of infrastructure was hit by the financial crisis. The government approached the project to develop infrastructure in order to stimulate the financial condition by amending the entire previous act to the new one named the Act on Private Participation in Infrastructure (the “Korean PPP Act”) as of December 1998.¹² Eventually, at the end of 2008, there were more than 400 PPP projects in process and about 250 projects completed and were in operation.¹³

In the perception of Thailand, it has been disclosed recently that investment proportion compared to Gross Domestic Product (the “GDP”) has been declining since the year of 2007, which eventually reached 6.3 percentages in the year of 2010. This could lead to worsen national economic potential in the near future.¹⁴ Therefore, Thailand must inject budgets in amount of more than 5.5 percentage of the GDP in infrastructure projects, in order to develop national infrastructure to be equivalent to other Asia-Pacific countries within ten years. This is clearly seen that only revenue from government sector suffices to invest in many projects due to its limit ability to raise money. For example, it must be concerned to request for financial support from

¹¹ Yseult Marique, **Public-Private Partnerships and the Law**. 1 (1st ed. 2014).

¹² Jay-Hyung Kim, Jungwook Kim, Sung Hwan Shin and Seung-yeon Lee, *Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea Volume 1: Institutional Arrangements and Performance*, 6 (1st ed. 2011).

¹³ *Id.* at 3.

¹⁴ คงขวัญ สีลา, “บทวิเคราะห์ เรื่องความร่วมมือภาครัฐ-ภาคเอกชน (Public Private Partnership : PPP): นวัตกรรมการคลังแห่งอนาคต”, 26 ตุลาคม 2553, หน้า 1 (Kongkwan Sila, “*Analysis regarding cooperation between public and private sector (Public Private Partnership: PPP) : Innovation of the future*” 1, 2013), <http://www.fpo.go.th/FPO/index2.php?mod=Content&file=contentview&contentID=CNT0006003&categoryID=CAT0000146>. (28 August 2015)

financial institutions since financial policy may affect stability of national finance.¹⁵ Therefore, the PPP has become a significant tool to boost the undergoing processes of national economic growth and infrastructure development.

In 2011, the state's tax revenue was approximately USD 43 billion, while the investment on transportation as planned over the next ten years is projected to be about USD 53 billion. The situation of tax collection in the nation is limited and the amount of national debt presented that Thailand should not use the conventional methods to deliver the infrastructure. It is shown that those important infrastructure projects valued huge amount of state's budget such as USD 6.56 billion for rail development and USD 26.7 billion for high-speed rail.¹⁶

1.2 Statement of Problem

In Thailand, after the reformation from absolute monarchy to democracy, the Control on Trading Affecting Safety and Peace of the Public Act B.E. 2471 had been effective, but it was not covered all of the public facilities as it mainly related to trading. Also, the unsystematic of governmental agencies caused the inefficiency of undertaking infrastructure projects. The reason of the government to enact the Revolutionary Council Order No. 58 (the "Order No. 58") is to ensure the important of the efficiency of public facilities projects.¹⁷

The approval of any infrastructure project under the Order No. 58 depended on discretion of the relevant ministers. There was no specification of procedure since regulations and qualifications related to concession or approval of any infrastructure projects. Thus, it can be understood that the details of those matters are solely in the relevant ministers' discretion. This caused corruption during the process of approval by politicians. It can be obviously seen in the case of Don Mueng Toll way Project and Bangkok Elevated Road and Train System (BERTS). For the purpose of diminishing

¹⁵ *Id.*

¹⁶ Nakhon Kokkaew, Jiraporn Sunkpho and Derek Alexander, "Thailand's New Public Private Partnerships Law: A Cure to the Problem?", **8 Eur. Procurement & Pub. Private Partnership L. Rev.** 143, 144-145 (2013).

¹⁷ จุลสิงห์ วสันตสิงห์, สัจญาของรัฐ, (กรุงเทพฯ: วิญญูชน), พิมพ์ครั้งที่ 1, 2554, หน้า 168 (Jullasingha Wasanthasingha, **Government Contract.** 168 (1st ed.2014)).

severe corruption situation, the government of Mr. Panyarachun issued the Regulation of the Prime Minister's Office on Private Participation in State Undertaking B.E. 2534 with the objective to be a regulation concerning concession and participation in public services especially projects valued above one billion Baht. After that, the regulation was enforced to be an act called the Private Participation in State Undertaking B.E. 2535 (the "PPSU Act").¹⁸

As of year 1992, there was the PPSU Act as a legal framework regarding concession of the state in private sectors. Unfortunately, it has been effective for about twenty years, which was terminated in 2003. This act had a number of drawbacks such as no procedure of procurement and contract amendment. Thus, it can be concluded that the PPSU act was ineffective to facilitate accomplishment of the PPP project. As a result, it was repealed and the new law named "the Private Investment in State Undertaking Act B.E. 2556" (the "PISU Act") came into effect on April 4th, 2013.¹⁹

One of the most significant problems in the PPSU Act was the unclear scope of the Participation in the State Undertaking which was required to be construed. There were more than thirty issues sent to the Council of State to determine whether a project failed under this act or not. Nevertheless, after the effectiveness of the PISU Act, the scope of the Participation in the State Undertaking still remained as same as in the PPSU Act. According to section 4 in the PISU Act, in consideration of which project must fall under the PISU Act, such project must meet these following requirements:²⁰

1. Be a State-Undertaking as defined in Section 4;
2. Be an Investment as defined in Section 4; and
3. Have a value of Project at least one billion Baht or higher value as prescribed by Ministerial Regulation.

¹⁸ *Id.*

¹⁹ คณา ศกสศศ, รายงานการศึกษาส่วนบุคคล เรื่อง กรณีศึกษาเฉพาะทางคำนิยามการ "ร่วมลงทุน" ตาม พ.ร.บ. การให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. 2556, หน้า 1 (1557) (Katha Sathonsuth. **Individual Study regarding the Study on the definition of "Investment" of Private in State Undertaking Act B.E. 2556.** 1 (2014)), <http://www.mfa. o.th /dvifa/contents/filemanager/files/nbt/nbt6/IS/IS6022.pdf>. (10 October 2015).

²⁰ Wasanthasingha, *supra* note 17 at 167-168.

With regard to the value of the Project qualified under the PISU Act, it was, once, a problematic issue in the PPSU Act since the law only indicated that the Project must be in value of at least one thousand millions Baht, yet no detail mentioning what assets should be included to evaluate the value of a project in particular revealed.²¹ However, after the PISU Act has been effective, there has been a Notification of Private Investments in State Undertakings Policy Committee regarding regulation and calculation of value of PPP project under the PISU Act. Therefore, such problem has been diminished.

On the contrary, in respect of State Undertaking definition which is unchanged from the PPSU Act, it has been defined in section 4 as:

“State Undertaking means an undertaking having one of the following descriptions:

(1) An undertaking which a government agency, state enterprise, other state agency or local administrative organization, either singly or collectively, have a legal obligation to perform

(2) An undertaking which requires the utilization of natural resources or properties of one or several government agencies, state enterprises, other state agencies or local administrative organizations, either singly or collectively”.

Moreover, pursuant to section 4 of the PISU Act, it stated that

“Investment means a public-private joint investment undertaken by any means or designation of a unilateral private investment by way a license or concession or grant of any kind of right”

Due to vagueness of those two definitions, both public and private investors have been facing the same problem as occurred during the PPSU Act was effective, which would lead to many issues needed the Council of State to construe again. It can

²¹ The Minister of Finance issued the Ministerial Regulation regarding the Increase of Project's Value under the Private Investment in State Undertaking Act B.E. 2556 that the Project subject to the PISU Act must be valued at least five thousand millions Baht.

be clearly seen that decisive scope of Investment in the State Undertaking is a significant part in the PISU Act so that it must be clarified or revised immediately.²²

Nevertheless, it has appeared that the commentaries of the Council of State were construed scope of Participation in the State Undertaking under the PPSU act widely and inconsistently. This would be an obstacle for the private investors intending to invest in the PPP project. Furthermore, the Council of State is the governmental organization with the objectives to resolve the problems in governmental process, but their opinions are not considered as a law. Therefore, it is not binding the private sector, and the private sector could argue against the Council of State's commentary.

In addition, according to the Supreme Administrative Court Judgment no.Ao 349/2549 and Council of State's Commentary no. 570/2542, 291/2550, 292/2550, 293/2550 and 294/2550, when any PPP agreement or project failed to comply with the PPSU Act, the agreement shall not be legally binding the government.²³ As a result, it would affect the invalidation of such agreement. In the perception of the private investor, since the nature of the PPP project has cost high value, this principle would be a significant risk to be considered as a pivotal point prior to making a decision.

The PISU Act, finally, is necessary to be amended due to its ambiguous in the scope of Investment in the State Undertaking. It would be more easily for the state and private sector to apply this law in their projects. This also leads to time and cost saving simultaneously which may induce potential private sector to invest in public projects due to shortened certainty of the law and the procedure of the PPP project

²² Sathossuth, *supra* note 19, at 1.

²³ กิติพงษ์ อูร์พีพัฒนพงศ์, “มุมมองของเอกชนต่อพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ”, เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐเอกชน เล่ม 2, 99 (2556). (Kitipong Aurapeepattanapong, “*Private Sector Aspects toward the new PPP Act*”, Document of the Private Investment in State Undertaking Act: New Dimension in Public Private Partnerships Book 2, 99, (2013))

1.3 Objectives of the Study

1.3.1 To study the scope of Participation/Investment in the State Undertaking which is subject to the PPSU Act and PISU Act.

Due to a lot of issues sent to the Council of State, it has interpreted many projects based on different backgrounds. This thesis will study and conclude the Council of State's commentaries regarding the scope of the participation/investment in the State Undertaking. Moreover, this thesis will identify the problems occurring from the discrepancy of commentaries and analyze the resolutions of such problems existing in the PISU Act whether they can solve the problems occurring from the PPSU Act.

1.3.2 To analyze and compare the PPP law in Thailand and in international aspect including foreign laws

It will describe the characteristics of PPP project in international and details of the PPP law in the South Korea and the United States. Also, there are comparisons the characteristics of PPP project under Thai law and in worldwide aspect including the law of the South Korea and the United States in order to have a suitable scope of PPP project.

1.3.3 To restate the scope of private Investment in the State undertaking under the PISU Act

In the absence of decisive law, this paper is conducted to research the appropriate approaches such as amending the Act and establishing the special organization. By doing this, the laws and policies in particular countries, such as the South Korea who are a professional in the PPP project, as well as the concept of the PPP in worldwide will be analyzed and picked up to be applied as the recommendation. On the other hand, the PPP law of the United States will be studied to present the problems occurring from a lack of efficient PPP law.

1.4 Scope of the Study

The scope of the thesis is to study the scope of the private investment under the PISU Act. The Council of States commentaries are mainly focused to analyze the Act, together with the scholar's opinions brought up to help supporting the result of the

analysis. Moreover, the model law from other foreign countries, which are the South Korea and the United States are studied and determined to apply to the PISU Act.

1.5 Hypothesis of the Study

In respect of the previous Act of the PPSU Act, the means to resolve ambiguity of the law provision is to submit the issue to the Council of State to determine whether the project must be processed according to the Act. This is obviously time consuming and obstructs the flow of commercial transaction. Also, the private sector has to absorb the burden of the interest and devaluation of asset.

The consistency of law provision is one of the resolutions for the public sector to achieve the effective PISU Act enforcement and facilitate private investment in huge projects. It is possible to accomplish this mission by amending the Act and/or issuance of secondary regulations to identify more thoroughly qualification of PPP project fell under the PISU Act.

1.6 Research Methodology

This thesis has been developed by means of documentary research from the secondary resources. The law of Thailand will be researched about the foundation and details of the law. Furthermore, due to its reputation in achievement of PPP projects, the law of Republic of Korea will be studied and analyzed as a model law. On the other hand, the law of the United States will be exemplified as the failure of PPP law and to give Thailand a sign of warning of what must not comply with. Additionally, the concept of the PPP in international aspects is also researched to cross check whether the law of Thailand and the South Korea are appropriate. The resources of the said laws will be from books, journals, articles, reviews, press releases, dissertation, web pages, law, Council of State's commentaries and court decision.

CHAPTER 2

AN OVERVIEW OF PUBLIC PRIVATE PARTNERSHIP

2.1 Purposes of Public Private Partnership

It is widely seen that traditional public procurement has been a problematic issue in delivering public services. Due to the ambiguous terms of reference and specification, the unexpected outcomes to public sector are found. In respect of risk mitigation, the private sector usually has contractual elements of risk relating to design, construction, maintenance and operation matter, whereas risks relating to investment, financing, currency transactions, planning issues, obsolescence, political and legal aspects falls to the public sector. To allocate the risks, the state basically requests the private sector to perform bonds or any other financial security depending on the negotiation among parties. As a result, the risk allocation would definitely be a factor to identify the price of each contract. The more risks mean the higher price of the contract. However, there are still various unpredictable risks the public sector has to confront, on the grounds that the method of traditional public procurement bases on the lowest price. Consequently, traditional public procurement displays inefficiency of contract management caused by its control system operated by public authorities. This leads to uncontrollable contractual performance resulting in financial burden to the public sector. Also, unnecessary repetitive function negatively affects financial status and cost saving of relevant the public sector.²⁴

There are various means to deliver public services by purely public sector to purely private sector involvement. The purely public sector may lead to poor management of contract called 'government failure'. On the other hand, a purely private measure could cause inequalities in the distribution of services which are known as 'market failure'. Accordingly, the PPP becomes an approach to enhance the

²⁴ Christopher H. Bovis, "Public Service Partnerships as Instrument of Public Sector Management in the European Union", **18 Colum. J. Eur. L.** 473, 7 (2012).

deficiencies of both public and private sector.²⁵ Due to its substantial advantages, many governments use PPP as a new strategy for providing infrastructure and public services. In aspect of public sector, the PPP alleviates the financial burden and risk mitigation.²⁶

In fact, the concept of PPP has been introduced for a long history as a measure to deliver the public service in both developed and developing countries. As of early 1792, the United States allowed the private sector involving in highway projects well-known as the Philadelphia and Lancaster Turnpike in Pennsylvania.²⁷ The first wave of PPPs in Canada was delivered in the 1990s such as the Highway 407 long-term lease in the Greater Toronto Area, the development of the Brampton and Royal Ottawa Hospitals in Ontario.²⁸

The United Kingdom (the “UK”) has developed the most advanced PPP program. Due to its financial crisis triggered in September 1992 ‘Black Wednesday’, the UK government established the English Private Finance Initiatives (the “PFI”) and then was rebranded as PPP in 1997.²⁹ This is including a purpose of resolving problems concerning traditional public procurement as well. The PFI/PPP has been currently become the largest proportion of investment at 24 percentages which mostly found in the important infrastructure areas. The PPP program has been initiated in many European Union states such as France, Ireland, and the Netherlands as well. There are several countries in global sector applying PPP to deliver the public service such as the South Korea, Canada and Australia especially in the state of Victoria.³⁰ Between 1985 and 2004, there were a total of 2,096 PPP projects with a total value of nearly USD 887 billion. Most of PPP focused on transportation such as roads, bridges, tunnels, railroads, and airports. Nevertheless, some countries such as the South Korea and the United

²⁵ Young Hoon Kwak, Ying Yi Chih and C. William Ibbs, “Towards a Comprehensive Understanding of Public Private Partnerships for Infrastructure Development”, **CALIFORNIA MANAGEMENT REVIEW VOL. 51, NO. 2, 2** (2009)

²⁶ *Id.* at 1.

²⁷ O’Steen and Jenkins, *supra* note 9.

²⁸ Siemiatycki, *supra* note 10.

²⁹ Marique, *supra* note 11.

³⁰ Bovis, *supra* note 24, at 7.

States used the PPP in alternative public projects for instance, development of schools, hospitals and public housing including prisons and water supply and treatment.³¹

2.2 Characteristics of Public Private Partnership

The characteristics of PPP are an action when private sector becoming an important player in financing and delivering public service by getting involved with various phases of the project such as design, construction, completion and operation. Consequently, the longevity of project is necessary on the grounds that the private sector needs to gain sufficient profit for repayment the loan and duration to acquire the return. Moreover, due to its long-term contract of each project, the private sector accepts risks dramatically which distinguishes to traditional public procurement where public sector has burden of most of risks in each project. The private sector absorbing financial burden instead of the public sector positively affects towards financial status of the state, as the public debts do not include in any assessment of indebtedness.³²

Many scholar, institutions, government and even internal organizations similarly defined the definition of the PPP.

The United Nations (UN) defined the PPP as:

“Innovative methods used by the public sector to contract with the private sector, who bring their capital and their ability to deliver projects on time and to budget, while the public sector retains the responsibility to provide these services to the public in a way that benefits the public and delivers economic development and an improvement in the quality of life.”³³

³¹ Kwak, Chih and Ibbs, *supra* note 25 at 6.

³² Bovis. *supra* note 24 at 6.

³³ Siemiatycki, *supra* note 10 at 6.

The United States Nation Council of State Legislature P3 Toolkit defined the PPP as:

“A contractual agreement formed between public and private sector partners, which allows more private sector participation than in traditional. The agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, and/or system, the private party will be given additional decision rights in determining how the project or task will be completed.”³⁴

The European Commission defined the PPP as:

“A partnership is an arrangement between two or more parties who have agreed to work cooperatively toward shared and/or compatible objectives and in which there is shared authority and responsibility; joint investment of resources; shared liability or risk-taking; and ideally mutual benefits.”³⁵

The World Bank defined the PPP as:

“The key elements are the existence of a partnership style approach to the provision of infrastructure as opposed to an arm’s-length supplier relationship... Either each party takes responsibilities for an element of the total enterprise and they work together, or both parties take joint responsibility for each element... A PPP involves a sharing of risk, responsibility, and reward, and it is undertaken in those circumstances hen there is a value-for-money benefit to the taxpayers.”³⁶

³⁴ *Id.* at 3.

³⁵ European Commission, *Guidelines for Successful Public-Private Partnerships*, 2003, http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf (21 October 2015)

³⁶ *Id.*

Black's Law Dictionary (10th ed. 2014), public-private partnership means:³⁷

“A business and contractual relationship between a government agency and a private company to finance, construct, and operate public transportation networks, parks, convention centers, and similar projects intended to serve the public. Use of a public-private partnership may enable earlier completion or make possible projects that would otherwise have been impossible.”

According to the above definition of the PPP, it can be concluded that the **PPP is an agreement between public and private party with objective to provide public services by any means to ensure the sharing of risks in the project** in which the details were set out below.

1. The PPP must be an agreement between public and private sector

In this sense, the private sector can be any private entity both local and international investors including nongovernmental organizations (NGOs) and community-based organizations (CBOs). The private partner typically has expertise, technology and experience in the field related to the project. However, the cooperation between nations is not considered as the private sector.³⁸

The public partner in the PPP project is governmental entities including ministries, departments, municipalities and state owned enterprises.³⁹

2. The PPP must contain the purpose to provide public service

According to French Supreme Administrative Court Judgment, it defined “public service” as an activity which is conducted by authority for purpose of

³⁷ Black's Law Dictionary (10th ed. 2014), Bryan A. Garner, Editor in Chief

³⁸ Asian Development Bank, **Public-Private Partnership Handbook**, <http://www.adb.org/documents/public-private-partnership-ppp-handbook>. (21 October 2015)

³⁹ *Id.*

public interest. It can be concluded that the public service must be qualified as these following factors:⁴⁰

(1) Structure

In France, the public service consists of both central and local administration including public organizations and public enterprises. However, some public enterprises do not provide public services and some public services were delivered by private sectors. Therefore, only the structure factor is insufficient to determine whether an activity is a public service or not.⁴¹

As a consequence, the governmental bodies should be included the direct or indirect of public services. In this sense, the government may operate such service by itself or assign private enterprises to operate, yet the state still plays a role as an undertaker of the project which is called concession.⁴²

(2) Objective

Notwithstanding a service operated by the public authority, it may not be the public service. It should be considered the details and objectives of such activity. The public service must be the act conducted by the administration for purpose of public interest, so the act conducted by the administration without public interest purpose is not the public service such as renting the land, distributing the lottery and operating warehouse.⁴³

The public service can be categorized into two main types as administrative and industrial/commercial public service.

(i) Administrative public service

This type of public service is relevant to defense and security. The members of the state can utilize administrative public service without fee or charges. The public

⁴⁰ Boramanan *supra* note 4 at 239-246.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

sector has to use the special power or techniques in delivering this public service. Therefore, the government is unable to assign private or other entities to provide this public service.⁴⁴

(ii) Industrial and commercial public service

The Tribunal of conflicts of France has first introduced the industrial and commercial public service. Additionally, in *Union Syndicale des industries aéronautiques* dated 16 November 1956, the court held that public service, which was industrial and commercial public service, must consist of both objective and financial resources while working process was similar to private enterprise. Provided that such service has any different points, even one, from private enterprise, it shall be deemed as administrative public service. The examples of industrial and commercial public services are the provision of energy such as fuel and electricity, and transportation such as railroad and toll way.⁴⁵

In addition, there are more new types of public services which the state may assign the private to conduct as set out below.⁴⁶

(i) Social public service

Social service has objective to aid the society which has been conducted as the tradition of each society, for example school, nursery and pawn shop. The social service can be usually found in duty of local government such as municipality and province.

(ii) Health public service

This is related to service the state provides the health information and campaign for anti-deceases including establishment of any organization or institution to cure a specific decease, for instance, hospital and anti-cancer center.

(iii) Cultural public service

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The cultural public service is the service with the objective to benefit public in respect of cultural and art. This is including theatre, museum and historical park.

(iv) Sport public service

The sport public service is the service with the objectives to develop potential in sport and support good health such as stadium and sport complex.

(3) Legal System

It must be subject to administrative law system and under administrative court jurisdiction.

3. The PPP must be done by any means to ensure the sharing of risks

It is understood that the public party mostly does not have to invest their own capital to the project and also retain quality improvement, innovation, management efficiency and effectiveness. As a result of these benefits, the public party also attains value for money in delivery public service. In this sense, the value for money concept is relevant to effectiveness and efficiency of public services in comparison between the input and output cost as well as quantitative and qualitative judgment.⁴⁷ Therefore, another characteristic of the PPP is the distribution of risks between the public and private sectors.⁴⁸ In many projects, the private sector is expected to finance and deliver the public service by providing input in various phrases such as design, construct, operate and maintain the project. This can be clearly seen that the concept of the PPP is different from the idea of traditional procurement where the government serves all risks on the grounds that the private sector is expected to absorb substantial risks. There are a number of risks related the PPP as follows:⁴⁹

⁴⁷ Christopher H. Bovis, “*Risk in Public-Private Partnership and Critical Infrastructure*”, **2 European Journal of Risk Regulation**, 200, 201 (2015).

⁴⁸ Christopher H. Bovis, “*Public Private Partnerships: The Challenges and Opportunities for Delivering Public Services in the 21st Century*”, **5 Eur. Pub. Private Partnership L. Rev.** **1**, 1, 5 (2010).

⁴⁹ Bovis, *supra* note 47.

- (i) Construction or project risk which is relevant to design problem, cost overrun and project delay;
- (ii) Financial risk which is relating to fluctuation of interest rates, exchange rates, and other factors affecting financial costs;
- (iii) Performance risk which is relevant to availability and continuity as well as quality of the asset;
- (iv) Demand risk which is related to the continuous need of a particular public service;
- (v) Residual value risk which is concerning the market price of the relevant asset in the future; and
- (vi) Political risk which covers all risks arising directly and indirectly from the government which consists of external political risk such as war, currency convertible and hedged and internal political risk such as taxation, terrorism, inflation and industrial unrest.

2.3 Advantages of Public Private Partnership

The increase of private participation in public service projects dramatically influences the efficiency of infrastructure facilities. This also affects positively to labor market as there are more jobs available. Regarding public interest, public facility is likely to be accessible. At the same time, it is the constraint of state budgets in infrastructure investment during national economic crisis. It is undeniably that PPP benefits substantial to the nation as set out below.⁵⁰

2.3.1 Value of Money

This is the most important benefit regarding PPP project. Value for money concept is about the effectiveness and efficiency of a public service in comparison between the input cost and output cost, including quantitative and qualitative

⁵⁰ สำนักงานอัยการพิเศษฝ่ายสัญญาและหารือ 1, สำนักงานที่ปรึกษาทนาย, สำนักงานอัยการสูงสุด. เอกสารประกอบการสัมมนา โครงการสัมมนา “พระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐเอกชน” เล่ม 1. หน้า 108 (2556). (Department of Contracts and Consultation 1, Office of Legal Consultation, Office of Attorney General. (2556). Documents of “*the Private Investment in State Undertaking Act B.E. 2556: New Dimension in Public and Private Partnership*” Book 1, 108 (2013)) [herein as Office of Attorney]

judgment.⁵¹ In other words, this is a measure to deliver a project with the same specification as the traditional procurement with less money or deliver the higher quality of project with the same amount of money.⁵² This can be concluded that PPP would provide more-efficient, lower-cost and reliable services.⁵³

2.3.2 Risk Transfer

The public sector can transfer risks related to construction, finance and operation of the project to the private sector.⁵⁴

2.3.3 Ability to Repayment

Due to the nature of long term contract, it allows private partner more time to recover from the investment cost. As the private sector would play an important role in financing and deliver public service, which is the characteristics of PP, the need for longevity of the contract allows affordability of the private sector to recoup its investment profitably. This also enables the private partner to reduce annual charges occurring from the project.⁵⁵ Furthermore, it is an incentive to the private sector to deliver projects on time and within budget.⁵⁶

2.3.4 Efficiency

The government generally lacks of expertise in delivering infrastructure, whereas the private sector can bring expertise in design, construction and finance to fulfill the demand of the public sector.⁵⁷ This is also the way to introduce technology and innovation in providing better public services by enhancing operational

⁵¹ Bovis *supra* note 48.

⁵² G.W.E.B. van Herpen, “*Public Private Partnerships, the Advantages and Disadvantages Examined*”, AVV Transport Research Centre, 3 (2002), file:///C:/Users/Intel/Downloads/public-private-partnerships-the-advantages-and-disadvantages-examined%20(1).pdf (23 November 2015)

⁵³ Kwak, Chih and Ibbs, *supra* note 25 at 5.

⁵⁴ *Id.*

⁵⁵ Bovis, *supra* note 47 at 2.

⁵⁶ Public Private Partnership in Infrastructure Resource Center, Government Objectives: Benefits and Risks of PPPs, <http://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives>. (23 November 2015) [herein as PPPIRC]

⁵⁷ David Lick and Roger E. Hamlin, “*Public-Private Partnerships for Promotion of Cross-Border Trade and Transportation*”, 37 CUSLJ, 171, 10 (2012).

efficiency.⁵⁸ Not only professional expertise, the private partner is also capable of developing technology and gathering assets required to achieve the project rapidly. In contrast, the public party needs to bring the issue to the authorized entities for presentation and vote prior to commit any processes because of the repetitive function in the public sector.⁵⁹

2.3.5 Cost-Savings

In conventional public procurement, the government designs and opens a bid to find the lowest bidder in which the competition based on only construction cost. On the contrary, the competition in PPP project is based on design, construction, finance, operation and maintenance.⁶⁰ This could help keeping public sector budgets, especially budget deficiencies. Moreover, the PPP allows the public sector to avoid up-front capital costs and reduce administration costs.⁶¹

2.3.6 Time-to-Delivery Savings

In respect of the private sector, it must generate the outcomes as soon as possible since it will generate profits from the completion of the project. The quicker it achieves the project, the quicker it will obtain the returns. The private sector is accountable to its shareholders' investments which are to ensure that it is not diminished and valuable spent. As a result of this, most PPP projects are likely to be delivered or completed on time. In contrast, in public procurement, the delays might not affect the same financial impact as the private does.⁶²

2.4 Legal Formats of Public Private Partnership

There are several types of PPP, but the major types consist of concession, contractual PPP and the institutional PPP or known as “join-venture model”.

⁵⁸ PPPIRC, *supra* note 56.

⁵⁹ Lick and Hamlin, *supra* note 57.

⁶⁰ *Id.*

⁶¹ Kwak, Chih and Ibbs, *supra* note 25 at 5.

⁶² Herpen, *supra* note 52 at 5.

2.4.1 Concessions

It is a public contract where private party provides service exchanging for an exclusive right to exploit from services or provide a particular service. However, the right of exploitation may come together with the obligation to grant consideration to the authorized public sector depending on the elements of risk allocation among parties. This also includes the duty to comply with restrictions on pricing and related regulations which control such exclusive right.⁶³

The followings are the three main characteristics of public concession as:

- (1) The beneficiaries must be the third party or other public authority, not the granted public authority;
- (2) The concession must concern the public interest; and
- (3) The private party must assume risks relating to such service.

Moreover, due to the operation or function of sale, rent or exploitation of public properties, the private sector should generate profit from the concession as the fees paid by the end users.⁶⁴

2.4.2 Contractual PPP

This type of PPP presents a contractual relationship between public and private sectors. The private party provides financing for completing services and receives payment of utility service charges in return depending on usage volumes or demand.⁶⁵

2.4.3 Institutional PPP

Another type of PPP involves in establishment of a separate legal entity which holds jointly by public and private partners. This new entity is used for a purpose of raising finance and delivery of the public service. Being a major shareholder allows the

⁶³ Oliver P. Yandle, “*Financing Sources for Trade & Investment in Latin America*”, **13 Am. U. Int'l L. Rev.** 815. 23 (1998).

⁶⁴ Bovis, *supra* note 48, at 8-9.

⁶⁵ *Id.* at 15.

public sector to influence on decision-making regarding matters of the entity and also retain a control over the delivery of public service as it is the main objectives of the entity. The institutional PPP could jointly hold by private and public sectors in variety of structures such as private and public sector being jointly partners, private party undertaking by public sector jointly with other private party and private partner of state-owned enterprise which obtains concession or public contracts.⁶⁶

2.5 Types of Public Private Partnership

There is no specific rule to indicate what types of PPP arrangements should be applied to a particular project. This is depending on the regulations and state's policy. Another factors needed to consider is whether such types of arrangement addresses the cost benefit, value of money, the sources of finance, the commercial arrangements and the nature of investors and government participants.⁶⁷ The responsibility of public and private sector generally sets out in each PPP contract. The graph below presents the comprehension of private participation in each type of the PPP. These are main types of PPP.

2.5.1 Contracts for Goods and Service

This is appropriated to use in the existing project. The public usually contracts out the private to operate and obtain remuneration from the project such as toll way fees. This includes a contract to purchase spare parts or stationery and procure civil works such as laying pipes or cables. These types of PPP are suitable when the public need to purchase the goods on the basis of the provider's standard terms and conditions. Leakage reduction contract in water sector often uses this service contract.⁶⁸

2.5.2 Management/ Operation and Maintenance Contracts

The main characteristic is that the authority assigns the contractor to manage a particular task for a short time period with two to five years. The task mostly

⁶⁶ *Id.*

⁶⁷ O'Steen and Jenkins, *supra* note 9 at 3-4.

⁶⁸ Public-Private Partnership in Infrastructure Resources Center, Civil Works and Service Contracts, <http://ppp.worldbank.org/public-private-partnership/agreements/civil-works-and-service-contracts>. (1 April 2016)

emphasizes input more than output while operation and maintenance agreements are rather focus on output. The contractor has a duty in a wide range of activities from technical assistance to full-scale operation and maintenance.⁶⁹

In management contracts, the operator is paid in fixed fee for performing a specific task. In this case there is no risk on asset condition on the ground that the amount of remuneration obtained does not depend on tariff collection. The more sophisticated management contract, called operation and maintenance contract, is used and imposed performance targets and based a portion of remuneration, in order to stimulate the efficiency or improve bill collection. As a result, the operator has more risk on asset condition, even replacement of more minor components and equipment. There may have an obligation to operate and maintain the assets which includes the replacement of small and low value parts of equipment. The operator is required to monitor that the output is being achieved. This is also related to higher establishment costs.⁷⁰

However, the cost to cover staffs' wages and expense is usually paid in fixed amount by the contractor. It sometimes is responsible for performance base fee and liquidated damages in case of the imposed performance target failure. The problem of this kind of contract is the employees of authority are still working for the authority, so that the contractor finds it difficult to control them since they still count on their employer.⁷¹

This kind of PPP usually found in water sector and some in energy sector. Furthermore, there is resembled operating or franchise agreements for trams and rail in Victoria, Australia and the United Kingdom.⁷²

⁶⁹ Public-Private Partnership in Infrastructure Resources Center, Management/Operation and Maintenance Contracts, <http://ppp.worldbank.org/public-private-partnership/agreements/management-and-operating-contracts>. (1 April 2016)

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

2.5.3 Leased and Affermage Contract

When private equity and commercial debt is insufficient in the market, so that the public party has to finance the project and engages the private party to operate and maintain the utility by imposed incentives to attract private efficiency. The period of contract is typically between eight and fifteen years. The operator tends to employ staffs directly and being transferred or seconded by the authority. During the term of contract, the operator has responsibility for the maintenance and some replacement cost. At the end of the period, the utility will be handed back to the public.⁷³

In the case of lease, the rental fee is paid to the public as the owner of the asset is the fixed amount, not based on the level of tariff collection while the remaining is retained by the operator. This can be seen that under the lease form, the collective risk is likely to pass to private contractor. On the contrary, the public sector takes the collective risk in affermage on the ground that the operator firstly obtains the fee. Meanwhile, it pays the additional surcharge from the customers to the state as to remunerate the investments cost. These types of PPP usually use in water and energy sectors.⁷⁴

2.5.4 Concession, Build-Operate-Transfer (BOT) Project and Design-Build-Operate (DBO) Project

These PPP forms are focused on output results. BOT and DBO are relating to significant design and construction. There usually are long term contract for both green field and brown field projects which engage in remarkably refurbishment and expansion.⁷⁵

⁷³ Public-Private Partnership in Infrastructure Resources Center, Leases and Affermage Contracts, <http://ppp.worldbank.org/public-private-partnership/agreements/leases-and-affermage-contracts>. (23 March 2016)

⁷⁴ *Id.*

⁷⁵ Public-Private Partnership in Infrastructure Resources Center, Concessions, Build-Operate-Transfer (BOT) and Design-Build-Operate (DBO) Projects, <http://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>. (6 July 2016)

2.5.4.1 Concession

In respect of concession, it was first introduced in France where the private concessionaire is responsible for operation, maintenance, financing and managing the asset and investment so that it bears risk of asset's conditions and investment by itself. Concession is typically relating to extensive rehabilitation and extension of an existing assets or utility with long term period of twenty five to thirty years. Consequently, the concessionaire will obtain the cash flow immediately from the outset of the concession. There is no asset transfer to the private and at the end of period all rights in respect to that asset revert to the state. It is rather focused on outputs than inputs. The tariffs obtained are performance-based in which the private is left to determine the way to achieve the target. The revenues will be obtained directly from the consumers, while the authority only collects the concession fee from the concessionaire.⁷⁶

2.5.4.2 Build-Operate-Transfer (BOT) Project

In the context of BOT projects, the public sector grants a right to private sector to develop and operate a facility, usually found in a green field new build project. BOT is likely to be the project finance in which the operator is responsible for financing, owning and constructing the facility for a specific period, and transferring to the public sector afterwards. As its purpose to develop the green field project, there will be no revenue stream from the beginning of the period. As a consequence, the lenders will have to pass on the risk associated with the projects to the appropriate actor. In this case, the operator is prohibited to conduct any activities other than within the scope of the project. The operator usually is a special purpose vehicle. Due to its variety of responsibility under the project, the operator usually consists of shareholders with diverse experience in many industries such as construction and operation.⁷⁷

In the BOT project, the revenues are mostly obtained from a particular off-take purchaser who purchases output from the project company. In power sector, for example in power purchase agreement, there is an available payment (AP) which is

⁷⁶ *Id.*

⁷⁷ *Id.*

a minimum payment the government has to pay to the project company. Given that the company can deliver the qualified service, there will be additional payment from the government.⁷⁸

2.5.4.3 Design-Build-Operate (DBO) Project

In the DBO project, the public is responsible to finance the construction of the new asset where the ownership will not be transferred to the public. The private has a duty to design, build and operate the asset within a period of time. It can be seen that the details of contract in the DBO project are less complex than the BOT project and concession on account of no financial document. It usually is a turnkey construction contract combined to an operating contract. The contractor also has no financial risk. The private must operate the project to meet an agreed level to obtain the tariffs from the public. The tariffs are obtained in sum amount after the completion of construction and operating fee during the operating period.⁷⁹

2.5.5 Joint Venture/ Partial Divestiture of Public Assets

Joint venture between the public and private sector may occur when a contracting authority has a reason to have shares in the project company. The authority can be a shareholder in an existing or a new project company which is holding the assets of the utility. In case of project financial company, it is established to conduct any activities within the limited scope of work. The proportion of each shareholder in the company depends on the amount of money the government wishes to get rid of the balance sheet and whether the authority wants to retain the management control of the company. In some cases, although the majority shares owned by the private, the government still has the management control over the project. It is typical in the project company where most of the key contracts such as construction, maintenance and operation associated with the project will be subcontracted to the private parties of

⁷⁸ *Id.*

⁷⁹ *Id.*

shareholders. Moreover, the project company can be established in other forms such as partnership and consortium.⁸⁰

2.5.6 Full Divestiture/ Privatization

The full divestiture or privatization arises the public transfers all or partial of the interests in utility asset to the private sector. In this case, the government has indirect control over the asset or creates mechanism to regulate the private in the form of licensing. The full divestiture is different from the partial privatization and joint venture agreement between public and private parties since the public partner still has significant interest in the project. In some cases, the private sector does not want to retain all the existing liabilities of such utility, so that it limits the portion by transfer the asset to the new established special purpose company. Moreover, England and Wales have privatized the water, energy, telecommunications and rail sectors since early 1990s.⁸¹

The Black's Law Dictionary defined the privatization as "*The act or process of converting a business or industry from governmental ownership or control to private enterprise.*"⁸² As the concept of PPP and privatization are similar as "*rooted in the philosophy that private [entity] involvement in the delivery of public projects or services can result in operational and fiscal benefit for a public agency*". It has been agreed that they are both "*alternative service delivery arrangements to traditional public procurement*". There are three main followings distinctions between the PPP and privatization:⁸³

1. Ownership of the asset: in respect of the PPP concept, the public sector continues having an ownership of the asset or infrastructure and control over the

⁸⁰ Public-Private Partnership in Infrastructure Resources, Joint Ventures / Government Shareholding in Project Company, <http://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>. (13 February 2016)

⁸¹ Public-Private Partnership in Infrastructure Resources Center, Full Divestiture / Privatization, <http://ppp.worldbank.org/public-private-partnership/agreements/full-divestiture-privatization>. (13 February 2016)

⁸² Garner, Bryan A., **Black's Law Dictionary**, (10th ed. 2014).

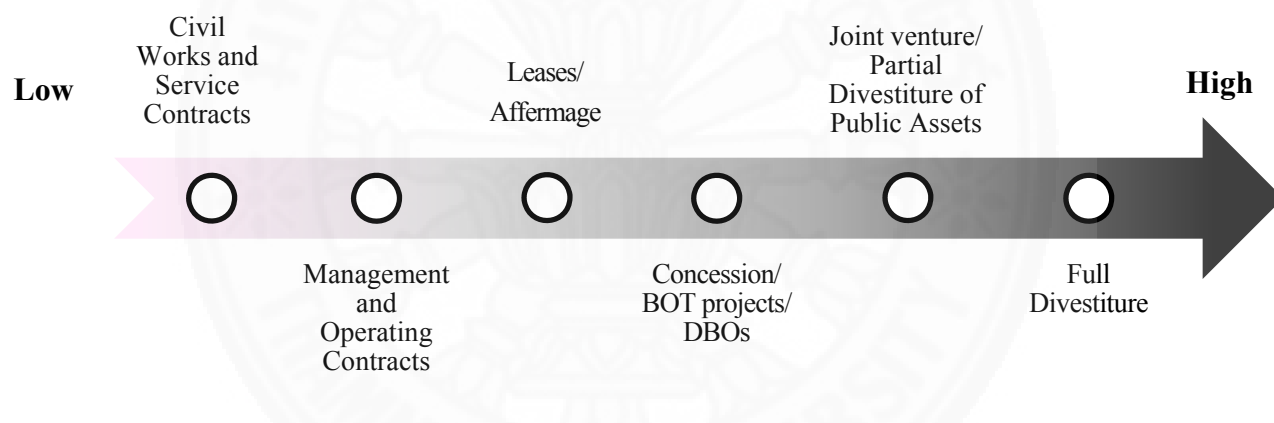
⁸³ O'Steen and Jenkins, *supra* note 9 at 3-4.

management of those assets, also establishes the user rates. On the contrary, privatization involves with selling or transferring asset or infrastructure of the public to private sector.⁸⁴

2. Structure: public party plays a substantial role in PPP project to undertake and control assets or infrastructure while in privatization, the government insignificantly involves with the project, except for being a regulator.⁸⁵

3. Risk: when the asset is privatized, the private entity assumes sole responsibilities for assets and infrastructure, whereas, in PPP project, both private and public sectors jointly undertake risks.⁸⁶

Figure 2.1 Private Sector Involvements



Source: <http://ppp.worldbank.org/public-private-partnership/agreements/full-divestiture-privatization>.

2.6 Public Private Partnership in Global Trends

It was reportedly that at the third quarter of 2015, the total global investment in PPP projects was USD 15,789 million for project signed and USD 16,969 million for projects which achieved the financial close during the quarter. The accumulated volume of PPP projects signed through the year 2015 was lower than the total

⁸⁴ *Id.*

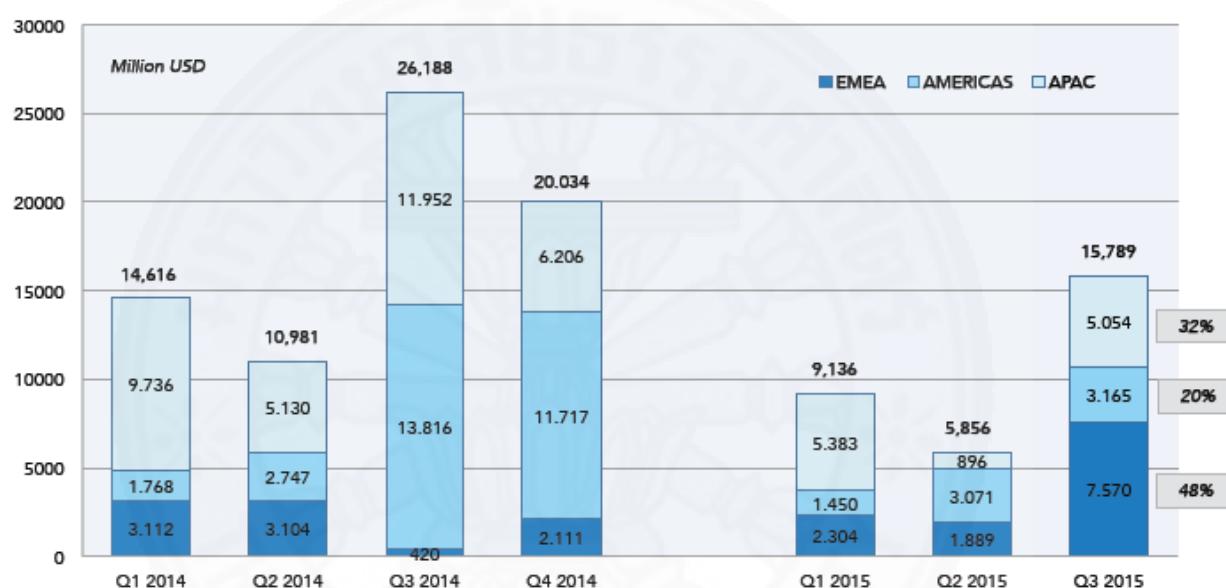
⁸⁵ *Id.*

⁸⁶ *Id.*

investment in the year 2014, while the project with financial close in 2015 was higher than 2014.⁸⁷

The greatest volume of PPP project both signed and reached financial close was 48 percentages in the European, Middle East and Africa. Additionally, the transportation sector was the most significant sector with 54 percentages of signed projects and 56 percentages of reaching financial close projects.⁸⁸

Figure 2.2 Quarter 3 volume invested: PPP projects signed

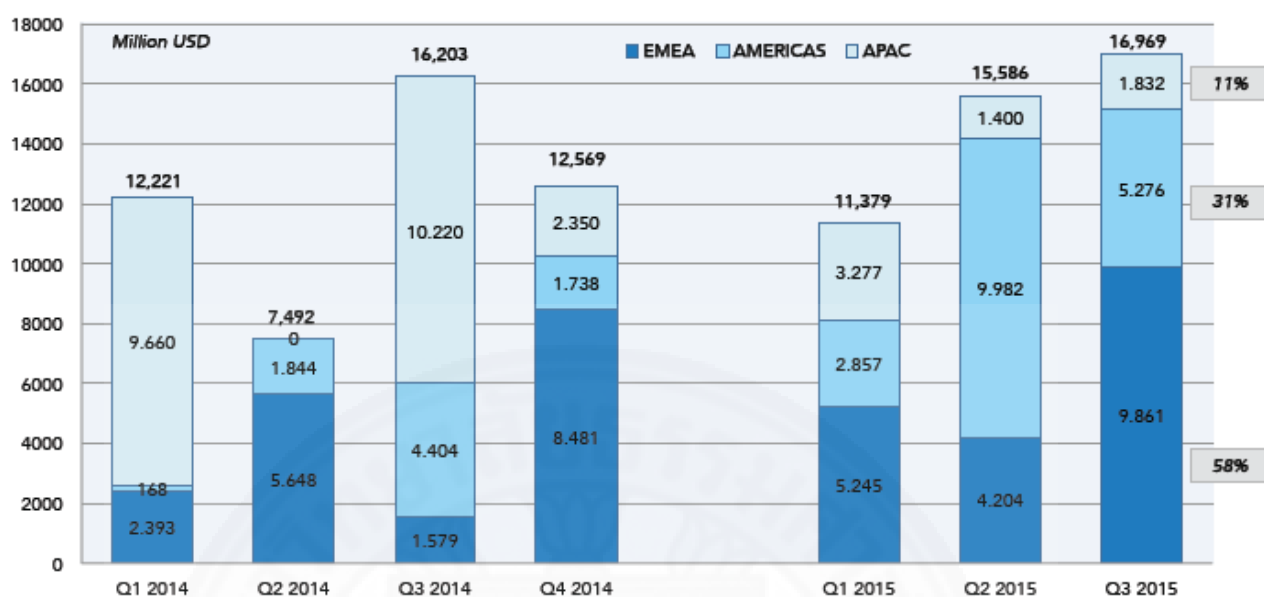


Source: <http://infrappworld.com/report/global-ppp-report-q3-2015>.

⁸⁷ InfraPPP. Global PPP Report Q3 2015. <http://infrappworld.com/report/global-ppp-report-q3-2015>. (9 April 2016)

⁸⁸ *Id.*

Figure 2.3 Quarterly volume invested: PPP project with financial close



Source: <http://infrappworld.com/report/global-ppp-report-q3-2015>.

The Thames tideway tunnel project in the United Kingdom was the greatest investment volume project at USD 6,480 million for both signed and reaching financial close in the last quarter of 2015. This was followed by the Regina bypass in Canada with USD 1,300 million.⁸⁹

Moving on to the future trend of global PPP, it is likely that Latin America is the best target to invest in PPP, since Brazil, Peru, Colombia, Mexico, Chile, Paraguay and Uruguay had a number of pipeline projects. In Brazil, there will be the concession of sixteen toll-roads in 2016 as the government intends to develop the logistics. Moreover, there are plans to invest on the port sectors next year. Whilst Peru is emphasizing on energy and infrastructure project since there have had twenty projects with a value over USD 5 billion, while Colombia and Uruguay are focusing on the road projects. Regarding to Chile, it is projected to have infrastructure concessions with cost USD 1.13 billion in 2016.⁹⁰

⁸⁹ *Id.*

⁹⁰ *Id.*

Yet, the PPP projects could also be found in America continent. In North America, Mexico has three road concessions and seven hospital developing projects with expected investment cost is around USD 520 million. In the United States, it is different among the states, but Virginia and Pennsylvania are likely to have more offers in pipeline projects. Canada has a great pipeline of PPP project with around 35 projects in structuring and tender stages in Ontario.⁹¹

Turning to Europe, only Germany and Ireland are interesting targets to invest on PPP project in 2016. The Government of Germany announced the plans to build ten road PPP projects in the middle of 2015 which would construct the new road and maintain and operate the existing roads. These projects would be valued about USD 12 billion. In respect of Ireland, the National Roads Authority (NRA) of Ireland has announced the plans to develop the eight toll road by using PPP model. The accumulated investment cost is USD 1.53 billion, while it is expected the private investor to support around USD 1.04 billion.⁹²

In addition, the PPP projects emerged in n Asia-Pacific. China, by Ministry of Finance, has established a central Government PPP Center and drafted the PPP Guidelines and related documents to disseminate information of about 1,000 PPP projects worth USD 317.75 billion. However, it can be seen that international investors are unlikely to participate in green field project, as a result, the foreign investors may invest in the PPP projects through acquisition of the local enterprises to be its affiliates.⁹³

The Government of India has plans to award 5,000 kilometers of road projects valued USD 3.2 billion to private companies within this year. The cabinet also approved the 400 railway station next year through the Swiss challenge formula.⁹⁴

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Thailand's PPP Committee announced five transport plans to develop its economy and improve its transport system comprising of three metro projects and two road projects which cost around USD 9.27 billion.⁹⁵

Nonetheless, due to its complicate PPP structure, Africa is not an attractive place to invest in PPP project. Despite working on PPP project's structuring, there is a small chance that any PPP projects during the year 2016 could be seen.⁹⁶



⁹⁵ *Id.*

⁹⁶ *Id.*

CHAPTER 3

PUBLIC PRIVATE PARTNERSHIP IN FOREIGN COUNTRIES

3.1 Public Private Partnership in the Republic of Korea

The South Korea is one of the wealthiest countries in Asia with a high standard of living. It is also a member of G20 Industrial countries, Asia-Pacific Economic Cooperation (APEC) and The Organization for Economic Cooperation and Development (OECD) which could refer to a High Income Nation by the World Bank and an Advanced Economy according to the International Monetary Fund (IMF). Moreover, it is well-known as an Asian Tiger and designated as the fastest economic growth nation in the last five decades. This is due to its per capita income rose from USD 1,342 in 1960 to USD 19,227 in 2008. It is resulting from the policy of the government to mobilize the government's role of investment in public facility to the private sector in order to satisfy the need of infrastructure.⁹⁷

3.1.1 History

In the past, the Republic of Korea changed its policy regarding infrastructure development. During 1970s and 1980s, the government had change a policy from expanding transport infrastructure to focus on the transport system causing the congestion problems. The budget had been allocated to fulfill the policy to promote industrialization, as a result, infrastructure supporting development of industry was place in first priority such as the Seoul-Pusan Expressway.⁹⁸

Prior to 1990s, the PPP was fairly known in infrastructure projects and was stipulated in specific laws such as Road Act, Port Act, etc. The first program introducing private participation in public facility started in 1994. At the end of the 1990s, on the account of rapid economic growth, the need for infrastructures dramatically increased while the South Korea was severely deficiency of public

⁹⁷ Teshome Tafesse, “*Public Private Partnership in Development: Lessons in Developing Legal and Institutional Framework for South Korea*”, **Public Policy and Administration Research Vol 3**, No.4, 50, 51 (2014).

⁹⁸ Public-Private Infrastructure Advisory Facility, Country Case Study: Korea, <https://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/korea.pdf> (3 March 2016) [herein as PPIAF]

facilities due to its limited ability to inject budgets to such projects. As a result, the government initiated a measure to induce private sector to invest in infrastructures facilities. Therefore, the Korean government came up with the Act on Promotion of Private Capital Investment in Social Overhead Capital in August 1990. According to the Act, it was stipulated precisely criteria on concession period, user fees, government support and project implementation processes.⁹⁹

In the year 1994, the Private Capital Inducement Act was launched with objective to induce private participation in the public service. This Act was separated the private participation projects into two categories as follows:¹⁰⁰

1. Most strategic infrastructure projects such as roads, railways, ports, telecommunication, etc.
2. Other infrastructure projects such as gas supply, bus terminals, power generation, sport complex and other relating commercial fields.

According to the Act, the category one projects could only operate in BTO (Build Transfer and Operate) arrangement, whereas category two projects may obtain ownership through BOT (Build Operate and Transfer) or BOO (Build Own and Operate).¹⁰¹

Due to various unexpected risks, it turned out that this policy failed to complete the goal of forty infrastructure facilities while only five of them were developed. Also, the investment budget was deficiency and the government did not allow private investor to operate and maintain the facilities.¹⁰²

In the late 1997, notwithstanding the policy to support the growth of PPP projects, the South Korea faced the financial crisis in which the PPP projects were hit adversely and resulted in significantly declined of outcomes. This incidence led the policy maker to emphasize comprehensively on PPP project, as it could play an important role to stimulate the economy and induce foreign direct investment. The

⁹⁹ Kim, Kim, Shin and Lee, *supra* note 12 at 6.

¹⁰⁰ PPIAF, *supra* note 98

¹⁰¹ *Id.*

¹⁰² *Id.*

growth of infrastructure facility would be a factor to alleviate financial crises since it would upgrade the country's credit rating. Therefore, the government resolved the catastrophe by amending the entire of previous act to the new one named the Act on Private Participation in Infrastructure (the "Korean PPP Act") as of December 1998.¹⁰³

In the period of 1999 to 2004, the government tried to overcome various problems regarding the PPP promoting by potential measures and amendment of the Act.¹⁰⁴ By doing this, it had introduced the Minimum Revenue Guarantee (MRG) program. Regarding to such program, the government guaranteed the minimum revenues in each projects. If the amount of revenue was lower than the minimum guarantee, it agreed to remedy the deficit.¹⁰⁵ For the purpose of encouraging private investment, the government had a policy of risk-sharing between the state and private sector where the government would share more risks in a particular project. The other measures to fulfill this policy were buyout rights and sharing of exchange risk.¹⁰⁶ In relation to the Act amendment, it removed artificial divisions of facilities eligible for PPP support, separated infrastructure project into solicited and unsolicited projects, and required feasibility and appropriated studies for the selection of projects. Additionally, the Private Infrastructure Investment Center of Korea (the "PICKO") was established to support technical assistance to the government and local authority concerning private participation in delivery the infrastructure. The PICKO had a duty to prepare the study of feasibilities and tender offers, undertake and evaluate the bids, negotiate and conclude concession agreement.¹⁰⁷ The new Act also granted buyout rights, improved the Korea infrastructure Credit Guarantee Fund (ICGF) system and established an infrastructure fund.¹⁰⁸

The last amendment was in the year 2005 which has been effective until present. It has expanded the scope of public facilities of PPP projects to economic production facilities, which were only thirty-five types, to social and residential

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *Id.* at 8.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 7-8.

facilities such as educational, cultural, welfare, environmental and defense facilities.¹⁰⁹ As a consequence, there have been forty-four eligible infrastructure types under the Korean PPP Act. The revision also introduced the BTL (Build Transfer and Lease) method led to more diversified scheme to implement the project. Moreover, the PICKO was expanded and become a specialized agency for PPP projects, called Public Private Infrastructure Investment Management Center (the “PIMAC”), part of Korea Development Institution (KDI), which was established under this new amendment as well. This organization has had objectives to provide technical assistance to the Ministry of Strategy and Finance (MOSF) and procurement authorities.¹¹⁰

3.1.2 Trends

As of the year 2012 there were more than 600 projects in construction and operation in the South Korea. Interestingly, the amount of PPP projects was reached to the peak in 2007 with 120 projects. It was shown that infrastructure investment increased significantly to USD 10.4 billion from 1990 to 2007. In 2012, the government invested around USD 5 billion in PPP infrastructure projects.

3.1.3 Legal Framework

The Korean PPP Act and the PPP enforcement Decree are the major regulations of the legal framework for the PPP projects in the South Korea.¹¹¹ It was stated in Article 1 of the Korean PPP Act that “*the purpose of this Act is to contribute to the development of the national economy by encouraging the creative and efficient expansion and operation of infrastructure, by promoting the investment of the private sector in such infrastructure.*”¹¹² One of the significant power of this act is that it prevails other acts as to exempt the PPP projects from strict regulations in the area of national agency management and allows a special purpose company (SPC) to play a role of competent authority.¹¹³ In addition, the prominent characteristic of this Act is

¹⁰⁹ *Id.*

¹¹⁰ Kim, Kim, Shin and Lee, *supra* note 12 at 8.

¹¹¹ *Id.* at 8.

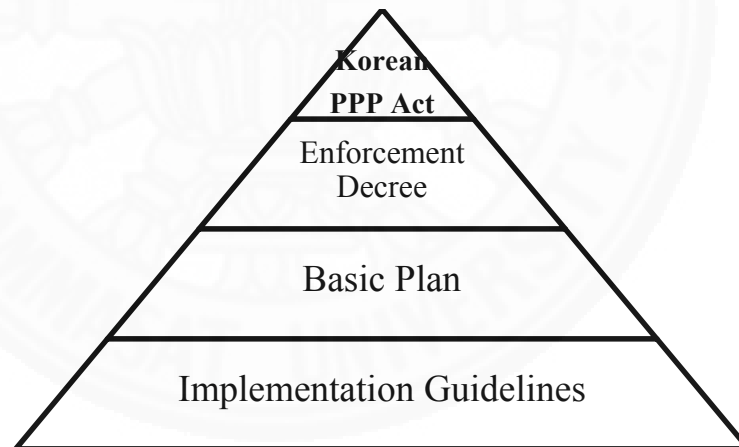
¹¹² Act on Public-Private Partnerships in Infrastructure, Article 2

¹¹³ Kim, Kim, Shin and Lee, *supra* note 12 at 8.

that it clearly defines the eligible infrastructure types, procurement scheme and processes, the roles of the public and private parties, government policy supports, etc.

In respect of Enforcement Decree, it is the implemented instrument of the Korean PPP Act. Moreover, the PPP Basic plan and PPP Implementation Guidelines thoroughly indicate details about policy direction, procurement types and government supports. According to the Korean PPP Act, the Ministry of Strategy and Finance (the “MOSF”) and the PIMAC have a duty to issue the PPP Basic Plan which contains government policy directions, project implementation procedures, financing and refinancing options, risk mitigation mechanisms, payment schemes for government subsidies and documentation instruction. On the other hand, the PIMAC is responsible to establish the PPP Implementation Guidelines regarding value for money (VFM) test, RFP preparation, standard output specification by facility, tender evaluation, standard concession agreement and refinancing. Both the PPP Basic Plan and Implementation Guidelines are yearly updated based on changes and market conditions.

Figure 3.1 Hierarchy of legal framework



3.1.4 The Private Participation in Infrastructure Law

In respect to the infrastructure project the private sector can participate, it was defined the Public Private Partnership Project in the Korean PPP Act, Article 2 Definition subparagraph 5 which can be separated into two following types:¹¹⁴

¹¹⁴ Act on Public-Private Partnerships in Infrastructure, Article 2 subparagraph 5

The term “public-private partnership project” means any project proposed by the private sector as prescribed in Article 9, or any infrastructure facilities project conducted by the concessionaire as prescribed in subparagraph 7, in accordance with a master plan for a public-private partnership

3.1.4.1 Solicited Project

The competent authority identifies the needed and potential PPP projects in the master plan as solicited project. Article 2 subparagraph 5 was specified that the PPP projects included infrastructure facilities project conducted by the concessionaire according to the master plan. As to identify a particular project whether being eligible under the Korean PPP Act must be understood the definition of Infrastructure Facilities Projects first. Pursuant to Article 2 subparagraph 2, it was defined as “*projects involving work such as construction, expansion, renovation or operation of infrastructure facilities*”¹¹⁵ The procedure to implement the solicited project is set out below.

Step 1: Designation of PPP Project

The competent authority creates a PPP project plan which describes the significance and details of each project. According to the Basic Plan, it identifies general principle to select a PPP project.¹¹⁶

Firstly, the candidate project must be one of the 46 eligible facility types as specified in the Korean PPP Act. Accordingly, the definition of the Eligible Infrastructure Facility as prescribed in Article 2 was clearly modified in 2005. This is due to the government is determined to stimulate private investment in public facilities which would be contributed more benefit to public interest.¹¹⁷ The Korean PPP Act was specified 46 infrastructure facility types which can be grouped into 15 sectors as set out in the table below.¹¹⁸

facilities project as prescribed in Article 10: Provided, that the part that is constructed in excess (referring to the construction conducted in excess of the project expenditure of the relevant year but within the scope that has been agreed upon between the State and a party to the contract; hereinafter the same shall apply) from among the Government placed projects that are funded by continuing expenditures under Article 23 of the National Finance Act shall be deemed a public-private partnership project.

¹¹⁵ Act on Public-Private Partnerships in Infrastructure, Article 2

¹¹⁶ Kim, Kim, Shin and Lee, *supra* note 12 at 61-67.

¹¹⁷ Tafesse, *supra* note 97 at 54.

¹¹⁸ Kim, Kim, Shin and Lee, *supra* note 12 at 12.

Table 3.1 Eligible Infrastructure Facility under the Korean PPP Act

Sector	Infrastructure Type
Road (4)	Roads and ancillary facilities, non-road parking facilities, intelligent transport systems, transfer centers
Rail (3)	Railways. Railway facilities, urban railways
Port (3)	Port facilities, fishing port facilities, eligible facilities for new port construction
Airport (1)	Airport facilities
Water resources (3)	Multipurpose dams, river affiliated ancillary structure, waterworks
Communication (5)	Telecommunication facilities, information communication systems, information superhighway, map information systems, ubiquitous city infrastructure
Energy (3)	Electric source facilities, gas supply facilities, collective energy facilities
Environment (5)	Excreta treatment facilities and public livestock wastewater treatment facilities, waste disposal facilities, recycling facilities, sewage and sewage treatment facilities
Logistics (2)	Distribution complexes and cargo terminals, passenger terminals
Culture and tourism (9)	Tourist sites or complexes, youth training facilities, public and/or professional sports facilities, libraries, museums and art galleries, international conference facilities, culture centers, science museums, urban parks
Education (1)	Preschool and school facilities
National defense (1)	Military residential facilities
Housing (1)	Public rental housing
Welfare (3)	Senior homes and welfare medical facilities and facilities for remarried seniors, public health and medical facilities, child care facilities
Forestry (2)	Natural recreational resorts, arboretums

Source: Jay-Hyung Kim, Jungwook Kim, Sung Hwan Shin and Seung-yeon Lee, Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea Volume 1: Institutional Arrangements and Performance, 6 (1st ed. 2011).

However, there are many scholars complain this definition as it is too strict and not flexible. This could constraint the types of infrastructure to be developed through the PPP projects in the near future. They also recommended to revise this definition to be wider and practical.¹¹⁹

Moreover, the potential and efficiency of the user should be carefully evaluated. This is to ensure that the candidate project does not exceed the national medium and long term infrastructure investment plans.¹²⁰

In the case that the project costs more than W50 billion and would require more than W30 billion from the central government, the competent authority must submit the project to the MOSF to initially conduct feasibility in accordance with the National Fiscal Act. In this context, the PIMAC has a duty to conduct feasibility study by consideration of economic and policy criteria, in order to compare the value between PPP procurement and traditional public procurement.¹²¹

Additionally, the designation of the PPP project is based on the project size. In respect of project expected to cost less than W200 billion, the competent authority shall conduct feasibility by itself, yet it is required to submit the result of feasibility study and basic design documents to the PIMAC to review and comment. After that, the competent authority must request MOSF to submit the result of feasibility and the PIMAC's comment to the PPP Committee.¹²²

Step 2: Announcement of Request for Proposals

After the project is designated, the competent authority must announce the request for proposal within one year from the date of designation of the project. It is usually published in the government gazette and the websites of the competent authority. In a manner of project costs more than W200 billion or needs more than W30 billion as a subsidy from the government, the competent authority has to request the

¹¹⁹ *Id.* at 11.

¹²⁰ *Id.* at 61.

¹²¹ *Id.*

¹²² *Id.* at 62-63.

PIMAC to review the request for proposal document, and then submit it to the PPP Committee prior to announce such request.¹²³

Step 3: Submission of Project Proposals

The private sector submits the proposal contained all the required details to the competent authority. In this stage, the private sector usually forms a consortium with all constructors, maintenance team, financial institutions, etc. The competent authority should select at least two winning bidders to enter into the negotiation stage.¹²⁴

Step 4: Bid Evaluation and Selection of Preferred Bidder

The competent authority establishes a team including hiring external expert to examine the proposal to ensuring the criteria according to the request of proposal. In this step, there are two stages which are evaluation of pre-qualification and evaluation of technical and price elements.¹²⁵

In respect of pre-qualification evaluation, the team will evaluate the general ability of the bidders such as design, build, finance and operate the project. The bidders who do not pass the qualification test in this stage have not right to proceed in the technical and price evaluation. Furthermore, in the second stage, the qualification and ability in the first stage will not be included in consideration. The score only considers the price and technical. The competent authority is the one who weights the score proportion on price and technical which bases on characteristic of a particular project.¹²⁶

Step 5: Negotiation and Contract Award

This stage usually involves with the external advisor including legal, financial and engineering experts, who play a role to advise the competent authority to negotiate with the preferred bidder on the details of terms and conditions in the contract. In addition, PIMAC may be act as a team leader or an advisor in this negotiation stage upon request from the competent authority. In case of failure in negotiation within the specific time, the competent authority should have the second plan to proceed such as initiate negotiation with the second preferred bidder, re-posting the request of proposal

¹²³ *Id.* at 64.

¹²⁴ *Id.*

¹²⁵ *Id.* at 65.

¹²⁶ *Id.*

or invalidating the designation of the PPP project. In respect of project cost more than W200 billion or required a subsidy from the government, after completion of the negotiation, the draft contract must be reviewed by the PPP Committee. After that, the competent authority promotes a preferred bidder to be a concessionaire to complete the negotiation of the PPP contract.¹²⁷

Step 6: Approval of Detailed Engineering and Design Plan for Implementation

The concessionaire creates the Detailed Engineering and Design Plan for Implementation (the “DEDPI”) based on the PPP contract and then submits to the competent authority for approval within one year from the date of concessionaire designation. The competent authority must inform the decision to the concessionaire in written form within three months from the filing date of the application.¹²⁸

Step 7: Construction and Operation

The concessionaire has a duty to construct the PPP facility following to the schedule approved by the DEDPI. In this step, the competent authority is responsible to monitor the construction and undertake all material used in the project, which is qualified.¹²⁹

Nevertheless, due to change of design, government policy, refinancing, etc. the contract may be modified. As a consequence, any contract approved by the PPP Committee must be submitted to have an approval again. At the end of construction period, the concessionaire must submit the construction completion report to the competent authority within fifteen days from the completion date.¹³⁰

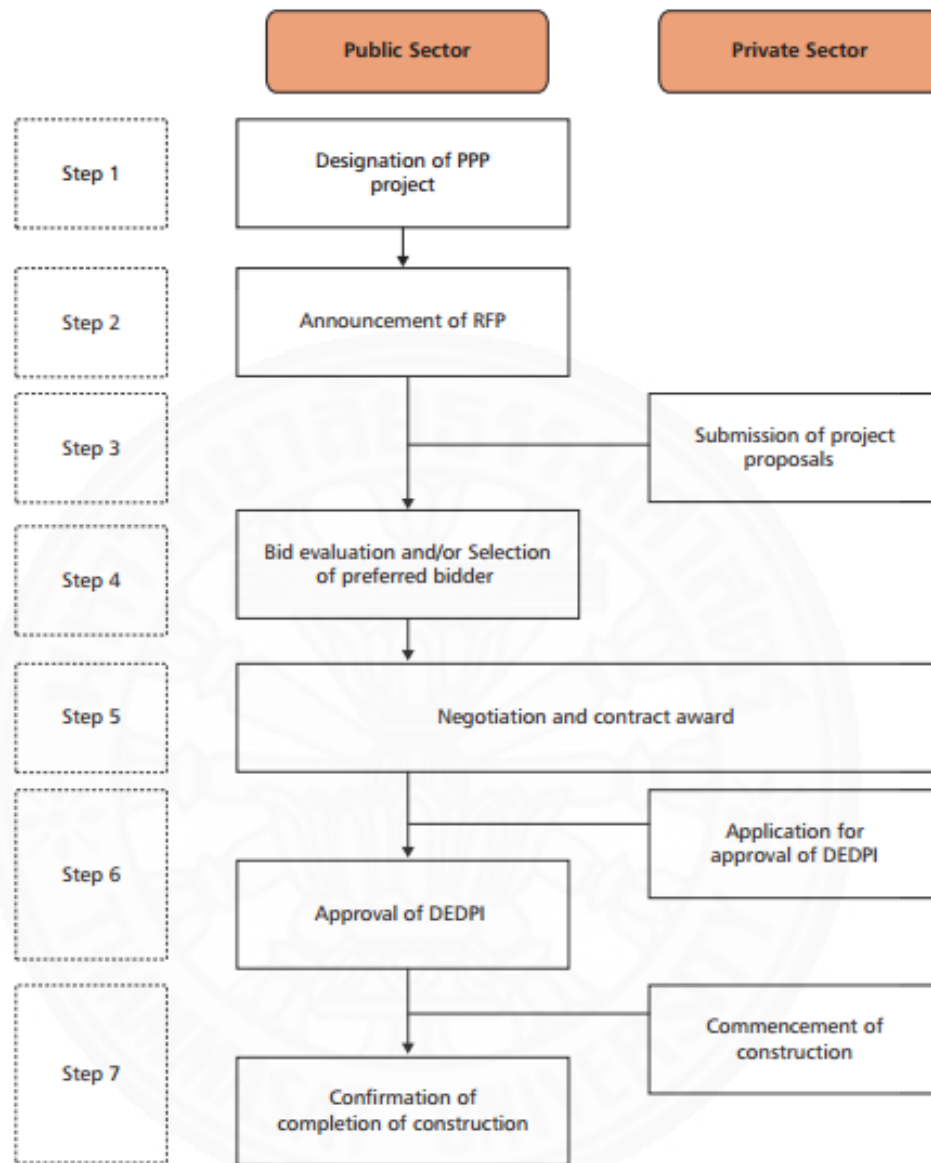
¹²⁷ *Id.* at 65-66.

¹²⁸ *Id.* at 66.

¹²⁹ *Id.* at 66-67.

¹³⁰ *Id.*

Figure 3.2 Procurement Procedures for Solicited Project



DEDPI = Detailed Engineering and Design Plan for Implementation, PPP = public-private partnership, RFP = request for proposal.

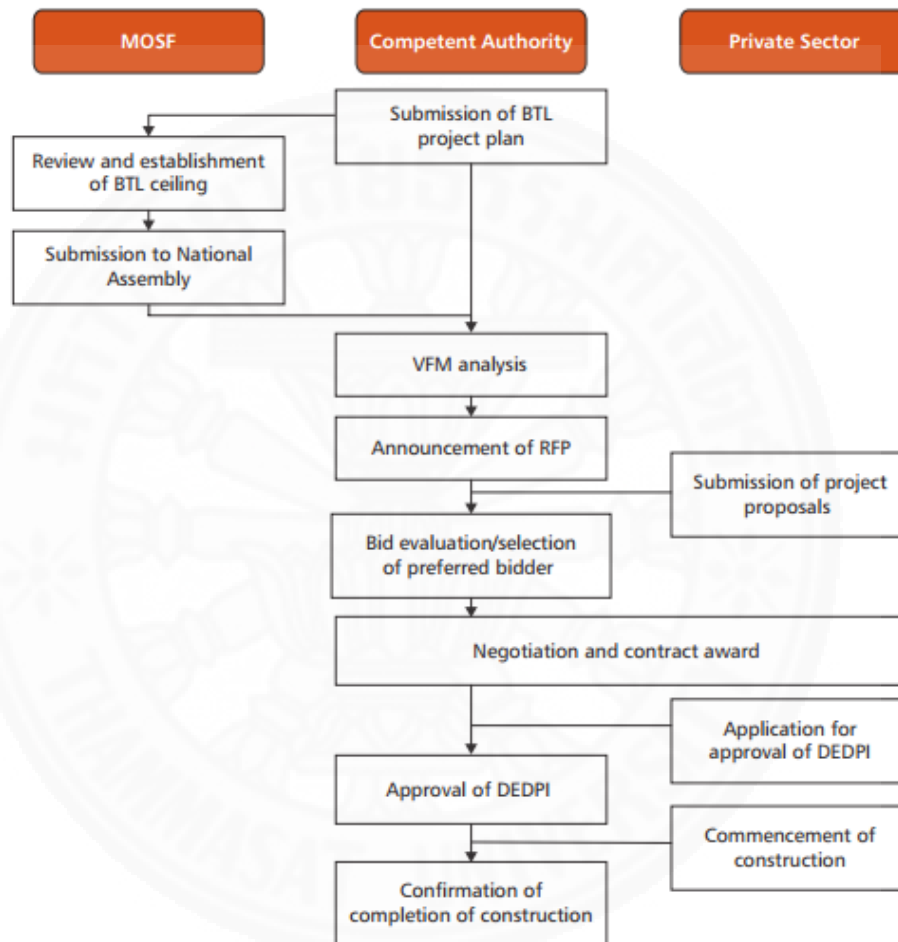
Source: Ministry of Strategy and Finance. 2009. Basic Plan for Private Participation in Infrastructure. Seoul.

Source: Jay-Hyung Kim, Jungwook Kim, Sung Hwan Shin and Seung-yeon Lee, Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea Volume 1: Institutional Arrangements and Performance, 6 (1st ed. 2011).

Moreover, as the BTL (Build Transfer and Lease) scheme can only proceed in solicited project. Generally, its process resemble to the BTO scheme, there are only in the beginning parts that the BTL project has additional steps. Pursuant to the Korean

PPP Act, the government has a duty to submit the accumulated maximum amount of BTL project implemented in the next fiscal year together with budget proposal to the National Assembly. During the announcement of request of proposal, the competent authority has to announce the BTL ceiling.¹³¹

Figure 3.3 Procurement Procedures for Build-Transfer-Lease Project



BTL = build-transfer-lease, DEDPI = Detailed Engineering and Design Plan for Implementation, RFP = request for proposal, VFM = value for money.

Source: Ministry of Strategy and Finance. 2009. Basic Plan for Private Participation in Infrastructure. Seoul.

Source: Jay-Hyung Kim, Jungwook Kim, Sung Hwan Shin and Seung-yeon Lee, Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea Volume 1: Institutional Arrangements and Performance, 6 (1st ed. 2011).

¹³¹ *Id.* at 71.

3.1.4.2 Unsolicited Project

Article 9 of the Korean Act allows private sector to propose the potential PPP and request the competent authority for designation such project to be the PPP. The selection process will be conducted under a competitive bidding. It should be noted that in case of the unsolicited project, the law does not required that the project must relate to the Infrastructure Facilities Projects. The procedure to implement the unsolicited project is set out below.

Step 1: Submission of Project Proposal

The proposal regarding unsolicited project should be deeply reviewed by the public authority in assorted aspects such as the coherent with the government investment plans, priorities and advantages to the public and commercial viability.¹³²

Step 2: Review of Project Proposal

The competent authority requests the PIMAC to conduct Value-for-Money (VFM) analysis. Then, then PIMAC submits their commentary and result of VFM analysis from the unsolicited project to the competent authority and MOSF. After all the review by public authority, the competent authority must notify the private party the decision.¹³³

In respect of unsolicited projects with total cost exceeded W200 billion or required subsidy by the central government, the approval from the PPP committee is requisite.¹³⁴

Step 3: Notification of Request for Alternate Proposals

At this stage, the competent authority must announce the outlined content of the project proposal to public at least ninety days counting from the notification date in order to allow the other private parties to apply proposal for bidding. This is due to ensure the fair competition.¹³⁵

Step 4: Bid Evaluation and Selection of Preferred Bidder

¹³² *Id.* at 67.

¹³³ *Id.* at 68.

¹³⁴ *Id.*

¹³⁵ *Id.* at 69.

If there are other proposals submitted, the competent authority must evaluate all the proposals and then select the preferred bidder. In the case of no other private parties responds to the announcement, the initial party should be designated as a concessionaire and process to negotiation stage.¹³⁶

As the government wants to support efficiency and innovation of the private sector, there is a policy to compensate the losing bidder for a specific proportion of bid preparation cost.¹³⁷

Step 5: Negotiation and Contract Award

The competent authority is the one who negotiates with the private party with suggestions from the external advisor. In some case, the PIMAC becomes a team leader or advisor to negotiate the contract. In this stage, the competent authority should prepare for the second plan to deal with the negotiation failure. After completion of the negotiation, the contract must be reviewed by the PPP committee.

Step 6: Approval of Detailed Engineering and Design Plan for Implementation

The Competent authority reviews and approves the DEDPI which the concessionaire creates according to the term and conditions of the contract.

Step 7: Construction and Operation

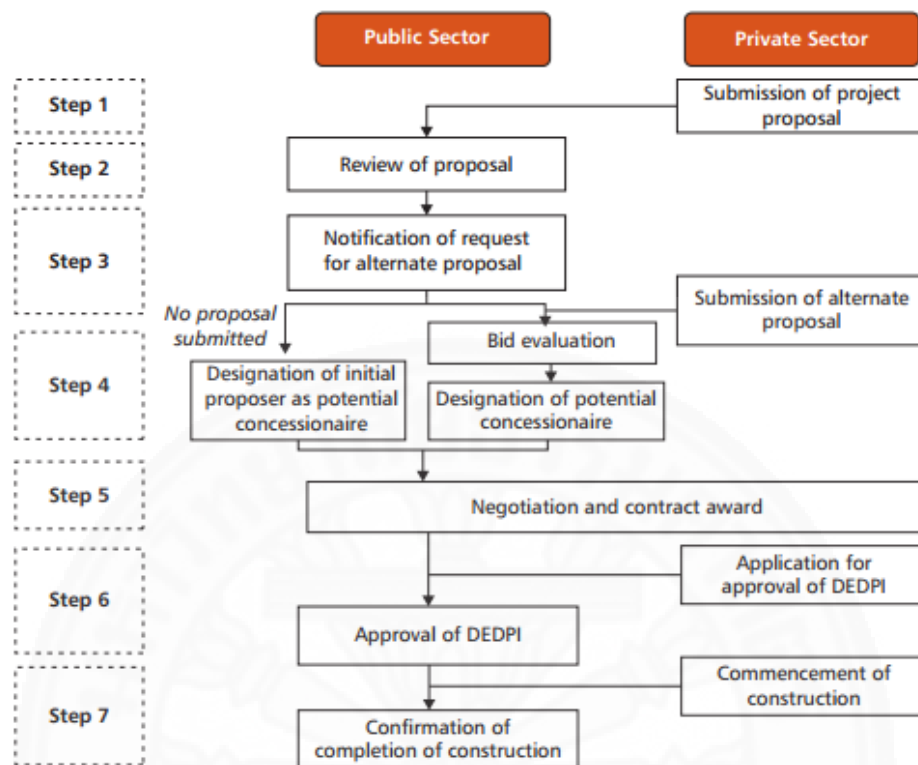
The concessionaire shall commence construction and complete it within the period of time specified in the contract. In a meantime, the competent authority has a duty to monitor the conduction of the concessionaire.¹³⁸

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

Figure 3.4 Procurement Procedure for Unsolicited Project



DEDPI = Detailed Engineering and Design Plan for Implementation.

Source: Ministry of Strategy and Finance. 2009. Basic Plan for Private Participation in Infrastructure. Seoul.

Source: Jay-Hyung Kim, Jungwook Kim, Sung Hwan Shin and Seung-yeon Lee, Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea Volume 1: Institutional Arrangements and Performance, 6 (1st ed. 2011).

3.1.5 Procurement Methods

There are only four types of the PPP, stated as below, to be conducted in the South Korean as specified in Article 4 (Implementation Methods of Public-Private Partnership Projects) of the Korean PPP Act.

3.1.5.1 Build-Transfer-Operate Method

The ownership of infrastructure facilities shall be transferred to the state as soon as the completion of the construction and the concessionaire has a right to manage and operate the assets while obtaining return on investment (ROI). The concessionaire

will recover their investment directly through the user fees. Most of the BTO projects are transportation such as roads, railways and seaports.¹³⁹

3.1.5.2 Build-Transfer-Lease Method

The ownership of the infrastructure facilities shall be transferred to the state upon the completion of construction. The government shall also grant the right to operate the facilities to the concessionaire while the concessionaire obtains the lease payment and the operational cost. The amount of payment based on the operational performance. This type of PPP is usually applied to the project in which the concessionaire is difficult to generate the revenue directly from the user, so that the government has to pay the investment cost to the concessionaire. Most of the BTL project are social infrastructure such as schools, welfare facilities, environmental facilities and military residence.¹⁴⁰

3.1.5.3 Build-Operate-Transfer Method

The concessionaire remains the ownership of the infrastructure facilities for a specific period of time after the completion of the construction. After the termination of the concession agreement, the ownership shall be transferred to the government.¹⁴¹

3.1.5.4 Build-Own-Operate Method

The concessionaire invested its capital to the project. After the completion of construction, the concessionaire shall have an ownership of the infrastructure throughout their life span.¹⁴²

However, the private sector may propose other types of PPP through unsolicited projects under article 9 or modification of the master plan under article 12 and adopted by the competent authority as it deems reasonable.¹⁴³

¹³⁹ Act on Public Private Partnerships in Infrastructure Article 4

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

3.1.6 Key Success Factors

Since the Korean PPP Act has been introduced, the trend of private participation in infrastructure in the South Korea has been growing over the decades. The amount of PPP projects increased from 2001 with twenty-five projects to over hundreds projects in 2007. The value of PPP project rose to exceed W 7,000 billion at the end of 2012. All these number can guarantee the success of the private participation in infrastructure. There are a number of factors contributing the achievement of PPP in the South Korea.

3.6.1.1 Certainty Legal Framework

The most significant factor is the clear legal framework including the Korean PPP Act, Enforcement Decree, Basic Plans and PPP Implementation Guidelines. In light of this, the MOSF plays an important role to create and manage the PPP Basic Plan and Guidelines in order to direct government policy.¹⁴⁴ The hierarchy of the PPP laws and regulations is indicated in the Korean PPP Act, the Enforcement Decree and the PPP Basic Plan. It is undeniably that the Korean PPP Act and Enforcement Decree is clearly imposed the definition of eligible infrastructure types, procurement types and processes, rights and obligations of each related party, both public and private sector, as well as risk-sharing mechanism. The PPP Basic Plan can be frequently updated and adjusted in order to follow the market conditions and government demands.¹⁴⁵ Due to the consistency of the laws and regulations, it helps private investors to mitigate risks and encourage them to invest in public infrastructure.¹⁴⁶

3.6.1.2 Supporting Agency

According to the Korean PPP Act, the PICKO has been established under the Korea Land Institute with the main objective to conduct feasibility study. After that, due to the increased demand of professional service and experiences, the PICKO was transformed to be the PIMAC. This change has widened the capacity of the agency to

¹⁴⁴ Okyu Kwon, The Republic of Korea's Infrastructure Development: Experiences and Some Lessons for Africa's Developing Economies, http://www.growthdialogue.org/sites/default/files/documents/Growth_Dialogue_No.1_Korea's%20Infrastructure%20Development_5-25-11_WEB.pdf, (4 May 2016).

¹⁴⁵ Kim, Kim, Shin and Lee, *supra* note 12 at 161-162.

¹⁴⁶ Kwon, *supra* note 144.

support information and provide research regarding PPP projects.¹⁴⁷ The missions and roles of the PIMAC have been prescribed in the Enforcement Decree. There have also been responsibilities to support the MOSF to establish the PPP Basic plan and provide services through all PPP processes such as carrying out feasibility study and VFM tests, formulating the request for proposal, evaluating proposals, promoting foreign investment in consultation services and supporting negotiations. In addition, the agency also have had training programs for governmental officials and coordinated with international organization and foreign countries.¹⁴⁸ As a result, there are various fields of experts in the PIMAC, including economics, finance, accounting, law, engineering, urban planning, etc. In this sense, it is acceptable that the PIMAC has been an important agency to contribute the success of PPP project through assisting both public and private sectors and promoting infrastructure projects.¹⁴⁹

3.6.1.3 Government Incentives

The government initiates a number of campaigns to persuade private investment in infrastructure projects. The supports consists of financial and risk-sharing measures such as granting land expropriation right to the concessionaire, providing financial support, offering minimum revenue guarantee, establishing Korea Infrastructure Credit Guarantee Fund (KICGE), allowing refinancing and granting tax benefit.

3.6.1.4 Support Foreign Investors

Not only treating foreign investors as same as domestic investors, the South Korean government also implements additional advantages such as tax credit and financial supports to the foreign investors such as tax exemption when investing in a Foreign investment area.¹⁵⁰

It can be clearly seen that the PPP laws and regulations of the South Korea is consistent and systemetic leading to a number of successful PPP projects in this country. In detials, the South Korea Government has declared their policy clearly to

¹⁴⁷ *Id.*

¹⁴⁸ Kim, Kim, Shin and Lee, *supra* note 12 at 162-163.

¹⁴⁹ Kwon, *supra* note 144.

¹⁵⁰ *Id.*

support the private participation in infrastructure projects and also announced the demand of infrastructure facilities in the country as known the solicited project. In addition, it encourages creativity and innovation of the private sector, as it enacts the laws to impose the process allowing the private sector to initiate the unsolicited project. However, the unsolicited project is thoroughly examined the necessity and value for money by the PIMAC and competent authority to ensure that the designated PPP projects will be worth for the country. Furthermore, the Korean PPP law has also been specified the procurements schemes of PPP projects which consist of BTO, BTL, BOT, BOO as well as other schemes proposed by the private sector. One of the most important factors to bring the South Korea to be a successful country in respect of PPP project development is the PIMAC which is an efficient agency with responsibilities to support all aspects relating to PPP projects. The PIMAC undoubtedly helps to facilitate both local and foreign private investors as well as related authority to process and achieve the PPP projects.

3.2 Public Private Partnership in the United States

The concept of PPP has been introduced for many years, but the term public private and partnership was used in the United States (the “US”) in the late 1990s and early 2000s. The trend of the PPP in the US mostly targeted the infrastructure, especially transportation.¹⁵¹

3.2.1 History

The historical background of the PPP in the US began when the European’s notion of nation-state and concept of sovereignty were influenced in the 1960s and 1970s together with the ideal of natural rights in the seventeenth century. As a result, the differentiation of public and private became the crucial issue. The court emphasized on the neutral and apolitical system of the private sector. The public law was narrowed, whereas the expansion and liberalization of the private law was supported. It was agreeable that the responsibility of public interest mainly failed to the state. Along with,

¹⁵¹ Dominique Custos and John Reitz, “Public-Private Partnerships”, **58 Am. J. Comp. L. Supp.** 555, 555 (2010).

the Great Depression led the state to increasingly intervene among private transactions until 1945.¹⁵²

After World War II, the impact of totalitarian directed the state policy to emphasize more on public interest and the freedom of the private law as well. Despite expansion of government program in Johnson's Great Society, the Regan and two Bush governments were ongoing such policy. The ideal of PPP has been precisely used during the Clinton years as it introduced the New Public Management (NPM) which "*refers to a cluster of contemporary ideas and practices that seek, at their core, to use private sector and business approaches in the public sector*". It is undeniably that the NPM campaign supported the use of the PPP.¹⁵³ This campaign was also transferred to Bush years.¹⁵⁴

The term PPP, both in the US and the Europe, was the old phenomenon of long contract out the government services and restated as the PPP in the 1990s. The development of the PPP especially in construction and operation of infrastructure has separated into three periods.¹⁵⁵

The first phase was before the 1990s when the private was full responsibility of construction and maintenance of toll way and roads. The first project was turnpike in 1792 which private party had an ownership of the facility, and the Pennsylvania chartered it for the public purpose. During this period, the state assigned the provision of infrastructure to the private entrepreneurs, while it was acting as the financial aid such as loan of credit, bond issuance and tax exemption with transferring ownership to the state. Being the major financial provider affected the financial status of the government indebtedness.¹⁵⁶

The second phase, the government turned to intervene and control the utilities. In basic infrastructure such as road, water and transportation, the state directly financed

¹⁵² *Id.* at 564-565.

¹⁵³ *Id.* at 566.

¹⁵⁴ *Id.* at 565.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 567.

and had ownership towards these facilities where the private sector involved through procurement contracts which awarded to the lowest price bidder. However, in the next phase, the trend of the first phase were back to be influenced in delivering of infrastructure which led to the modern era of the PPP. However, the government was more strict in the modern PPP than in the pre-nineteenth century.¹⁵⁷

It can be seen that the US has used PPP to deliver a wide range of infrastructure in various forms for more than thirty years. During 1986 – 2012, water segment had the largest number of projects at thirty three percentages, while around twenty-eight percentages of all PPP projects were relating to roads transportation. However, the public and private investments in infrastructure projects hold a small proportion of the total infrastructure funding in the US.¹⁵⁸

However, during the Obama administration, the Build America Investment Initiative is a project launched by President Obama, in order to drive the PPP in the US and will be ongoing for the next several years. This approach is to engage the state and local governments to cooperate with purpose to increase infrastructure investment and widen the PPP's market.¹⁵⁹

3.2.2 Trends

There have been over 375 PPP infrastructure projects across the country since 1985. Florida, California and Texas have been the leaders of the PPP movement contributing the large percentages of national's PPP projects.

The numbers of financial closed PPP in the US in 2015 were tiny due to many projects took a long consideration and process. In addition, many large projects were cancelled especially the Indianapolis Consolidated Justice Facility and the Houston Justice Complex. In 2015, it can be seen the scope of PPP has been expanded beyond transportation sector such as the Michigan freeway lighting PPP and the Kentucky

¹⁵⁷ *Id.* at 566-567.

¹⁵⁸ Robert H Edwards, Jr. Randall F Hafer and Mark J Riedy, *The Public-Private Partnership Law Review*, <http://ppp.worldbank.org/public-private-partnership/library/public-private-partnership-law-review-united-states>. (25 May 2016)

¹⁵⁹ *Id.*

Wired broadband PPP. As a consequence, it appears that the legislation has been developed, in order to deliver non-transportation through the PPP process.¹⁶⁰

In the year 2015, there were a number of PPP projects reaching financial close. The followings are notable PPP projects achieved financial close:¹⁶¹

1. Pennsylvania's Rapid Bridges Project. This project was the first US Project to combine the variety of projects into single project. It reached financial closed in March 2015. The Plenary/Walsh Group consortium won the concession to construct, reconstruct and replace 558 bridges in the duration of three years and also maintain them for twenty five years.

2. Kentucky Broadband P3. This project was to develop 3200-mile high-speed broadband internet work. Macquarie's consortium achieved the concession to undertake this project.

3. Michigan Freeway Lighting P3. The Star American consortium would replace the old lights with energy-saving LEDs over two-year period and maintained them for thirteen years. It reached financial close in August 24, 2015.

4. I-77 HOT Lanes P3. The Cintra consortium would construct twenty-six miles of lanes along I-77 and I-277 in Charlotte and also High Occupancy Toll (HOT) facilities located in North Carolina. The financial close was reached in May 2015 with value of USD 655 Million.

5. Route 823 Portsmouth Bypass Project. ACS, InfraRed and Star America as a consortium won the concession to develop and maintain a new 16-mile, four-lane bypass and other related improvements. It reached financial close in April 2015.

It is predictable that in spite of unaggressive thrive, there are some growth in the PPP projects in the US. The reason is that various PPP projects developed during 2016, including Los Angeles International Airport's (LAX) automated people move project, part of the larger LAX Landside Access Modernization Program, proposed

¹⁶⁰ Roderick N. Devlin, D. Bruce Gabriel and Carolina Mederos, "Market Update: A Review of Recent Activity in the US Public Private Partnership (P3) Sector and the Outlook for the Year to Come", 3 March 2016, <http://www.squirepattonboggs.com/~media/files/insights/publications/2016/03/market-update-a-review-of-recent-activity-in-the-us-public-private-partnership/market20update20a20review20of20recent20activity20in20the20us20p320sector20and20outloo.pdf>. (25 May 2016)

¹⁶¹ *Id.*

courthouse a water projects of Miami-Dade County and I-395 Reconstruction DBF Project of the Florida Department of Transportation.¹⁶²

Moody's Investors Services reported that the US has had the potential to become the largest market for the PPP in the world accounted for its huge size of infrastructure and growing urban population. Since many infrastructure needs to be upgraded and replaced as well as the government has limited budget, the PPP scheme has been increasingly used over the past five years. The new legislation and public policy initiatives have become an important factor to encourage investment in the PPP.¹⁶³ However, it should be noted that the growth of PPP in the US may be limitedly raised as a result of the overall economic condition of the US and the strengths of its debt and equity capital markets.¹⁶⁴

3.2.3 The Public Private Partnership Law

It is agreeable that defining the term PPP in the US is not easy due to its variety uses among the states. The US, even worse, has no adoption of a federal statutory on the PPP resulting in the absence of definition of the PPP.¹⁶⁵

3.2.3.1 Characteristics of Public Private Partnership

Interestingly, the definition of the PPP was defined by the U.S. Government Accountability Office (the "GAO") in 1999 as a "*contractual agreement formed between public and private sector partners, which allows more private sector participation than in traditional*". It is also broadly described that "*the agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, and/or manage a facility or system [that provide in whole or in part a public service]. While the public sector usually retains ownership in the facility or system, the private party will be given additional decision rights in determining how the project or task will be completed*". A number of PPP arrangements

¹⁶² *Id.*

¹⁶³ Moody's Investors Service, "Moody's: US is Poised to Become Largest Public-Private Partnership (P3) Market in the World", https://www.moody's.com/research/Moodys-US-is-poised-to-become-largest-public-private-partnership--PR_308002, 8 Sep 2014. (25 May 2016)

¹⁶⁴ Edwards, Hafer and Riedy *supra* note 158.

¹⁶⁵ Custos and Reitz *supra* note 151 at 557.

can be accrued from the definition by the GAO from the simple contract out develop to complicated agreement with full of technical terms.¹⁶⁶

According to the GAO's definition, it can be concluded that the PPP of the US contains two factors which are as follows: (i) a specific form of government contract which is a method of procurement; and (ii) the actual combination of responsibilities assumed by private partner.¹⁶⁷

In the context of the state government, the Florida Legislature defines the PPP as "*any joint venture or contractual agreement between a governmental agency, municipality, city, or otherwise and at least one private organization, such as a non-profit or a corporation.*" In contrast, Texas government has defined the PPP in its Transportation Code which has been close to the Florida's but that has been specifically only applied in the section of highway and interstate.¹⁶⁸

There was a case brought to the US District Court for the District of Columbia to determine the validity of the PPP project. Private developers of the City Center DC filed a case against the Department of Labor Administrative Review Board's determination showing that the construction of the CityCenterDC, a part of PPP project, was not related to public work pursuant to the David-Bacon Act. In the ruling, the court considered that the development of CityCenterDC would not be built or used by the government, since the project was constituted of condominiums, apartments, offices, hotel, retail stores and some public open spaces. This mixed-used project would be entirely funded, operated and maintained by private entities for the period of ninety-nine years leases from the city.¹⁶⁹ Therefore, the construction of CityCenterDC was not the public work.¹⁷⁰ As a consequence, state's asset might not be developed through the

¹⁶⁶ *Id.* at 558.

¹⁶⁷ *Id.*

¹⁶⁸ Anika Guevara, "*PUBLIC-PRIVATE PARTNERSHIPS: AN INNOVATIVE SOLUTION FOR A DECLINING INFRASTRUCTURE*", 47 *Urb. Law.* 309, 2 (2015).

¹⁶⁹ Melanie Trottman, "*Court Rules Against Labor Department in CityCenterDC Case*", **the Wall Street Journal**, <http://blogs.wsj.com/washwire/2014/04/01/court-rules-against-labor-department-in-citycenterdc-case/>, 1 April 2014. (26 May 2016)

¹⁷⁰ Edwards, Hafer and Riedy *supra* note 158.

PPP, it must be considered whether it is public work or not prior to decide whether the project qualified as the PPP project.

In the light of the PPP in the US, not all contractual relationship between private and public sector are considered as the PPP. The parties in the PPP are expected to contribute their resources such as capital, expertise and asset and share risks among partners. It should be noted that there is no co-ownership in the PPP. Usually, the private party will conduct its responsibilities as specified in the long term agreement and at the end of the period it will transfer ownership to the public sector.¹⁷¹

3.2.3.2 Eligible Infrastructure

Some states create their own PPP in the state statutory while some do not absorb the concept of the PPP.¹⁷² There are thirty-one states having PPP legislation for highways, roads and bridges, whereas, twenty-one states having PPP legislative for transit projects. Generally, the details of PPP law of each state are about to allow the public sector to enter into a contract with private sector to design, construct, repair, expand, operate and finance highways, roads and bridge projects. The eligible infrastructure projects in twenty-one states enacted in their PPP law are far beyond roads and highways, including ferries, pipelines, rail and other public facilities. This is undeniably that the state with narrowly defined eligible infrastructure project will be less attractive for private investment than the wider one.¹⁷³

3.2.3.3 Solicited and Unsolicited Project

Most of the states in the US accept the unsolicited project to be proposed by the private entities, whereas only a few decline the idea of the unsolicited project. In this sense, the public sector can impose budget's priority, evaluation criteria, and the foundation for bidding. In addition, outlining the objectives and prospective effects toward community contained in solicited project will increase accountability and transparency. In contrast, the unsolicited project has no criteria to meet and no outline

¹⁷¹ Guevara *supra* note 168.

¹⁷² Custos and Reitz *supra* note 151 at 557.

¹⁷³ Emilia Istrate and Robert Puentes, "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units", http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208_transportation_istrate_puentes.pdf. (25 May 2016)

to plan and predict the impact to community. The only thing the state can provide is to sponsor the new ideas.¹⁷⁴

3.2.3.4 State Approval

In general, the PPP projects to be developed must be approved from some authorized agencies prior to implementing such as the state transportation commission (California and Oregon), the Board of Public Works (Maryland) and Special Public-Private Partnership Infrastructure Oversight Commission (Massachusetts). There are nine states that the each PPP project needs to be approved by the state legislature prior to developing the projects. This can be illustrated in Tennessee where legislature approval is demanded in order to allow private entities to develop or operate toll ways. The legislative approval may guarantee the success of the project, yet time consuming, which has the negative impact on cost of the projects. On the contrary, some states allow lower authority to consider the proposed PPP project. This can be seen in Minnesota where the PPP law states that *“the governing body of a county or municipality through which a facility passes may veto the project within thirty days of approval by the commissioner.”*¹⁷⁵

In sum, there is no federal PPP law in the US. Most of the states have established their own PPP legislation. Some are similar, and some are totally different among states. It is undeniably that the PPP statutory in the US seems to be fragmented. The Below figure is the characteristic of states PPP legislation.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Figure 3.5 Characteristic of States PPP Law in the United States

Appendix C. Characteristics of state PPP legislation, as of December 2011

	Broad application of legislation ^{1 5}	Unsolicited proposals ⁴	Availability payments/ shadow tolls ³	Gives lower level agencies PPP authority ⁷	Prior state legislature approval needed ¹	Non-compete clauses ^{3 6}	Public sector agency can hire its own technical and legal consultants ²
Alabama	*		*	*		*	
Alaska							*
Arkansas				*		N	
Arizona	*	*	*	*		*	
California	*	*		*		*	
Colorado	*	*		*			*
Delaware	*	*			*	*	
Florida		*	*	*	*	N	*
Georgia	*	*	*				*
Illinois	*		*				
Indiana	*			*	*		*
Louisiana	*	*	*	*			
Maine	*	*			*		
Maryland	*	*					*
Massachusetts	*	*					*
Minnesota		*		*			
Mississippi		*		*		N	*
Missouri	*	*		*	*		
Nevada	*	*		*			
North Carolina	*	*			*	N	*
North Dakota	*	*		*			
Ohio	*	*					
Oregon	*	*	*				*
South Carolina							
Tennessee					*		
Texas	*	*	*	*		N	*
Utah		*					*
Virginia	*	*		*			*
Washington	*	*			*		*
West Virginia	*				*		
Wisconsin							

1. NCSL, 2010; Appendix B.
2. Pricewaterhouse Coopers, "Public-Private Partnerships: The US Perspective" (June 2010).
3. Wagner, 2011.
4. Pricewaterhouse Coopers, 2010 for legislation through May 2010; Wagner, 2011 for legislation passed thereafter.
5. Brookings Metro Program analysis.
6. A column with an "N" indicates that statute explicitly forbids PPP agreement from containing a non-compete clause.
7. Brookings analysis of Jaime Rall "State Transportation PPP Enabling Statutes Relevant to Localities," National Conference of State Legislatures, March 2011; and Wagner, 2011.

Note: While in Utah, prior state legislature approval is not needed to engage in a PPP contract, legislative approval is needed to establish or operate a tollway on an existing highway. Maryland PPP legislation requires legislative review of proposed PPP projects, instead of state legislative approval.

Source: http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208_transportation_istrate_puentes.pdf.

3.2.4 Failure Factors

The US has desperately needed budget in order to deliver the infrastructure to the public. This is due to the pressure of the lack of infrastructures in the nationwide as well as maintenance and renovation of them. The American's Infrastructure G.P.A is currently at D+. It has been revealed that the mass transit and the bridge across the

country as well as the railroads desperately need to be increased and upgraded. As a consequence of this problem, the US has to waken itself to alleviate infrastructure situation. It was declared that it approximately needs USD 3.6 trillion to achieve the mission by the year 2020.¹⁷⁶

Huge governmental budget needs to be spent on infrastructure investment indeed. Consequently, the US is facing difficult situation to balance the infrastructure demands and the budget required to build, maintain and renovate such infrastructure. In this case, the PPP would have been the appropriate choice for the US, in order to acquire money to response the demand of public facilities in the country. While many countries in the European countries have their statutory legislature which regulate and define the PPP, such as the United Kingdom, the US has no federal legislature regarding the PPP.¹⁷⁷

Some states used the means of increasing vehicle, sales and gas taxes to have more funding in order to deliver the infrastructure. On the other hand, the PPP has become a means for several states, as it appears there are enactments of about thirty-five bills in sixteen states for the purpose of allowing various types of PPP arrangements. Each state has its own PPP laws which are different from each other. This contributes the US's PPP law to be unsystematic and inconsistent. It is recommended to enact the federal PPP law or the uniform law of the PPP, so that all states will have to follow this rule as of enacting its own PPP law. This approach will help to alleviate the desperately insufficient infrastructure in the US.¹⁷⁸

In respect of enactment of federal PPP law, the government must provide a standard definition of the term "PPP" to declare what can be done through PPP process. Moreover, the said federal law should provide guidelines and requirements to indicate what public purpose means and also the allowed PPP arrangements. The implementation of this law would encourage the formation of PPP which would lead to the rebirth of America's infrastructure.¹⁷⁹

¹⁷⁶ Guevara *supra* note 168 at 4-5.

¹⁷⁷ *Id.* at 3.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *Id.* at 8-9.

CHAPTER 4

PUBLIC PRIVATE PARTNERSHIP IN THAILAND

Public investment is the important factor to develop national economic, especially investment in infrastructure. It would increase ability to compete in global competitiveness. Given that Thailand develops its infrastructure equivalent to other Asia-Pacific countries within ten years, the amount of 5.5 hundred billion Baht per year must be injected to government's budget. Nevertheless, only governmental investment is insufficient to deliver all needed infrastructure because of its various constraints such as loan and tax revenue which affects dramatically in public interest and financial status of the country. Therefore, the PPP ideal became a good measure in delivering public facilities.¹⁸⁰

4.1 History

The concept of the PPP has been introduced since in the era of King Rama V the Great, as his majesty allowed the private sector to invest in some of public services such as dredging the canals and constructing the railways. By doing this, the King granted the rights and obligations to the private investor to have an exclusive right to collect the user fees, while it had to pay remuneration to the government. After that, in the period of King Rama VI and VII, there were several laws enacted regarding public private partnership such as Rail and Highway Management Act B.E. 2464, Control on Trading Affecting Safety and Peace of the Public Act B.E. 2471 and Granted Concession Highways Act B.E. 2473.¹⁸¹

After the reformation from absolute monarchy to democracy, the Control on Trading Affecting Safety and Peace of the Public Act B.E. 2471 has been effective concerning the private investment in public services. This act was in force for forty years with only twice amendment (in 1942 and 1956) and then was repealed by the

¹⁸⁰ Sila, *supra* note 14 at 1.

¹⁸¹ เข็มชัย ชุติวังศ์, “ปัญหาการจัดทำสัญญาในโครงการให้เอกชนลงทุนในโครงสร้างพื้นฐานหรือบริการสาธารณะ”, เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐเอกชน เล่ม 2, 12-13 (2556). (Chemchai Chutiwong, “Issue on Drafting Public Private Partnerships in Infrastructure or Public Services”, Document of the Private Investment in State Undertaking Act: New Dimension in Public Private Partnerships Book 2, 12-13, (2013))

Order No.58 as of January 27th, 1973 which has been still effective until these days. Due to increasing demand of infrastructure facilities, the Control on Trading Affecting Safety and Peace of the Public Act B.E. 2471 was not covered all of the public facilities and it mainly related to trading. In addition, the unsystematic of governmental agencies caused inefficiency of undertaking infrastructure projects as well. These were the reasons of the government to enact the “Order No.58” to ensure the importance of the efficiency of public facilities projects.¹⁸²

The approval of any infrastructure project under the Order No. 58 depended on discretion of the relevant ministers. In this regard, the minister has a power to issue terms and conditions relating to the project. Also, he may alter such terms and conditions anytime, but the period of their effectiveness needs to be specified. Subject to this Order, there are no specification of procedure, regulations and qualifications related to concession or approval of any infrastructure projects. Thus, it can be understood that the details of those matters are solely in the relevant ministers’ discretion. In spite of the Order No.58, which is still effective, most of public services are subject to their particular law and some are not recognized as the activities needed to be controlled such as warehouse business. However, there are some of services are not subject to any particular law such as water supply and electricity generation, so that they shall be continually subject to the Order No. 58.¹⁸³

Nonetheless, private participation in public facilities was almost impossible on the ground that the government established a number of state owned enterprises to operate most of infrastructure facilities such as State Railway of Thailand, Port Authority of Thailand and telecommunication of Thailand. Moreover, there are some state owned enterprises established under the Civil and Commercial Code of Thailand in form of company limited such as Thai Airways Company Limited, Transportation Company Limited, etc.¹⁸⁴

¹⁸² Wasanthasingha, *supra* note 17 at 167-168.

¹⁸³ *Id.*

¹⁸⁴ Chutiwong, *supra* note 181 at 15.

During 1957 to 1987, the government developed a number of infrastructure following to Economic and Social Development Plan especially East Coast Land Development Project. There were many huge infrastructures in this project such as Laemchabang Port, Map Ta Phut Industrial Estate and petrochemical factories. It is undeniably that the huge amount of budget was spent in these projects so that the government had to seek for international loan. National Debt Regulation declared the debt ceiling of not more than 9 percentages of accumulated national income. This caused the government to be incapable of ongoing establishment in more facilities. As a consequence, private investment became a major sector to participate in development of public facilities.¹⁸⁵

Prior to the year 1992, any investment project of governmental agencies and state owned enterprise must be proposed to the Economic and Social Development Committee and approved by the cabinet. However, there have been some projects the governmental agencies or state-owned enterprise granted private sector to exclusively operate the projects which were not required the approval of the cabinet. Nevertheless, the approval of the authorized minister is required as specified in the Order No. 58. Since such order has no specification relating to the process, regulation or conditions in order to approve the projects; it caused corruption during the process of approval by politicians. This can be obviously seen in Don Mueng Tollway Project and Bangkok Elevated Road and Train System (BERTS). For the purpose of diminishing severe corruption situation, there was a revolution conducted by National Peace Keeping Council (NPKC) and designated Mr. Anand Panyarachun to be a prime minister. Under the government of Mr. Panyarachun, it was issued the Regulation of the Prime Minister's Office on Private Participation in State Undertaking B.E. 2534 with the objective to be a regulation concerning concession and participate in public services especially projects with value of more than one billion Baht. After that, such regulation was upgraded to be an act called the Private Participation in State Undertaking B.E. 2535.¹⁸⁶

¹⁸⁵ *Id.*

¹⁸⁶ Wasanthasingha, *supra* note 17 at 167-168.

4.2 Trends

Despite of global economic crisis, Thailand invested dramatically on infrastructure in the past few years. Thai government plans to spend in accumulated amount of USD 67 billion to develop public facilities over the coming decade. In 2011 the state's tax revenue was approximately at USD 43 billion while the investment on transportation as planed over the next ten years is projected to about USD 53 billion. The situation of tax collection in the nation is limited and the amount of national debt presented that Thailand should not use the conventional methods to deliver the infrastructure. It is shown that those important infrastructure projects valued huge amount of state's budget such as USD 6.56 billion for rail development and USD 26.7 billion for high-speed rail.¹⁸⁷

These followings are the examples of Thailand's successful PPP projects:¹⁸⁸

1. Power plant project of Electricity Generating Authority of Thailand (EGAT) with the approximately value of USD 10 billion. The type of the project was Build-Own-Operate (BOO). The private sector became electricity producer called Independence Power Producer (IPP) who produced electricity under terms and conditions stipulated by EGAT and then solely sold electricity to EGAT which was Single Buyer Enhancement (SBE). And then EGAT would sell such electricity to Metropolitan Electricity Authority (MEA) and Provincial Electricity Authority (PEA) and other directed customers of EGAT.

2. BTS Sky Train granted concession to the Bangkok Mass Transit System Public Company Limited to develop and operate sky train project with the duration of thirty years. In this project, the private company invested and then transferred ownership to Bangkok after the completion of construction while the company had the exclusive right to collect fee during the concession period.

Under the Thai Khem Kaeng Action Plan established by Mr. Aptsit Vechachiwa government in 2012, there were only PPP infrastructure project regarding logistics which was Mass Transit System Project. The value of the project was only 1.9 percentages compared to overall budget in the Thai Khem Kaeng Action Plan. The

¹⁸⁷ Kokkaew, Sunkpho and Alexander, *supra* note 16 at 144-145.

¹⁸⁸ Sila, *supra* note 14 at 6.

government invested in construction cost which was about eighty percentages and the private sector invested in rail system, trains and operation which was about twenty percentage of overall cost of project.¹⁸⁹

Under the PISU Act, the PPP committee is required to work with the State Enterprise Policy Office (the “SEPO”) to issue a five-year strategic plan to be approved by the cabinet. On May 23rd, 2015 the PPP strategic plan for the year 2015-2019 was approved and was published in the government gazette on June 28th, 2015. The current strategic plan has been separated the PPP projects into two groups which are the project have to be conducted as the PPP (opt-out) and the project the government should encourage private sector to conduct (opt-in). Overall accumulated values of the projects are estimated 1.41 billion Baht. The table below represents the opt-in and opt-out projects in the 2015-2019 strategic plan.¹⁹⁰

Table 4.1 The opt-in and opt-out projects in the 2015-2019 strategic plan.

Opt-out Project	Opt-in Project
1. Urban mass rail systems	1. Toll road between cities
2. Urban toll roads	2. Container freight terminal
3. Commercial ports	3. Common ticket system
4. High speed rail systems	4. Management of airport area
5. Telecommunication networks	5. Water quality management system
6. High speed internet systems	6. Irrigation system
	7. Solid waste disposal system
	8. Public school
	9. Public health infrastructure
	10. Management of medicines and medical devices
	11. Infrastructure for science, technology and innovation

¹⁸⁹ *Id.*

¹⁹⁰ สำนักงานคณะกรรมการนโยบายรัฐวิสาหกิจ, กระทรวงการคลัง, “แนวทางปฏิบัติและแผนยุทธศาสตร์การให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. 2558-2562”, การประชุมเชิงปฏิบัติการ, 16 ตุลาคม 2558, 10. (State Owned Enterprise, Ministry of Finance, “Guidelines and Strategic Plan to participate in Public Private Partnership 2015 – 2019, Workshop”, 16 October, 2015, 10.) http://www.otp.go.th/images/stories/news1/2558/10_october/12_21102558/PPP.pdf. (25 November 2015)

Opt-out Project	Opt-in Project
	12. digital economy
	13. Convention center
	14. Shelter for poor, elderly and disadvantaged people

Moreover, the 2015-2019 strategic plan was also specified the PPP pipeline which accumulated total value of 1.58 billion Baht where the transportation is the major sector in PPP application.¹⁹¹

4.3 Private Participation in State Undertaking Act B.E. 2535 (PPSU Act)

4.3.1 Overview

The power to approve all infrastructure projects solely falls to an authorized minister with no certain procedures and qualification of the participated public sectors resulting in a wide range of corruption. As a consequence, the PPSU Act was enacted in order to provide the guideline in concession procedure, granting any exclusive right to private sector or public and private sectors jointly investment projects.¹⁹² Due to widely corruptions in the nation, the government set up a structure to oversight the large PPP projects and to ensure the project are supported by viably financial sources and appropriately conducted in regular procedures.¹⁹³ If any projects have a value with at least 1 billion Baht, it must be complied with all process and conditions according to the PPSU Act.¹⁹⁴

The PPSU Act was stipulated in twenty-four chapters with the main details as follows:

(1) Eligible Project

The eligible projects under the PPSU Act must have these following requirements:¹⁹⁵

¹⁹¹ *Id.*

¹⁹² Aurapeepattanapong *supra* note 23 at 108.

¹⁹³ Kokkaew, Sunkpho and Alexander, *supra* note 16 at 145.

¹⁹⁴ Aurapeepattanapong, *supra* note 23 at 108.

¹⁹⁵ The Private Participation in State Undertaking B.E.2535 Section 5

- The project must be an undertaking where the government agency, state enterprise, other state agencies or local administrative organizations, either solely or collectively, have a legal obligation to perform. This is including an undertaking which requires the utilization of natural resources or properties of one or several government agencies, state enterprises, other state agencies or local administrative organization, either solely or collectively;
- The project must be participated by the private sector. This can be jointly participated by public or exclusively by private sector in the means of granting a license or concession or any kind of rights. In the case of the service providing projects which the state do not participate or invest jointly with the private sector, such service is not considered as a PPP project under the PPSU Act; and
- The value of the project must be at least one billion baht. Investment value of both public and private sectors are included in calculation of the project.

(2) Submission of project

Host agency must purpose the feasibility study of the qualified projects under the PPSU Act as the Office of the National Economic and Social Development Board prescribed to responsible ministry. Providing that any project with the value exceeding five billion baht is occurred, the qualified consultant reports must be submitted to ministry as well.

After the acquiring of the Office of the National Economic and Social Development Board or Ministry of Finance reports, the commentary is needed and sent back to the host agency within sixty days. If agreeing with the project, it shall submit the purpose to the cabinet.¹⁹⁶

(3) Project selection and implementation

As of the cabinet approved the project, the host agency shall process by establishing a committee who has these following duties:

¹⁹⁶ The Private Participation in State Undertaking B.E.2535 Section 6-9

- Consider and approve draft of invitation of private participation or the term of reference regarding the project;
- Determine the bid security and the performance security;
- Select a private individual to participate; and
- Consider other matters related to the project as appropriate.

The committee has the responsibility to approve the invitation of private participation or the term of reference. The process of selection generally uses the method of bidding. Provided that the committees consider the bidding method inappropriate, they can report to the National Economic and Social Development Board and the Ministry of Finance. In the case that both organizations agree with the committee, the recommended method shall be conducted. On the contrary, the bidding method shall be conducted, if only one organization disagrees. Given that both organizations disagree, the issue shall be submitted for approval of the cabinet.

Furthermore, after finished the selection process, the draft of contract must be examined by the Office of the Attorney-General prior to sign the contract.¹⁹⁷

(4) Project supervision and monitoring

After signing the contract, the host agency must establish a committee as a coordinate of the project and have these following duties:

- Monitor and supervise the implementation as provided in the agreement; and
- Report the result of implementation, progress, problems and solutions to the Responsible Minister for information.¹⁹⁸

4.3.2 Problems on the Private Participation in State Undertaking Act B.E. 2535 Act

After the PPSU Act has been effectively used in Thailand for several years, it appears that it turns to be an obstacle to develop public private partnership project in

¹⁹⁷ The Private Participation in State Undertaking B.E.2535 Section 12-21

¹⁹⁸ The Private Participation in State Undertaking B.E.2535 Section 22-24

the nation. As a consequence, many of the PPP projects have not been supported. The below identified the problems of the PPSU Act.

1. Submission and selection process under the PPSU Act takes a long duration to complete. This includes the process to negotiate and examine the contract. This can be illustrated in the Industrial Waste Incinerator Project in Bang Pu Industrial Estate was taken around three years from the feasibility study process to contract signing.¹⁹⁹

2. There are various private sectors interesting to participate on the ground that they are large value of projects regarding the PPP and consequently political and commercial benefits are usually involved with these projects. As a result, there is a lot of complaint submitted to the National Anti-Corruption Commission (NACC) or the Administrative Court to grant the order to cease the project, which would take longer duration of the project. Due to many corruption issues, some PPP projects were cancelled or unable to continue proceeding.²⁰⁰

3. Several provisions in the PPSU act are ambiguous and frequently practically contribute the problems in each process.

4.3.3 Problems on the scope of the Participation on State Undertaking

4.3.3.1 Calculation of the Project

The calculation of the value of the project is one of the significant problems associated with the PPSU Act. The law stipulated the project under the PPSU Act shall be exceeding one billion Baht with no guideline and method to calculate the value of the project. Especially in the project which the state grants the concession or license to the private sector, it was frequently been argued that whether the value of the project should include investment cost paid by the private sector.²⁰¹ However, this problem has been solved after the PISU Act is effective.

¹⁹⁹ Chutiwong, *supra* note 181 at 22.

²⁰⁰ *Id.*

²⁰¹ จารุวรรณ เสงฆะระกูล, "แนวทางการใช้บังคับพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535". เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐเอกชน เล่ม 2, 82 (2556). (Jarawan Hengtrakoon, "Guidelines on Private Participation in State

4.3.3.2 Scope of the State Undertaking

There has been an argument whether the particular project was considered as State Undertaking or not.²⁰² The Act did not describe the word “the utilization of asset” that what kinds of utilization of the asset should fall under this Act. The law should clarify the utilization of the asset under this section.²⁰³

As a consequence of various complicated cases, many government agencies concerned about the unconformity of the PPSU Act which would cause substantial effect to the parties. The Council of State has a duty to render legal opinion to the State agencies for the purpose of clarifying rules in performing official duties within the scope of legitimacy.²⁰⁴ Therefore, there are a number of cases sent to the Council of State, in order to construe that whether a particular action was subject to the PPSU Act. The below statements are the example and analysis of commentaries of the Council of State regarding the State Undertaking.

(1) The examples of the commentaries of the Council of State

(1.1) The activity the Council of State considered as the State Undertaking

(1.1.1) An undertaking which a government agency, state enterprise, other state agencies or local administrative organization have a legal obligation to perform.

(i) Commentary No. 433/2536

According to the Royal Decree of Establishment of Dairy Farming Promotion Organization of Thailand B.E. 2514, the distribution of milk is an activity of Dairy

Undertaking Act B.E. 2535”, Document of the Private Investment in State Undertaking Act: New Dimension in Public Private Partnerships Book 2, 83, (2013)).

²⁰² The Private Participation in State Undertaking Act B.E. 2535 Section 4 under was stipulated that “State undertaking” means an undertaking in which anyone or more of the Government agencies, State enterprises, State agencies or local administration have the powers and duties to engage under the law, or an undertaking which requires the utilization of natural resources or assets of anyone or more of State agencies, State enterprises, State agencies or local administration.

²⁰³ Hengtrakoon *supra* note 201 at 82.

²⁰⁴ Office of the Council of State, Philosophy, Mandate and Organization Chart, [http://www.krisdika.go.th/wps/portal/general_en!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A2czQ0cTQ89ApyAnA0_EIOAQGdXAwM_Y30_j_zcVP2CbEdFAFGmRSc!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfTjBDNjFBNDfJUUSQjBJT1QwUFFDRTAwVjA!/. \(6 June 2016\).](http://www.krisdika.go.th/wps/portal/general_en!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A2czQ0cTQ89ApyAnA0_EIOAQGdXAwM_Y30_j_zcVP2CbEdFAFGmRSc!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfTjBDNjFBNDfJUUSQjBJT1QwUFFDRTAwVjA!/)

Farming Promotion Organization of Thailand (องค์การส่งเสริมกิจการโคนมแห่งประเทศไทย) specified in section 7 paragraph 1 (4) and (5). Therefore, such activity is deemed State Undertaking

(ii) Commentary No. 587/2538

The Treasury Department (กรมธนารักษ์) has a duty to utilize the government surplus land (ที่ราชพัสดุ) by mean of renting following to the Government Surplus Land Act B.E. 2518 combined with ministerial rule (B.E. 2519) article 16 (2), so that renting the government surplus land to private sectors is the State Undertaking.

(iii) Commentary No.88/2541

Petroleum Authority of Thailand (PTT) Act B.E. 2521 indicated that the PTT can operate Petroleum business which includes transporting petroleum through pipeline. Moreover, Petroleum Authority of Thailand Act B.E. 2521 is also imposed the PTT the power to specify bounder of petroleum pipeline and expropriate the land necessary to construct the petroleum pipeline. Thus, due to acquire state's power to process, such transporting of petroleum is the State Undertaking.

(iv) Commentary No.688/2541

According to section 18 (3) under the Public Health Act B.E. 2535 (พระราชบัญญัติการสาธารณสุข พ.ศ. 2535), waste management in local area is a duty of local government. In this case, it is the Bangkok Metropolitan Administration (BMA) (กรุงเทพมหานคร (องค์การปกครองส่วนท้องถิ่น)). Despite the allowance of the private sector to operate such waste management, the BMA still has responsibility to ensure the efficiency of such private contractor in waste management. Since the waste management is under the BMA's duty as specified in the Public Health Act, it is considered as the State Undertaking under the PPSU Act.

(v) Commentary No.689/2541

Telegraph and telephone is the monopolized activity by the government as specified in section 5 (3) of the Telegraph and Telephone Act B.E. 2477. After the privatization of Telephone Authority Organization of Thailand (TOT) (องค์การโทรศัพท์

แห่งประเทศไทย), it was transformed to be a TOT public company limited owned by the government. It, consequently, is deemed as a state owned enterprise under section 5 (6) the PPSU Act.

(vi) Commentary No.785/2541

In respect of railway transportation, it is an activity which is responsibility of State Railway of Thailand (SRT) (การรถไฟแห่งประเทศไทย) as specified in the State Railway of Thailand Act B.E. 2494. In addition, such activity also utilizes railway and other assets which are belong to state's property to process, so that railway transportation is a State Undertaking under the PPSU Act.

(vii) Commentary No.102/2542

The action conducted by the Electricity Generating Authority of Thailand (EGAT) (การไฟฟ้าฝ่ายผลิตแห่งประเทศไทย) is considered as the State Undertaking of section 5 in the PPSU Act on the ground that such action is the activity of which EGAT is required to do under the EGAT Act B.E. 2511.

(viii) Commentary No.239/2542

Renting the government surplus land (ที่ราชพัสดุ) is State Undertaking as stipulated in the PPSU Act, since it is the activity in which the Treasury Department (กรมธนารักษ์) has a duty to follow according to the Government Surplus Land Act B.E. 2518 and related ministerial regulations.

(ix) Commentary No.570/2542

Issuing the lottery is the legally duty of the Government Lottery Office (the "GLO") (สำนักงานสลากกินแบ่งรัฐบาล) as specified in section 5 (3) under the GLO Act B.E. 2487. Consequently, when the GLO allows the private sector to issue and distribute the lottery on behalf of the GLO, such activities is the State Undertaking under the PPSU Act.

(x) Commentary No.392/2543

Warehouse business, airline catering, ground equipment service and hydrant fueling system are included in the meaning of airport activities under section 3 of the

Airport Authority of Thailand (AOT) Act B.E. 2522. The New Bangkok International Airport Company Limited (NBIA) (บริษัท ท่าอากาศยานสากลกรุงเทพแห่งใหม่ จำกัด) has been an affiliate company of AOT which has established under section 8 (10 bis) by the cabinet's resolution to operate businesses relating to airport. Its memorandum of association (MOA) was indicated that the company shall operate and support airport-related-businesses. Such activities of the NBIA were the State Undertaking, since it was in the meaning of airport activities under the AOT Act.

(xi) Commentary No.324/2544

The Treasury Department allowed private sector to lease the government surplus land (ที่ราชพัสดุ) in the Government Surplus Land Management Projects during 1992 and 1994. Each of projects was conducted in accordance with the Government Surplus Land Act B.E. 2518 and related to ministerial regulations, so that these projects are considered as the State Undertaking under the PPSU Act.

(1.1.2) An undertaking which requires the utilization of natural resources

(i) Commentary No.291/2550

Telephone Authority of Thailand (TOT) (องค์การโทรศัพท์แห่งประเทศไทย) has its duty as stipulated in section 6 of the TOT Act B.E. 2497 and is necessary to utilize radio frequency, the national natural resource and property of the TOT, which is permitted to use according to the TOT Act B.E. 2497. Therefore, permitting the private to invest in a project utilizing such frequency is a State Undertaking in the PPSU Act.

(ii) Commentary No.293/2550

Cellular radio frequency service provider is a responsibility of the Communication Authority of Thailand (CAT) (การสื่อสารแห่งประเทศไทย) as specified in section 7 and 10 of the CAT Act B.E. 2519 which has been effective on the date entering into the contract of cellular radio frequency service between CAT and WCS Company Limited. This contract has required to utilize the radio frequency which is the national natural resource and property. As a result, as the CAT allowed WCS Company Limited to provide cellular radio frequency service in range transferred from TAC Public Company Limited in specific duration and under particular conditions according to the

CAT undertaking and remunerate fee to the CAT, this is considered as the State Undertaking under the PPSU Act.

(1.1.3) An undertaking which requires properties of government agencies, state enterprises, other state agencies or local administrative organization

(i) Commentary No.578/2535

The word “property” has not been defined in the PPSU Act, so that the meaning in the Civil and Commercial Code should be applied. According to the section 138 CCC, it is stipulated that “*Property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated.*” Radio frequency is the signal the state acquired according to the Telecommunication Treaty. Anyone who wants to use such signal shall have license and subject to the Telecommunication Regulation. Consequently, the radio frequency is deemed as property of the state. Since the radio frequency is an incorporeal object, susceptible of having a value and of being appropriated, so that establishing a radio and television station with UHF system is an activity which must utilize the property of the state. Thus, such action is the State Undertaking.

(ii) Commentary No.127/2542

According to section 6 under the Metropolitan Waterworks Authority (MWA) (การประปานครหลวง) Act B.E. 2510, it was stipulated that the MWA has responsibility to explore and supply raw water to use in waterworks. Furthermore, in part 3 of the act, the MWA has the power to expropriate land necessary to support water transportation and supply system. In fact, the land has been indicated to be expropriated, in order to be a place for water transporting canal. Such land is the material for the construction of water transporting canal. Therefore, construction of such canal is the State Undertaking.

(iii) Commentary No. 130/2543

Traffic right for aircraft is deemed as the state’s assets. When the Thai Airways Public Company Limited (บริษัท การบินไทย จำกัด (มหาชน)) was permitted to operate air navigation which needs to utilize the traffic right (สิทธิการบิน) for aircraft, it was deemed that the Thai Airways Public Company Limited was conducting the State Undertaking.

(iv) Commentary No.222/2542

The right to provide international air service (สิทธิในการดำเนินกิจการเดินอากาศระหว่างประเทศ) in which Thailand acquired under the Convention on International Civil Aviation and related bilateral agreement shall be a property of the state.

(v) Commentary No.67/2545

The online commercial registration system would be utilized for commercial data processes and undertaken by the Department of Business Development (DBD) (กรมพัฒนาธุรกิจการค้า) who has a duty to register variety kinds of businesses according to section 1026 of the CCC and also provide such data to the public. As a consequence, the project to establish such system whether the DBD jointly invested with private sector or private sector wholly invested shall be the State Undertaking under the PPSU Act.

(vi) Commentary No.31/2547

As the construction of all three small hydro power plants was on the government surplus land around the dam owned by the Royal Irrigation Department (กรมชลประทาน), these projects shall be a State Undertaking.

(vii) Commentary No.135/2548

Establishing a joint venture company to provide delivery service, the company was required the Air Operator License (ใบอนุญาตประกอบกิจการสำขายในการเดินอากาศ) according to article 3(4), 4 and 9 of the Order No.58. Thailand had acquired the right to provide international air service (สิทธิในการดำเนินกิจการเดินอากาศระหว่างประเทศ) under the Convention on International Civil Aviation and related bilateral agreement which was considered as utilization of state's property. Thus, this activity was the State Undertaking.

(1.2) The activity the Council of State not considered as the State Undertaking

(i) Commentary No. 438/22540

The private party acquired the raw water and used to produce the water tap by means of purchasing from the owner, and then the Provincial Waterworks Authority (การประปาส่วนภูมิภาค) bought such water from the private party subsequently. There was no jointly investment between the state and private sector, so that this was not the State Undertaking under the PPSU Act.

(ii) Commentary No.288/2541

Gas Separation Plant project by PTT Public Limited Company (PTT) was established in order to add value of liquid petroleum gas (LPG) and natural gasoline (NGL) transported from the Trans-Thailand-Malaysia (TTM) project. However, there was no law said the gas separation was a duty of a particular governmental bodies and this project was not required natural resources and government's property. Therefore, such project was not the State Undertaking.

(iii) Commentary No. 408/2541

The Council of State stated that not only the activity that was specified as the objectives of a particular governmental agency in its established law needs to follow the PPSU Act, but also the other related laws. However, such objectives are not including of which indicated in the memorandum of association of governmental agencies established in the forms of a company limited and public company limited.

Rattanasin Bank (state owned enterprise) intended to sell its shares to the private party. The Council of State was of the opinion that since the business of the Rattanasin Bank was not a specific business required to do by any law and was not utilized natural resources. In addition, utilization of capital of the Bank was not the utilization of state's property. The state's property in this context means the property which is the core asset in respect of operating the organization's business such as the core asset of the Expressway Authority of Thailand (EXAT) (การทางพิเศษแห่งประเทศไทย) is toll way. This does not include the general asset such as building, office equipment, cash or deposit in bank account.

Furthermore, in consideration of the utilization of state's property, the private sector who is a separated person from Rattanasin Bank must utilize the property

directly. On the other hand, increasing capital of the Bank by means of issuing the new shares and offering such shares exclusively to only one person did not lead the Bank to be another juristic person apart from itself. In this case, there was only the new shareholder investing in the Bank and shared profits and liability. The Council of State commented that this was the general business of the Bank, thus, it was not the State Undertaking.

(iv) Commentary No. 78/2546

The Thai Olefin Public Company Limited was a state owned enterprise operating petrochemical industry and other related products. This can be seen that its business was the general petrochemical business. There was no law required it to operate such business. Moreover, the material used in this business was Naphtha, LPG and Ethane which was obviously not natural resource and state's property. As a consequence, the Council of State had an opinion that selling the new subscribed ordinary shares of the company was not the State Undertaking.

(v) Commentary No. 115/2546

Although the Airport Authority of Thailand (AOT) (การท่าอากาศยานแห่งประเทศไทย) was transformed to be the Airport Authority of Thailand Public Company Limited (บริษัท ท่าอากาศยานไทย จำกัด (มหาชน)), it continued to have power, rights and benefits and was protected under the law as same as the AOT. This included the power to operate the airport activities in the Suvarnabhumi Airport according to Ministerial Regulation no. 11 (B.E. 2536) issued following to the Airport Authority of Thailand Act B.E. 2522. The Council of State was of the opinion that Even though the activities supporting the airport business such as airline catering, maintenance and warehouse service was the activities of which the AOT had power to operate according to the law, it did not prohibit other airline company to conduct as such to its airline and customers. Therefore, the AOT allowing the private to operate such businesses in the area of the Suvarnabhumi Airport was not the State Undertaking.

(vi) Commentary No.538/2549

The Industrial Estate Authority of Thailand (IEAT) (การนิคมอุตสาหกรรมแห่งประเทศไทย) Act B.E. 2522 and the amendment imposed the right to be a shareholder in any juristic person to do its objectives-related-businesses.

The IEAT purchased the shares of Leam Chabang Industry Company Limited and Sime LCP Power Company Limited, both of which operate electricity generation as an industrial businessman in the area of the IEAT. However this was not the State Undertaking, because it was not the activity the IEAT was required by law to conduct.

(2) The Analysis of the commentaries of the Council of State

(2.1) The Council of State looks up to the objectives of the organization imposed in the act establishing such organization. Provided that the objectives cover the issued activity, the Council of State will determine it as the State Undertaking. Moreover, not only activity that was specified as the objectives of a particular governmental agency in its established law needs to follow the PPSU Act, but also the other related laws. However, such objectives are not including of which indicated in the memorandum of association of governmental agencies established in the forms of company limited and public company limited.

These following activities are considered as the State Undertaking:

- (i) Renting the government surplus land by the Treasury Department with unconcern whether the private party is required to build the new building on such land and transfer the ownership to the Treasury Department or not;
- (ii) Allowing the private in the state's convention center management project;
- (iii) Assigning the private to be an agent of the GLO to issue and distribute the lottery to the public; and
- (iv) Allowing the private to operate warehouse, airline catering and ground equipment service and hydrant fueling system.

It can be obviously seen that the Council of State does not concern whether such activities are public service or not. This may be due to the ambiguous and wide definition of the State Undertaking.

(2.2) The Council of State had opinion regarding state's property as follows:

(i) The Council of State defined the Properties in this definition as same as the meaning under section 138 of the Civil and Commercial Code²⁰⁵. The Council of State's interpretation of the meaning of state's property is rather too wide (Dr. Aurapeepattanapong). This can be seen in the Council of State's Commentary no. 587/2538 where the Treasury Department renting private sector the land was considered as the State Undertaking. Moreover, in respect of the property of the government in the definition of State Undertaking, the Council of State was of the opinion that the electronic commercial data in the system of Ministry of Commerce was the property of the government (the Commentary no. 67/2545). Also, in the Commentary no.222/2544 and 135/2548, the traffic right which Thailand acquired according to the Convention on International Civil Aviation and related bilateral treaty was considered as state's property as well.²⁰⁶

(ii) The Property in which a governmental body purchased from foreign country is not considered as natural resources and state's property under the PPSU Act. This can be seen in the Commentary No. 288/2541 where the LPG and NGL should be considered as natural resources or state's asset, but the Council of State has the opposite opinion. Since this gas separation plant can be run because of the LPG and NGL acquired from the government to government (G2G) project where the PTT who is a state owned enterprise invested in this project fifty percentages. In addition, the PTT must spend its budget in construction of the gas separation plant. This project should be deemed as utilizing the state's property which should turn in to be a State Undertaking.

²⁰⁵ Section 138 under the Civil and Commercial Code was stipulated that "Property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated."

²⁰⁶ Aurapeepattanapong *supra* note 23 at 107-108.

(iii) The state's property in context of the PPSU Act means the property which is the core asset in respect of operating the organization's business such as the core asset of the Expressway Authority of Thailand (EXAT) is toll way. This does not include the general asset such as building, office equipment, cash or deposit in bank account.

4.3.3.3 Scope of the Participation

The word "Participation" obviously has the definition differently from the general meaning, as it did not mean to cover only the jointly investment where public and private pooled assets to a project together. However, it included granting an exclusive right to private sector, granting license and concession. Therefore, in the case that the state granted a particular exclusive right to conduct a specific act under its authorization such as undertaking on high value computer system in its organization, should it be recognized as the PPP project having to comply with the PPSU Act? These problems has been occurred for a long time since the effectiveness of the PPSU Act and led to burden of the Council of State to construe and grant the commentaries to a number of cases.²⁰⁷ On account of the mentioned duty of the Council of State, there are various cases sent to the Council of State to be construed if a particular action is considered as the participation which might be subject to the PPSU Act. The examples and analysis of the Council of State concerning the Participation are described below.

(1) The examples of the commentaries of the Council of State

(1.1) The activity the Council of State considered as the Participation

(i) Commentary No.688/2541

Bangkok Metropolitan Administration (BMA) (กรุงเทพมหานคร (องค์การปกครองส่วนท้องถิ่น)) assigned the private party to construct and operate waste management system. In this project, the BMA had no return or responsibility in respect of this project. The Council of State was of the opinion that whether the private party jointly

²⁰⁷ *Id.*

or wholly invests in such project, so that in this case it was an Participation in the State Undertaking.

(ii) Commentary No.102/2542

Electricity Generating Authority of Thailand (EGAT) (การไฟฟ้าฝ่ายผลิตแห่งประเทศไทย) and Ratchaburi Holding Company Limited, a company with hundred percent of shares owned by EGAT, intended to establish the new affiliate companies with an objective to purchase a power plant from EGAT and then generate and sell electricity to EGAT. EGAT was about to sell fifty one percent of its shares in Ratchaburi Holding Company Limited to its private business partners. This was the Participation under the PPSU Act.

(iii) Commentary No. 130/2543

The Ministry of Finance selling its shares in Thai Airway International Public Company Limited, a state owned enterprise, to private sector was considered as the Participation in State Undertaking under the PPSU Act. This was due to allowing the private party to have a role in managing the company.

(iv) Commentary No. 392/2543

Airport Authority of Thailand Public Company Limited (AOT) (บริษัท ท่าอากาศยานไทย จำกัด (มหาชน)) allowed private sector to operate businesses in airport area which was the government surplus land for thirty years and can be renewed twice, ten years each. In this project, private party must deliver income to the AOT as specified in the agreement. This was long term agreement and these businesses cannot be done without permission of the AOT. In addition, the AOT had duty and liability to undertake those businesses concerning investment, management and operation throughout the term of agreement. Therefore, this was the Participation under the PPSU Act.

(v) Commentary No.489/2546

A private party solely invested in a project acquiring the right to utilize the cellular radio frequency owned by the Telecommunication Authority of Thailand. This shall be the Participation under the PPSU Act.

(vi) Commentary No.31/2547

The Electricity Generating Authority of Thailand (EGAT) (การไฟฟ้าฝ่ายผลิตแห่งประเทศไทย) holding forty nine percent of shares in Ratchaburi Energy Company Limited was considered as the Participation under the PPSU Act.

(vii) Commentary No.135/2548

Establishment of joint venture company among Thai Airway International Public Company Limited, other state owned enterprise and private parties who held at least fifty one percent of all shares in the company to operate international goods carriage service was deemed as the Participation under the PPSU Act.

(viii) Commentary No.291/2550

Telephone Authority of Thailand (TOT) (องค์การโทรศัพท์แห่งประเทศไทย) had a duty to provide cellular radio frequency for Advance Info Service Company Limited, in order that the company would deliver public the cellular service for the period of twenty years. This project, the company had responsibility to invest in all equipment and places to operate Mobile Telephone Exchange with Base Stations and Microwave Links system and pay the fee to the TOT. This can be seen that the TOT designated such company by licensing, granting concession or any kind of right, so that this was the Participation under the PPSU Act.

(1.2) The activity the Council of State not considered as the Participation

(i) Commentary No.749/2535

The Communication Authority of Thailand (CAT) (การสื่อสารแห่งประเทศไทย) spent its own budget, in order to process construction of underwater fiber optic from Thailand to Malaysia. It only hired the private contractor to construct such fiber optic. After the completion of the construction, the CAT would operate such fiber optic by itself. In this case, it can be seen that the CAT solely invested in such State Undertaking without investment from the private party, so that this was not the Participation under the PPSU Act.

(ii) Commentary No.15/2536

The Petroleum Authority of Thailand (PTT) jointly investing in lubricant production with the private party was not the Participation under the PPSU Act. The Council of State was of the opinion that the Participation under the PPSU Act regarding the project initiated by the governmental agencies, but in this case, the private party did.

(iii) Commentary No.61/2543

Government Pharmaceutical Organization (GPO) (องค์การเภสัชกรรม) had a power to jointly invest with others, in order to benefits its core business according to the GPO Act B.E. 2509. The GPO intended to invest in manufacturing of medical device with the Carlyle Capital Investment Corporation (CCIC) and Omikron Group. This was not the Participation under the PPSU Act on the ground that the private parties were that one who initiated the project, not the GPO.

(iv) Commentary No.472/2544

Mass Rapid Transit Authority of Thailand (MRT) (การรถไฟฟ้าขนส่งมวลชนแห่งประเทศไทย) was about to purchase the shares in Bangkok Expressway and Metro Public Company Limited according to Metropolitan Rapid Transit Chaloem Ratchamongkhon Line Project (โครงการระบบรถไฟฟ้ามหานคร สายเฉลิมรัชมงคล) Agreement clause 2.3. Pursuant to the MRT Act B.E. 2543, the MRT has a power to hold shares in company limited or public company limited to operate metro-system-related-businesses. As a result, this case was not the Participation under the PPSU Act.

(v) Commentary No.577/2544

The Metropolitan Waterworks Authority of Thailand (MWA) (การประปานครหลวง) hired a private party to fix the water pipeline in order to decrease the consumption of tap water. In calculation of the payment, there were an additional payments other than the general payment which based on the quantity of tap water was saved more than the goal indicated by the MWA. Moreover, the private contractor also brought labors, materials and equipment by itself. This kind of contract was the Contract for Work according to section 587 under the CCC. Consequently, this was not granting

permission, concession and any kind of right, so that it was not the Participation under the PPSU Act.

(vi) Commentary No. 115/2546

The private party operated airline catering at Suvarnabhumi Airport, and the Airport Authority of Thailand Public Company Limited (AOT) (บริษัท ท่าอากาศยานไทย จำกัด (มหาชน)) did not involve in this project. The AOT only granted permission to the private party to deliver food and beverage to other airlines in the area of airport. In addition, the contract was between the private party and the airlines. Therefore, this case was not the Participation under the PPSU Act.

(2) Analysis the commentaries of the Council of State

(2.1) Selling shares of state owned enterprises whether selling the existing ordinary shares or subscribing the new shares is not the Participation under the PPSU Act (Commentary No. 408/2541, Commentary No.102/2542 and Commentary No. 78/2546). In contrast, according to Commentary No.130/2543, the Council of State was of the opinion that the Ministry of Finance sold its shares in Thai Airway International Public Company Limited was considered as the Participation in State Undertaking under the PPSU Act.

(2.2) When a governmental agency purchases or holds shares in private company, it is considered as the Participation under the PPSU Act (Commentary No.31/2547 and Commentary No.135/2548). On the contrary, the Council of State had the opinion in Commentary No.472/2544 that if there is an agreement imposed a governmental agency to purchase shares in a private company when holding shares by such is not the Participation under the PPSU Act.

(2.3) The contract of works under the Civil and Commercial Code section 587 is not the Participation under the PPSU Act (Commentary No.749/2535 and Commentary No.577/2544).

(2.4) The Participation under the PPSU Act includes only the project initiated by the governmental agencies (Commentary No.15/2536 and Commentary No.61/2543).

In conclusion, the commentaries of the Council of State was construed the scope of public private partnership under the PPSU act widely and complicated, this would be an obstacle for the private investors intending to invest in the PPP project. Moreover, the Council of State is the governmental organization with the objectives to resolve the problem in governmental process, but it is not considered as a law. According to Cabinet's resolution dated 2 March 1939 imposed that all public sectors shall comply with the Council of State's commentary.²⁰⁸ It can be said that the Council of State is not an administrative order by itself. Due to aforesaid Cabinet's resolution, the governmental organizations have to comply with the Council of State's commentary. However, it is not binding the private sector, so the private can argue against the Council of State's commentary.

Additionally, there was a case brought to the court to decide if a particular case failed to the PPSU Act. Reference made to the Supreme Court case no.2503/2552, where Jago Company Limited (plaintiff) filed a suit against the GLO (defendant) to request the court for enforcement of the arbitration award. In the light of this, the Jago Company Limited requested the court to enforce the GLO to pay damages in amount of 2,508,593,718 Baht due to default of contract since January 4, 2000. The trial court and court of appeal adjudged to enforce the arbitration award for the Jago Company Limited. The GLO, subsequently, appealed to the Supreme Court.²⁰⁹ The Court held that contract between the plaintiff and the defendant agreed to designate the plaintiff to distribute and reward the lottery on behalf of the defendant, so that it was the Participation as stipulated in section 5 of the PPSU Act. Therefore, the contract between the plaintiff and defendant shall comply with the PPSU Act. The parties failed to comply according to the PPSU Act, this contract shall not bound the parties. Thus, the

²⁰⁸ นพดล เภรีฤกษ์, การให้ความเห็นทางกฎหมาย, <http://www.lawreform.go.th/lawreform/images/th/content/th/33/6497.doc>. (Noppadon Paereererk, **Issuance of Legal Commentary**, <http://www.lawreform.go.th/lawreform/images/th/content/th/33/6497.doc>.)

²⁰⁹ ผู้จัดการรายวัน, "จโก้"แพ้คดีค่าโง่ กองสลากรอด2.5พันล., <http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9530000026974>, 24 กุมภาพันธ์ 2553, (6 มิถุนายน 2559) (Daily Manager, "*Jago Lose the Case of damages, the GLO Won and No Need to Pay 2.5 Million Baht*", <http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9530000026974>, 24 February 2010, (6 June 2016))

arbitration award cannot be enforced.²¹⁰ It should be noted that the distribution and reward the lottery is not a public service.

In the light of Supreme Court Judgment, its enforceability differs from the Council of State's commentary, as it is binding all the parties in the case which included the private party as specified in section 142 of the Civil and Procedure Code B.E.2477.

4.3.4 The effects of non-compliance with the Private Participation in State Undertaking Act B.E. 2535

The Council of State has commented that given that amendment of the PPP agreement did not comply with the process pursuant to the PPSU Act, such agreement shall not be binding to the governmental agency. However, the agreement was still effective as long as no revocation, subsequent condition or other causes. The Cabinet has the power to revoke such agreement. To determinate the revocation of the agreement, the Cabinet should concern public interest. In case of no revocation, the Cabinet should process according to section 13 and 21 of the PPSU Act. (The Commentary no. 570/2542, 291/2550, 292/2550, 293/2550 and 294/2550)²¹¹

According to the Supreme Administrative Court Judgment no.Ao 349/2549 between the Office of Prime Minister (OPM) and the ITV Public Company Limited (ITV), the OPM and the ITV entered into a contract to operate radio and television station UHF system. The parties has dispute and the Arbitration awarded the OPM to compensate damages to the ITV. The OPM requested the Administrative Court to repeal such awards and the Supreme Administrative Court held that the project committees failed to deliver the amended contract for the Cabinet's approval as stipulated in the PPSU Act, so that such contract shall not be legally binding the government. Therefore, the court was unable to enforce the state following to arbitration award.²¹²

Moreover, the Supreme Court also adjudged that an agreement had been executed against the PPUS Act resulting in a clause regarding arbitration procedure

²¹⁰ Supreme Court Judgment no.2503/2552

²¹¹ *Id.*

²¹² Supreme Administrative Court Judgment no.Ao 349/2549

shall be invalid. Thus, the court shall be unable to enforce the arbitration award according to such invalid clause since it was against section 24 of Arbitration Act B.E. 2545.²¹³

This can be concluded that when any PPP agreement or project failed to comply with the PPSU Act, it would affect the invalidation of such agreement to public party. This would impact substantially to the legal obligations of the public party against private party. In the perception of the private investor, since the nature of the PPP project costs high value, this principle would be a significant risk to be considered as a pivotal point prior making a decision.

4.4 Private Investment in State Undertaking Act B.E. 2556

4.4.1 The reason to enact the Private Investment in State Undertaking Act B.E. 2556 Act

Due to these following reasons, the new PPP law named the PISU Act has been enacted and effective since April 3rd, 2013.²¹⁴

(1) The PPSU Act contains various ambiguous provisions which lead to many problems in respect of enforcing and construing the law. Consequently, the government wants to clarify the rules, regulations and procedure to contribute reliability towards private investment in public service. This is to ensure the transparency and coherent to public policy and fiscal discipline.

(2) It is a lack of significant necessarily procedure and regulations, especially, the process of amendment agreement.

(3) The demand of infrastructure and public services in Thailand is increasing. As a result, the government is responsible to reflect the needs of the public. By doing so, the immense capital have to be invested while the state is unable to afford that much capital.

(4) Allowing private participation in public service project would save cost and mitigate the risks of the government as most of them are the high value project.

²¹³ *Id.*

²¹⁴ Note of the Private Investment in State Undertaking Act B.E. 2556.

(5) The PPP project can alleviate the efficiency and capacity of the country in global economic competitiveness and allows liberalization of trade and investment with other countries.

(6) The government has intention to initiate an organization which has a duty to undertake and support public and private investment.

According to the above mentioned, the private participation is an important resolution to resolve the problem. Therefore, having a certain and efficient PPP law could persuade the private investor to invest in the public service project. As a result, this would benefit substantially to the nationwide.

4.4.2 Overview

The PISU Act has been effective since the 4th April of 2013. It contains seventy-two sections. The followings are main principles in the PISU Act.

1. Strategic Plan

The PISU Act imposes the government to have the public private investment strategic plan which indicated the five-year plan on PPP projects. This plan must follow to the Constitution and Economic and Social Development Plan. In order to establish this plan, it is required public hearing. This plan is binding all relating governmental bodies to purpose and initiate projects coherent to the strategic plan. It is a tool of the cabinet and PPP committees to evaluate each project.²¹⁵

2. Private Investment in State Undertakings Policy Committee (the “PPP Committees”)

Under PISU Act, there must be an appointment of the PPP Committees whom the Prime Minister is the president and the Minister of Finance is the vice president with fifteen other committees. The PPP Committees have responsibilities to arrange the strategic plan and purpose to the cabinet as well as approve the PPP project. Moreover, the committees have a duty to issue the rules and regulations regarding the PPP and to

²¹⁵ The Private Investment in State Undertaking Act B.E. 2556 Act chapter 3

consider legal issues relating to PPP projects. In addition, the PPP Committees have power to indicate qualification of prohibited private sectors or advisors.²¹⁶

3. State Enterprise Policy Office (SEPO)

The PISU Act is designated the SEPO to be a secretary of the PPP Committees and have responsibilities as follows:²¹⁷

- (1) To formulate a draft Strategic Plan for the Committee's approval
- (2) To conduct feasibility study and submit opinions to the Committees for consideration and approval
- (3) To prepare draft monetary or fiscal measures or approaches for supporting private investments in State Undertaking for submission to the Committee;
- (4) To submit opinions to the Committees in the case of a non-application of the selection by bidding process;
- (5) To prepare draft rules and procedures for private investment in State Undertaking in projects having a lesser value than the amount stated in the Act for submission to the Committees;
- (6) To engage in technical collaboration, research and development with state agencies and both domestic and foreign private agencies, which performs duties pertaining to private investment in State Undertaking and to arrange for the development of personnel competencies in State Agencies to ensure knowledge and expertise for the efficient compliance of this Act;
- (7) To study, research and prepare a database relating to private investment in state enterprises for dissemination, provision of education and advice to State Agencies and the general public in order to promote and build an understanding of private investments in State Undertaking;
- (8) To consider and determine approaches relating to the implementation of this Act;
- (9) To report problems and obstacles arising from the implementation of this Act to the Committee; and

²¹⁶ The Private Investment in State Undertaking Act B.E. 2556 Act chapter 2

²¹⁷ The Private Investment in State Undertaking Act B.E. 2556 Act section 18

(10) To perform other duties provided by this Act or other law as the powers and duties of the SEPO or as entrusted by the Cabinet, Ministers and Committees.

In this manner, there is the Promotion of Private Investment in State Affairs Division (the “PPISA”) in the SEPO who has responsibilities regarding all matters relating to the PPP as specified in Article 10 under the Ministerial Regulation concerning Department Separation of the SEPO, Ministry of Finance B.E. 2557. It can be seen that the duty of the PPISA in such Ministerial Regulation are quiet similar to the responsibilities of the SEPO under the PISU Act. Therefore, it is assumed that the PPISA will take all responsibilities of the SEPO as specified in section 18 of the PISU Act.

4. Evaluation of PPP project

Since the PPSU Act was not imposed the secondary rule regarding evaluation of PPP project, so that the governmental bodies avoid the PPP processes by separating projects in order to decrease value of each project. As a result, the PISU Act was stipulated the guideline to assess the value of projects. Moreover, there are sections concerning process to the project value less than one billion Baht as well.²¹⁸

5. Propose the PPP project

5.1 The host agency conducts feasibility study and analyze the details of the project as specified in section 24

5.2 The host agency hires advisor to formulate a report and analyze the project and then submits the report to the responsible ministry. The responsible ministry has to complete the consideration on the report within sixty days from the submission date.

5.3 The host agency proposes such report to the SEPO. The SEPO, then, deliberates and delivers its opinion to the PPP Committees. Besides submitting the report to the SEPO, the comment from the National Economic and Social Development Board and related organization is also required. In the case of utilizing

²¹⁸ The Private Investment in State Undertaking Act B.E. 2556 Act section 23

the public budget, the commentary from the Bureau of the Budget is needed to submit along with comment from the SEPO.

5.4 In case of the project required public budget or guarantee by the Ministry of Finance, after approval from the PPP Committee, the PPP project shall be sent for approval from the Cabinet.²¹⁹

6. Selection of Private Sector

6.1 After approved by the PPP Committees or the Cabinet, the host agency formulates a draft invitation to tender for private investment, draft terms of reference and draft private investment contract. The details of such contract must contains the details specify in section 34.

6.2 The Host Agency designates the selection committee.

6.3 The law is stipulated to establish the list of persons having expertise and experience in each fields, so that the host agency will be able to choose the qualified person to be the selection and advisory committee. Moreover, the PISU Act is adjusted the components and amount of selection and advisory committees by decreasing amount of members from private sectors, in order to constraints the conflict of interest of such committees.

6.4 The host agency and the selection committees jointly deliberate the means to select the private sector in the PPP project whether through bidding or not. If no bidding, the approval from the PPP Committee is required.

6.5 After selected the private sector, the host agency negotiates PPP contract with such private party.

6.6 The selection committee submits the report regarding such PPP project to SEPO and sends draft of PPP contract to the Attorney General within fifteen days from the date of completion of the selection process.

²¹⁹ The Private Investment in State Undertaking Act B.E. 2556 Act chapter 3

6.7 The SEPO considers the report and the Attorney General reviews draft of contract within forty-five days from the submission date and then grants their opinions to the responsible ministry.

6.8 The responsible ministry proposes its comment, report, draft of PPP contract and related document to the Cabinet for approval within thirty days.

6.9 After approval from the Cabinet, the host agency and selected private party execute the PPP contract and commence the project.²²⁰

7. Supervision and monitoring

After the PPP contract was executed, the Responsible Minister shall designate a supervision committee to monitor and supervise the PPP project to follow the terms and conditions of the PPP contract and report the outcome to the Responsible Minister. Interestingly, if the Host Agency fails to comply with the PPP contract, the supervision committee shall report to the Responsible Minister as for ordering the Host Agency to comply as such. It should be noted that the PISU Act has no measure to protect the rights of the private party when the Host Agency defaults.²²¹

8. Contractual amendment

The new law imposed the procedures to amend the PPP contract based on the previous Council of State's commentaries.²²²

9. Preparation of the plan after the expiration of the contract

The host agency has a duty to plan the measure after the expiration of the contract. This must be purposed five years prior to the expiration date. In the case that the Cabinet suggests the private participation to be continued after expiration, it has to follow the procurement rule under the PISU Act again.²²³

10. Establishment of Private Investment in State Undertaking Promotion Fund (the "PPP Fund")

²²⁰ The Private Investment in State Undertaking Act B.E. 2556 Act chapter 5

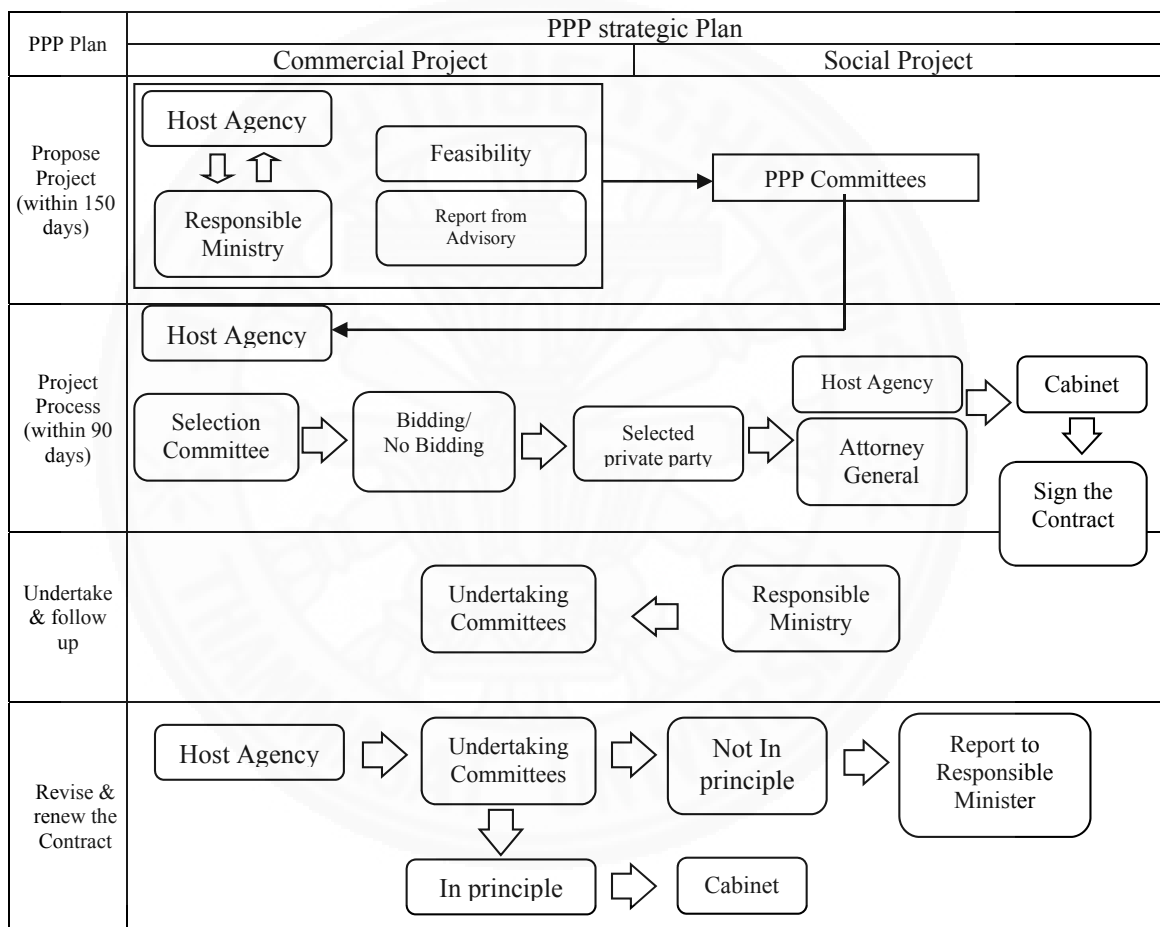
²²¹ The Private Investment in State Undertaking Act B.E. 2556 Act chapter 6

²²² The Private Investment in State Undertaking Act B.E. 2556 Act chapter 7

²²³ The Private Investment in State Undertaking Act B.E. 2556 Act section 48

In order to conduct feasibility study, the budget for feasibility study usually derives from state budget which takes time to acquire, so that the new law imposed the establishment of the PPP Fund under the Ministry of Finance. This fund will support the PPP project according to the strategic plan to hire the consultant to conduct the feasibility. As a result, such fund becomes an important tool to help the achievement of PPP projects.

Figure 4.1 The Overall Process of the PPP under the PISU Act



Source: State Enterprise Policy Office

4.4.3 Problems on the investment in State Undertaking

Despite amendment of various provisions was enacted to be the solutions of many problems of the old law, the PISU Act was not amended the definition of the project, state undertaking and participation, all of which are regarding the scope of project eligible under this act.

It is surprisingly that as one of the reasons to amend the PPSU Act is to scope the eligible project under the PPP law, but there is no change in definition of what activity is the Investment in the State Undertaking under the PPSU Act. According to the principle of law that the same definition in the same law must have the same meaning, this would lead to the same problems as in the PPSU Act faced. The below table is the comparison between the definition of Project, State Undertaking and Investment (formerly called Participation) in the PPSU Act and PISU Act which is very similar.

Table 4.2 Comparison of the definition in the PPUS Act and PISU Act

	Definition	
	The PPSU Act	The PISU Act
Project	Investment in a State Undertaking and the project costs is more than one billion baht or as prescribed in the Royal Decree	Investment in a State Undertaking
State Undertaking	An undertaking which a government agency, state enterprise, other state agency or local administrative organization, either singly or collectively, have a legal obligation to perform and an undertaking which requires the utilization of natural resources or properties of one or several government agencies, state enterprises, other state agencies or local administrative organizations, either singly or collectively.	An undertaking having one of the following descriptions: (1) An undertaking which a government agency, state enterprise, other state agency or local administrative organization, either singly or collectively, have a legal obligation to perform (2) An undertaking which requires the utilization of natural resources or properties of one or several government agencies, state enterprises, other state agencies or local administrative organizations, either singly or collectively.

	Definition	
	The PPSU Act	The PISU Act
Investment (Participation)	A public-private joint investment undertaken by any means or designation of a unilateral private investment by way a license or concession or grant of any kind of right.	A public-private joint investment undertaken by any means or designation of a unilateral private investment by way a license or concession or grant of any kind of right.

During the process of enactment the PISU Act, during the meeting of Council of the State (Special Committee) no.1/2554²²⁴ and 2/2554²²⁵ dated July 7th, 2011 and July 14th, 2011 respectively, the committees have defined the scope of the Investment in the State Undertaking under the PISU Act as below.

1. The PPP Project

Under the PISU Act, the definition of the “Project” was changed by eliminating the cost of the project. As a consequence, it was defined as “*Investment in a State Undertaking*”. In consideration of what kind of activity should be subject to the PISU Act, the definition of the Investment and the State Undertaking must be clearly defined.

2. State Undertaking

The overall definition of the State Undertaking under the PISU Act was not alternated from the one in the PPSU Act which is

“An undertaking having one of the following descriptions:

- (1) An undertaking which a government agency, state enterprise, other state agency or local administration, either singly or collectively, have a legal obligation to perform*

²²⁴ สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการกฤษฎีกา (คณะพิเศษ) ครั้งที่ 1/2554 วันที่ 7 กรกฎาคม 2554 ณ ห้องประชุม สมภพ โทตระกิตย์. (The Council of State, Minutes of Meeting of the Council of State (Special Committee) no.1/2011 dated 7 July 2011 at Sompop Hotrakit Meeting Room)

²²⁵ สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการกฤษฎีกา (คณะพิเศษ) ครั้งที่ 2/2554 วันที่ 14 กรกฎาคม 2554 ณ ห้องประชุม สมภพ โทตระกิตย์. (The Council of State, Minutes of Meeting of the Council of State (Special Committee) no.2/2011 dated 14 July 2011 at Sompop Hotrakit Meeting Room)

(2) An undertaking which requires the utilization of natural resources or properties of one or several government agencies, state enterprises, other state agencies or local administrative organizations, either singly or collectively.”

However, there are changes in some words contained in the definition of the State Undertaking which are State Enterprise and Local Administrative Organization.

2.1 State Enterprise

Under the PPSU Act, it was defined that the State Enterprise means any state enterprise under the Budget Procedures Act B.E. 2502. On the other hand, it has been revised during drafting of the PISU Act to:

“State Enterprise means:

- (1) A government organization under the law of establishment of government organizations, government undertaking under a law establishing such an undertaking or business entity owned by the government*
- (2) A company or juristic partnership in which more than fifty percent of the capital is owned by the Ministry of Finance or a state enterprise under (1) or Other State Agency.”*

According to a comment of a committee in the Private Investment in State Undertaking B.E. ... Drafting Commission, in the previous definition of State Enterprise, it would include the affiliate company of the affiliate company of the state owned enterprise (the “Indirect Control Company”). When the Indirect Control Company jointly invested with the government agency, their project was not subject to the PPSU Act. As of enacting the PISU Act, such kind of company is considered as a private party, so that its investment in state undertaking with any governmental body must be subject to the PISU Act.

In addition, the State Enterprise under the PISU Act covers only a/an company or enterprise in which any governmental agency holds its shares more than fifty percentages. In case of the Indirect Control Company, the Ministry of Finance will undertake it through the governmental agency which is its parent company. This is due

to a Cabinet Resolution imposing that the establishment of an affiliate company of any state own enterprise must be approved by the Cabinet.

2.2 Local Administration

Under the PPSU Act, the definition of the Local Administration was “*local administration according to the National Government Organization Act, B.E. 2534 (พระราชบัญญัติระเบียบบริหารราชการแผ่นดิน พ.ศ. 2534)*”. After that, it was changed to “*Provincial Administration Organization (องค์การบริหารส่วนจังหวัด (อบจ.)), municipality, Subdistrict Administration Organization (องค์การบริหารส่วนตำบล (อบต.)), Bangkok Metropolitan Administration, the City of Pattaya or other local administration established by law*”

In addition, there is a word of “Other Government Sector” that is added under the PISU Act.

2.3 Other Government Sector

In PISU Act, it was supplemented the Other Government Sector in the definition of the State Undertaking in order to be coherent with the Constitutional. Consequently, any activities in which such Other Government Sector has a legal obligation to perform or must be utilized the natural resource or state’s properties of the Other Government Sector are considered as the State Undertaking and then may be subject to the PISU Act.

3. Investment

It has been agreed that the definition of investment or Participation in the PISU and PPSU Act respectively is ambiguous and leads to various issues to the Council of State, so that it should be more clearly defined than in the PPSU Act.

However, one of the committees referred that the unclear definition issue can be solved by these following solutions:²²⁶

3.1 Compliance with the Council of State’s commentaries

²²⁶ The Council of State *supra* note 224.

By this mean, other than the above mention issues regarding the commentaries, Aurapeepattanapong is of the opinion that the unchanged definition of Investment or Participation would cause the inappropriate interpretation, on the ground that the Council of State has been commented the definition of Investment (Participation) too wide and has no scope to limit that which project fails under the law. Therefore, this mean may not be a good way to solve the problem.²²⁷

3.2 Judgment made by the PPP Committee

As mentioned during the meeting that the PPP Committee will be designated under the PISU act and shall have a power to determine which project is qualified under the PISU act. Moreover, the PISU Act also indicates the strategic plan to notify the project of which is subject to the PISU Act. This will help solving this problem.

However, pursuant to section 16 of the PISU Act²²⁸, it identifies the powers and duties of the PPP committees. It may be assumed that the power as specified in section 16 (2) and (9) are the power to determine whether a project is qualified as PPP or not. Nevertheless, there is no provision to impose the process for consulting the PPP committees regarding the PISU Act. As a result, the host agency²²⁹ has to submit the proposal together with feasibility study issued by the private consultant to the responsible ministry²³⁰ and then to the SEPO. After approved by the SEPO, it will be passed to the PPP Committee. At this stage, the PPP Committee will have a power to determine the project whether qualified or not. It is undeniably that the host agency has to conduct all the feasibility study before having a chance to know whether the project is subject to the PISU Act or not which leads to time and budget consuming.

In addition, despite the law indicated the power of the PPP Committee as such, the Bangkok Metropolitan Administration (BMA) has intention to send the issue to the Council of State for commentary of whether the Krungthep Thanakom Company

²²⁷ Aurapeepattanapong *supra* note 23 at 107.

²²⁸ The Private Investment in State Undertaking Act B.E. 2556 section 16

²²⁹ the Private Investment in State Undertaking Act B.E. 2556 Section 4

²³⁰ the Private Investment in State Undertaking Act B.E. 2556 section 4

Limited is the private under the PISU Act or not.²³¹ This can be understood that the power of the PPP Committee under section 16 is still unclear and impractical.

In respect of structure of the PPP Committees, as specified in section 8 under the PISU Act, it is composed of the Prime Minister, Minister of Finance, Permanent Secretary of the Ministry of Finance, Secretary of the Council of State, Secretary of the Office of the National Economic and Social Development Board, Director of the Bureau of the Budget, Director General of the Comptroller General's Department, Director of the Public Debt Management Office, Attorney General, Director of the SEPO and other professionals up to seven persons. It reflects the obscure and independence of the Committees, on the ground that it seems to be interacted by the political sentiment and obsessed by the businessman. Additionally, it should be noted that there is no specification fields of expert regarding the other professional in the Committees.

3.3 Enacting the Royal Decree as specified in section 7²³²

Under section 7 of the PISU Act, it is regarding the State Undertaking which is not subject to the PISU Act since there are sufficient regulations indicating the process, supervision and monitoring of the project. The concessions under the law of petroleum and mining concessions under the law on minerals are exempted to this law.

In addition to those concessions, if any State Undertaking is governed by the law which has sufficiently provided process, supervision and monitoring for private participation, the Cabinet can enact a Royal Decree to exclude the application of this Act to such State Undertaking.

In the light of this, the Ministry of Transportation has an issue of public transport concession and granting Air Navigation Right to Commercial Airlines. In the opinion of the Ministry of Transport, it understood that it is subject to the PISU Act, but it has granted such concessions and rights to the private through the authorized

²³¹ หนังสือพิมพ์เดลินิวส์ ฉบับวันที่ 10 ธันวาคม 2557 <http://www.dailynews.co.th/bangkok/240844> (Daily News Newspaper dated 10 December 2014, <http://www.dailynews.co.th/bangkok/240844>) (1 December 2015)

²³² The Private Investment in State Undertaking Act B.E. 2556 section 7

governmental agencies without application of the PISU Act. This initiated the issue of what sufficiently provided process is, supervision and monitoring is.²³³

The Vice-Secretary of Ad Hoc Committees to Consider the Bill suggested that at first stage it needs to consider of which action is qualified as State Undertaking. If the action is qualified as the State Undertaking of the PISU Act, then consider whether it has sufficiently provided process, supervision and monitoring for private participation. By doing this, as the law of petroleum and the law on minerals have been effective longer than the PPSU Act and no problem occurring from those law, so that they will be applied as the standard law contained sufficient process, supervision and monitoring. Moreover, the PPP Committees have a power to give advice or opinions to the Minister prior to enact the Royal Decree as specified in section 16 (5).²³⁴

According to the Vice-Secretary of Ad Hoc Committee commented as mentioned above, it needs to be considered if any action qualified as State Undertaking under the PISU Act prior to enacting the Royal Decree to exempt a particular action. Therefore, this mean cannot resolve the problem of unclear definition of Project under the PISU act.

4.4.4 Effects of Non-Compliance with the Private Investment in State Undertaking Act B.E. 2556

1. The project established prior to effectiveness of the PPSU Act

A project established before the PPSU Act was effective and failed to comply with the PPSU Act when it was effective. The PISU Act has not imposed the result of this kind of case. Thus, it is recommended that the PISU Act should be engaged. If such project has not involved in any dispute settlement, the authorized minister designates a group of committees to consider the appropriate resolution including termination, amendment, remaining effective of the contract and propose such resolution to the

²³³ The Council of State *supra* note 224.

²³⁴ สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการวิสามัญพิจารณาร่างพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. ... สภาผู้แทนราษฎร ครั้งที่ 1 วันที่ 22 พฤษภาคม 2555 ณ ห้องประชุมคณะกรรมการธิการ หมายเลข 219 ชั้น 2 อาคารรัฐสภา 2. (The Council of State, Minutes of Meeting of Ad Hoc Committee to consider the bill of the Private Investment in State Undertaking B.E. ... House of Representative no.1 dated 22 May 2012 at Ad Hoc Committee Meeting Room no.219 2nd Floor, Statehouse 2.)

cabinet to make an order. In consideration of such resolution, the committees should concern the continuance of public interest and impact to the public.²³⁵

2. The project established during the effectiveness of the PPSU Act

In the case of no dispute settlement towards the project and non-compliance with the PPSU Act, the authorized minister shall designate a group of committees to consider the appropriate resolution including termination, amendment and remaining the effective of the contract and propose such resolution to the cabinet to make an order. In consideration of such resolution, the committees should concern the continuance of public interest and impact to the public.²³⁶

3. The new project

If the project established after the effectiveness of the PISU Act, the SEPO shall notify the Host Agency to give the explanation of facts and appropriate approaches for submission to the PPP Committees for direction. The PPP Committees may terminate, amend or remain the effectiveness of the contract and propose the cabinet to approve. In consideration of such resolution, the committees should concern the continuance of public interest and impact to the public. It is interestingly that the PISU Act has no provision indicated the measure to protect and compensate the rights of the private party in the case that the cabinet approve to amend or terminate the PPP contract.

Furthermore, the law allows the cabinet to terminate and amend the contract, but there is no clue of what the effects of termination of the contract when the case go to the court, it is doubtless that the court still hold a judgment as the Supreme Administrative Court Judgment no.Ao 349/2549 between the Office of Prime Minister and the ITV Public Company Limited as mentioned in 4.3.4 paragraph 2, where the contract was unenforceable and whether the private sector who already invested in the project would be compensated. It should be noted that the PISU Act has no provision regarding the measure to compensate the private sector when the amendment, termination and unenforceability occurs.

²³⁵ The Private Investment in State Undertaking Act B.E. 2556 section 72

²³⁶ The Private Investment in State Undertaking Act B.E. 2556 section 72

4.5 Analysis on Investment in the State Undertaking under the law of Thailand to Characteristics of General Public Private Partnership

1. The PPP must be an agreement between public and private sector

Under the PISU Act, the PPP agreement was made between public and private sector. The public sector is including the government, municipals, local authority, state owned enterprise, governmental organization and governmental agencies. This is the same ideal as the general characteristics of the PPP.

2. The PPP must contain the purpose to provide public service

The definition given by various foreign and international organizations, the PPP arrangement is generally used in provision of public services. In the light of the PPSU and PISU Act, the PPP shall apply to the Investment in the State Undertaking which is a quiet wide definition and needed to be construed. As the State Undertaking is the action which the government has a legal obligation to perform, but some legal obligation of government is not the public service.

According to the Council of State's commentary no.570/2542, the Council of State was of the opinion that the issuance of lottery is the legal obligation of the GLO, so that it is considered as the State Undertaking. When the private party participated as the agency of the GLO to distribute and reward the lottery shall be subject to the PISU Act. In this case, although the distribution and reward the lottery was conducted by the GLO which is the governmental agency, its objective is not for public interest. Therefore, it should not be considered as the PPP project in accordance with the French Supreme Administrative Court Judgment.

There are some cases the government agency has conducted the activity which is not the public service but the Council of State commented that it is the State Undertaking as it is the obligation stipulated in such agency's act. In the case of the Treasury Department rent the convention hall to the private sector, the Council of State determined as the State Undertaking as the Treasury Department has legal obligation under the Government Surplus Land Act B.E. 2518 (พระราชบัญญัติว่าด้วยที่ราชพัสดุ พ.ศ. 2518) (the Commentary no. 587/2538). As a consequence, it was subject to the PPSU Act. In consideration of this case, despite of conducted by the government bodies, but the

objectives is not for public interest. Therefore, this project should not fall into application of the PPSU Act.

In addition, referring to the Council of State's commentary no.392/2543, warehouse, food supplied and passenger service agent was included as the legal obligation of the Airport of Thailand Public Company Limited (the "AOT") which shall be considered as the State Undertaking. As a result, the private participation in these activities shall be the PPP project under the PPSU Act. It is undeniably that the warehouse, food supplied and passenger service agent are not the public service. Thus, it should not be considered as the PPP project.

This can be concluded that it is inappropriate to impose the PPP as the legal obligation of the government bodies on the ground that some governmental agencies have conducted activities which are not the public service even its established act allows it to do so.

Furthermore, under the PISU Act, any activity required the utilization of the properties of the governmental bodies shall be deemed as the State Undertaking and may be required to comply with the PISU Act. According to the Council of State's Commentary no. 222/2544, traffic right of the Thai Airways is considered as state's property. Also, the electronic commercial data of the Ministry of Commerce is the property of the government. The reason of why this case should be the PPP project is the private participate to provide the online system of the commercial data which will be published for people to examine the commercial matters. It is not agreeable that the commercial data of the Ministry of Commerce is the property. This is due to its invaluable as it is the public information, so that everyone can see it. I am of an opinion that utilization of the state's properties should not be one of the qualifications of the PPP project. Therefore, specification of the State Undertaking as in the section 4 has led to confusion of the private investors to participate in the PPP project in Thailand.

3. The PPP must be done by any means to ensure the sharing of risks

The main reason to initiate the PPP is to allocate the risks in which the government has been faced in provision of public service in the past through traditional procurement. In the PPP concept, the private play an important role to absorb the risks from the government especially, the financial risk. Therefore, in performing the PPP project, the private should be the risk allocator instead of the government.

In consideration the concept of the PPP under the PISU Act and the commentaries of the Council of State, it seemed that the mitigation of risk is not a qualification of the PPP project in Thailand. This can be seen in the Council of State's Commentary no.587/2538, the government rented the convention hall to the private party to operate and the remuneration was paid in accordance with the terms of contract without additional duties, shall be a PPP project under the PPSU Act. Accordingly, the private party did not absorb any risk from the government as it would be paid the fixed remuneration on the due date.

Therefore, to define the PPP project, it should include the types of the PPP arrangements which allocate the risk of the project from the government to the private sector, in order to achieve the objective of the PPP which was established to resolve the problem of the traditional procurement.

There is another issue incurred in the Council of State's Commentary no.130/2543. As the Council of State determined that the transfer of shares of the Thai Airways International Public Company Limited (the "Thai Airways") to a particular private party shall be considered as the PPP project. The Council of State was of the opinion that since the Thai Airways operated its business by acquiring the traffic right which is considered as the state's property. It is doubtful if this activity should be called the PPP project since the private strategic partner did not provide anything unless the financing. Despite absorbing the financial risk, the other risks still remain to the Thai Airways. Therefore, this transaction should not be the PPP project and subject to the PISU Act.

4.6 Analysis on Investment in the State Undertaking under the law of Thailand to the PPP Project under the Law of the Republic of Korea

The consistent laws and regulations are one of the significant factors to contribute the achievement of PPP project in the South Korea. In fact, during the process of drafting the PISU Act, it was acceptable that the details of the PISU Act was similar to the Korean PPP Act such as implementing the PPP project, the PPP Committees, Basic Plan, etc. However, there are some provisions relating to the PPP project in the Korean PPP Act, but does not appear in the PISU Act. The analysis of the PISU Act and the Korean PPP Act as set out below.

1. Infrastructure types in the PPP projects

The solicited project under the Korean PPP Act must be the Infrastructure facilities project conducted by the concessionaire as provided in the Basic Plan. As a result, the solicited project must be a project involving work, such as construction, expansion, renovation or operation of the 46 infrastructure facility types which can be grouped into 15 sectors as specified in the Korean PPP Act. On the contrary, the unsolicited project not specified in the PPP Basic Plan is not required to have qualification as specified in Article 2 subparagraph 5 under the Korean PPP Act. In the light of this, due to encourage creativity and innovation of the private sector, the law allows the private party to create its own PPP project and propose to the competent authority.

In respect of the PISU Act, the meaning of the State Undertaking, on the other hand, is indicated about the activity specified in the government agencies' established Act and utilized the natural resources and government's property. It is undeniably that this provision is rather wide and ambiguous leading many issues sent to the Council of State for commentary. In this context, Thailand should apply the way to impose the definition of Infrastructure Facilities which are subject to the PPP law as appeared in the Korean PPP Act.

2. Investment Methods

Although article 2 subparagraph 2 under the Korean PPP Act is stipulated the definition of the infrastructure facilities projects as a project involving work, such as construction, expansion, renovation or operation of infrastructure facilities, in Article 4 specifies the scheme of procurement to only four methods: Build-Transfer-Operate, Build-Transfer-Lease, Build-Operate-Transfer and Build-Own-Operate. All of which are differently described the role and duties of the related parties in the project. This contributes to understanding and realizing of the related authorities and private investors that if the investment scheme falls to one of these, it can be assumed as the PPP project and must be subject to the Korean PPP Act. Provided that it does not fall to these schemes but relating to work on those infrastructure facilities, they have an option to propose their own scheme to through unsolicited project under article 9 or modification of the master plan under article 12 and adopted by the competent authority as it deems reasonable.

With regard to the PISU Act, there is no procurement method, only process of procurement is provided in chapter 4 and 5. However, it is defined what the investment in State Undertaking is in section 4²³⁷. It is acceptable that this definition is complicated and ambiguous, especially “grant of any kind of right” is very board. It has been an issue sent to the Council of State to be construed and granted the commentary since the PPSU was effective.

3. An Agency Supporting PPP Project

In the South Korea, there is an independent agency called the PIMAC, a government-funded economic research institution. The roles and responsibilities of the PIMAC, as specified in article 20 of the Enforcement Decree of the Act on Public-Private Partnerships in Infrastructure, is to support the Ministry of Strategy and Finance regarding establishment of the PPP Basic Plan and supporting the public authorities in procurement process. It also develops guidelines in respect of implementation of PPP

²³⁷ The Private Investment in State Undertaking Act B.E. 2556 section 4

projects. Moreover, the PIMAC is an important organization to support information and provide training relating to PPP project to public and private sectors.

In context of Thailand, the SEPO is an agency who undertakes and supports the activities relating to PPP project. In fact, the SEPO has its main responsibilities to develop and undertake all state enterprises.²³⁸ Additionally, pursuant to section 18 under the PISU Act, it is stipulated the roles of the SEPO in a manner of PPP projects. However, the PPP projects are not only relating to the state enterprise but also other governmental agencies. Therefore, Promotion of Private Investment in State Affairs Division (กองส่งเสริมการให้เอกชนร่วมลงทุนในกิจการของรัฐ) which is currently under the SEPO should be separated to be an independent administrative body as same as the PIMAC and indicated the roles and responsibilities of the new PPP unit in the PISU Act or other related regulation such as notification. This will lead Thailand to have more efficient organization in supporting the PPP projects.

In conclusion, the PISU Act should be revised in various aspects such as the scope of the PPP project, the investment method subject to the PISU Act, the process to designate the unsolicited project as well as establishment of an independent PPP Unit. This will lead the PISU Act to be more conceivable and explicitly. The consistent and clear laws and regulations can induce the private sectors to invest in country's infrastructure facilities. In addition, it should have a PPP Unit to support both public and private parties in all aspects of the PPP project. These changes will be a key to support the achievement of PPP projects in Thailand.

4.7 Analysis on Investment in the State Undertaking under the law of Thailand to the PPP Project under the Law of the United States

Despite of being a sheer size of infrastructure market, the US, in respect of the PPP legislation, has fallen behind many nations in the world especially the European countries. The fragmented of the US PPP law is an illustration of many developing countries to learn the outcome of inefficient PPP law. Therefore, the analysis of

²³⁸ สำนักงานคณะกรรมการรัฐวิสาหกิจ, วิสัยทัศน์และยุทธศาสตร์, <http://www.sepo.go.th/content/2> (10 พฤษภาคม 2559) (State Enterprise Policy Office, Vision and strategy, <http://www.sepo.go.th/content/2> (10 May 2016)).

Investment in the State Undertaking under the law of Thailand to the PPP Project under the Law of the United States is stated below.

1. Characteristics of Public Private Partnership

As before mentioned that the GAO who is the US Government Accountability Office stated what the PPP is in context of American society. However, this concept is not recognized as a federal law mandated all states to follow. As a result, the states created its own characteristics of the PPP such as Florida and Texas. Consequently, the PPP concept in each state came out to be inconsistent leading to unequal infrastructure development among states. Furthermore, private investors have burden concerning the unconformity of PPP law resulting in avoidance of investment in the PPP.

In context of Thailand, the characteristics of the PPP project are defined in section 4. Due to its wideness and vagueness, the governmental agencies have been struggling in applying the definition of the PPP project under the PISU Act to the real work. As a consequence, many cases were sent to the Council of States to make a decision. However, the commentary of the Council of State is not deemed as a law. This can be understood that the scope of the PPP project under the PISU Act is inefficient which might lead to lack of infrastructure as in the US.

2. Eligible Infrastructure

There is no specific legislature to impose the eligible infrastructure in the PPP project. In contrast, if look up in the state legislation, the PPP law was imposed what types of infrastructure can be developed through the PPP process. In the light of this, it reflects the explicit state law regarding the eligible infrastructure under the PPP. Nevertheless, each state indicated the eligible infrastructure differently. As a result, an infrastructure can be developed through the PPP in some states while in some cannot. This can be seen inconsistent of the PPP law in the nationwide.

Under the PISU Act, there is no reference to what kinds of infrastructure must be subject to the PPP law. It provides only board definition which regarding the activities of the governmental agencies, natural resources and state's properties. This

causes risks to the governmental agencies and private investors whether the projects they are about to develop is considered as a PPP project or not.

3. Solicited and Unsolicited Project

Most of the PPP states law, it provides clearly process for the private entities to invest in the solicited PPP project where the state government has already researched and outlined the process, outcomes and risks. On the contrary, some states even though support the idea of private sector by allowing unsolicited project, the process to apply unsolicited project is not available. This obsoletes the innovative idea of the private party to be encouraged and developed. Similarly, the government of Thailand allows the unsolicited project to be developed by means of PPP project but there is no clearly process regarding unsolicited project provided under the PISU Act.

4. State Approval

The US federal law is not imposed that the government body has power to approve the PPP project. However, the state laws explicitly specify the authorized agency to approve the PPP project which is different in each state. On the other hand, the PISU Act is imposed clearly that the PPP Committees have the power to approve the principle of each PPP project and then submit for the approval of the cabinet prior to commence such project.

In conclusion, it is undeniably that the US and Thailand are confronting similar problems of inefficient PPP law. Therefore, Thailand should learn the US's failure to resolve its problems regarding the PPP law.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

According to the theory of many scholars in Renaissance, the state was established for the purpose of facilitating the Common Goods or Public Interest. In respect of modern administration, the executive power comes along with the responsibility to serve the common interest of the public which can be called as public service. It has no specific definition of the public service in the law, however, it technically consists of the action by the public sector conducting an act with the objective to satisfy the public interest which is subject to the administrative law such as electrical and water provision, telecommunication, education and health facility.

Due to advance economic development, the state has to decentralize to municipal government in order to ensure the provision of public service in nationwide. Instead of directly delivering the public service, the government assigns the local government and state owned enterprise to ensure the qualitative and quantitative service. Moreover, the huge budget is needed in provision of infrastructure as well as advance technology and workforce. On the account of limited capacity of the public sector and efficiency of the private sector, there is a trend of private participation in the infrastructure delivery in these days while the government only acts as a regulator to standardize the service as well as a supporter to aid financing.

The PPP is a type of private participation which may be confused with the privatization. In this sense, privatization involves the whole or partial sales of shares or assets in the entity owned by the public sector while the ownership of the facility will be transferred to the private sector. Since plenty of advantages are found, PPP recently has been one of the most favorable forms in worldwide regarding private participation. Interestingly, there is no official definition of the PPP. Each country and organization defined its own definition but there are some identicalities of concepts among those definitions. This thesis has examined those definitions and reached to the conclusion that the general concept of the PPP is “*an agreement between public and private sector with the purpose to provide public service by any means to ensure the sharing of risks.*”

Moreover, there are a number of PPP types, and all of which have its characteristics from the most intensive public involvement to full private participation.

In the context of PPP in Thailand, it was firstly introduced as the power to approve infrastructure project which was solely authorized ministers caused the dramatic corruption across the nation. The government in that time, as a result, enacted the first PPP law in the form of Regulation of the Prime Minister's Office on Private Participation in State Undertaking B.E. 2534 which afterward was transformed to the PPSU Act.

For the past two decades, there have been several problems occurring from the PPSU Act and one of the most important points is the scope of the Participation in the State Undertaking under this act. It led to many issues sent to construe at the Council of State. Nonetheless, as study in depth of its commentaries, it can be seen that some of which are inconsistent and construe beyond the context of the given definition in the act.

In respect of the judgment of the court, when any PPP agreement or project failed to comply with the PPSU Act, it would affect the invalidation of such agreement between parties. Consequently, this would impact substantially to the legal obligations of the public party against private party.

Moreover, as analyzing the scope of Participation in the State Undertaking under the PPSU Act, it was found that it is defined differently to the general characteristics of the PPP.

After the reformation of the PPP law in Thailand, the new PPP law known as the PISU Act was effective in 2013. It was revised and added the new matters to ensure the practicality and transparency of the PPP project. However, the scope of Participation (Investment) in the State Undertaking remains the same, and this incurs the same problems as in the PPSU Act. Despite during the enacting of the Act, one of the committees referred that the unclear scope of Investment in State Undertaking issue can be solved by compliance with the Council of State's commentaries, judgment made by the PPP Committees and enacting the Royal Decree as specified in section 7 of the

PISU Act. Nevertheless, it was analyzed in this thesis that all of these recommended resolutions are impractical. If the parties fail to comply with the PISU Act, it will affect the PPP contract to be amended or even terminated by the cabinet's approval without consent from the parties. Nonetheless, it appears that there is no provision imposed the measure to protect the private party when the amendment or termination occurs. Therefore, it is important to balance the burden occurring from the PPP project between public and private parties.

In the context of the PPP in the South Korea, the South Korea was severely deficiency of public facilities at the end of the 1990s. Due to the financial crisis in the late 1997, the government approached to enact the new law which is the new Korean PPP Act as of December 1998. According to the Korean PPP Act, the scope of the PPP project was precisely separated into two types which are solicited and unsolicited project. Meanwhile, both types of projects are imposed the process from the beginning to the end of the project. In respect of solicited project, it was required the facility in the project must be one of the infrastructure types as specified in the Korean PPP Act. Moreover, it also specifies the types of investment method of the PPP project. The main factors contributing the South Korea to achieve in the PPP project are certain laws and regulations as well as a strong supportive agency known as the PIMAC. Obviously, the PPP law of the South Korean might be a good choice for Thailand to follow.

Turning into the US, due to the pressure of the lack of infrastructures in the nationwide, it has desperately needed budget in order to deliver the infrastructure to the public. As a result, the PPP concept becomes a good option to raise budget. However, there is no federal PPP law in the US and most of the states have established their own PPP legislation. Some are similar, and some are totally different among states. It is undeniably that the PPP statutory in the US seems to be fragmented. Consequently, it was agreeable that the concept of the PPP should be defined and the federal government should concern on enact the federal or uniform PPP law. This can be seen that the US are facing the same problem as Thailand which leads to confusion and negative impact to both public and private parties who wish to invest in the PPP project.

5.2 Recommendations

The definition of Project, State Undertaking and Investment specified in section 4 should be deleted, since the new definition as described below will be substituted. Moreover, the process to purpose the unsolicited project and the measure to protect rights of the private party should be imposed.

In order to encourage the efficiency of the PPP entities, the structure and qualifications of the PPP Committees should be revised as well as the establishment of the independent administrative body to support the PPP project.

5.2.1 Amendment of the definition of the PPP Project and Public Service

The appropriate definition of the “PPP Project” should be added in section 4 as *“an agreement between public and private party with objective to provide Public Services by any means to ensure the sharing of risks in the project.”*

Moreover, the definition of “Public Service” is needed to be specified in section 4 as *“any public utility the state establishes to service or facilitate the public on the purpose of public interest which relating to these following facilities:*

- (1) Railway systems;*
- (2) Toll road systems, parking and terminal;*
- (3) Port and airport;*
- (4) Water resources and management;*
- (5) Communication systems;*
- (6) Energy resources and management;*
- (7) Environment treatment and management;*
- (8) Logistics;*
- (9) Tourism;*
- (10) Education*
- (11) Convention center;*
- (12) National defense;*
- (13) Public health;*
- (14) Public housing;*
- (15) Welfare; and*
- (16) Other facilities as prescribed in the Royal Decree and other laws.”*

5.2.2 Amendment of the Investment Method

The PISU Act should impose the investment methods which are the PPP project under the PISU Act. In this context, the investment methods should have the qualifications coherent with the general PPP project as above mentioned which contains three followings factors:

1. An agreement between public and private sector;
2. With the purpose to provide public service; and
3. By any means to ensure sharing of risks.

The definition of the “Investment” in section 4 under the PISU Act should be deleted and the new provision regarding the investment methods should be implemented as “*The PPP projects shall be conducted in one of the following methods:*

(1)Affermage, the public sector finance the project and engages the private party to operate and maintain the facility, and the private sector retains operation fee and pay the additional surcharge obtained from the customers to remunerate the public sector;

(2)Build-Transfer-Operate (BTO), the ownership of the facility shall be transferred to the public sector upon the completion of construction, and the private sector shall have the rights to manage and operate the facility for a specified period;

(3)Build-Transfer-Lease (BTL), the ownership of the facility shall be transferred to the public sector upon the completion of construction, and the private sector shall have rights to manage and operate the facility for a specified period, but the public sector shall rent them for a specified period as provided in the agreement, and use and make profits from the facility;

(4)Build-Operate-Transfer (BOT), the private sector shall assume ownership of the facility for a specified period after the completion of construction, and the ownership shall be transferred to the public sector upon the termination of the duration in the agreement;

(5)Joint Venture or Partial Divestiture of Public Assets, when a public and private sector jointly have shares in the project company which is holding the facility; and

(6) Other methods proposed by the private sector and approved by the PPP Committee.”

5.2.3 Addition of the Unsolicited Project Process

Due to the lack of provision regarding purposal of the unsolicited project process, it is recommended to impose Chapter 4/1 Unsolicited Project Purposal as follows:

“Unsolicited Project means the PPP project which does not contain in the Master Plan”

“Section 31/1 The private sector may propose Unsolicited Project in written proposal and submit it to the Host Agency. Such written proposal must contain the details as prescribed in the Ministerial Regulation.”

“Section 31/2 When the Host Agency deems that the proposal meets the formal requisites and conforms with the relating laws and policies of the Host Agency, it shall submit the proposal and its opinion to the Responsible Ministry and then to the State Enterprise Policy Office to review the details of the proposal.

During this process, the Host Agency may hire the consultant to conduct feasibility study and analyze the project.”

“Section 31/3 If the State Enterprise Policy Office considers such proposal as an appropriate project, it shall submit the proposal and relating documents together with its opinion to the PPP Committees to approve such proposal to be established through process under this Act.”

“Section 31/4 If the State Enterprise Policy Office considers such proposal as an inappropriate project, it shall notify the decision to the Responsible Ministry and Host Agency.”

“Section 31/5 In the case that the PPP Committees approves such proposal, the Host Agency shall notify such private sector of such decision and publicly notify the outlines of such proposal to enable a third person, other than such private sector to make a proposal and ongoing the project as specified in Chapter”

“Section 31/6 In selection process, the selection committees shall favorably treat the initial private sector as stipulated in the Ministerial Regulation.”

After the proposed project was approved by the PPP Committees, the Host Agency shall follow the process to select the concessionaire as prescribed in Chapter 5 of the PISU Act. Moreover, during the selection process, the initial private sector who initiated the project should be treated more favorably than the other private parties, because it made an effort to create and study this project. Meanwhile, there should have decisive regulation to indicate method to treat such initial private party which can be stipulated in the Ministerial Regulation.

5.2.4 Addition of the Measure to Protect the Rights of the Private Party

The PISU Act is a law concerning the jointly contract to invest in public service between public and private party and also processes both before and after entering into PPP contract including amendment. However, the law was only imposed about the duty of public sector when default of the contract as specified in section 46, but there is no provision regarding the rights and duties of the private party in such case such as the right to terminate the contract and measure to compensate the private.

In addition to the default of contract, in the case that the parties fail to comply with the PISU Act, section 60 allows the PPP Committees to grant opinion to the cabinet to approve the amendment or termination of the contract without consent from private party. The worse thing is the PISU Act does not have provision about the rights of the private party to be protected such as temporary protection measure during consideration of the competent authority, the measure to compensate the private party and right to appeal the cabinet's approval.

As both public and private parties have already invested a lot of budget in the project, there should be chapters in the PISU Act to clarify the rights and duties of both public and private parties when the default of the contract as well as amendment or termination of the contract by the cabinet's approval. Therefore, a chapter “Default of contract” and “Amendment and Termination of contract” which indicated the rights and duties of the public and private sector regarding such matters should be added in the PISU Act.

5.2.5 Revision of the Structure and Qualifications of the PPP Committees

To ensure the transparency of the PPP Committees, it is recommended to revise the structure and qualifications of the PPP Committees by amending section 8 and add section 10 bis in the PISU Act as follows:

“Section 8 The PPP Committees shall be composed of seven professionals with not less than fifteen-year-experience, one is from each following fields:

- (1) State Administrative;*
- (2) Engineering;*
- (3) Economics;*
- (4) Law;*
- (5) State Budget;*
- (6) Business; and*
- (7) Other fields relating to PPP project.”*

“Section 10 bis The PPP Committees must not be:

- (1) Government official*
- (2) Employee of any governmental body, Local Administration, director, advisor of governmental body relating to private participation.*
- (3) Working in any field which has conflict of interest both direct or indirect against his/her duty as a committee*

Spouse of the PPP Committees is also subject to sub section (2) and (3).

5.2.6 Establishment of Private Investment in State Undertaking Center

It is recommended to establish an independent administrative body with government-funded called Private Investment in State Undertaking Center or PISUC. This institution should have a main duty to support the PPP projects in all aspects to both public and private sectors. Therefore, I am of the opinion that section 18 under the PISU Act should be revised as follows:

“The Private Investment in State Undertaking Center is responsible to be a secretary of the PPP Committee and have these following duties:

- (1) To formulate a draft Strategic Plan for the Committee’s approval*
- (2) To conduct feasibility study and submit opinions to Committee for consideration and approval*
- (3) To prepare draft monetary or fiscal measures or approaches for supporting private investments in State Undertaking for submission to the Committee;*
- (4) To submit opinions to the Committee in the case of a non-application of the selection by bidding process under section 38;*
- (5) To prepare draft rules and procedures for private investment in State Undertaking in projects having a lesser value than the amount stated in section 23 for submission to the Committee pursuant to section 58;*
- (6) To engage in technical collaboration, research and development with state agencies, research and development agencies and private agencies, both domestic and foreign, which performs duties pertaining to private investment in State Undertaking and to arrange for the development of personnel competencies in State Agencies to ensure knowledge and expertise for the efficient compliance of this Act;*
- (7) To study, research and prepare a database relating to private investment in state enterprises for dissemination, provision of education and advice to State Agencies and the general public in order to promote and build an understanding of private investments in State Undertaking;*
- (8) To consider and determine approaches relating to the implementation of this Act;*
- (9) To consider damages or approaches to compensate the private party when amendment or termination of the PPP contract without consent of the private party;*
- (10) To report problems and obstacles arising from the implementation of this Act to the Committee; and*
- (11) To perform other duties provided by this Act or other law as the powers and duties of the Center or as entrusted by the Cabinet, Ministers and Committee.”*

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