

THE PUBLIC-PRIVATE  
PARTNERSHIP  
LAW REVIEW

FIFTH EDITION

**Editors**

Bruno Werneck and Mário Saadi

THE LAWREVIEWS

THE PUBLIC-PRIVATE  
PARTNERSHIP LAW  
REVIEW

FIFTH EDITION

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# PREFACE

We are very pleased to present the fifth edition of *The Public-Private Partnership Law Review*. Notwithstanding the number of chapters in various publications in The Law Reviews series on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement), we identified the need for a deeper understanding of the specific issues related to this topic in different countries.

In 2014, Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004). Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment in large projects dates from the 1980s and 1990s.

This is the case for countries such as the United Kingdom and the United States. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986 to 2012, approximately 700 PPP projects reached financial closure. The United Kingdom is widely known as one of the pioneers of the PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports, and railways. The Private Finance Initiative was launched in the United Kingdom in 1992, aiming to boost design-build-finance-operate projects.

In certain developing countries, PPP laws are more recent than the Brazilian PPP law. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1,299/2000, ratified by Law No. 25,414/2000). The Argentinian PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education, justice, transportation, construction of airport facilities, highways and investments in local security. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 govern the Public-Private Partnerships Law and other related PPP regulations, which establish procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has been enacted (Law No. 5,102) to promote public infrastructure and the expansion and improvement of services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives regarding PPP issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the world.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model. One specific feature of the PPP law in Brazil, for instance, is state guarantees. This



feature permits that the obligation of the public party to pay a concessionaire be guaranteed by, among other mechanisms authorised by law: a pledge of revenues; creation or use of special funds; purchase of a guarantee from insurance companies that are not under public control; guarantees by international organisations or financial institutions not controlled by any government authority; or guarantees by guarantor funds or state-owned companies created especially for that purpose.

The state guarantee pursuant to PPP agreements is an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions – one that is viewed as crucial for the success of PPPs, especially from a private investor's standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This is made worse by the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. Unlike PPP projects in developing countries, government solvency has not historically been a serious consideration in other jurisdictions. That is the case in countries such as Australia, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks the most.

Brazil must adopt cutting-edge models for awarding PPP agreements. The winner is usually chosen based solely on the price criterion (offering of lower prices or highest offers), which sometimes leads to projects lacking advanced or tailor-made solutions. Despite the legal provisions on the role of technical evaluation of offers, they are becoming less relevant. However, some ongoing discussions regarding amendments to the Brazilian procurement legislation and new criteria, which are based on the international experience, could (fortunately) be approved.

We highlighted some discussions regarding the amendment to the Federal Procurement Law (Federal Law No. 8,666/1993), which is expected to expedite public procurement in Brazil. One of the main innovations proposed in this debate is the competitive dialogue, a type of bid in which the authority engages with bidders to discuss and develop one or more solutions for the tendered project. After the conclusion of the dialogue phase, the authority will establish a term for the submission of bids.

Competitive dialogue is a reality in many jurisdictions (e.g., Australia, Belgium, China, France, Ireland, Japan and the United Kingdom). In Japan, for example, some projects are procured through the competitive dialogue process. This process may be adopted if a relevant authority is unable to prepare a proper service requirement, in which case it proposes a dialogue with multiple bidders simultaneously to learn more about the specific service it seeks to implement. As another example, in France a dialogue will be conducted with each bidder to define solutions on the basis of the functional programme. At the end of the dialogue period, the procuring authority will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be awarded to the bidder with the best price in accordance with the criteria established in the contract notice or in the tender procedure. We hope the importance of this tool is recognised in Brazil and reflected in our legislation.

Further, the Investment Partnerships Programme, as established in Federal Law No. 13,334/2016, is a legal plan regarding infrastructure development in the country, providing conditions for the attraction of investments in infrastructure projects and creating environments for greater integration between public and private sectors.

The PPI is comprised of two relevant bodies within the federal government: the PPI Board and the PPI Secretariat. The first one evaluates and recommends to the President the projects that should be part of the PPI, as well as decides on subjects concerning the execution of partnership contracts and privatisations. The second one is a taskforce that acts in support of the Ministries and Regulatory Agencies to execute the PPI's activities. These entities, together with other bodies and controlling agencies, are expected to act in an articulated manner as to ensure stability, legal certainty, predictability and effectiveness of the investment policies.

With regard to the plans of the president-elect for infrastructure investments in Brazil, the responsible governmental team has already confirmed the continuity of the PPI, linked to the presidency and preserving the members of its current technical team. In addition, the new government team endorses the development of a programme by PPI to support public-private partnerships of states and municipalities, which would mainly cover sanitation and public lighting sectors. Given the lack of operational, technical and economic-financial ability of municipalities to manage such programmes, the federal government is expected to act closely with local entities to boost projects in priority areas.

In the fifth edition of this book, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions. We would like to thank all of them for their support in producing *The Public-Private Partnership Law Review*, and in helping with the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this fifth edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs. We also look forward to hearing your thoughts on this edition, and particularly your comments and suggestions for improving future editions of this work.

**Bruno Werneck and Mário Saadi**

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

São Paulo

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# VIETNAM

*Kazuhide Ohya, Vu Le Bang and Nguyen Van Trang<sup>1</sup>*

## I OVERVIEW

In 2018, Vietnam made its debut in the top-five countries for total volume of private participation in infrastructure.<sup>2</sup> According to the World Bank's database, 107 PPP projects are said to have reached financial closure in Vietnam during 1990–2018.<sup>3</sup> However, no official statistics on the number of PPP projects have been published in Vietnam and the PPP projects mentioned in the World Bank's database also seem to be only focused on major projects and many small projects and provincial level projects are missing from the database, especially in the areas of electricity, roads, and water and sewerage.<sup>4</sup>

In 1986, the *Đổi Mới* policy adopted at the 6th National Congress of the Communist Party of Vietnam introduced market economy in Vietnam and opened the market to foreign investors. Since then, Vietnam has faced a gap between the huge demand for infrastructure development with a rapidly growing population and economy and a scarce governmental budget, and, therefore, expectation to the private funds for the infrastructure development has existed. The history of PPP legislation in Vietnam started in 1992, when the amended Foreign Investment Law mentioned build–operate–transfer (BOT) for the first time. In 1994, it was reported that the first BOT contract was entered into for the water treatment plant project of Binh An Water Corporation Limited.<sup>5</sup> In this phase, PPP legislation was limited mainly for foreign investment and several PPP projects with foreign investors emerged.

Around the time when the Asian currency crisis started in 1997, Decree 77-CP dated 18 June 1997 also provided BOT regulations for full participation of domestic investors for the first time. At this stage, PPP projects of domestic investors were mainly established by the state-owned enterprises (SOEs) with the aim to implement such projects without state budget allocation, but those aims were not always successful.<sup>6</sup>

1 Kazuhide Ohya and Vu Le Bang are partners, and Nguyen Van Trang is a senior associate at Nishimura & Asahi.

2 See <http://blogs.worldbank.org/ppps/comment/reply/1081> (accessed on 2 January 2019).

3 See <http://ppi.worldbank.org/snapshots/country/vietnam> (accessed on 12 December 2018).

4 Unofficial source of statistics revealed that there were about 200 projects that have been licensed in the past 20 years. Among which, 158 BOT projects and BT projects in transportation sector, nine BOT projects in power sector and five PPP projects for water treatment (See <https://theleader.vn/viet-nam-khong-co-du-an-ppp-nao-chuan-theo-quy-dinh-1543895758822.htm> (accessed on 2 January 2019).

5 Ngoc Oanh, Binh Anh Water Corporation Limited: Always Supplying High Quality Potable Water, Vietnam Business Forum Magazine (undated), available at [http://vccinews.com/news\\_detail.asp?news\\_id=4226](http://vccinews.com/news_detail.asp?news_id=4226) (accessed on 6 February 2019).

6 For example, Huynh Tan Phat Road Project originally developed by Vietnam Urban and Industrial Zone Development Investment Corporation and Ong Thin Bridge Project originally planned to be developed by Civil Engineering and Construction Company 5 as BOT projects did not become profitable and were

With Vietnam's participation in the World Trade Organization, distinctions between the foreign investors and domestic investors were abolished in principle,<sup>7</sup> and BOT regulations were also unified in 2007. Subsequently, two regulations for PPPs – Decree 108/2009/ND-CP and Prime Minister Decision 71/2010/QĐ-TTg – co-existed without mutual coordination for a while, but this confusing situation was resolved in 2015 by Decree 15/2015/ND-CP (which was replaced by Decree 63/2018/ND-CP, taking effect on 19 June 2018). Decree 30/2015/ND-CP on selection of investors and Decree 63/2018/ND-CP are currently in effect for PPP regulations in Vietnam.

## II THE YEAR IN REVIEW

In 2017, the Standing Committee of the National Assembly issued Resolution No. 437/NQ-UBTVQH14, in which the government and the Prime Minister are requested to establish a PPP law. At the 29th Standing Committee of the National Assembly on 10 December 2018, the government announced its plan to submit a PPP law for comments at the 7th Session of the National Assembly (May 2019) and for approval at the 8th Session of the National Assembly (October 2019).<sup>8</sup> The draft PPP law has been circulated for comments by ministries and published on the website of Ministry of Planning and Investment (MPI) since June 2018.<sup>9</sup> It is expected to set the criteria on selection of PPP projects, evaluation of financial capacity of investors, and the equity ratio applied to each group of projects.

On 19 June 2018, Decree 63/2018/ND-CP replacing Decree 15/2015/ND-CP came into effect, and the legal framework set forth under this Decree is expected to encourage private investors to invest in PPPs. The key highlights of this Decree are the simplification of the procedure for investment in PPP projects<sup>10</sup> and the expansion of the funding sources for the state's participation in PPP projects.<sup>11</sup>

As a matter of fact, the Vietnamese government is calling for PPP investments in many projects<sup>12</sup> and it is no surprise for the Vietnamese government to make efforts to improve their PPP framework to attract more foreign investors. On the other hand, controlling the increasing public debt is also an inevitable task for the Vietnamese government. We see the tendency of conditions for government guarantee and undertakings (GGU) getting stricter in Law No. 83/2015/QH13 on State Budget, Law No. 20/2017/QH14 on Public Debt Management and Decree No. 91/2018/ND-CP on issuance and management of government guarantee. In 2017, no GGU was issued.<sup>13</sup> Recently, the Prime Minister issued Instruction No. 31/CT-TTg dated 8 November 2018 to request the Ministry of Finance to refrain from issuing GGU to the maximum possible extent and the Deputy Prime Minister turned down the proposal of the Ministry of Finance on the application of a pilot mechanism for issuance

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eventually transferred to public sectors.

7 See Paragraph 39, p. 11 of the 'Report on the Working Party on the Accession of Vietnam'.

8 See <http://www.baogiaothong.vn/can-som-co-luat-dau-tu-theo-hinh-thuc-doi-tac-cong--tu-d281761.html>.

9 See <http://www.mpi.gov.vn/Pages/tinbai.aspx?idTin=40082&idcm=140> (accessed on 2 January 2019).

10 Article 9 of Decree 63/2018/ND-CP.

11 Article 11 of Decree 63/2018/ND-CP.

12 Decision No. 631/QĐ-TTg dated 29 April 2014 of the Prime Minister promulgating the list of national projects in which foreign investments are called for by 2020 (including by PPP). The following links are for the projects calling for PPP investment: <http://ppp.mt.gov.vn/pppunit/Projects>; <http://ppp.mpi.gov.vn/Pages/project.aspx>.

13 See <https://vnexpress.net/kinh-doanh/hon-26-ty-usd-no-chinh-phu-bao-lanh-3761227.html>.

of GGU to guarantee for PPP projects in transportation sectors.<sup>14</sup> The unavailability of the GGU was one of the major blockages for foreign investors to establish international standard PPP projects in Vietnam with appropriate risk allocation between the public and private sectors, and such tendency of imposing stricter conditions may further frustrate foreign investors. Actually, except for projects for thermal power plants using imported coals,<sup>15</sup> it is not easy for foreign investors to be granted GGU for their PPP projects in Vietnam.

As a result, the following two types of domestic investors may have a higher possibility of implementing PPP projects in Vietnam: (1) strong domestic investors such as major SOEs that have enough influence to procure GGU; and (2) domestic investors who can implement PPP projects without government guarantee by utilising domestic loans from state-invested banks, such as the Joint Stock Commercial Bank for Investment and Development of Vietnam (BIDV), the Joint Stock Commercial Bank for Foreign Trade of Vietnam (Vietcombank) and the Joint Stock Commercial Bank for Industry and Trade (VietinBank). The latter pattern is predominant in the area of road infrastructure projects. It is said that the state-invested banks mentioned above are taking huge commercial risks in such area (including step-in rights) and are currently bridging the gap between the huge demand for infrastructure development and a scarce state budget.

Another trending topic in the infrastructure development area in Vietnam is the boom in the renewable energy sector. With the Vietnamese government's strong supports for promoting environmentally friendly energy sources, including raising feed-in tariff for solar and wind power projects and efforts to improve the regulatory framework for investments in such projects,<sup>16</sup> an increasing number of investors are lured into such projects.<sup>17</sup>

### III GENERAL FRAMEWORK

#### i Types of public-private partnership

Under the current PPP regulations, the following seven principal public-private partnership structures are provided:

Structure type	Definition
BOT	Structure for the construction of infrastructure facility upon the completion of which the investor has the right to commercially operate such facility for a fixed term, and upon the expiry of such term, the investor transfers the facility to the state.*
Build-transfer-operate (BTO)	Structure for the construction of an infrastructure facility upon the completion of which the investor transfers such facility to the state and has the right to commercially operate the facility for a fixed term.†

14 See <http://baodauthau.vn/dau-tu/chua-xay-dung-co-che-bao-lanh-chinh-phu-ap-dung-thi-diem-cho-du-an-ppp-82053.html>.

15 Projects for thermal power plants enjoy certain preferential treatments, including GGU, under Decision 2414/QD-TTg dated 11 December 2013. In these projects, participation of foreign investors who are capable of implementing such projects is necessary because of the lack of capacity and experience of domestic investors for such projects.

16 Notable regulations are Decision 11/2017/QD-TTg, which raised feed-in-tariff for on-grid solar power plants, Circular 16/2017/TT-BCT on project development and model purchase agreements for solar power projects, and Decision 39/2018/QD-TTg on amendment and supplementation of some articles of Decision 37/2011/QD-TTg on the support mechanisms for development of wind power projects in Vietnam.

17 However, not all of these projects are implemented under PPP regulations.

Structure type	Definition
Build–transfer (BT)	Structure for the construction of an infrastructure facility whereby the investor transfers such facility to the state and is rewarded by way of land use rights, working headquarters, infrastructure assets, or the right to commercially operate facilities or provide services to implement other projects to recover capital invested in such facility.‡
Build–own–operate (BOO)	Structure for the construction of an infrastructure facility upon the completion of which the investor owns and has the right to commercially operate the facility for a fixed term.§
Build–transfer–lease (BTL)	Structure for the construction of an infrastructure facility upon the completion of which the investor transfers such facility to the state and has the right to provide services on the basis of operating and exploiting the facility for a fixed term; and the state has the authority to hire such services and shall make payment to the investor periodically on the basis of the volume and quality of services.¶
Build–lease–transfer (BLT)	Structure for the construction of an infrastructure facility upon the completion of which the investor has the right to provide services on the basis of operating and exploiting such facility for a fixed term; the state has the right to hire such services and shall make payment to the investor periodically on the basis of the volume and quality of services; and upon the expiry of the term for provision of such services, the investor transfers the facility to the authorised state agency.#
Operate–manage (O&M)	Structure for an investor to commercially operate a facility partly or entirely for a fixed term.**
Mixed contract	Structure that is a mixture of two or more of the above types for the construction or operation of an infrastructure facility.††
Notes * Article 3.3 of Decree 63/2018/ND-CP. ‡ Article 3.4 of Decree 63/2018/ND-CP. ‡ Articles 3.5, 10.4, 15.3, 33, 34, 35 and 36 of Decree 63/2018/ND-CP. § Article 3.6 of Decree 63/2018/ND-CP. ¶ Articles 3.7 and 15.2 of Decree 63/2018/ND-CP. # Articles 3.8 of Decree 63/2018/ND-CP. ** Article 3.9 of Decree 63/2018/ND-CP. †† Article 3.10 of Decree 63/2018/ND-CP	

BOT, BTO and BT are traditional structures in Vietnam. The difference between BOT and BTO is the timing of transfer of the project assets to the state. Once the project assets are transferred to the state, they are classified as ‘public assets’,<sup>18</sup> which are subject to stricter control or management of the state. In that sense, BOT investors, under which the transfer will be made after the operation, may enjoy relatively more flexible control or management over the project assets than BTO investors. BT is recognised as a PPP structure in Vietnam, though no operational or management risk is passed to the private sector.

BOO, BTL, BLT and O&M structures were newly introduced by Decree 15/2015/ND-CP. BOO was implemented in practice even before being introduced by Decree 15/2015/ND-CP. BTL and BLT are new concepts introduced by Decree 15/2015/ND-CP. The elements that differentiate BTL and BLT from BOT or BTO structures are the payment method to the service of the investors and the payer to the service of investors (i.e., payment by the state on the basis of volume and quality of service including availability payment, not fees from end-users or off-takers).<sup>19</sup>

Decree 63 adopted all types of PPP structures under its predecessor regulation and newly introduced a new concept of mixed contract.

## ii The authorities

In Vietnam, there is no unified service window for PPPs. A certain ministry, branch or provincial people’s committee is authorised to enter into project contracts within the scope

18 Article 3.1 of the Law on Management and Utilization of Public Asset.

19 However, various payment arrangements were made under BOT/BTO projects in the past.

of its functions, duties and powers, and to perform rights and obligations as agreed with investors in project contracts, with certain power to delegate such authority. Investors are recommended to consult with experts such as lawyers in the early stage of project preparation for PPPs to identify which state agency will be the key counterpart for discussion and negotiation for the project to facilitate the project establishment. For example, depending on the sectors of PPP projects at the central government level, the following state agencies would be the competent contracting or regulatory agencies:

Sectors	Competent contracting/regulatory state agency
Roads, railways, ports, airports	Ministry of Transportation
Water, wastewater	Various governmental agencies, including the Ministry of Natural Resources and Environment
Energy	Ministry of Industry and Trade Vietnam Electricity Corporation (EVN)
Information communications technology	Ministry of Information and Communications

The State Steering Committee for PPP is an inter-Ministry specialised governmental entity that facilitates the PPP programme in Vietnam (the Committee). The Committee was established by Decision 1624/QĐ-TTg in 2012 and strengthened its function by Decision 2048/QĐ-TTg in 2016, which replaced Decision 1624/QĐ-TTg. The Vice Prime Minister is the chair of the Committee. The MPI is also the central Ministry among the governmental Ministries to promote PPP regime in Vietnam. The Ministry of Finance, Ministry of Justice and SBV also play important roles in the formation of PPP projects.

### iii General requirements for PPP contracts

A project must satisfy all the following conditions to be eligible for making an investment policy decision in the PPP investment form:<sup>20</sup>

- a* a conformity with development master plans for the industries and sectors and socio-economic developmental plan as approved by the competent authorities;
- b* being in one of the following investment sectors:
  - transportation;
  - power plants and power transmission lines;
  - public lighting systems; clean water supply systems; water drainage systems; waste water and waste collection and treatment systems; parks; housing and yards for parking cars, vehicles, machinery and equipment; and cemeteries;
  - headquarters or offices of state agencies; official residential housing; social housing; resettlement housing;
  - health; education, training and vocational training; culture; sport; tourism; science and technology, hydrometeorology; information technology application;
  - commercial infrastructure; infrastructure of urban zones, economic zones, industrial zones, industrial clusters, and centralised information technology zones; high-tech technical infrastructure; and incubation establishments, technical establishments, and common working areas supporting small and medium-sized enterprises;

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20 Article 20 of Decree 63.

- agriculture and rural development; development services for connecting production with processing and sale of agricultural products; and
  - other sectors as decided by the Prime Minister of the government;
- c* not overlapping with other projects for which an investment policy decision or investment decision was made;
- d* being capable of capital recovery for the investor;
- e* conforming with the capability of balancing the state portion for participating in a PPP project; and
- f* having an environmental impact assessment report as prescribed by the law on protection of the environment.<sup>21</sup>

There is no pre-fixed limitation for the term of the project, and it will be agreed among the parties in the project contract considering the sector, size, characteristics and type of project. The overall outline of the procedure for solicited PPP projects is as follows:<sup>22</sup>

- a* formulation and evaluation of the pre-feasibility study report, issuance of the investment policy decision and the announcement of the project;
- b* formulation, evaluation and approval of the feasibility study report;
- c* procurement for selection of investor;
- d* negotiation, establishment of the project company (if any) and signing of the project contract; and
- e* implementation of the project, accounting finalisation and transfer of the facility.<sup>23</sup>

Within seven business days after the approval of a project proposal, the announcement of the project will be made on the national bidding network system in accordance with the Law on Bidding.<sup>24</sup>

The authorities to 'evaluate' feasibility study reports are (1) the State Evaluation Committee for national important projects; and for projects using official development assistance (ODA) capital and concessional loan capital of foreign donors as the state capital contribution portion in the sectors of national defence and security, and religion; (2) ministers, heads of ministerial equivalent agencies and chairmen of provincial people's committees assigning their PPP co-ordinating for projects other than those prescribed in (1).<sup>25</sup> The authorities to 'approve' feasibility study reports are: (1) the Prime Minister for national important projects; and for projects using ODA and concessional loan capital of foreign donors as the state capital contribution portion in the sectors of national defence

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21 Article 20 of Decree 63/2018/ND-CP.

22 BT projects, Group C PPP projects and high-tech projects follow different procedures. Group C PPP projects are not required to formulate and evaluate a pre-feasibility study report or to issue an investment policy decision, but the project must be announced after the feasibility study report is approved. The selection of investors of high-tech projects will be conducted after the pre-feasibility study report and project approval. As a result, the selected investors will be responsible for preparing the feasibility study report.

23 Article 9 of Decree 63/2018/ND-CP.

24 Article 21.1 of Decree 63/2018/ND-CP.

25 Article 30.1 of Decree 63/2018/ND-CP.



and security, and religion; and (2) ministers, heads of ministerial equivalent agencies and government agencies, and chairmen of provincial people's committees for projects other than those stipulated in (1).<sup>26</sup>

#### **IV BIDDING AND AWARD PROCEDURE**

##### **i Expressions of interest**

Based on the approved feasibility study report for a PPP project, pre-qualification shall be conducted before preparing the plan for selection of investors to identify investors with sufficient capacity and experience to satisfy the project requirements and to invite them to participate in open bidding.<sup>27</sup> Within three business days from the publication of the notice of invitation of pre-qualification applications on the national bidding network system or in the bidding newspaper, pre-qualification invitation documents must be issued.<sup>28</sup> The application period is at least 30 days from the pre-qualification invitation.<sup>29</sup> If investors wish to clarify pre-qualification invitation documents, they can send a written request to the inviting party until five business days prior to the bid closing date.<sup>30</sup> Pre-qualification is conducted in accordance with the assessment criteria set out in the pre-qualification invitation documents.<sup>31</sup> Investors will be required to prove financial-commercial capacity and ability to raise funds, implement the project and experience in similar projects, declare the preliminary method for implementing the project and commit to implementing it, and declare any dispute or litigation arising out of current or earlier contracts.<sup>32</sup>

##### **ii Requests for proposals and unsolicited proposals**

The selection of investors is basically made through international open bidding. Domestic open bidding is only allowed: where participation of foreign investors is restricted for the investment sectors by international treaties or laws of Vietnam; where foreign investors did not participate in or pass international pre-qualification; in Group C PPP projects; or in certain small-scale investment projects using land.<sup>33</sup> Invitation of bidding will be sent to the investors who passed pre-qualification.<sup>34</sup> Bidding procedures for Group C PPP projects and projects using land are provided separately from bidding procedures for other PPP projects. By the bidding application closing date, bidders need to provide bidding deposits, the amount of which is between 0.5 per cent and 1.5 per cent of the proposed total invested capital.<sup>35</sup>

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26 Article 31.1 of Decree 63.

27 Article 16 of Decree 30/2015/ND-CP. Certain small projects may be exempted from this process.

28 Article 6.3 of Decree 30/2015/ND-CP.

29 Article 6.4 of Decree 30/2015/ND-CP.

30 Article 18.2(c) of Decree 30/2015/ND-CP.

31 Articles 17.1(d) and 20.1 of Decree 30/2015/ND-CP.

32 Articles 17.1(c) and 20.1 of Decree 30/2015/ND-CP.

33 Article 9 of Decree 30/2015/ND-CP.

34 Article 29 of Decree 30/2015/ND-CP.

35 Articles 11.2 and 11.3(b) of the Law on Bidding.

Direct appointment of the investor (without bidding procedure) is allowed only in quite limited circumstances, that is, if:

- a* only one investor registers and satisfies the requirements set out in the pre-qualification invitation documents or only one investor passes the pre-qualification;
- b* only one investor has the capacity to implement the project because of intellectual property, commercial secrets, technology or arranging capital funding; or
- c* an investor proposing a PPP project (i.e., an investor of an unsolicited proposal project, which is further discussed below) satisfies the requirements for project implementation with the highest feasibility and efficiency, considering that:
  - the investor has a feasibility study report that has been approved already;
  - the service prices proposed by the investor, amounts of economic assistance by the government or social benefits are reasonable; and
  - there is a necessity for national security.<sup>36</sup>

Unsolicited proposals of PPP projects from investors are possible in Vietnam. If the investor is a state-owned enterprise, it must form a consortium with another enterprise to propose the project. Under unsolicited projects, investors need to prepare the pre-feasibility report and the feasibility study report mentioned in the overall outline of the procedure for solicited PPP projects in Section III.iii (bullet points (a) and (b)), by their own expenses.<sup>37</sup> If the feasibility study report is approved, such investor is entitled to preferential treatment (5 per cent) in the financial–commercial assessment process of the bidding.<sup>38</sup>

### iii Evaluation and grant

The evaluation process consists of assessment of technical proposals and assessment of commercial–financial proposals.<sup>39</sup> Through these assessments, investors who satisfied the requirements will be ranked in the list. The investor ranked first will be invited to negotiate an investment (preliminary) agreement,<sup>40</sup> which is not a PPP contract itself, but rather a preliminary agreement on the draft PPP contract. If preliminary negotiations are unsuccessful, the next ranking bidder will be invited to negotiate the same.<sup>41</sup>

Once the investment (preliminary) agreement is concluded, if necessary, the investor will proceed to the process of establishment of the project company in accordance with the general procedure provided by enterprises law.<sup>42</sup> Under the new legal framework, the investor is no longer required to obtain an investment registration certificate for a PPP project.

After the project company is established, the investor may either sign the project contract then assign the rights and obligations of the investor under the project contract to the project company; or together with the project company to sign the project contract.<sup>43</sup> Guarantee for contract performance must be provided prior to the date on which the PPP contract takes effect.<sup>44</sup> An amount of a contract performance guarantee is stipulated in the bid invitation documents at a level between 1 per cent and 3 per cent of the total investment capital of the project.<sup>45</sup>

Procedures for Group C PPP projects and projects using land are provided separately from procedures for other PPP projects.

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43 Article 39 of Decree 63/2018/ND-CP.

44 Article 72 of the Law on Bidding and Article 47 of Decree 63/2018/ND-CP.

45 Article 72.2 of the Law on Bidding.

## V THE CONTRACT

### i Payment

Payments by the state to the investors in PPP projects are one of the inevitable factors for such PPP projects to be viable. Under the old PPP regime, Decree 108/2009/ND-CP and Prime Minister Decision 71/2010/QĐ-TTg respectively provided the limits for available state investment capital of 49 per cent and 30 per cent of the total investment capital of a project. These limits were abolished under the current PPP regulations.

The state's participation in a PPP project may be made in one or more of the following forms ((a) and (b) will not be available for projects whose investors are selected by direct appointment):

- a* the state's capital contribution, which shall be used to support construction of facilities for the purpose of ensuring the viability of projects, excluding BT projects;
- b* capital for payment to the investor, which shall be used to make payment to investors providing services under BLT or BTL contracts;
- c* land fund, working headquarters or infrastructure assets as payment to the investor or the right to commercially operate and exploit the facility and the services assigned to the investor in a BT project; or
- d* capital for supporting construction of auxiliary works, and arranging compensation, site clearance and resettlement.<sup>46</sup>

State investment capital to be used to support construction of project facilities via viability gap funding will be disbursed in accordance with the procedure to disburse for capital originated from the state budget.<sup>47</sup> As a general principle, the payment will be made after certain volume or value of construction as agreed in the project contract has been completed in accordance with the ratio, value and progress, and other conditions agreed in the project contract.<sup>48</sup>

Under BTL and BLT contracts, the state will make payments to investors periodically as from the time of service provision as agreed in the project contract and on the basis of volume and quality of service (key performance indicators) as agreed in the project contract including availability payment.<sup>49</sup> Availability payments or performance-based payments have been used in utilities PPP projects (power generation and water supply projects) in Vietnam, and recently, a newly introduced BTL/BLT contract form was actually used.<sup>50</sup>

A BT contract is a unique type of PPP contract under which the investor will be rewarded by way of land use rights (not payment by cash) in order to implement other projects to recover capital invested in the facility.

<sup>46</sup> Article 11 of Decree 63/2018/ND-CP.

<sup>47</sup> Article 17.1 of Circular 88/2018/TT-BTC.

<sup>48</sup> Article 17.2 of Circular 88/2018/TT-BTC.

<sup>49</sup> Article 18.1 of Circular 88/2018/TT-BTC.

<sup>50</sup> See <http://www.ipc.danang.gov.vn/vi/chi-tiet-tin-tuc?dinhdanh=1403601&cat=0>; <http://baodauthau.vn/dau-tu/an-giang-dau-tu-du-an-xu-ly-chat-thai-ran-theo-hinh-thuc-bl-46266.html>; <http://kehoachtaichinh.medinet.gov.vn/xa-hoi-hoa/cac-du-an-dau-tu-theo-hinh-thuc-doi-tac-cong-tu-ppp-cua-cac-benh-vien-thanh-pho-c4624-304.aspx>; <http://www.baodanang.vn/channel/5404/201601/danh-muc-cac-du-an-keu-goi-dau-tu-theo-hinh-thuc-doi-tac-cong-tu-ppp-2462283/index.htm>.

## ii State guarantees

### *Government guarantees on loans*

The guideline for government guarantees on loans is available under Law No. 83/2015/QH13 on State Budget, Law No. 20/2017/QH14 on Public Debt Management and Decree No. 91/2018/ND-CP on the issuance and management of government guarantee. For debts of investors or project companies to be guaranteed by the government, they need to obtain the in-principle approval from the Prime Minister.<sup>51</sup> According to the Ministry of Finance, the total guaranteed amount as of the end of 2017 is equivalent to US\$26 billion. Government guarantees issued to foreign loans accounted for more than 84 per cent of the guaranteed amount. The total outstanding principal is equivalent to US\$12.5 billion, of which 64 per cent was attributable to the power sector. Among them, US\$89 million went into default. All those debts were repaid from the accumulated fund for loan repayment and only half of defaulting debtors could fully return the defaulted amount to the fund.<sup>52</sup>

### *Government guarantees on other obligations*

Decree 63/2018/ND-CP also provides government guarantees on provision of raw materials, on consumption of products and services, and on other contractual obligations to the investor, project company or other enterprises participating in project implementation, and a guarantee for performance by state-owned enterprises of the obligation to sell fuel and raw materials to, and to purchase products and services from, the investor and project company.<sup>53</sup> For example, government guarantees were provided for the contractual obligations of EVN (off-taker) in power plant projects and of the providers of water pipes in water plant projects. For these types of guarantees, the Prime Minister's decision to appoint the guarantor is also necessary.<sup>54</sup> However, it has not seemed to be easy to obtain these guarantees recently. In addition, if the local level people's committee is a provider of the guarantee and does not have enough budget to implement such guarantee obligations, investors need to request necessary arrangements to secure the required budget for the local authorities to implement such a guarantee obligation.

### *Guarantee on foreign currency balancing (availability)*

The Vietnamese dong is not traded in the international market and no commercial bank will be able to sell United States dollars, even in Vietnam, if the bank's rate is outside the range of rate decided by the State Bank of Vietnam because of Vietnamese foreign exchange regulations.<sup>55</sup> As a result, there is a risk that conversion from Vietnamese dong to hard currencies becomes impossible, and this risk became a reality in 2008. Government guarantee on the foreign currency balancing (availability) is a critical issue for foreign-invested PPP projects under which the income of the projects are denominated in Vietnamese dong, such as power plant projects, water plant projects and toll fee road projects.

51 Article 13 of Decree 91/2018/ND-CP.

52 See <https://vnexpress.net/kinh-doanh/hon-26-ty-usd-no-chinh-phu-bao-lanh-3761227.html>.

53 Article 61 of Decree 63/2018/ND-CP.

54 id.

55 Decision 230/QD-NHNN dated 11 February 2011 and Article 5 of Circular 15/2015/TT-NHNN.

Article 64 of Decree 63/2018/ND-CP provides guidelines for such government guarantees on foreign currency balancing. Investors and project companies of the following project may be considered to be granted a government guarantee on foreign currency balancing (availability):

- a* projects that fall under the authority of the National Assembly or the Prime Minister to approve the investment policies; and
- b* projects for development of important infrastructures.

The Vietnamese government does not have enough foreign currency reserves (though the situation has been improving recently), so the procurement of this type of guarantee is not easy, as illustrated above.

### ***Other guarantees***

Decree 63/2018/ND-CP also provides for other types of government guarantees that include a guarantee on the purpose of land use right for the project being unchanged even if the lenders exercise their step-in rights (Article 63), a guarantee on the priority provision of public service (Article 65) and a guarantee on protection from confiscation of project assets (Article 66). Foreign investors of PPP projects in Vietnam have tried to obtain GGU even for the types of guarantees not clearly provided in the PPP regulations. Such guarantees include on the overseas fund transfer, permission of overseas bank account opening and of protection from the change of laws.

### **iii Distribution of risk**

Risk allocation is a mandatory item to be provided in pre-feasibility study reports and feasibility study reports.<sup>56</sup> In Vietnam, there is no official standard or reference risk allocation template, and risk allocation needs to be negotiated with the authorised state agency case by case. This negotiation takes quite long time and foreign investors often encounter difficulties.

### **iv Adjustment and revision**

PPP project contracts may be amended or supplemented as a result of a change of project size, technical specifications of the facility or the total investment capital already agreed; a *force majeure* event; an amendment of the feasibility study report; or other circumstances as stipulated in the project contract.<sup>57</sup> In practice, several terms of BOT projects were extended to make up for deficiencies caused because of the changes in the situation expected at the stage of project proposal and feasibility study.<sup>58</sup>

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56 Article 18.3 and Article 29.1 of Decree 63/2018/ND-CP.

57 Article 44 of Decree 63/2018/ND-CP.

58 e.g., Rach Mieu Bridge (<https://tuoitre.vn/du-an-bot-xay-dung-cau-duong-thang-it-thua-nhieu-168513.htm>).

## v Ownership of underlying assets

The provincial people's committee is responsible for site clearance and for completing procedures for allocation or lease of land to implement the project.<sup>59</sup> Site clearance and resettlement in Vietnam often face difficulties and cause delays in implementation of PPP projects.

If a project involves transfer of a project facility, the authorised state agency and the investor shall reach agreement in the project contract on the conditions and procedures for such transfer, in accordance with the following principles:

- a the investor notifies the authorised state agency about transfer of the project facility one year before the date of transfer or within such other period as agreed in the project contract;
- b the authorised state agency arranges verification of the quality, value and status of the project facility;
- c the investor and project company ensure the discharge of any financial or other obligation of project facility, undertakings of necessary repairs, maintenance and overhaul, and others, in accordance with the project contract; and
- d the authorised state agency organises management and operation of the facility after it is handed over.

The transfer is only permissible upon the completion of construction works or commencement of the operation of such projects.<sup>60</sup>

The investor and project company are permitted to mortgage assets and land use rights in the project and the right to commercially operate the project facility with the lender.<sup>61</sup> However, only credit institutions authorised to operate in Vietnam are eligible for taking mortgage on the land use rights, and foreign financial institutions are not qualified to do so.<sup>62</sup>

## vi Early termination

Early termination of PPP project contracts may happen as a result of breach of contract without taking effective remedial measures, a *force majeure* event or in other circumstances stipulated in the project contract. In practice, if a project turns out to be commercially not feasible, solutions through revision of contract term, as mentioned above, or taking over by governmental institutions are sought.<sup>63</sup>

## VI FINANCE

There are international and domestic banks (including BIDV, Vietcombank and Vietinbank) that have capacity to finance PPP projects in Vietnam. In certain sectors, banks (especially international banks) are facing bankability issues caused by various reasons including foreign exchange-related issues and lack of appropriate risk allocation.

<sup>59</sup> Article 49 of Decree 63/2018/ND-CP.

<sup>60</sup> Article 43.1 of Decree 63/2018/ND-CP.

<sup>61</sup> Article 62 of Decree 63/2018/ND-CP.

<sup>62</sup> Articles 174 and 175 of the Law on Land. It is not clear whether foreign bank branches in Vietnam are included in 'credit institutions authorized to operate in Vietnam' or not. At this point in time, opinions of the state authorities are not necessarily unified.

<sup>63</sup> e.g., Huynh Tan Phat road project mentioned in footnote 6.

## VII RECENT DECISIONS

In Vietnam, both international and domestic arbitrations are allowed for dispute resolution method in PPP projects. According to the United Nations Conference on Trade and Development's website,<sup>64</sup> eight investment disputes are reported with Vietnam as respondent state, three of which were decided in favour of the state (the latest case is *RECOFI v. Vietnam*, whose decision was finalised in 2016).<sup>65</sup> Vietnam is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and foreign arbitration awards should be recognised and enforceable in accordance with the rules thereof. In practice, however, recognition and enforcement were often unreasonably denied by Vietnamese courts because of reasons of inconsistency with the basic principle of law of Vietnam or that the dispute is not a commercial one covered by the New York Convention. Domestic arbitration is also growing rapidly and increasingly recognised and utilised in Vietnam.

## VIII OUTLOOK

As mentioned above, a new PPP Law is expected to be finalised in the near future. Currently, it is not certain how Vietnam will tackle the issues caused by limited state budget, including unavailability of appropriate GGUs, but we hope several positive changes that are somehow implied in the publicised drafts will be included in the new regulations.

One of the desired changes is the facilitation of brownfield investments. Even if foreign investors have difficulties in forming greenfield PPP projects as a result of limited provision of GGUs, etc., they may take risks of such projects after local investors, especially major SOEs, take the development risks of such projects. Local investors can also benefit from brownfield investments by collecting funds earlier than originally scheduled. We hope the new regulations will clarify the procedures and conditions for brownfield investments that are not clear enough under the current regulations and facilitate brownfield investments.

Another change is enhancement of existing funds or establishment of new funds specifically reserved for supporting PPP projects so as to cover a shortage of state budget and to attract investors' private investment capital source. However, details including possibility of inclusion of such change are not available yet.

Although many challenges still exist in PPP projects in Vietnam, there is no doubt about the huge demand for them.

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<sup>64</sup> Available at <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2> (accessed on 6 February 2019). This website provides information on investment disputes and does not focus on PPP projects.

<sup>65</sup> Available at <http://investmentpolicyhub.unctad.org/ISDS/Details/554> (accessed on 22 January 2018).

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