

## Newsletter

October 2016

### ASEAN PPP Legal Update (Vol. 7)<sup>1</sup>

In this issue, we highlight the following important recent developments in legal reforms with respect to PPPs in ASEAN countries.

- Direction of PPP-Related Legal Reforms under the New Administration (Philippines)
- Development of New Government Guarantees for Infra Businesses (Indonesia)
- Introduction of Mechanisms to Accelerate PPP Projects, such as the PPP Fast Track Program, etc. (Thailand)

#### 1. Direction of PPP-Related Legal Reforms under the New Administration (Philippines)

In the Philippines, lively discussions took place during the Aquino administration<sup>2</sup> on reforming the PPP-related legal framework to promote PPP projects. The Duterte administration, which only took office in June 2016, seems to have taken up the baton<sup>3</sup>. A new bill (House Bill No. 163, the "Bill") was submitted to Congress<sup>4</sup> in July 2016 seeking to establish a new PPP law to supersede the "BOT Law," the current basic PPP-related law in the Philippines (Republic Act No. 6957, 7718). The Bill will likely be enacted into law by the end of the 17th Congress (June 2017) at the earliest, and proposes multiple important changes to the current framework, including the following.

- i. Expansion of business structures ("Operation and Maintenance" and "Supply and Operate" to be added)<sup>5</sup>
- ii. Extension of the submission period for proposals to compete with an unsolicited proposal (from 60 days to up to 6 months)<sup>6</sup>
- iii. Restriction on the issuance of temporary restraining orders or similar orders against PPP projects<sup>7</sup> by the courts (except for the Supreme Court)

<sup>1</sup> We changed the title of this newsletter from "ASEAN Infracapital Legal Update" to "ASEAN PPP Legal Update" starting with this issue and will continue to cover important issues in connection with PPP businesses in ASEAN countries.

<sup>2</sup> For an outline of the current PPP framework in the Philippines and the direction of PPP legal reforms under the former administration, please see [Vol. 2](#) of this newsletter.

<sup>3</sup> In September 2016, the National Economic Development Authority (NEDA) Board has approved PHP 74.6 billion upgrade of all terminals of the Ninoy Aquino International Airport which is the first PPP project under the Duterte administration together with other 8 projects (<http://cnnphilippines.com/business/2016/09/16/NEDA-Board-approves-9-projects-worth-%E2%82%B1171B.html>)

<sup>4</sup> The Bill essentially succeeded House Bill 3951 (substituted for HB 6331) which was expected to be enacted during the 16th Congress during the Aquino administration.

<sup>5</sup> Article 4 of the Bill

<sup>6</sup> Article 9(a)(2) of the Bill

<sup>7</sup> Article 16 of the Bill

- iv. Preferential treatment for projects of national significance<sup>8</sup>
- v. Expansion of the role of the PPP Center (e.g. review of PPP contracts)<sup>9</sup>
- vi. Establishment of a government guarantee fund to guarantee contingent obligations of Contract Agencies under PPP contracts<sup>10</sup>

Although the details of the government guarantee fund described in vi. above have yet to be disclosed (e.g. its size and coverage eligibility criteria), this fund is expected to help mitigate risks relating to Contract Agency cash shortfalls and/or government budget approval delays, thereby enabling the Contract Agency to discharge its contingent obligations.<sup>11</sup> It should be noted, however, that obligations concerning availability payments (which are important PPP promotion schemes) do not constitute contingent obligations and therefore will not be covered by this fund.<sup>12</sup> Also worth mentioning is the fact that the Bill does not include specific provisions relating to government support and the recovery of investments by private entities. We are unaware of any initiatives to change the current scheme in either regard.<sup>13</sup>

In addition to the PPP legal reforms mentioned above, attention is drawn to the extent of the relaxation of restrictions on foreign investment in business activities requiring a public utility franchise. The Philippine Constitution provides that foreign investment in entities engaged in such business activities is limited to 40% of overall investment, and the relevant laws and regulations, including the BOT Law and the Negative List, have been developed in line with these constitutional limits. Momentum for a constitutional change seems to exist, given the fact that a bill aiming to lift this restriction (Resolution of Both Houses 1), which failed to pass in December 2015, was resubmitted in June 2016, and President Duterte is reportedly backing this constitutional reform with the goal of promoting foreign investment.<sup>14</sup> The current climate offers a chance that the framework of foreign investment restrictions which has long been a bottleneck to foreign investment in infrastructure businesses in the Philippines may change drastically in the near future, and due attention should be paid to all developments.

## **2. Development of Government Guarantees for Infra Business (Indonesia)**

In Indonesia, in addition to (i) the Indonesia Infrastructure Guarantee Fund ("IIGF") for PPP projects and (ii) the business viability guarantee provided by the Minister of Finance for IPP projects ("BVGL") listed in the "Second Fast

<sup>8</sup> Article 20 of the Bill

<sup>9</sup> Article 22 of the Bill

<sup>10</sup> Article 26 of the Bill

<sup>11</sup> For example, "compensation of the private sector in the event that the government does not approve a price increase in connection with a transportation or water business" would be included in contingent liability.

<sup>12</sup> An availability payment by a Contract Agency could be covered by government monetary support (e.g. a government guarantee or credit enhancement) under the current regime. However, the government of the Philippines has been reluctant to provide such support due to budgetary constraints.

<sup>13</sup> Concerning current government support and investment recovery measures, please see [Vol. 2](#) of this newsletter.

<sup>14</sup> "Moves to amend charter snowball in Congress" (Business World Online, July 5, 2016)

Track" program<sup>15</sup>, the following government guarantee systems for infrastructure businesses have been newly established over the last year.

#### (1) Government Guarantee for IPP Projects listed in the PLN's Long Term Electricity Generation Plan (RUPTL)

In accordance with Presidential Regulation No. 4 of 2016 on Acceleration of Power Infrastructure Development ("**PR 4/2016**") issued in January 2016, a new system of government guarantees was created to be provided by the Minister of Finance for IPP projects listed in the PLN's Long Term Electricity Generation Plan (RUPTL).<sup>16</sup> Under the new system, IPP projects not listed in the "Second Fast Track" program may be eligible for a government guarantee.<sup>17</sup> The PLN's Long Term Electricity Generation Plan (RUPTL) for 2016-2025 was published in June this year.<sup>18</sup> Aside from IPP projects, PR 4/2016 also makes the Minister of Finance ("**MoF**") guarantees available for loans obtained by PLN in relation to development of power infrastructure projects ("**PLN Loan Guarantee**").

In late August 2016, MoF issued Regulation No. 130/PMK.08/2016 on Procedures of the Granting of Government Guarantee for the Acceleration of Development of Electricity Infrastructure ("**PMK 130/2016**") in connection with PLN Loan Guarantee and BVGL. As expected, PMK 130/2016 provides that IPP projects which are developed under the Second Fast Track Program or PR 4/2016 can be eligible for BVGL. This new regulation also replaces the previous MOF regulation on BVGL under the Second Fast Track Program.

However, the BVGL is not automatically available for all IPP projects under PR 4/2016 and the Second Fast Track Program. PMK 130/2016 requires PLN to prepare a list of projects which have to be approved by the Minister of Energy and Mineral Resources and afterward submitted to MoF. Only projects which are included in this list will be eligible for government guarantee under PMK 130/2016 (the same applies to PLN Loan guarantee). In addition, for IPP projects, the procurement documents for the relevant project must also specify that BVGL will be available.

#### (2) Government Guarantee for State-Owned Infrastructure Institutions

A government guarantee system for international lenders was newly established by Presidential Regulation No. 82 of 2015 on Central Government Guarantees for Infrastructure Financing through Direct Loans from International Financial Institutions to State-Owned Enterprises ("**SOEs**") issued in July 2015. Under this new system, the Minister of Finance has the option of providing a guarantee to international development financial institutions or ECAs (including ADB and JBIC) which extend loans to (a) SOEs promoting certain important infrastructure projects in line with the Mid-Term

<sup>15</sup> For information concerning these guarantee systems, please see [Vol. 1](#) (Japanese) and [Vol. 6](#) of this newsletter.

<sup>16</sup> For the details of this new system, please see the relevant [newsletter](#) issued by HHP (B&M Jakarta) in February 2016.

<sup>17</sup> In Indonesia, a significant number of IPP projects do not fall under definition of a PPP project and are not listed in the "Second Fast Track" program.

<sup>18</sup> Concerning the details of this plan, please see the relevant [newsletter](#) issued by HHP (B&M Jakarta) in June 2016.

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National Development Plan selected by the National Planning Development Agency (BAPPENAS) or (b) state-owned infrastructure funding companies such as PT Sarana Multi Infrastruktur (SMI) which channel loans to SOEs to support their involvement in infrastructure businesses ("**SOEs Loan Guarantee**"). However, under this scheme, MoF can assign issuance of the guarantee to IIGF, which will raise concern regarding the guarantor's creditworthiness among international lenders. In this case, the credit enhancement approaches taken in the case of PPP projects would need to be applied to IIGF in order for this system to be utilized.<sup>19</sup>

The following chart outlines the government guarantees mentioned above.

	<b>IIGF Guarantee</b>	<b>BVGL</b>	<b>PLN Loan Guarantee</b>	<b>SOEs Loan Guarantee</b>
<b>Eligible Project</b>	Infra Project	IPP Project	PLN's Power Infra Project	Infra Project
<b>Guarantor</b>	IIGF (and MoF)	MoF	MoF and/or IIGF	MoF and/or IIGF
<b>Guaranteed Obligations</b>	Obligations of Government Agencies under the PPP contracts	PLN's financial obligations under the PPA for (a) purchase of power; and, on a case by case basis, and/or (b) non-purchase of power <sup>20</sup>	Full guarantee of PLN's financial obligations under the Loan Agreement	Obligations of the SOE/SMI under the Loan Agreement
<b>Beneficiary</b>	Project Company	Project Company	PLN's lenders	International Financial Institutions

### 3. Introduction of Mechanisms to Accelerate PPP Projects, such as the PPP Fast Track Program, etc. (Thailand)

The "PPP Fast Track" program was approved by the cabinet of Thailand in November 2015. The PPP Fast Track program is intended to expedite the PPP project implementation process, a critical issue in promoting PPP projects in Thailand. The time period required to approve a PPP business and start the tender process will be shortened from approximately 25 months to 9 months. Three urban railroad projects in Bangkok have been listed under this program: (i) development of the BTS Skyline Pink Line (THB 56,725 million), (ii) development of the BTS Skyline Yellow Line Project (THB 54,768 million)

<sup>19</sup> For example, in the Central Java IPP Project, a co-guarantee by the IIGF and the MoF was arranged under which the IIGF guarantees the PLN's obligations up to Rp 30 billion and the MoF guarantees the remainder of the PLN's obligations (to unlimited extent).

<sup>20</sup> Only for political risks allocated to PLN and PLN's non-remediable events which should be broad enough to include termination payment.

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and (iii) extension of BTS Skyline Blue Line (THB 82,600 million). Two motorway projects have also been listed. Railroad projects (i) and (ii) above have already been approved as PPP projects by the cabinet and are now undergoing the tender process of private companies.<sup>21</sup> Importantly, independent business schemes (PPP Net Cost) were chosen for projects (i) and (ii), in contrast to the BTS Purple Line Project in which the MRTA's availability payment scheme (PPP Gross Cost) was adopted.<sup>22</sup> It has been reported that several other projects, including high speed rail projects (a 193.5 kilometer Bangkok-Rayong line and a 211 kilometer Bangkok-Hua Hin line) are soon to be listed under the PPP Fast Track program.

On 26 April 2016, the Ministerial Regulation to Increase the Value Threshold of Projects Required to be Governed by the PPP Act (2016) was enacted. Under this Regulation, projects with values of THB 5,000 million or more (major projects) are subject to the rules and procedures prescribed in the PPP Act.<sup>23</sup> A much simpler procedure was established for minor projects with project values of THB 1,000 million or less. Midsize projects with values between THB 1,000 million and THB 5,000 million will be subject to the rules and procedures prescribed in the PPP Act or the rules for minor projects as determined by the PPP Committee on a case-by-case basis. This amendment will promote minor and midsize PPP projects. The promotion of major projects will materially depend on the success of the PPP Fast Track Program described above.

<sup>21</sup> These projects are named as important projects in Thailand in the "MLIT Action Plan for Overseas Deployment of Infra Systems" issued by the Ministry of Land, Infrastructure, Transport and Tourism in March 2016.

<sup>22</sup> Marubeni Corporation and Toshiba Corporation were awarded contracts for construction of this railroad system in 2013.

<sup>23</sup> Prior to April 2016, the PPP Act was applicable to any projects of private investments in state undertakings, having a value of at least THB 1,000 million or more.

## Appendix: Baker & McKenzie's Regional Presence in Asia Pacific

### China/Hong Kong

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Partners: 74

Associates: 160

### Vietnam

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Partners: 9

Associates: 42

### Indonesia

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Partners: 18

Associates: 98

### Singapore

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Partners: 40

Associates: 67

### Malaysia

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Partners: 18

Associates: 53

### Thailand

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Partners: 54

Associates: 28



### Myanmar

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Partners: 4

Associates: 9

### Korea

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Partners: 1

Associates: 3

### Japan

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Partners: 48

Counsel: 34

Associates: 89

### Taiwan

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Partners: 34

Associates: 34

### Philippines

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Partners: 20

Associates: 36

### Australia

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Partners: 83

Associates: 197

### Strength in numbers

Offices: 17

Professionals: 1,200+

Partners: 400+

Associates: 800+