On 14 February 2015 the Vietnamese Government issued a new decree regulating investment in public-private partnerships (the PPP Decree). The new PPP Decree will replace the current pilot PPP regulations in Decision 71 dated 9 November 2010 (Decision 71) as well as the BOT regulations in Decree 108, as amended (BOT Decree).

Infrastructure Development Before New PPP Decree

Up until now, foreign investors in Vietnamese infrastructure projects have focused on four types of structures:

- BOT projects, such as AES’s Mong Duong 2 project, the Phu My 2-2 project and the Phu My 3 project;
- BT projects, such as those attempted by some Korean investors, primarily in the road sector;
- “Japanese PPP” projects; which involve Japanese ODA being granted for a publicly-funded portion of a development together with a private commercial project that benefits from such public expenditure – Lach Huyen port being an example;
- Direct investments under the Investment Law, which can receive certain guarantees from the Government relating to foreign exchange, performance of State-owned companies and other risks to the financial returns expected from the project – the Nghi Son refinery project being the most recent example.

PPPs have been theoretically possible under Decision 71 for 4 years. But no foreign investment has been made under these regulations. The only serious attempt to get one off the structuring blocks was the World Bank’s attempt to support the Dau Giay to Phan Thiet expressway project, but that now appears to be in intensive care.

Steps Forward Under New PPP Decree

1. Structures available for PPP

The PPP Decree covers both availability-payment type contracts and user-fee type contracts. It expands the BOT Decree by covering the following additional types of project:

- Build-Own-Operate;
- Build-Transfer-Lease;
- Build-Lease-Transfer; and
- Operate – Manage.
In addition, the PPP Decree authorises “similar contracts” if they are approved by the Prime Minister. As is often the case in Vietnam, this provides room for discretionary variations as a theme.

2. Sectors available for PPP

The list of sectors available for public-private investment enumerated under the PPP Decree is broader than that contained in Decision 71 and the BOT Decree. PPP investments are allowed in transportation, water supply and waste treatment, power plants and transmission, and infrastructure facilities for healthcare, education, culture, sport, industry and agriculture.

Other projects may also be done through PPP, as decided by the Prime Minister.

Projects in the above sectors can still be implemented under the Investment Law without recourse to PPP and are entitled to such incentives as exist under that law.

3. State participation in a PPP project

State capital can be used to fund gaps in the private sector viability of a project. There is no longer a cap on the State capital that can be used in a PPP project. The goal is for the State-owned capital to be determined according to the needs of the project. This will involve a proposal and approval process, which could of course be political in nature and which may prove cumbersome in practice.

4. Incentives

The PPP Decree provides certain incentives to PPP projects. The table below summaries the incentives provided under the PPP Decree, compared to those granted under the current BOT regime:

<table>
<thead>
<tr>
<th>BOT Decree</th>
<th>PPP Decree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land Exemption from rent or land use fees for the whole duration of the project.</td>
<td>Exemption from land use fees/rental in accordance with the land law.</td>
</tr>
<tr>
<td>Mortgage of land use rights Land use rights can only be mortgaged to lenders after obtaining a legal opinion of the MOJ.</td>
<td>Land use rights, and other assets and rights, can be mortgaged in accordance with the land law and civil law. Mortgages of land to a foreign lender are not possible under current law.</td>
</tr>
<tr>
<td>Tax incentives A BOT company is entitled to certain tax incentives.</td>
<td>In accordance with the tax laws. Similar to the BOT Decree.</td>
</tr>
<tr>
<td>Foreign exchange In practice, the Government has guaranteed the convertibility, availability and remittability of foreign currency for some BOT projects.</td>
<td>Important infrastructure projects (which are included in the Government’s programme or approved by the Prime Minister) can obtain FX availability guarantees. Exchange rate guarantees are not mentioned and the identity of the issuer of the guarantee is vague.</td>
</tr>
<tr>
<td>Government’s support for use of public utilities A BOT company is entitled to support from the Government for the use of public services. Accordingly, the Project Company is permitted to use land, roads and other support facilities to implement projects and has priority rights to use public facilities to implement the project where public services are scarce.</td>
<td>Similar to the BOT Decree.</td>
</tr>
<tr>
<td>Government Guarantee Full guarantees have been provided by the Government for different aspects of a BOT project.</td>
<td>Performance guarantees of state-owned counterparties are possible, but the guarantor will be appointed by the Prime Minister and does not appear to be the Government.</td>
</tr>
</tbody>
</table>
Project Development Process

5. Development Steps
The PPP Decree sets out a set of steps that will have to be followed to develop a project. Vietnam has so far not shown great abilities in developing projects for foreign investors to bid on (Nghi Son 2 power project being an example of a problematic process). The main fear is that the PPP Decree is overly prescriptive and therefore it will be difficult to implement in practice. In general, the main steps required to implement a PPP project comprise:

• Screening and publication of projects on the national procurement system. Projects can be (i) proposed by the Authorised State Authorities (ASA), or (ii) proposed by investors. Investors that propose projects or prepare the feasibility study of a project can be entitled to “incentives” during the tender process. The nature of these “incentives” remains unknown, though the press has suggested it could be a 5% preference in the tender process;

• Feasibility study to determine investment (including State contribution) and contract structure;

• Approval of State support;

• Approved PPP projects will be published in the tendering system;

• Bids by and selection of investor in compliance with the current tender law dated 26 November 2013 (the Tender Law);

• Signing of project contracts.

6. Project Contracts
The PPP Decree sets out the principal subjects to be covered in the project contract, including lender’s step-in rights, assignment rights and the right to amend the project contract (normally all subject to the approval of the ASA). There is no detail and all risk allocations remain to be determined.

The final step after concluding all the project discussions with the ASA is to obtain an investment certificate. Under the PPP Decree, the parties will execute an “investment agreement”, instead of initialling the project contracts themselves. This agreement will confirm (i) the draft of the project contract, and (ii) rights and obligations of the parties in obtaining the investment certificate for the project company.

8. Authority
There is no clear mechanism to understand which authority will be in charge of developing which kind of project. The final approval authority will rest as follows:

a. The Ministry of Planning and Investment will issue the investment certificate for:
   i. projects of national importance;
   ii. projects to which a Ministry is party to the project contract; and
   iii. project to be implemented in two provinces or more.

b. The provincial People’s Committee will issue the investment certificate for other projects (except very small ones).

9. Comment on Tenders
Tendering has not had a great track record for foreign infrastructure projects. Many investors will not prepare proposals that are then put out to tender (even if they do obtain a preference in the bidding). Furthermore, many issues have been pushed into the Tender Law. For example, the PPP Decree provides that the ASA and the investors may agree on the performance security in accordance with the Tender Law. Under this law, the performance security with respect to BOT contracts and “other contracts in accordance with investment law” will be between 1% – 3%. This is not only vague but means the security for a PPP project could be 3% – higher than under the BOT regime.
**Financing Issues**

The PPP Decree raises some concerns for project lenders:

1. **Land**

   The exemption available to investors on land rent/land use fees in BOT projects has been removed from the PPP Decree. Maybe the intention was to overcome the problem that arose in the context of a mortgage of land use rights, which is only possible if all land rent has been paid (the Government’s position in past deals has been that no mortgage is therefore possible because no rent is payable). However, even if this is the case, it does not solve the mortgage problem, because the land law does not allow foreign lenders to take mortgages over land use rights.

2. **Exchange rate guarantee**

   It is unclear under the PPP Decree whether the Government will guarantee the convertibility and remittability of foreign currency demands. If not, some PPP projects may not be bankable. Current practice in BOT projects is to provide guarantees of exchange rates, although sponsors are now often left with a small level of residual risk.

3. **Governing law**

   Foreign law may be used as the governing law for (i) project contracts where one party is a foreign investor; and (ii) contracts guaranteed by the competent authority, but only if the foreign law is not contrary to Vietnamese law on selection and application of foreign law. To the extent these provisions make it impossible to use a foreign governing law, this is likely to seriously affect the bankability of large PPP projects.

**Effect on Existing Projects**

A few projects have been implemented as BOTs (Phu My 2-2, Phu My 3 and Mong Duong 2 in particular). Numerous projects are being negotiated as BOTs under the existing BOT regulations. The transition clause of the PPP Decree states that:

- Projects that were signed or licensed prior to 10 April 2015 will remain governed by their project documents and investment certificates.
  - As the BOT Decree will be repealed from 10 April 2015, BOT projects developed to date under that Decree will be in legal limbo in respect of any matters not covered by the investment certificate and project contract.

- Project documents that have been initialled prior to the effective date of the PPP Decree are not subject to re-negotiation.
  - If a project contract has not yet been initialled the document should re-negotiated to be compliant with this PPP decree. This may result in another delay for some long-suffering developers.

- Projects that have been allocated to an investor prior to the effective date of the PPP Decree will remain so allocated.

- Feasibility study reports which have been approved prior to the effective date of the PPP Decree do not have to be re-approved.
  - It is unclear what will happen with feasibility studies that have been submitted but not yet been approved before 10 April 2014.

If any other transition issue arises it will be decided by the Prime Minister upon the proposal of the Ministry of Planning and Investment. As the devil is likely to be lurking in the details of all projects currently being developed, the Prime Minister may be busy.

As the existing BOT regime has been abolished, there is a lot of pressure on this untested PPP regime.
Work Remaining

The PPP Decree manages to be prescriptive and vague at the same time and needs clarity on the specific issues, such as how specific risks are allocated and, at the end of the day, standard forms for each infrastructure sector. To avoid different interpretation from ministry to ministry, many new implementing circulars will be needed. These are unlikely to be issued shortly. This is ultimately one aspect of the need for more institutional capacity. But it is also a function of the administrative system in Vietnam. Neither are likely to be soluble in the short term.

Guarantees and viability gap funding for a PPP to become a helpful adjust to infrastructure development in Vietnam there will need to be a pipeline of attractive and feasible PPP projects for infrastructure that Vietnam visibly needs and that also attract investors. The MPI has to date had difficulty obtaining workable project proposals from ASAs. Many proposals have been submitted that are too small or otherwise not attractive (e.g. of a size that would not interest project financiers or where the role of the private sector is aspirational rather than real or the revenue stream is conjectural) are among the main gaps that will need to be filled before starting on a comprehensive PPP program. These gaps can be filled on a project by project basis, but the expense of preparing project proposals without having guidelines on what support is available will make such preparation unattractive. And even if the approach is successful in one case, the results are likely to provide little systemic encouragement outside a particular sector.

While the PPP Decree may be a step in the right direction, it has taken a long time to take that step. There is a lot more to be done. It will be important to the credibility of the programme that the next steps are taken promptly and done well.

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