

# **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

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

This article will present 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, there is a recommendation provided to resolve such problem.

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

#### บทคัดย่อ

เนื่องจากอำนาจบริหาร ซึ่งเป็นหนึ่งในอำนาจของรัฐทั้งสามตามทฤษฎีการแบ่งแยกอำนาจของมองเตสกีเออ รัฐบาลหรือฝ่ายบริหารมีหน้าที่ในการให้บริการสาธารณะเพื่อตอบสนองความต้องการของสาธารณชน อย่างไรก็ตาม บริการสาธารณะส่วนใหญ่เป็นการลงทุนขนาดใหญ่ที่ต้องระดมเงินทุนจำนวนมาก การให้เอกชนร่วมลงทุนในกิจการของรัฐ (PPP) จึงเข้ามามีบทบาทในการแก้ไขปัญหาการให้บริการสาธารณะในหลายประเทศ

ในกรณีของประเทศไทย แม้ PPP เป็นที่รู้จักมาเป็นเวลานานตั้งแต่สมัยรัชกาลที่ 5 แต่ไม่ปรากฏว่ามีกฎระเบียบเกี่ยวกับ PPP อย่างเป็นทางการจนกระทั่งปี พ.ศ. 2535 ได้มีการบัญญัติพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 เพื่อกำหนดกฎเกณฑ์เกี่ยวกับ PPP ในประเทศไทย โดยตลอดระยะเวลากว่ายี่สิบปีที่พระราชบัญญัตินี้มีผลใช้บังคับ ปรากฏว่ามีปัญหาจำนวนมากที่เกิดขึ้นจากการปรับใช้พระราชบัญญัตินี้ และหนึ่งในปัญหาที่สำคัญคือ ขอบเขตของการร่วมงานหรือดำเนินการในกิจการของรัฐคืออะไร ซึ่งปัญหานี้เกิดจากการที่คำนิยามกว้างและกำกวม ทำให้ผู้ใช้กฎหมายทั้งภาครัฐและผู้ลงทุนเอกชนเกิดความสับสนในการปรับใช้พระราชบัญญัตินี้

ด้วยเหตุดังกล่าว จึงมีการบัญญัติกฎหมายฉบับใหม่มาบังคับใช้แทนพระราชบัญญัติเดิม โดยกฎหมายฉบับใหม่ชื่อว่า พระราชบัญญัติว่าด้วยการให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. 2556 แต่ปัญหาเรื่องขอบเขตของการลงทุนในกิจการของรัฐที่จะต้องตกอยู่ภายใต้บังคับของพระราชบัญญัตินี้ดังกล่าวยังไม่ได้รับการแก้ไข จึงทำให้ปัญหาเดิมยังคงดำเนินต่อไป

ในบทความนี้จะแสดงให้เห็นถึง PPP ในภาพรวม และได้ยกกฎหมาย PPP ของประเทศ สาธารณรัฐเกาหลีและสหรัฐอเมริกาเป็นตัวอย่างในการศึกษา นอกจากนี้ ยังได้ศึกษารายละเอียดและ วิเคราะห์ปัญหาที่เกี่ยวกับขอบเขตของให้เอกชนลงทุนในกิจการของรัฐทั้งในพระราชบัญญัติว่าด้วยการให้ เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 และพระราชบัญญัติว่าด้วยการให้เอกชน ร่วมลงทุนในกิจการของรัฐ พ.ศ. 2556 และสุดท้ายได้แสดงความคิดเห็นเป็นข้อเสนอแนะในการ ปรับปรุงกฎหมายดังกล่าวด้วย

**คำสำคัญ:** การให้เอกชนร่วมลงทุนในกิจการของรัฐ, PPP, บริการสาธารณะ, การร่วมลงทุนของเอกชน

## 1. The Overview 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. The public private partnership (the “PPP”) becomes an approach to enhance the deficiencies of both public and private sector.<sup>1</sup> Due to its substantial advantages, many governments use PPP as a new strategy for providing infrastructure and public services.<sup>2</sup>

Many scholar, institutions, government and even internal organizations such as the United Nations (UN), The United States Nation Council of State Legislature P3 Toolkit, The European Commission and The World Bank as well as Black’s Law Dictionary similarly defined the definition of the PPP. Accordingly, 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.**

1. The PPP must be an agreement between public and private sector: The public partner in the PPP project is governmental entities including ministries, departments, municipalities and state owned

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<sup>1</sup> 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)

<sup>2</sup>*Id.* at 1.

enterprises.<sup>3</sup> The private sector can be any private entity both local and international investors including nongovernmental organizations (NGOs) and community-based organizations (CBOs).

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 public interest.

2.1. Objective: it must be an activity relating to public interest;

2.2. 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

2.3. Legal System: it must be subject to administrative law system and under administrative court jurisdiction.<sup>4</sup>

The PPP must be done by any means to ensure the sharing of risks: 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 such as construction or project risks, financial risks, performance risks, etc.

## **2. Public Private Partnership in Foreign Countries**

### **2.1 Public Private Partnership in the Republic of Korea**

#### **2.1.1 The Private Participation in Infrastructure Law**

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.<sup>5</sup> 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:<sup>6</sup>

#### **(1) Solicited Project**

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<sup>3</sup> Asian Development Bank, Public-Private Partnership Handbook, <http://www.adb.org/documents/public-private-partnership-ppp-handbook>

<sup>4</sup> นันทวัฒน์ บรมานันท์, กฎหมายปกครอง, (กรุงเทพฯ: วิญญูชน), พิมพ์ครั้งที่ 4, 2557, หน้า 335 (Nanthawat Boramanan, Administrative Law, at 335 (4<sup>th</sup> ed. 2014)).

<sup>5</sup> *Id.* at 8.

<sup>6</sup> Act on Public-Private Partnerships in Infrastructure, Article 2 subparagraph 5

The competent authority creates a PPP project plan which describes the significance and details of each project. The candidate project must be one of the 46 eligible facility types as specified in the Korean PPP Act.<sup>7</sup>

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.

## (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.

### 2.1.2 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 of the Korean PPP Act.

(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).<sup>8</sup>

(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.<sup>9</sup>

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<sup>7</sup> 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*, 12 (1<sup>st</sup> ed. 2011).

<sup>8</sup> Act on Public Private Partnerships in Infrastructure Article 4

<sup>9</sup> *Id.*

(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.<sup>10</sup>

(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.<sup>11</sup>

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.<sup>12</sup>

#### 2.1.3 Key Success Factors

The PPP laws and regulations of the South Korea is consistent and systematic leading to a number of successful PPP projects in this country. One of the most important factors to bring the South Korea to be a successful country in respect of PPP project development is the Public Private Infrastructure Investment Management Center (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.

## 2.2 Public Private Partnership in the United States

### 2.2.1 The Public Private Partnership Law

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.<sup>13</sup>

#### (1) Characteristics of Public Private Partnership

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Dominique Custos and John Reitz, “Public-Private Partnerships”, 58 Am. J. Comp. L. Supp. 555, 555 (2010).

The definition of the PPP defined by the U.S. Government Accountability Office (the “GAO”) in 1999 contained 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.<sup>14</sup> In the context of the state government, there are both similar and contrast to each other.<sup>15</sup> In addition, the private 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.<sup>16</sup>

## (2) Eligible Infrastructure

Some states create their own PPP in the state statutory while some do not absorb the concept of the PPP.<sup>17</sup> There are thirty-one states having PPP legislation for highways, roads and bridges, whereas, twenty-one states having PPP legislative for transit projects.

## (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. However, the unsolicited project has no criteria to meet and no outline to plan and predict the impact to community. The only thing the state can provide is to sponsor the new ideas.<sup>18</sup>

## (4) State Approval

In general, the PPP projects to be developed must be approved from some authorized agencies prior to implementing, while there are nine states that the each PPP project needs to be approved by the state legislature prior to developing the projects. The legislative approval may guarantee the success of the project, yet

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<sup>14</sup> *Id.*

<sup>15</sup> Anika Guevara, “PUBLIC-PRIVATE PARTNERSHIPS:AN INNOVATIVE SOLUTION FOR A DECLINING INFRASTRUCTURE”, 47 Urb. Law. 309, 2 (2015).

<sup>16</sup> *Id.*

<sup>17</sup> Custos and Reitz *supra* note 13 at 557.

<sup>18</sup> Emilia Istrate and Robert Puentes, “Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units” December 2011, [http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208\\_transportation\\_istrate\\_puentes.pdf](http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208_transportation_istrate_puentes.pdf). (25 May 2016)

time consuming, which has the negative impact on cost of the projects.<sup>19</sup>

### 2.2.2 Failure Factors

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.

## 3. Public Private Partnership in Thailand

The concept of the PPP has been introduced since in the era of King Rama V the Great. In the period of King Rama VI and VII, there was the Control on Trading Affecting Safety and Peace of the Public Act B.E. 2471.<sup>20</sup> And then it was repealed by the Revolutionary Council Order No. 58. Due to corruption during the process of approval by politicians, it was substituted by the Private Participation in State Undertaking B.E. 2535 (the “PPSU Act”).

### 3.1 The Private Participation in State Undertaking B.E. 2535

After the PPSU Act had been effectively used in Thailand for several years, it was found that the provisions regarding what project was the Participation in the State Undertaking which would be subject to the PPSU Act are ambiguous and frequently practically contribute the problems.

Since 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.<sup>21</sup> Therefore, there are a

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<sup>19</sup> *Id.*

<sup>20</sup> เข็มชัย ชุตินวงศ์, “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))

<sup>21</sup> 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\\_A2czQ0cTQ89A](http://www.krisdika.go.th/wps/portal/general_en!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A2czQ0cTQ89A)



number of cases sent to the Council of State, in order to construe that whether a particular action was subject to the PPSU Act. It can be concluded as set out below.

### 3.1.1 Scope of the State Undertaking

(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. It can be obviously seen that the Council of State does not concern whether such activities are public service or not.

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

- The Council of State defined the Properties in this definition as same as the meaning under section 138 of the Civil and Commercial Code<sup>22</sup>. Moreover, the Council of State was of the opinion that the electronic commercial data in the system of Ministry of Commerce and the traffic right which Thailand acquired according to the Convention on International Civil Aviation and related bilateral treaty was the property of the government.<sup>23</sup>

- 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.

- 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, not include the general asset such as building, office equipment, cash or deposit in bank account.

### 3.1.2 Scope of the Participation

(1) Selling shares of state owned enterprises whether selling the existing ordinary shares or subscribing the new shares is

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<sup>22</sup> Section 138 under the Civil and Commercial Code

<sup>23</sup> กิตติพงษ์ อรุณพัฒน์พงศ์, “มุมมองของเอกชนต่อพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ”. เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐ เอกชน เล่ม 2, 107-108, (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, 107-108, (2013))

not the Participation under the PPSU Act. In contrast, 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) When a governmental agency purchases and holds shares in private company, it is considered as the Participation under the PPSU Act. On the contrary, 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.

(3) The contract of works under the Civil and Commercial Code section 587 is not the Participation under the PPSU Act.

(4) The Participation under the PPSU Act includes only the project initiated by the governmental agencies.

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.

### 3.1.3 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.<sup>24</sup>

According to the Supreme Administrative Court Judgment no.Ao 349/2549, the amendment of the PPP project's contract which failed to approve by the Cabinet shall not be legally binding the government. Therefore, the court was unable to enforce the state following to arbitration award.<sup>25</sup>

## **3.2 Private Investment in State Undertaking Act B.E. 2556 (the "PISU Act")**

Despite amendment of various provisions was enacted to be the solutions of many problems, there is no change in definition of

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<sup>24</sup> The Council of State's Commentary no. 570/2542, 291/2550, 292/2550, 293/2550 and 294/2550

<sup>25</sup> Supreme Court Judgment no.2503/2552

what activity is the Investment in the State Undertaking under the PPUS Act. This would lead to the same problems as in the PPSU Act faced.

### 3.2.1 Resolution of the unclear scope of Investment in the State Undertaking

During the process of enactment the PISU Act, (meeting of Council of the State (Special Committee) no.1/2554<sup>26</sup> and 2/2554<sup>27</sup> dated July 7th, 2011 and July 14th, 2011 respectively), one of the committees referred that the unclear definition issue can be solved by these following solutions:

#### (1) Compliance with the Council of State's 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.<sup>28</sup>

#### (2) Judgment made by the PPP Committee

There is no provision to impose the process for consulting the PPP committees regarding the PISU Act. As a result, 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.

#### (3) Enacting the Royal Decree as specified in section 7

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 prior to enacting the Royal Decree to

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<sup>26</sup> 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)

<sup>27</sup> 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)

<sup>28</sup> Aurapeepattanapong *supra* note 23 at 107.

exempt a particular action.<sup>29</sup> Therefore, this mean cannot resolve the problem of unclear definition of Project under the PISU act.

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

#### (1) The project established before and during effectiveness of the PPSU Act

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 cabinet to make an order.<sup>30</sup>

#### (2) The new project

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.

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

To analysis the Korean PPP Act and the PISU Act, it can be clearly seen that 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

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<sup>29</sup> สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการพิจารณาการวิสามัญพิจารณาร่างพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. ... สภาผู้แทนราษฎร ครั้งที่ 1 วันที่ 22 พฤษภาคม 2555 ณ ห้องประชุม คณะกรรมาธิการ 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 2<sup>nd</sup> Floor, Statehouse 2.)

<sup>30</sup> The Private Investment in State Undertaking Act B.E. 2556 section 72

Unit to support both public and private parties in all aspects of the PPP project.

### **3.4 Analysis on Investment in the State Undertaking under the law of Thailand to the PPP project under the law of the United States**

Turning to 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. After analysis the law of the United States and Thailand, 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.

## **4. Conclusions and Recommendations**

### **4.1 Conclusions**

Due to plenty of advantages, the PPP recently has been one of the most favorable forms in worldwide regarding private sector 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.”*

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 PPSU Act as the first PPP law which after that led to several problems and one of the most important points is the scope of the Participation in the State Undertaking under this act. 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. However, it came out that the

commentaries of the Council of State was construed the scope of public private partnership under the PPSU act widely and complicated.

The new PPP law known as the PISU Act was effective in 2013 to ensure the practicality and transparency. However, the scope of Participation in the State Undertaking remains the same, and this incurs the same problems as in the PPSU Act. Despite the during the enacting of the Act, one of the committees referred that the unclear definition 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 paper that all of these resolutions are impractical to solve the problems.

In the context of the PPP in the South Korea, the scope of the PPP project was precisely described the qualifications and process of both solicited and unsolicited project. Moreover, it also specifies the types of investment method of the PPP project. The main factors to contribute 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.

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. Most of the states have established their own PPP legislation. It was agreeable the federal government should concern on enact the Uniform PPP law.

After analysis of the PPP law in the South Korea and the US as well as characteristics of PPP in global, it can be concluded that Thailand should apply the PPP law of the South Korea and revise the scope of Private Investment in the State Undertaking to conform with the characteristics of the PPP used in international. This is to ensure the efficiency and transparency of the PPP project in Thailand.

## 4.2 Recommendations

The definition of Project, State Undertaking and Investment specified in section 4 of the PISU Act should be deleted, since the new definitions which are the PPP Project and Public Service will be substituted by applying from the characteristics of PPP in international and the PPP law of the South Korea. In addition, it is necessary to impose the qualifications of the investment method in PPP project, in order to restrain the confusion. 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 and transparency of the relating parties in the PPP project, 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 in Thailand.

## REFERENCES

- Kwak, Young Hoon, Chih, Ying Yi. & Ibbs, C. William. (2009). Towards a Comprehensive Understanding of Public Private Partnerships for Infrastructure Development. *CALIFORNIA MANAGEMENT REVIEW VOL. 51, NO. 2*.
- Asian Development Bank. Public-Private Partnership Handbook. Retrieved from <http://www.adb.org/documents/public-private-partnership-ppp-handbook>
- นันทวัฒน์ บรมานันท์. (2557). *กฎหมายปกครอง*. (พิมพ์ครั้งที่ 4). กรุงเทพฯ: วิญญูชน.
- [Nanthawat Boramanan. (2014). *Administrative Law*. (4<sup>th</sup> ed.). Bangkok: Winyuchon.].
- Kim, Jay-Hyung., Kim, Jungwook Sung., Shin, Hwan. & Lee, Seungyeon. (2011) *Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea Volume 1: Institutional Arrangements and Performance*. (1<sup>st</sup> ed.) Philippines: Asian Development Bank.

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

Guevara, Anika. (2015). PUBLIC-PRIVATE PARTNERSHIPS: AN INNOVATIVE SOLUTION FOR A DECLINING INFRASTRUCTURE. 47 *Urb. Law.* 309, 4-5.

Emilia Istrate and Robert Puentes. Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units. December 2011. Retrieved from [http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208\\_transportation\\_istrate\\_puentes.pdf](http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208_transportation_istrate_puentes.pdf).

กิตติพงษ์ อูราเปตตานาสัก. (2556). มุมมองของเอกชนต่อพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ”. เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐเอกชน เล่ม 2. [Kitipong Aurapeepattanasak. (2013). 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.]

เข็มชัย ชูติวงศ์. (2556). “ปัญหาการจัดทำสัญญาในโครงการให้เอกชนลงทุนในโครงสร้างพื้นฐานหรือบริการสาธารณะ”. เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐเอกชน เล่ม 2. [Chemchai Chutiwong. (2013) “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.]

สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการกฤษฎีกา (คณะพิเศษ) ครั้งที่ 1/2554 วันที่ 7 กรกฎาคม 2554 ณ ห้องประชุม สมภพ โหตระกิตย์. [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]

สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการกฤษฎีกา (คณะพิเศษ) ครั้งที่ 2/2554 วันที่ 14 กรกฎาคม 2554 ณ ห้องประชุม สมภพ โหตระกิตย์. [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]

สำนักงานคณะกรรมการกฤษฎีกา. บันทึกการประชุมคณะกรรมการวิสามัญพิจารณาร่างพระราชบัญญัติ  
การให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. ... สภาผู้แทนราษฎร ครั้งที่ 1 วันที่ 22  
พฤษภาคม 2555 ณ ห้องประชุมคณะกรรมการ 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, Statehouse2.]