

SUSTAINABLE DEVELOPMENT IN PUBLIC-PRIVATE PARTNERSHIPS IN INFRASTRUCTURE
A TRANSNATIONAL LEGAL PERSPECTIVE

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Abstract

This paper investigates the inclusion and regulation of sustainability issues in Public-Private Partnerships in infrastructure (PPPs). Traditionally, the state has been in charge of the delivery of basic infrastructure for public services such as transportation, water or energy. The state usually conducts a public procurement to hire a private company that will build the infrastructure. In this configuration, the state finances the project and remains the owner of the asset. However, to remedy their limited financial capacities and enhance the efficiency of public services delivery, governments rely on the private sector through contracts called public-private partnerships. In a PPP configuration, the private sector finances the projects, and designs, maintains, and operates the infrastructure. The state prepares and regulates the project but does not carry the financial burden and is not in charge of the operation of the service. To make return on its investment, the private company generally collects fees from users, or receives a payment from the government when there are no identified users. These partnerships therefore involve long-term and complex contracts between a public authority and private parties, in which the private party bears significant risks.

Recently, international organizations actively promote PPPs to achieve sustainable development. They see private investment as a way to bridge the infrastructure gap in developing countries. This promotion of PPPs consists of the dissemination of knowledge, technical and policy assistance, and facilitation of private investments through guarantees and global policy coordination. More generally, international organizations promote the role of private companies and civil society to contribute to the implementation of public policies.

However, in spite of the link between sustainable development and PPPs in the discourse of international organizations, at present, domestic PPP laws and policies as well as the literature focus primarily on the financial aspects of PPPs and pay little attention to the environmental and social (E&S) sustainability of these projects. This lacuna in the literature is all the more regrettable since PPPs raise specific problems and opportunities in terms of sustainable development objectives. Critics of PPPs argue notably that the pursuit of private interests is incompatible with the protection of public values. Moreover

in PPPs, the private sector has relative freedom in designing the infrastructure. While this can lead to sustainable and innovative projects, it can also result in weak impact mitigation activities.

In this context, the dissertation examines how environmental and social sustainability aspects are integrated and regulated in PPP legal frameworks. For this purpose, the research addresses two issues. First, the dissertation seeks to elucidate to what extent PPP laws and policies integrate sustainability issues in Asian and African developing countries. More particularly, the research investigates whether the PPP laws and policies include E&S issues in each stage of the PPP cycle. Second, the dissertation analyzes the regulation of E&S issues in PPPs, by taking into account relevant norms and standards. Drawing on three case studies of PPP projects in India, the Philippines, and Laos, the research acknowledges that PPP projects involve a plurality of actors who expect the implementation of different environmental and social norms and standards. This research therefore seeks to clarify the way and the extent to which these norms interact and contribute to a project's sustainability.

To investigate sustainability issues in PPPs, this study adopts a transnational legal approach. This approach takes into account the network of regulations in which PPPs take place. Far from focusing on domestic law, the dissertation also considers non-state norms such as international standards and corporate regulations. The transnational legal approach envisions these non-state norms as maintaining complex relationships, rather than being separated from each other. This approach also requires to transcend the traditional public/private and domestic/international divides of the legal disciplines.

Chapter II of the research provides basic background information to understand the opportunities of PPPs to reach sustainable development, as well as a detailed literature review on the topic. The second chapter also explains the conflicting interests in PPPs that lead to conceptual and practical problems in including sustainability issues in PPP project.

Chapter III of the dissertation analyzes 22 PPP legislations, and shows that there is no consistency in which PPP laws include environmental and social issues. In spite of the influence of international organizations in drafting these laws, there is no specific pattern in the way these laws and policies integrate environmental and social aspects. Chapter III also shows that no legislation considers

environmental and social issues at each stage of the project cycle, which can limit the potential environmental and social outcomes of a project. This chapter finally provides the example of the directive of the European Union on concessions and public contracts. Indeed, the EU directive makes PPP a specific tool to harness sustainable development objectives and emphasizes the necessity to articulate requirements in the procurement process (criteria to evaluate bidders and criteria to evaluate offers), in the contract (notably taking into account the role of subcontractors), and in monitoring mechanisms.

Chapters IV provides the background, stakeholders, and applicable norms in each case studies. This chapter shows that besides domestic law, environmental and social aspects are regulated by a myriad of private norms and international standards that collaborate and complement each other. These include the World Bank safeguards, the International Finance Corporation Performance Standards, the ISO 14001, and companies' corporate regulations. Each case study details how these various norms interact and articulate within the contractual framework. In the Manila Light Rail Transit (LRT) extension project, the dissertation emphasizes on the inclusion of E&S criteria in the procurement process, and the reference to IFC Performance Standards in the contract. The LRT project shows that the public authority referred to the IFC Performance Standards on a voluntary basis, since IFC is not financing the project. The LRT also shows how these standards influenced the corporate regulations of the project company, since the company drawn its environmental and social management system on IFC Performance Standards and IFC ESMS guidebook. In the second case study, the Vadodara Halol Toll Road (VHTR), the private party cooperated with an NGO to design the environmental and social policy of the private party, based on domestic law and on the World Bank safeguards. Finally, the last case study, the Nam Theun 2 hydropower plant (NT2), analyses how several safeguards of multilateral development banks operate in one project, and displays the contractual mechanisms to ensure that the private operator is bound by these safeguards. The NT2 project also displays how one challenging energy project could turn into a development project with environmental and social objectives included in the design and the contract of the project.

Chapter V take inventory of these transnational norms and shows that they interact at a project level, but also at a more global level, during the norm making process. These norms and standards influence each other in term of content and structure during their elaboration. Generally, these norms do not compete, they rather collaborate and complete each other to ensure an effective impact mitigation strategy.

Based on these findings, the paper suggests recommendations so that PPPs can become a tool to harness sustainable development in infrastructure projects. In this regard, the research emphasizes the significance of E&S criteria in attributing the PPP project and ensuring that environmental and social obligations are coherently articulated in the contractual framework. From a theoretical perspective, this research opens up new perspectives for the academic discussions regarding transnational law, and the significance of the role of the State in the regulation of such issues.