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Introduction of the Private Finance Initiative Promotion Act in Japan

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1. INTRODUCTION

Recently the private sector's participation in public infrastructure development has begun to be introduced in various ways around the world. The private finance initiative (PFI) that originated in the United Kingdom is a mechanism to induce the private sector's capital and expertise into the public infrastructure development. The principal aim of the PFI is to involve the private sector in the provision of public services, thereby shifting the role of the public sector from owner and provider, to enabler, purchaser and guardian of the general public interest. In Japan the Act on Promotion of Public Infrastructure Development by Using Private Finance Initiative (hereinafter referred to as the PFI Promotion Act or the Act) was enacted on July 23, 1999.¹ Following its promulgation on July 30, the Act was implemented as of September 24, 1999. Although the Act bears the term PFI it does not necessarily mean exactly the same as that used in the UK. Characteristics unique to public infrastructure development in Japan including the relationship between the public and private sectors, financing mechanism and the business environment mold the Japanese version of PFI. This article will describe the background and purpose of the PFI Promotion Act and discuss whether

this Act functions as a vehicle to promote public infrastructure development by PFI in Japan. Questions to be discussed include the following: What were the restraints on public infrastructure development by PFI? How is PFI embodied in the Act? What are the implications of the Act for the future relationship between the public and private sectors in public infrastructure development in Japan?

2. WHY WAS THE ACT ENACTED?

2.1. Background of the Act

By legislation of the Financial Structure Reform Act in 1997 and the Central Government Structural Reform Act in 1998, the Japanese government has been driven to commit itself in its own administrative and financial reforms to streamline organs and budgets. Especially the expenditure on public infrastructure has been subject to review. Due to budget restraint and the stagnation of the domestic economy, public investment in infrastructure development, which used to lead the economy, is not expected to increase. Assuming that investment in infrastructure development was still essential and private capital sought new fields to cultivate, the Japanese government needed to strike out a new line for its policy toward public infrastructure development. Looking for a method to deal with the problem, several missions were dispatched to the UK to research public infrastructure development by PFI. There the Japanese government learned the gist of PFI: the concept of value for money and the clear allocation of risk and liability between the public and private sectors pursuant to contracts.² The concept of value for money, i.e. to provide the highest-quality service for money paid, the most efficient use of public money is totally new to Japanese government officials. Although it is the government's official posture on public spending that collected tax should be used in the most efficient and effective way, there has been no concrete method or effort or political will to materialize the idea. Furthermore, the Japanese government is not accustomed to allocate clearly risks and liabilities under contracts between the public and private sectors in public infrastructure projects. How the idea of value for money and clear allocation of risk and liability are embodied in the Act represents the Japanese government's stance on PFI in public infrastructure development. They might be molded into a Japanese version as discussed below.

2.2. The Government's Intention

The first time the idea of public infrastructure development by PFI was discussed as an official agenda was in a sub-committee of the Economic Council in July 1997. The discussion included questions on how roles should be allocated between the public and private sectors in public infrastructure development projects and what would be a concrete method to improve the efficiency thereof.³ The Japanese government then moved to adopt the PFI mechanism in public infrastructure development. The idea is to use private finance and expertise in the design, construction and operation of public infrastructure and in the provision of public services for improving efficiency and effectiveness thereof. The government assumed that by introducing PFI in public infrastructure development the social capital would be expanded, the quality of the public service would be improved and ultimately the tax burden would decrease. Shortly thereafter, as the domestic economy faced severe slump, the government was driven to hammer out a policy to stimulate the economy by expanding domestic demand and drew up 'the Urgent Economic Policies to Open Up the 21 Century' in November 1997. It contained deregulation measures and introduced PFI as a device to invite private capital to public infrastructure projects so that aggregate demand would increase to boost the domestic economy. In May 1998, the PFI Promotion Bill was submitted to the House of Representative. The inherent contradiction of aims and means to promote PFI in Japan was already embedded in the bill. The original purpose of the introduction of PFI into public infrastructure development was to scale down the government's role and public expenditure. Nevertheless, the enactment of the Act was accelerated by the need to boost the economy by increasing public spending. In fact, under the depressed economic circumstances, stimulus of the domestic economy rather than the reduction of governmental expenditure, has become a primary purpose of the Act. This makes a contrast to the UK where reduction of fiscal expenditure motivated the introduction of PFI.

The Japanese government's real intention of the Act is exposed in the articles that enumerate governmental assistance to public infrastructure projects designated under the Act. As the increase of public investment has been an orthodox measure taken by the Japanese government to boost its economy,⁴ the same idea is reflected in those articles. In deliberation of the bill, whether financial and fiscal assistance directly provided by the government should be included in the Act invited a hot debate.

The Opposition bashed the provision that assured investment and guarantees by the central and/or municipal governments, alleging that such financial assistance by the public sector would cause moral hazard of private contractors. In the final draft direct reference to governmental investment and guarantees was deleted. There remains, however, a provision that both central and municipal governments shall take special consideration to secure finance necessary for projects selected under the Act. The term 'special consideration' may be interpreted to trigger unlimited financial support from the government. It could be said that the government might have used the term of PFI as rhetorical makeshift to justify public expenditure for public infrastructure. As far as stimulation of the domestic economy by injection of public money has priority in the policy under the Act, the Act will induce the increase of public expenditure, which may adversely affect the economy *per se*. The PFI Promotion Act, which contains fiscal assistance, may make a double-edged instrument for the Japanese economy.

3. WHAT DOES THE ACT PROVIDE?

3.1. Structure of the Act

The PFI Promotion Act states fundamental principles to promote the private sector's participation in public infrastructure development projects and provides a framework to select certain projects and private contractors to undertake them to which governmental assistance will be given. The Act consists of the following parts: purpose, definition, basic principles, implementation principles and assistance measures by the government.

The purpose is 'to accumulate social capital efficiently and effectively by measures to use capital, managing abilities and technical skills of the private sector for promotion of construction, maintenance and operation of public infrastructure with the aim of sound national economic development (Article 1).' The provisions of definition follow (Article 2). A notable provision is the definition of 'designated projects' to which the Act applies.⁵ In Japan, public infrastructure projects have been understood to be limited to hard-type ones, i.e. building, construction, maintenance of physical facilities, and the civil engineering and construction industries have played major and dominant roles to undertake construction of public infrastructure facilities. The Act broadens the scope of

public infrastructure projects to entail soft-type ones, i.e. provision of public services. Not only civil engineering and construction companies but also any competent companies with capability to provide efficient service will have a chance to be selected as contractors under the Act.

3.2. Doctrines of the Act

Article 3 provides the doctrine underlying the Act as follows:

Article 3

1. *Public infrastructure projects shall be carried out by the private sector as much as possible when appropriate for reasons including that the cost will be paid by project revenues, in light of the efficient use of the financial budget and the appropriate allocation of roles between the central/municipal governments and private contractors.*
2. *The projects selected hereunder shall be carried out in such ways that 1) liabilities are clearly allocated between the central/municipal governments and private contractors, 2) profitability is secured, 3) ideas, managing abilities and technical skills of the private sector are fully utilized, and 4) low-priced and high-quality public service is provided to the citizenry.*

The term 'efficient use of the financial budget' in Article 3-1 seems to suggest the idea of value for money. It needs concrete methods to choose the most efficient way using such public comparator as used in the UK.

The phrase 'the cost will be paid by project revenues' suggests project finance as a scheme to be used in projects. Project finance is not commonly used in public infrastructure projects in Japan. Instead, corporate finance has prevailed, and borrowing based on the company's credibility, usually with a guarantee by its parent company, has been cost-effective and convenient in the main bank system.⁶ Therefore, the suggestion of project finance in the Act will have extensive ramifications for Japanese financial transaction practice, including risk and liability allocation among parties. The phrase 'liabilities shall be clearly allocated between the central/municipal governments and private contractors' in Article 3-2 reflects the past and present situation where the liabilities have not been clearly allocated in public infrastructure projects. This provision requires a reform in Japanese business transaction and a change in Japanese perception toward contracts. These will be discussed

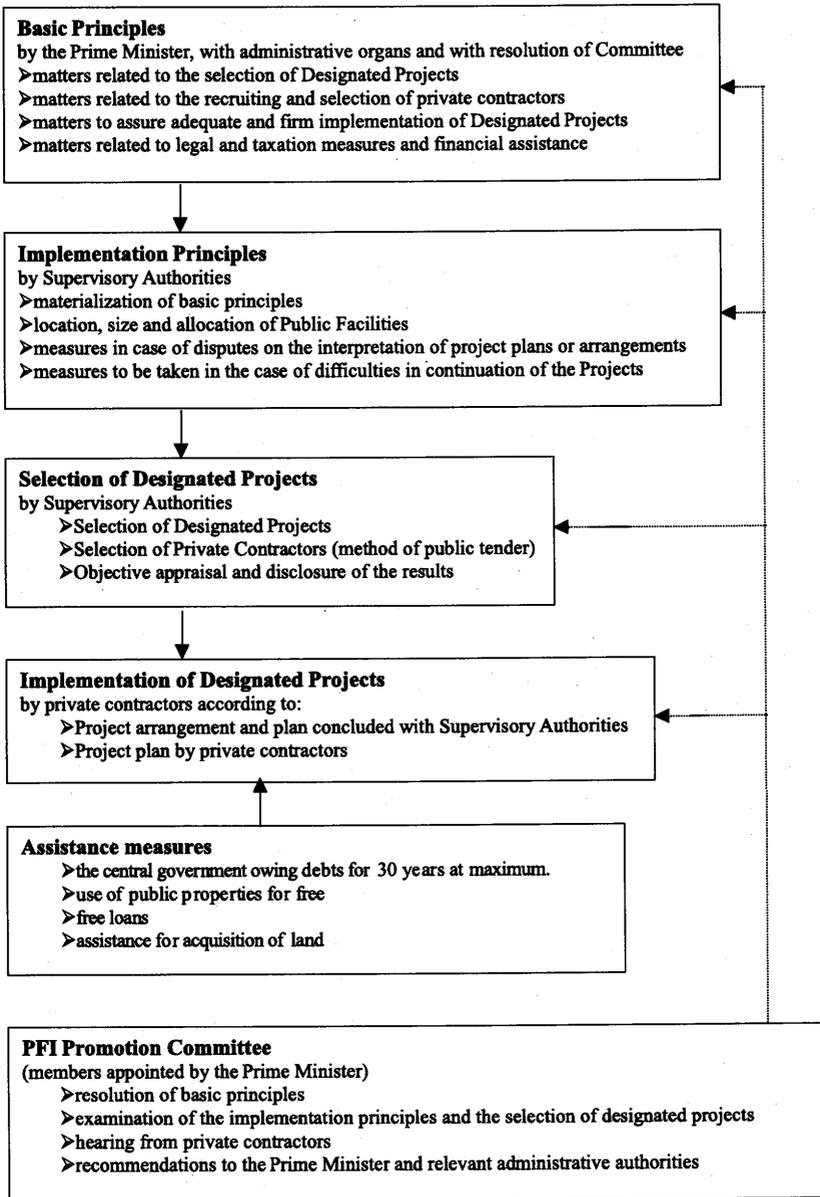
in the next chapter.

3.3. Implementation Process

Since the Act contains only general provisions, it needs detailed regulations for implementation. Based on the stated doctrine, basic and implementation principles are to be elaborated by the prime minister and supervisory authorities with jurisdiction over public infrastructure respectively. According to the principles, the supervisory authority will select projects and private contractors to carry them out. The structure of the implementation process is demonstrated in Figure 4.1.

The prime minister shall, in consultation with relevant administrative authorities, draw basic policies for promotion of PFI in public infrastructure projects. These include matters regarding selection of designated projects, invitation and selection of private contractors, implementation of projects and assistance measures by the government. The Committee on Promotion of PFI Projects, established in the Prime Minister's Office, shall make resolution on the basic principles (Article 4). Upon the resolution, supervisory authorities, e.g. a minister or a chief of a municipal government with jurisdiction over public infrastructure, shall crystallize the abovementioned basic principles in the form of implementation principles. These shall include conditions of size and location of PFI projects, measures taken in the case of disputes over interpretation of project plans and of difficulties in continuation of projects (Article 5). Pursuant to the principles the supervisory authority of the public infrastructure shall select projects and contractors to carry them out (Article 6). Then, the selected contractor shall carry out the project pursuant to the project arrangement to be concluded with the supervisory authority. The Committee's mandates are to examine the implementation principles and the selection of designated projects, to hear from private contractors, and to make recommendations to the prime minister and relevant administrative authorities. Early December 1999 the PFI Promotion Research Group in the Liberal Democratic Party produced a draft outlining the basic principles: (1) to secure transparency in selection of designated projects and to promote information disclosure, (2) to ease financial burden on the public sector, and (3) to establish objective appraisal standards to promote fair competition among private contractors.⁷ Based on the draft the Committee was due to establish basic principles by the end of December 1999. As of writing this, it is reported that the Committee

Figure 4.1: Structure of the PFI Promotion Act



Source: Economic Planning Agency, [1999] "Introduction of PFI Act," PFI Promotion Unit, General Planning Division, *Economy Society Policy*, No. 330, October 1999, p. 53.

will do so by the end of March 2000. Accordingly it will take further months until the selection procedures are concredited and projects are selected and implemented according to the Act. As discussed above, the Act provides the idea of value for money and risk and liability allocation in just an abstract way and the details of implementation are delegated to administrative organs. Thus, administrative organs should maintain transparency and information disclosure in establishing such implementation process.⁸ It is not desirable that the draft on deliberation in the Committee is not disclosed to the public.

3.4. Assistance Measures by the Government

In light of the idea of PFI, finance from the private sector has to be a main financing mechanism. However, the list of assistance measures in the Act features the government stance on PFI, i.e. a Japanese version of PFI, which might be said to deviate from the concept of PFI. Assistance measures to promote PFI projects are enlisted in Articles 12 to 16. The measures through good offices of the central and municipal governments include the following: leasing of public properties for free or with consideration at less than market price (Article 12), loans with no interest through the Development Bank of Japan (Article 13), assistance for finance, e.g. bond issue (Article 14), assistance for acquisition of land (Article 15), and other legal and taxation preferential treatment (Article 16). These provisions show the government's intention to use the Act as an instrument to stimulate the economy by its old trick, public finance. The Act could be regarded just as a convenient tool to justify the increase of public expenditure. It seems that prospective projects to be selected under the Act are just as a composition of infrastructure projects for which public expenditure (treasury investment and loan) will be spent as they have been in the amount of ¥40 trillion annually.⁹ This was more explicit in an early draft that contained the provision of public investment in contractors and public guarantee of their debt. The Opposition struck down the provisions. If these provisions had remained, it would have been absurd to call it the 'PFI Promotion Act.' Excessive public financial assistance might diminish the private sector's incentive to seek efficiency in its management and operation, and might manipulate the market principles originally expected.¹⁰

3.5. What were the Impediments to PFI?

Public infrastructure development by PFI often takes a scheme called project finance, which originated from oil excavation projects where future oil production was secured as collateral for loans, regardless of the credibility of the project company *per se*.¹¹ In such projects the project span usually ranges from 20 to 30 years. According to Article 15 in the Finance Act,¹² however, the central government is not allowed to commit itself to owing debts beyond five-year duration. The provision restricts the government's long-term commitment in public infrastructure projects and is a reason why the spot contract has been a typical form of infrastructure projects. In order to remove the impediment, the provision of Article 11 of the PFI Promotion Act paves the way for the central government to engage in a long-term contract, 30 years at maximum, and a scheme for project finance will be available in public infrastructure development.

The usage of public properties is restricted under the State-owned Property Act.¹³ According to Article 18 thereof, the state-owned property shall not be leased, exchanged, sold, transferred, contributed as investment or trusted; no private interest shall be vested therein. The exception is that surface rights may be established on land for such municipal governments or legal entities founded by Cabinet Orders as operate railways, roads and other public facilities on the land, and such municipal governments and legal entities may lease the land without consideration and generate profits from the use of the land. Similar provisions exist in the Municipal Autonomy Act.¹⁴ Article 238 thereof restricted the usage of properties of municipal governments in the same way. Then, Article 12 of the PFI Promotion Act makes it possible for the central and municipal governments to lease their properties to private contractors for projects selected under the Act. This will enable the various usage of the publicly owned property which has remained idle due to such restriction.¹⁵

Another notable provision in the Act is Article 20, which provides that when a private contractor purchases real property for the site of projects selected under the Act, mortgagee and mortgagor companies of the real property may appropriate the amount of loss incurred by the real property for the asset on their balance sheets on condition that they will write off the loss within 10 years.¹⁶ Let us assume that land purchased at ¥100 billion has a present value of ¥20 billion. Without Article 20, a loss of ¥80 billion incurs and the loss has to be written off in the same fiscal

year if the land is sold at present. In such a case both mortgagee and mortgagor companies decline to sell it to avoid falling insolvent. Then, Article 20 enables both mortgagee and mortgagor companies to write off the loss in installment for 10 years, i.e. ¥8 billion per year, so that the sale of the real property will be encouraged. Obviously this is a prescription for bad loan problems deeply rooted in the depression of the Japanese economy. This is a unique feature of the Japanese version of PFI.

3.6. Need for Further Deregulation

It is provided in Article 17 that in order to promote PFI projects the central and municipal governments shall abolish or relax the regulations impeding the use of private expertise. Since it is an excessive regulation that nips the private sector's initiative in the bud, deregulation should be an imperative step to be taken by the central government for the promotion of PFI. For example, there exist numerous laws to control and regulate the public domain, e.g. harbors and ports, rivers and roads (collectively referred to as 'Public Domain Control Act'). They are controlled and managed exclusively by the public sector under the Public Domain Control Act. Although the government explains that the Public Domain Control Act can be interpreted so that they do not need to be revised for the introduction of PFI,¹⁷ it is arguable that the existing system of controlling public domain may have discrepancy with the legal position of contractors who will engage in management and operation of public infrastructure according to the PFI Promotion Act.¹⁸ In respective projects the legal position of contractors needs to be clarified in contracts and the revision of relevant laws may be required. The government should continue to examine and revise the existing laws and regulations which adversely affect PFI.

4. WHAT ARE THE IMPLICATIONS OF THE ACT FOR THE FUTURE RELATIONSHIP BETWEEN THE PUBLIC AND PRIVATE SECTORS IN INFRASTRUCTURE DEVELOPMENT IN JAPAN?

4.1. Characteristics of Public Infrastructure Projects in Japan

In order to discuss what effects the PFI Promotion Act will bring about, we need to examine the existing pattern in public infrastructure projects in Japan most of which are construction projects. The conventional process of public infrastructure projects in Japan can be described as follows. The government draws detailed specification of the facility to be built. Based on its specification, the government invites public tender, selects a contractor on the basis of bidding price and awards a contract to an entity satisfying conditions prescribed by the government.¹⁹ It is usually the case that different contractors are selected to undertake design and construction respectively. Finance is provided by the government. These projects have been carried out according to a standard contract. After the contractor builds facilities, the government manages and operates them. In some cases a private sector entity undertakes a part of these functions but no operational discretion is given to the contractor. Under the administrative laws and guidance the administration exercises power to regulate the private contractors. In this framework, the public and private sectors are not parties on equal footing under contracts; rather, the private sector is obedient to the public sector.²⁰

4.2. Legal Mind in Transactions in Japan

It is not easy, not only between the government and private contractors but also for Japanese as a whole to clarify risks and liabilities due to their mentality toward contracts. In Japanese business transaction practice, contracts are not perceived as exclusive instruments to articulate rights and obligations between the parties. Rather, unwritten business relationship has significance and value. Weighing give-and-take relationship in the long term, liabilities in individual contracts tend to be blurred.²¹ Risks and liabilities are not clearly allocated and explicitly written in contracts. Parties tend to avoid discussing a hypothesis of the worst case in transaction.²² If one party tries to insert the other's defaulting case in the contract, the party may feel its credibility is hurt and may withdraw from the

negotiation. It is often found in contracts that any disputes and discrepancies arising from the contract shall be amicably settled in good faith by consultation between the parties. Japanese tend to try to resolve disputes by mutual consultation, rather than by resorting to the courts.²³

4.3. Third Sector and Public Investment

The mentality and practice described above discourage a swift procedure to liquidate or restructure the debts of failing third sector entities, where the risks and liabilities are not clearly allocated between the public and private sectors.

Prior to the introduction of the idea of PFI, there already existed 'the third sector' scheme in order to induce capital and expertise from the private sector in development of social infrastructure. The third sector literally means a combination of the public (the first) and private (the second) sectors. Usually it takes the form of corporate entity jointly invested by municipal governments and private sector enterprises and established pursuant to the Commercial Code.²⁴ The third sector entity features the following characteristics: joint investment by municipal governments and private enterprises, financial assistance from municipal governments including free loan, guarantee and subsidy. The officers of the company consist of the employees dispatched from respective shareholders, i.e. municipal governments and private enterprises. The scheme was intended to make use of merits of both public and private sectors, namely planning from the public viewpoint, licensing and subsidy from the public sector, and financing ability and efficient operational expertise from the private sector.²⁵ Originally third sector entities were established for operation of local railways and ferries which directly benefited local communities. However, establishment of third sector entities for the purpose of developing amusement parks and resorting facilities were inflated by the enactment of the Act on Provisional Measures for Promotion of the Expansion of Designated Facilities by means of Private Contractors Ability in 1986.²⁶ The Municipal Autonomy Act justifies investment by municipal governments only when the projects contribute to the public interest. Since the definition of public interest was ambiguous, 'the use of private finance and expertise' and 'vitalization of local economy' were presented in disguise of public interest. Led by the bubble economy, the number of projects that it would be dubious to call public infrastructure increased.

4.4. Bankruptcy of Third Sector Entities

In establishing an entity, municipal governments and private parties did not identify their respective obligations and rights regarding their investment ratio, additional funding, information disclosure and measures in insolvency.²⁷ Above all, it was not articulated whether and to what extent the municipal government should provide subsidy, debt guarantee and compensation for loss. Lenders to third sector entities believed to have recourse to ultimate sources from the government, and contractors could make profits by building a facility under a spot contract. Thus, no one questioned whether the project would be able to service its indebtedness out of its own revenues nor examined the sustainability of the project. Since liabilities and risks were not allocated clearly between the private and public sectors, which consist of both shareholders and board members, moral hazard tended to be generated on the part of the private parties. They heavily depended on as a last resort financial assistance from municipal governments for third sector entities on the verge of financial crisis. As the bubble economy burst, the financial and managerial vulnerability of numerous third sector entities became apparent. Since municipal governments declined to disclose the failure of those third sector entities and continued to pour public money therein, they still remained as legal entities, though in fact dead. In the prolonged stagnation of the domestic economy, due to the decrease of tax income and the budget restraint, the swelling financial burden owed by the public sector, ultimately taxpayers, for such third sector entities began to be questioned. Seeking information disclosure of the third sector entities, citizens started actions against municipal government chiefs and officials over their commitment to provide debt guarantee or compensation for loss of third sector entities.²⁸

4.5. PFI and the Third Sector

PFI Promotion Act does not exclude a third sector entity from being a 'selected contractor.' Article 10-2 of the Act provides: 'in case the selected contractor is a legal entity which is funded, partly or entirely, directly or indirectly by the central or municipal governments, the risk allocation between the contractors and the supervisory authority of the infrastructure shall be duly clarified in the project plans or arrangements with special note to avoid ambiguity in the selected contractor's liability.' This

provision was an outcome of compromise between the Ruling Coalition and the Opposition. The former desired third sector entities to be selected contractors under the Act to revitalize dying third sector entities. On the other hand, the latter insisted to exclude them, alleging that the introduction of PFI under the Act might be used to continue operation of third sector entities on the verge of bankruptcy. Facing disastrous third sector entities, critiques argued that projects stipulated in the name of PFI under the Act would repeat the same failure as the third sector did.²⁹ Furthermore, there still remains a doubt that the public sector and a third sector entity, which is partly funded by the public sector, may not maintain an arm's length contract relationship. Thus, in light of clarification of risk and liability allocation between the parties under contracts, it is not desirable to include a third sector entity in contractors selected under the Act.³⁰ Although the clarification of risks and liabilities is stressed in the Act, the provision *per se* is not enough to wipe out the doubt. Whether the rights, risks and liabilities are clearly allocated is totally dependent on the individual contract to be concluded in projects.

4.6. PFI Contracts

Public infrastructure projects by PFI will require a reform of the aforesaid practice and a new relationship between the public and private sectors, i.e. parties on equal footing under contracts. Contracts between the public and private sectors constitute a key instrument in projects. In the conventional patterns described in 4.1 of this chapter, it is sufficient to determine the object, specification, price and payment methods and other matters incident to sale and purchase contracts because they are spot contracts and static. In contrast, in PFI projects the government does not specify details but sets quality standards of the public service to be provided. Contractors are in charge of delivering the service pursuant to the contract with the public sector. The public sector purchases the service and pays therefor. Whether the risks and liabilities are clearly allocated in contracts between the public and private sectors determines the success of the projects. Risks and liabilities and allocation thereof vary from project to project in PFI mechanism. Transaction patterns may vary, as provision of service, not limited to building of facilities, will be undertaken by the private sector. Contracts need to be narrowly tailored to accommodate individual project schemes.

Due to the long-term duration of projects by PFI, rights and obliga-

tions have to be articulated, incorporating dynamic and chronological factors in respective stages of the project, i.e. financing, building and operation. Since unforeseeable environmental change may occur during the contract term, possibility of failure of the project has to be taken into consideration.³¹ The provisions in contracts are not static, but should be prepared for changes of the conditions and environment surrounding the projects. Incentives for contractors to improve efficiency and quality of service while maximizing profits need to be built into the contract. Both the public and private sectors require bargaining power in negotiating contracts.

Public infrastructure projects by PFI do not necessarily require a totally novel idea of contract but require clear and adequate definition and allocation of rights and obligations, which are dealt with in an ambiguous way in existing contractual practice.³² Introduction of PFI into public infrastructure development will provide a chance for Japanese to reform the relationship between the public and private sectors, which are at present far from standing on equal footing under contract.

5. TOWARD THE FUTURE

Whether the Act functions as a vehicle to promote PFI in infrastructure projects depends on what will motivate municipal governments to use private capital and expertise and what will induce the private sector to be engaged therein. Since municipal governments heavily depend on subsidy provided by the central government, they lack independence in decision-making and are inclined to follow administrative guidance by ministries.³³ Furthermore, the Municipal Autonomy Act heavily regulates their discretion and flexibility. As long as their finance is filled with subsidy and loan from the central government, municipal governments have no incentive to use PFI mechanism to improve value for money. On the other hand, in infrastructure projects private contractors have been put in a position to wait and follow directions given by the government, not in a position to produce original ideas to improve efficiency and quality in the projects. Unless the structural problems in the relationship between the central and municipal governments are solved, the private sector will not take the initiative in public infrastructure projects. Thus, the most necessary device to promote PFI projects is to make municipal governments have total discretion and flexibility in control of their own finance. In a sense, enactment of the Act is a top-down method to show municipi-

pal governments the direction to follow. It is ironical that municipal governments never move to adopt PFI without guidance by the central government. Unless the deep-rooted structure of the central and municipal governments is changed, the PFI Promotion Act may end up as a pipe dream that will never be materialized.

Looking at the central government budget for fiscal year 2000 drafted by the Ministry of Finance, we can still find the same share being spent on public infrastructure projects. Few congressmen hesitate to say publicly 'budgets are to be dispensed,'³⁴ which seems to be a far cry from understanding the concept of value for money. It is apparent in the draft budget that the government is not tackling its administrative and fiscal reform seriously. Considering the government's unchanged attitude toward its finance, the situation is unfavorable for public infrastructure development by PFI in substance. Japan should not lose the chance to use the PFI Promotion Act as an impetus for not only administrative and fiscal reform of the government but also structural reform of the economic system and transaction practice as a whole, which will eventually strengthen the country's economic fundamentals.

Notes

¹ *Law, No. 117*. In Japan a bill is submitted first to the House of Counselors and then to the House of Representative. With the approval of 2/3 of the latter House, an act is enacted.

² See Takahashi, Syoji [1999], "For the Promotion of PFI Projects (in Japanese)," *Economy Society Policy*, No.330, October 1999 p. 20.

³ *id.* p. 21.

⁴ See Doboku Gakkai (ed.) [1995], *System for Infrastructure Development: Japan's Experience* (in Japanese), p. 274.

⁵ Article 2-2.

⁶ See Daiichi Kangyou Bank (ed.) [1999], *PFI and Project Finance* (in Japanese), p. 129.

⁷ See *Nihon Keizai Shinbun*, 14 November 1999.

⁸ Law bears substance when the details of implementation are established. In Japan, most cases, laws enacted in the Parliament contain only general and abstract provisions of a law whereas administrative organs issue specific and detailed regulations and rules to implement the law. In a sense, the administration has much power to establish laws in substance.

⁹ See Katsuki Ouchi [1999], "Problems of Japanese PFI in the PFI Promotion Bill (in Japanese)," *Financial and Economic Affairs*, 19 April, p. 34.

¹⁰ *id.* p. 36.

¹¹ supra note 6, p. 129.

¹² *Law, No.34, 31 March, 1947*, (rev.).

¹³ *Act, No. 73, 30 June, 1948*, (rev.).

¹⁴ *Act, No. 67, 17 April, 1947*, (rev.).

¹⁵ It is pointed out that public property lands are not used effectively or neglected. "Effective Use of State-owned Property Land is Required," Editorial in *Yomiuri Shinbun*, 19 October 1999. According to the survey conducted by the Ministry of Finance on the use of state-owned property land in Tokyo and other prefectural office located cities, 35% of such land was judged to be required to be used effectively. In another words, they are not used effectively.

¹⁶ Relevant provisions, Articles 290-1 and 295-5, in the Commercial Code are revised accordingly.

¹⁷ Minutes of the First Meeting of the PFI Promotion Study Group in Economic Planning Agency, <http://www.epa.go.jp>.

¹⁸ See Obata, Junko [1999], "How will the Relationship between Public and Private Change by PFI (in Japanese)," *Economy Society Policy*, No.330 October, p. 31.

¹⁹ supra note 4, p. 262.

²⁰ supra note 18, p. 29.

²¹ See Mihara, Toru [1999], "Contracts in PFI (in Japanese)," *Economic Society Policy*, No.330, October, p. 42.

²² supra note 9, p. 37.

²³ supra note 6, p. 130.

²⁴ *Law, No. 48, 9 March, 1899*, (rev.).

²⁵ See Yorimoto, Katsumi et al. (eds.) [1996], *Contemporary Terms of Municipal Governance* (in Japanese), Gakuyou Shobou.

²⁶ Assistance measures provided in the Act include 1/2 reduction of real property acquisition tax and fixed assets tax and exemption of special land ownership tax, subsidy in amount of 5% of construction cost of designated facilities and loan with special interest from the Development Bank of Japan.

²⁷ See Kobayashi, Hiroyuki [1999], "PFI and Municipal Governments (in Japanese)," *Urban City Affairs*, 90(4), April, p. 86

²⁸ See Matsumoto, Yoshihiro [1999], "Trends of the Third Sector Bankruptcy (in Japanese)," *Finance and Legal Affairs*, No. 1536, 25 January, p. 24

²⁹ See *Nihon Keizai Shinbun*, 24 July 1999.

³⁰ supra note 27, p. 87.

³¹ supra note 21, p. 41.

³² *id.* p. 42.

³³ See Watanabe, Yozo [1998], "What is the Law ? (in Japanese)," Iwanami Shoten, p. 189.

³⁴ See 'Budget Turning Back to Small Government', Editorial in *Nihon Keizai*

Shinbun, 21 December 1999.

References

- Auerback, R., and A. Shutter [1995], "International Project Financing," in Norton, Auerback and Baba (eds.), *Environmental liability for Banks*.
- Daiichi Kangyou Bank [1999], *PFI and Project Finance* (in Japanese).
- Doboku Gakkai (ed.) [1995], *System for Infrastructure Development: Japan's Experience* (in Japanese).
- Economy Society Policy*, No.330, October 1999.
- Enjo, Kanako [1997], *Big Bang in Electric Power Industry in the UK* (in Japanese), Japan Electric Power Association.
- Fletcher, P., and J. Welch [1994], *State Support in International Project Finance*, *Journal of International Banking and Finance Law*, Butterworth.
- Kagami, Mitsuhiro, and Tsuji Masatsugu (eds.) [1999], *Privatization Deregulation and Institutional Framework*, Tokyo: Institute of Developing Economies (IDE), JETRO.
- Kobayashi, Hiroyuki [1999], "PFI and Municipal Governments (in Japanese)," *Urban City Affairs*, 4 (90), April.
- Ligherness, T. [1994], "A Borrower's View of Project Lending," *Journal of International Banking and Finance Law*, Butterworth.
- Local Government and the Private Finance Initiative, <http://www.local-regions.detr.gov.uk>.
- Matsumoto, Yoshihiro [1999], "Trends of the Third Sector Bankruptcy," *Finance and Legal Affairs*, No. 1536, 25 January.
- Nakajo, Ushio [1995], *Destroying Regulations*, Toyokeizai Shinposya.
- Nakamura, Taiwa [1996], *Policies and Economics of Privatization* (in Japanese), Nihonkeizai Hyoronsya.
- Norton, J., and R. Auerback [1993], "Public Projects and Private Finance" in Norton and Auerback (eds.), *International Finance in the 1990s*.
- Ouchi, Katsuki [1999], "Problems of Japanese PFI in the PFI Promotion Bill (in Japanese)," *Financial and Economic Affairs*, 19 April.

Excerpt
of
Act on Promotion of Public Infrastructure Development
by Using Private Finance Initiative

1. Purpose (Article 1):

To accumulate social capital efficiently and effectively by measures to use capital, managing ability and technical skills of the private sector to promote construction, maintenance and operation of public infrastructure for sound national economic development.

2. Definition (Article 2):

- (1) 'Public Facilities': (i) public facilities: roads, railways, harbors, airports, rivers, parks, water, sewage, water for industrial use, (ii) facilities for public use, including public office buildings, housing for public servants, (iii) public-owned houses and facilities for public purposes (including educational and cultural facilities, garbage processing facilities, medical facilities, social welfare facilities, correction and care facilities, parking spaces, underground areas), (iv) information and communication facilities, energy supply facilities, new energy facilities, recycling facilities, tourist facilities and research facilities, (v) facilities defined as corresponding to the above by regulations.
- (2) 'Designated Projects': projects related to development of Public Facilities (i.e. construction and maintenance of Public Facilities including the provision of public services) and carried out effectively and efficiently by using capital, managing abilities and technical skills of the private sector.
- (3) 'Supervisory Authorities of Public Facilities': (i) ministers: those who regulate Public Facilities or those who supervise Designated Projects, (ii) chiefs of municipal governments which regulate Public Facilities or plan to carry out Designated Projects, (iii) specified legal entities and other public purpose legal entities which develop Public Facilities.
- (4) 'Selected Projects': Designated Projects which are approved by Supervisory Authorities of Public Facilities as appropriate to carry out based on Basic and Implementation Principles.
- (5) 'Selected Contractors': those selected to carry out Selected Projects.

3. Fundamental Doctrines (Article 3)

- (1) Projects related to development of public facilities shall be carried out by the private sector as much as possible when appropriate.
- (2) Designated Projects, in which liabilities of the public and private sectors are clearly defined, shall be carried out to provide low-priced and high-quality services to the citizens on the profitable basis.

4. Basic Principles (Article 4)

- (1) The following shall be determined: (i) basic matters related to the selection of Designated Projects including those initiated by the private sector, (ii) basic matters related to the recruiting and selection of private contractors, (iii) basic matters to assure adequate and firm implementation of Designated Projects, including clarification of liabilities of private contractors, (iv) basic matters related to legal and taxation measures and fiscal and financial assistance, (v) other basic matters related to the Designated Projects.
- (2) The Prime Minister shall determine the Basic Principles, in consultation with relevant administrative organs and with resolution of Committee on Promotion of PFI Projects.

5. Implementation Principles (Article 5)

- (1) Supervisory Authorities of Public Facilities shall establish Implementation Principles when they select Designated Projects.
- (2) Implementation Principles shall contain details of the following regarding Designated Projects: (i) selection of Designated Projects, (ii) subscription and selection of private contractors, (iii) clarifications of the liabilities of private contractors for the purpose of adequate and firm implementation, (iv) location, size and allocation of Public Facilities, (v) measures to be taken in case of disputes over the interpretation of project plans or arrangements, (vi) measures to be taken in the case of difficulties in continuation of the projects, (vii) basic matters related to legal and taxation measures and fiscal and financial assistance, (viii) other matters necessary to implement Designated Projects.

6. Selection of Designated Projects and Private Contractors (Articles 6-10)

- (1) Supervisory Authorities of Public Facilities may, based on the Basic and Implementation Principles, select Designated Projects which they

consider appropriate to implement.

- (2) Supervisory Authorities of Public Facilities shall select private contractors to implement Selected Projects by means of public tender when they select Designated Projects.
- (3) In selecting Designated Projects and private contractors, Supervisory Authorities of Public Facilities shall render objective appraisal (including the effects and efficiencies of Designated Projects) and disclose the results thereof.
- (4) Municipal governments shall acquire the approval of their congress when they conclude contracts regarding Designated Projects of which the type and the amount are specified by the government ordinance.
- (5) In case the Selected Contractors are legal entities that are funded, partly or entirely, by the central or municipal governments, the risk allocation between the contractors and Supervisory Authorities of Public Facilities shall be duly clarified in the project plans or arrangements.

7. Assistance Measures (Article 11-20)

- (1) The central government may commit itself to owing debts for 30 years at maximum in Selected Projects.
- (2) The central and municipal governments may let Selected Contractors use their national or public properties for Selected Projects without consideration or with consideration at less than market price.
- (3) The central government may extend loans with no interest to Selected Contractors to undertake Selected Projects that are considered significantly public.
- (4) The central or municipal governments shall make efforts to pay special care for finance and issue of municipal bonds for implementation of Selected Projects.
- (5) The central and municipal governments shall pay appropriate care for Selected Contractor's acquisition or use of land for Selected Projects.
- (6) The central and municipal governments shall, in the light of Basic and Implementation Principles, take legal and taxation measures necessary to promote the implementation of Designated Projects, and shall provide Selected Contractors fiscal and financial assistance necessary therefor.
- (7) In order to promote the implementation of Designated Projects, the central and municipal governments shall, abolish or unease regula-

tions which may impede the use of technical skills and expertise of the private sector.

- (8) When Selected Contractors purchase real property for Selected Projects site, mortgagee and mortgagor companies of the real property may appropriate the amount of loss incurred by the real property to the asset on their balance sheets.

8. Committee on Promotion of PFI Projects (Article 21 and 22)

- (1) Committee on Promotion of PFI Projects shall be established in the Prime Minister's Office. The Committee shall examine and discuss the current situation of the implementation of PFI Projects.
- (2) The Committee shall consist of nine members, among academicians and professionals, appointed by the Prime Minister.

9. Delegation to Ordinances (Article 23)

Matters necessary to implement this act shall be provided in ordinances.

10. Attached Rules

- (1) Date of implementation: This act shall be implemented within three months from the date of issuance.
- (2) Reappraisal: Necessary measures shall be taken, based on the results of the reappraisal of the implementation situation of Designated Projects (including the current progress of abolishment or relaxation of regulations that may impede the use of technical skills and expertise of the private sector).
- (3) Public tender (Article 3): For the purpose of improving the public tender system regarding Public Facilities, the central government shall reappraise the selection methods of private contractors to implement Designated Projects and shall take necessary measures as the results thereof.
- (4) Relevant revision of laws related to this Act (Articles 4 to 14).