



GRATA
INTERNATIONAL

Public Private Partnership in Central Asia: comparative analysis of legal regulation

2 December 2021

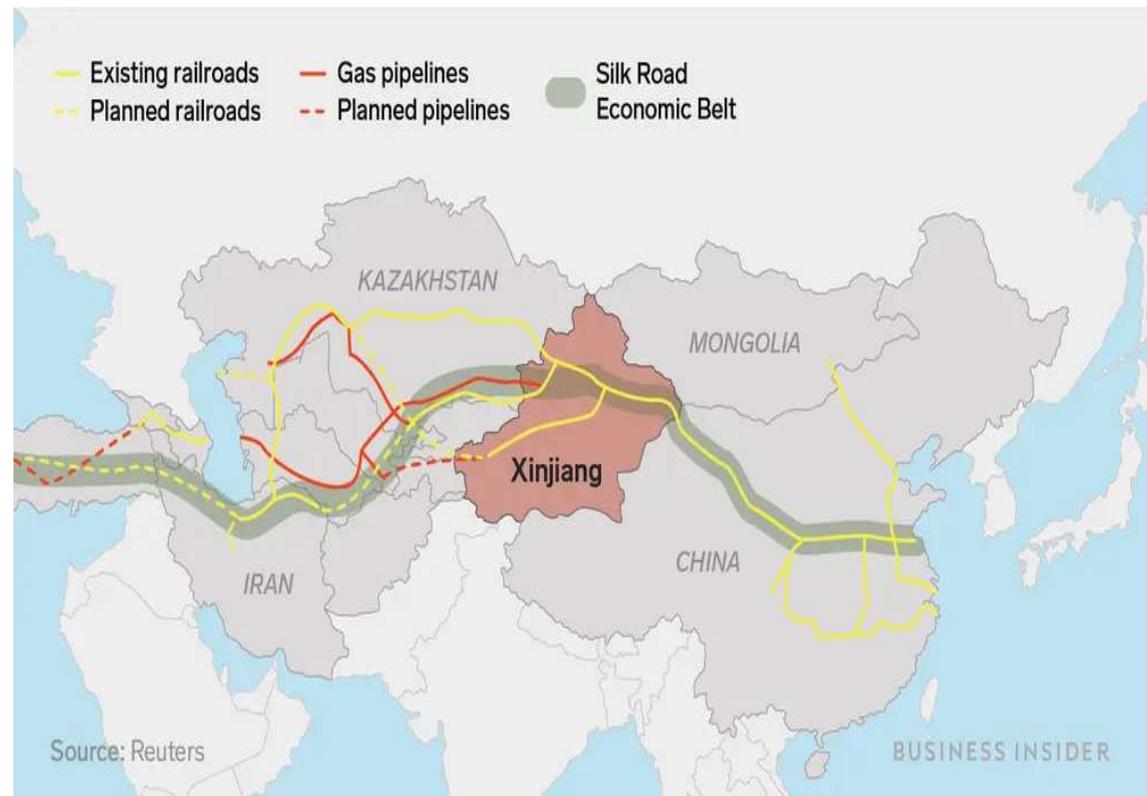
Shaimerden Chikanayev
Attorney-At-Law



- Central Asia**
- Kazakhstan
 - Kyrgyzstan
 - Tajikistan
 - Uzbekistan
 - Turkmenistan

Why Central Asia?

- Huge demand, because of deteriorating public infrastructure inherited from the Soviet era, including power plants, water and sanitation plants, airports, roads, hospitals, schools, etc.
- The launch of the **Belt and Road Initiative** scaled up China's investments in infrastructure in the region, however, so far Chinese banks and companies neglected the PPP mechanism, mainly because Chinese SOEs opted for special arrangements with local governments instead of participating in open tenders, that inevitably caused **corruption** in Chinese driven infrastructure projects. Lately, however, Chinese companies started considering PPPs.



Why PPP?

All countries of Central Asia recently enacted specific PPP laws, that demonstrates **political commitment** of the respective governments to use the PPP as a tool to attract foreign direct investment.

- **Tajikistan** – PPP Law dated 28 December 2012.
- **Kazakhstan** – PPP Law dated 31 October 2015.
- **Uzbekistan** – PPP Law dated 10 May 2019.
- **Turkmenistan** – PPP Law dated 5 June 2021.
- **Kyrgyzstan** – PPP Law dated 11 August 2021.

GDP per capita, PPP (current international \$) in Central Asia and Caucasian countries



Legal Concept of PPP in Central Asia

- PPP is a legal term in all countries of Central Asia.
- Unlike internationally accepted legal definition of a PPP as an “**agreement**” in the UNCITRAL Model Legislative Provisions on Public-Private Partnerships, legal concept of PPP in all countries of Central Asia means “**cooperation**” or a “**form of cooperation**” that corresponds to certain “**features**” and that has a **legal form** of a PPP agreement as a civil-law contract.
- As these “features” are not clearly and properly defined in the PPP laws of all five nations, there are high risks of “PPP imitations” and, therefore, invalidation or reclassification of PPP agreements into public contracts by respective national courts.
- PPP in a legal doctrine of countries of Central Asia is, generally, regarded as a **law institute** *sui generis*, belonging to a mixed system of private and public law.



What is PPP in Central Asia?

Kazakhstan	Kyrgyzstan	Tajikistan	Turkmenistan	Uzbekistan
<ul style="list-style-type: none">Extremely broad concept of a PPP as a form of cooperation between the public partner and a private partner that corresponds to the features defined by the PPP Law.	<ul style="list-style-type: none">PPP is a cooperation between public and private partners in order to develop and implement projects for the creation and/or modernization, operation and maintenance of infrastructure facilities and/or infrastructure services.	<ul style="list-style-type: none">PPP is a cooperation of public and private partners in the implementation of projects in the field of infrastructure and social services for a certain period established by the agreement on public-private partnership.	<ul style="list-style-type: none">PPP is a legally formalized mutually beneficial cooperation between public and private partners for a certain period of time, based on the pooling of their resources for the preparation and implementation of a public-private partnership project.	<ul style="list-style-type: none">PPP is a legally formalized cooperation between a public partner and a private partner for a certain period of time, based on the pooling of their resources for the implementation of a public-private partnership project.

Legal Concept of a PPP Agreement in Central Asia

- PPP agreement is a **legal term** in all countries of Central Asia.
- PPP agreements in Central Asia are classified as species of **private contracts** and not administrative contracts, as in France and some other civil law countries. One may argue, however, that a PPP agreement under Tajik law is not a private contract, but an administrative contract, as it is defined as a “legal act”.
- A PPP agreement in Central Asia is, therefore, an arms's length transaction rooted in the free will of the parties of **equal** bargaining power and therefore subject to all the traditional rules and concepts applicable to contracts entered into between private parties (i.e. freedom of contract, *pacta sunt servanda*, legal right for recovery of civil damages etc.).
- In each of the country of Central Asia a PPP agreement is a so-called **nominate contract** with its own specific legislation (i.e., its own specific law and specific bylaws), that spells out, in considerable detail, the contents of the PPP agreement.



What is a PPP agreement in Central Asia?

Kazakhstan	Kyrgyzstan	Tajikistan	Turkmenistan	Uzbekistan
<ul style="list-style-type: none">▪ PPP agreement is a written agreement defining the rights, obligations and responsibilities of the parties to the public-private partnership agreement, other terms of the public-private partnership agreement within the framework of the implementation of the public-private partnership project.	<ul style="list-style-type: none">▪ PPP agreement is a written contract between public and private partners defining the rights, obligations, responsibilities of the parties and other conditions for the implementation of a PPP project in accordance with the PPP Law.	<ul style="list-style-type: none">▪ PPP agreement is a legal act establishing the obligations of the contracting authority and the private partner, defining the rules for the implementation of the project in accordance with the PPP Law.	<ul style="list-style-type: none">▪ PPP agreement is a civil law contract between public and private partners concluded in accordance with the procedure and on the terms established by the PPP Law.	<ul style="list-style-type: none">▪ PPP agreement is a document between a public partner and a private partner concluded in accordance with the procedure and on the conditions provided for by the PPP Law.

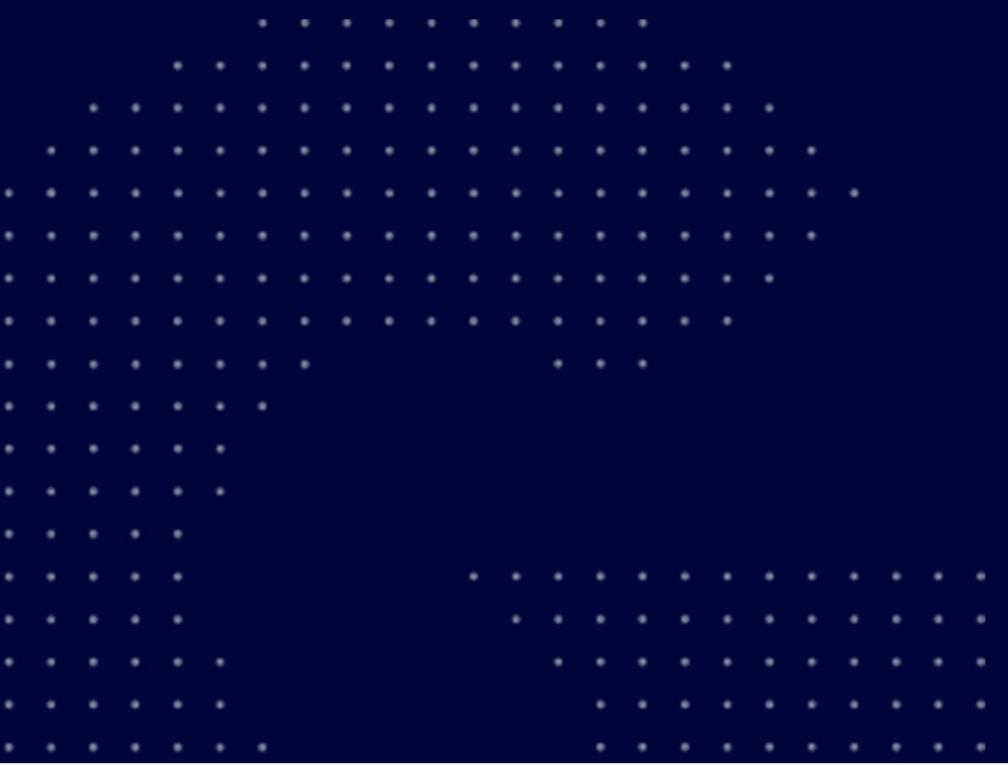
What is the subject of a PPP agreement?

Kazakhstan	Kyrgyzstan	Tajikistan	Turkmenistan	Uzbekistan
<ul style="list-style-type: none"> ▪ PPP projects in all sectors of economy, including subsoil use, may be implemented. ▪ A PPP agreement is a so-called mixed contract (i.e. contains the elements of different types of a contract). ▪ The subject of a PPP agreement, therefore, can vary depending on the types of contract a particular PPP agreement consists of. 	<ul style="list-style-type: none"> ▪ The Kyrgyz PPP Law enables to implement PPP projects in all sectors of economy, save for the use of mineral resources. ▪ PPP Law shall not be applicable to the sphere of public procurement and privatization. ▪ The subject of a PPP agreement is construction/modernization and operation of the infrastructure facilities by a private partner. 	<ul style="list-style-type: none"> ▪ The Tajik PPP Law enables to implement PPP projects in all sectors of economy, save for subsoil use. ▪ PPP Law shall not be applicable to the sphere of public procurement and privatization. ▪ The subject of a PPP agreement is construction and operation of the economic or social infrastructure by a private partner. 	<ul style="list-style-type: none"> ▪ PPP projects in all sectors of economy may be implemented, save for prospecting, extraction and refinement of hydrocarbon resources and specialized activities related to law enforcement, defense and security of the state. ▪ PPP Law shall not be applicable to the sphere of public procurement. ▪ A PPP agreement is a mixed contract. 	<ul style="list-style-type: none"> ▪ PPP projects in all sectors of economy may be implemented, save for activities related to prospecting, exploration of deposits and mining of mineral resources. ▪ PPP Law shall not be applicable to the sphere of public procurement. ▪ PPP agreement is a mixed contract.

Who is a Public Partner?

- In Turkmenistan, Kyrgyzstan and Uzbekistan **only the State** can act as a Public Partner and, therefore, private partner has legal recourse against state budget.
- Text
- In Kazakhstan PPP Law is still unclear on this issue, however, de-facto either the **State** or the **Region** or the **City** may act as Public Partner.
- In Kazakhstan, therefore, private partner has legal recourse only against local budget of a city or a region (that usually do not have any credit ratings) respectively in local PPP projects, but not against state budget of the Republic of Kazakhstan, that has country rating of S&P BBB-.
- In Tajikistan also either the **State** or the so-called **administrative and territorial units** may act as a Public Partner.





THANK YOU!

Shaimerden Chikanayev
Attorney-At-Law

+7701 7878020

schikanayev@gratanet.com

www.gratanet.com