

Study on Legal Guarantees for Public-Private Partnerships in Environmental Pollution Control

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Abstract: Although China has made significant progress in environmental protection in recent years, there is a need for improvement in the policy and methods of environmental governance due to the increasingly serious environmental problems. In response to this situation, the Development and Reform Commission, the Ministry of Finance, and other relevant departments have issued a series of policy documents that provide guidance and operational support for the development of public-private cooperation in environmental initiatives. While these policies and regulations have been initially implemented in our country, there are still some shortcomings and practical disadvantages during their application process. Therefore, it is necessary to continuously enhance the legal regulation of public-private cooperation in environmental pollution control based on each relevant policy foundation. This will ensure that the governance model can effectively fulfill its role under the protection of laws and regulations.

Keywords: Environmental Pollution; Public-private Partnerships; Legal Guarantee

1. Introduction

Environmental pollution has always been a major problem of our country and even the whole world which is difficult to solve. Environmental pollution control is a very important aspect in the field of environmental protection, mainly land pollution, air pollution, water pollution, Marine pollution and noise pollution. The Chinese government has also been exploring the road of environmental pollution control, such as pollutant discharge charging system and administrative order treatment and other means to reduce environmental pollution have played a certain role, but the effect is not obvious. With the continuous development of enterprises and the rise of social participation, enterprises no longer become bystanders of environmental pollution control. Nowadays, with the increasing investment of the state in environmental protection, enterprises and other private sectors also participate in it and cooperate with the government to jointly control environmental pollution.

Public-private partnership, also known as public-private partnership(PPP) for short, refers to the cooperation between the Public sector and the Private sector. The model of public-private partnership takes the construction of public infrastructure and the provision of public products and services as the object of cooperation. In order to promote the smooth realization of the cooperation, the public and private parties promise to share risks and responsibilities in advance, and share benefits and achievements afterwards^[1]. Public-private cooperation on environmental pollution control is the practical cooperation between public and private parties in specific projects of environmental pollution control. It is an innovative model for the purpose of protecting environmental public goods, improving environmental quality and mitigating environmental pollution.

Public-private cooperation on environmental pollution control not only conforms to the objective needs but also meets the realistic requirements. It not only meets the needs of the public governance concept and practice of environmental pollution, but also reflects the transformation and development of environmental pollution control from government-led governance to public-private cooperation governance. Public-private cooperation on environmental pollution control indicates that the government can separate and transfer part of its power to the private sector, and market some public services that can be marketable, so as to strengthen the coordination and cooperation relationship with the private sector. In other words, the stimulation of market competition mechanism can be applied to the optimization of environmental public services. Make full use of the advantages of social capital to supplement the defects in public affairs of environmental protection^[2]. Of course, the private sector alone can not complete the heavy responsibility of environmental pollution control. Public-private cooperation can make up for the

shortcomings of both sides, thus reducing their respective costs and achieving the best return, so as to speed up the construction of environmental pollution control projects, achieve the balance of project income, and independent financing. This solves the problem that the private sector is usually reluctant to invest in low-profit projects^[3]. In addition, under the realistic demand for "third-party governance" of environmental protection and the rise of environmental protection industries and services, the development of public-private cooperation on environmental pollution control has also been greatly promoted and developed. Environmental pollution public-private cooperation is also gradually becoming the inevitable trend of our country's environmental protection strategy.

2. Problems in the legal protection of public-private cooperation in environmental pollution control in China

2.1. Lack of clarity in environmental law provisions on public-private partnerships

The main existing legislation on environmental pollution is the Environmental Protection Law. Through consulting this law, it can be seen that the environmental Law does not explicitly provide for public-private cooperation. It only mentions the "comprehensive treatment" of environmental protection in Article 5 of the General Provisions, which has four levels of meaning: First, the management of environmental factors should be considered as a whole, such as the environmental protection of groundwater, surface water and atmosphere should be taken into account while controlling soil pollution; Second, we should make comprehensive use of political, economic and technological means to control the environment. Third, a coordinated and co-managed environment governance pattern featuring unified supervision and management by environmental protection departments, division of responsibilities by various departments, social responsibility by enterprises, enhanced environmental awareness by citizens, and active participation by the public; Fourth, the prevention^[4] and control of environmental pollution and ecological damage across administrative regions should be strengthened. It mainly provides for the common management of various environmental factors, and the provisions on the use of public-private cooperation in environmental pollution control are unclear, and there are no exact provisions to encourage or advocate public-private cooperation in environmental pollution control. In addition, there is no specific provisions on public-private cooperation in environmental pollution control, only involving enterprises and public institutions and other producers and operators to encourage emission reduction and pollutant discharge responsibility. The provisions of the Environmental Law on public-private partnership are almost blank. There are no relevant provisions on the application of public-private partnership system to environmental pollution control, whether cooperation should be encouraged, how cooperation should be conducted, and how specific operation and implementation should be carried out, let alone the provisions on the operation, supervision and dispute settlement of cooperative projects. The provisions on the rights and responsibilities of the public and private parties in environmental pollution control are inevitably missing. Therefore, specific provisions on public-private cooperation should be included in environmental law.

2.2. The absence of a general law on public-private partnerships

Based on the current situation of public-private partnership legislation, it is found that there is a lack of special and higher-level PPP legislation in China. The Guiding Opinions of The State Council on Innovating Investment and Financing Mechanisms to Encourage Social Investment in Key Fields (State Office [2014]60) and the Notice on Promoting the Guiding Opinions on Government-Social Capital Cooperation Mode in the Field of Public Service (State Office [2015]42) are not administrative regulations. With the consent of The State Council, the six ministries and commissions jointly issued the "Measures for the Management of infrastructure and public utilities franchise" and a series of normative documents issued by the Ministry of Finance and the Ministry of Construction, not only the legal level is low, the provisions are not comprehensive and detailed enough, and the specific implementation can not substantively solve the corresponding legal obstacles, such as guarantee law obstacles, arbitration law obstacles. A series of documents mostly belong to the guidance and policy documents within the ministries and commissions, and public-private cooperation is not any department alone can promote the completion. For example, the Ministry of Finance and the National Development and Reform Commission, their starting points and positions are different, the lack of coordination between the two sides, their own way, drafting and issuing regulations or normative documents will easily lead to contradictions, making the actual operator at a loss. Another example of the "infrastructure and public utilities franchise management measures" in article 51 provides: "the franchisee believes that the specific

administrative acts made by the administrative organ infringe on its legitimate rights and interests, has the right to statement, defense, and can file administrative reconsideration or administrative litigation according to law". The "PPP contract project Guide" issued by Ministry of Finance and the National Development and Reform Commission pointed out: "PPP agreement is a civil agreement, and if there is a dispute, they can be filed civil litigation or in accordance with the agreement to apply for arbitration". However, it is not clear whether social capital can demand the government to bear the liability for breach of contract because the government department fails to perform the franchise agreement, and whether social capital can file a civil lawsuit in the court.

Therefore, in order to ensure the smooth implementation of PPP projects, clarify the rights and obligations of the government, social capital and other participants, and effectively protect the interests of the public and private parties and other participants, it is urgent to introduce a high-level and highly effective special PPP legislation. So that participants can deal with conflicts between regulations and inter-departmental legal norms according to the legal effect and the legal habit that the new law is superior to the old law. The complete legal guarantee is the direct basis for the successful realization of the long-term cooperation of public-private cooperation projects. Therefore, it is necessary to formulate a higher level law applicable to PPP.

2.3. Problems in the operation of public-private partnerships for environmental pollution control

2.3.1. High cost of financing public-private partnership projects for environmental pollution control

There are many forms of public-private partnership, among which franchise project is the most important one. Most countries also generally adopt this form, handing over the franchise rights of project construction, operation and protection to the private sector, but the final ownership of the project is generally owned by the government. Environmental pollution control public-private cooperation projects usually have a long period and large investment, so they often result in a large amount of financing, higher financing liabilities than ordinary projects, and most of them are medium and long-term loans. In addition, environmental pollution control public-private cooperation project financing involves a wide range, many participants, complex structure, usually need to do a lot of related project assessment, risk burden, tax structure, asset mortgage and a series of technical work, financing documents are often several times more than the general project financing, the organization of project financing used longer time, resulting in higher upfront costs. Also in the project financing, the lender because of the greater risk, so hope to get higher returns, so that the public-private cooperation project loan interest rate is higher than the ordinary loan interest rate. At present, the application of public-private partnership in environmental pollution control is not very extensive, mainly in sewage treatment and garbage treatment, only in these two areas are faced with a lot of problems, so for environmental pollution control in other new areas of public-private cooperation will face all kinds of difficulties, in the project financing this is a new challenge.

2.3.2. Uncertainties in operation

As public-private cooperation on environmental pollution control is a new model of governance, once it is really implemented and put into operation, it will face many uncertainties.

First, Unreasonable price formation mechanisms and regulation. Generally speaking, the price in the field of public utilities is directly priced based on the principle of government cost plus profit plus tax. As a result, the profits of enterprises have nothing to do with their costs. In this way, enterprises cannot be stimulated to reduce costs and improve production efficiency. Due to the asymmetry of information, the operating enterprises of public utilities generally have the phenomenon of false reporting of production and operation costs and expenses, and the unreasonable pricing basis causes the policy losses to cover up the operating losses.

Second, operational inefficiency. In China, public utilities basically adopt the regional vertical integration organizational structure, completely managed by the local government, the lack of cross-regional operation subjects, market and regional differentiation makes the lack of effective competition between enterprises, resulting in low efficiency of public utilities operation, no motivation to improve management, and weak service consciousness. The operation enterprises of public utilities often take advantage of their monopoly advantages to extend the monopoly scope arbitrarily, and even damage the right of users or consumers to choose. It is usually manifested as: the setting of obstacles, the control of terminal products, the control of design and construction; The bundling of transactions, the phenomenon of excessive charges and so on.

Third, risk exposure is high. The honest performance of the contract by both the government and the private capital contract parties directly determines the success or failure of the public-private partnership project. No matter how perfect the laws and contracts are, if they are not properly performed, the interests of both parties will not be realized or guaranteed, let alone the smooth construction and long-term operation of the public-private partnership project. Sometimes, PPP project contracts cannot be honestly performed due to a variety of factors. Of course, if the contract is fulfilled, the project will inevitably avoid many risks, such as policy risks, exchange rate risks, technical risks, financial risks, operational risks, force majeure risks and other risks.

2.3.3. Inadequacy of the regulatory system

The supervision of public-private cooperation projects on environmental pollution control is mainly the supervision of the government. So far, the legislative process of the country has failed to catch up with practice, and the supervision of the government lacks legal basis and substantial legal guarantee. The departmental legislation formulated by different departments according to their own interests has also caused a large number of rule conflicts. At present, our country's supervision system of public-private cooperation in environmental pollution control is not fully established, local government supervision is completely dependent on various existing government regulators, resulting in a serious lack of independence and authority, however, decentralized regulatory power lacks both integration and coordination, the sharing of information and effective legal enforcement also seems to be disappointing. Therefore, it not only increases the cost of being regulated, but also wastes a lot of administrative resources. Moreover, most of the regulations have strong guidance, weak feasibility, implementation and stability, resulting in incomplete supervision system and insufficient supervision.

2.3.4. Inadequacy of dispute settlement mechanisms

The dispute settlement mechanism of public-private partnership is currently the most problematic and controversial issue. Its main focus is whether the contract of public-private partnership project is an administrative contract or a civil contract. When there is a dispute, whether it should be solved through civil litigation or administrative litigation for relief is related to the application of law. Therefore, to solve the dispute, the contract definition has become a prerequisite issue. Disputes are mainly divided into two categories: one is between the public sector and the private sector; The second is between the private sector and other stakeholders. The second type of dispute settlement is easier and can be coordinated by the public sector or resolved through civil litigation or civil arbitration procedures. The key lies in the first type of disputes between the public and private sectors, which is a more complex issue, and there are many disputes about the nature of the contract. Some people think it is a civil contract, some people think it is an administrative contract, and some people even think it is an economic administrative contract. The special legislation on public-private cooperation in our country and various localities does not explicitly raise the issue of dispute relief.

3. Improvement of Legal Guarantees for Public-Private Partnerships in Environmental Pollution Control in China

3.1. The essential framework and main contents of China's PPP law

Only laws can guarantee the smooth development of various undertakings, ensure the stability of social order, and ensure the legitimate interests of all participants. Similarly, public-private partnership governance also needs legal protection, so that public-private partnership can have a basis in governance, so it is imperative to bring public-private partnership governance into the legal scope. Obviously, the PPP project is not very comprehensive so far, so the laws and regulations in this area are still very weak, lack of authoritative legal support, and lack of specific market-oriented industry policies and regulations. At present, there is no specific state-level legislation on public-private cooperation.

Therefore, it is suggested to establish a unified law on public-private cooperation, allowing local governments to refine local regulations in accordance with the unified standards in their regions. Under the guidance of the national legal outline, a Basic law on public-private cooperation system will be promulgated, which will have high enforcement power and carry out complete and specific provisions. At the same time, some operational implementation rules, rules and standards can be issued as an important supplement, while paying attention to the unity and coherence of various laws and regulations. If a Chinese PPP law is formulated, its basic framework and main contents should include: basic principles, clear provisions on the PPP form of environmental protection, supervision, dispute settlement and relief.

3.2. Improvement of public-private partnership provisions in environmental law

3.2.1. Establishment of the principle of public-private partnership

The "environmental protection law" of our country lacks the specific provisions of public-private cooperation. The fifth in the general provisions is regulation of the basic principles of environmental protection, among which "integrated governance" is used to deal with the environmental problem by the systematic method, stipulate the common management system of environmental elements, and regulate the obligation of environmental protection agents and the way of participation in environmental governance. However, it still cannot reflect the clear provision of public-private cooperation. As for "public participation", it is clear that citizens, legal persons and other organizations enjoy the right to obtain environmental information, participate in and supervise environmental protection according to law, and it cannot be regarded as a regulation on public-private cooperation. Therefore, it is suggested that public-private cooperation can be added to the basic principles of Article 5 of the General Provisions of Environmental Law, and it is clearly stipulated that public-private cooperation in environmental protection is encouraged or advocated. After the addition of public-private cooperation, this article can be thus stipulated that "environmental protection shall adhere to the principles of giving priority to protection, giving priority to prevention, comprehensive treatment, promoting public-private cooperation, encouraging public participation and taking responsibility for damage."

3.2.2. Ideas for specific provisions on public-private partnerships

Assuming that a special PPP law is formulated, the relevant provisions of the PPP Law on the public and private parties in public-private partnership should be followed. If there is no special PPP law, then the corresponding specific provisions should be added to the sub-provisions of the Environmental Law. The specific provisions may include the following:

3.2.2.1. Provisions relating to accession to public-private partnerships

To add the relevant provisions of public-private cooperation to the sub-provisions of the Environmental Protection Law, it is suggested that it can be added to the provisions of Chapter V, adding provisions on the scope of application of public-private cooperation projects for environmental pollution control, the conclusion of contracts, the performance of contracts, the modification and termination of contracts, supervision and management, and dispute settlement. If specific provisions are made, the relevant departments of the people's government or the departments authorized by the government may, in accordance with the needs of environmental protection, put forward implementation plans for public-private cooperation projects for environmental pollution control. The qualified private sector shall be selected for cooperation according to the needs of the project. The contents of a public-private cooperation contract for environmental pollution control may include: project name, implementing agency, price budget, operation mode and term, investment and financing mode, income acquisition, risk sharing, liability for breach of contract, dispute settlement method and other matters requiring clarification. In the performance of the contract, the public and private parties shall abide by the principle of good faith, fully perform their obligations in accordance with the contract, and protect the lawful rights and interests of the public and private parties according to law. During the term of validity of the contract, if the contents of the contract need to be changed, the public and private parties shall sign a supplementary agreement on the basis of consensus through consultation. If the contract is prematurely terminated due to force majeure, the parties may terminate it through consensus through consultation. Another example is to stipulate that relevant government departments, such as environmental protection departments, shall supervise and manage the operations of the private sector according to their respective duties. When disputes arise between the public and private sectors, experts or third parties may be invited to mediate, or legal proceedings may be brought.

3.2.2.2. Clarify the rights and responsibilities of both the public and private sectors in the management of environmental pollution

Public-private cooperation on environmental pollution control defines the relationship between the public and private sectors as a cooperative relationship, which means that all partners have equal status, participate in fair competition, have a clear division of labor, complement each other's advantages, and share benefits and risks. This requires that the responsibilities, rights and obligations of both public and private sectors should be fully covered in the provisions of the law.

The power and responsibility of the government in public-private cooperation on environmental pollution control. First of all, transform the functions of the government, that is, separate the power of operation from the functions of the public sector, and divide the rights of the public and private sectors

in parallel to avoid cross-delegation. The public sector should delegate power, clarify the scope of its own powers and responsibilities, and perform according to the contract. It only needs to supervise the market, assets and equity of public nature. It should give up direct intervention and turn to macro management. The public sector should also form supporting institutions and increase or decrease the number of specialized agencies to participate in the cooperation of public utilities. The government should shift from direct management of environmental pollution control to creating conditions for competition, managing business order and creating market operation mechanisms^[5]. The details include: first, within the government, it is not only necessary to clarify the scope of powers and responsibilities of departments at all levels, unify administrative objectives, clarify the relationship between powers and affairs, but also to ensure that the financial subsidies of various localities are impartial and balance financial matters. At the same time, it is also necessary to actively seek financing channels, expand the sources of funds, and solve the financing difficulties from the source; Second, for private partners, the government should play a guiding role and make them actively take measures to achieve self-support, such as increasing the internal construction and rectification of enterprises, actively enhancing the corporate image and reputation, enhancing their own development strength, and looking for suitable investment and financing methods. Secondly, due to the special status of the public sector of the government, which determines its natural advantages, the role of the public sector of the government is of great importance in public-private cooperation. In the traditional public service management mode, the government has always been in the leading management position, but after the emergence of the public-private partnership system, part of the role of the government needs to be transferred to the private partners, which requires the government to change the "role playing", from the leading role to the equal role, that is, to fulfill the power and responsibility under the guidance and norms of laws and regulations. In accordance with the law of market development and the principle of honesty and credit on the basis of equality and transaction. In order to achieve effective public-private cooperation in environmental pollution control, the management of the public sector is also indispensable. In this way, the result-oriented responsibility system comes into being. The specific meaning is to expand the scope of responsibility of public sector workers from the behavior itself to the behavior and its results, introduce no-fault responsibility into the public-private cooperation, and be a useful supplement to the regulatory function, so that the public sector can exercise its power more prudently, the legitimate rights and interests of the private sector will not be infringed, and it is a stimulant to attract potential private investment. In summary: First, on the basis of unified laws and regulations, according to the characteristics of various types of public-private cooperation to formulate the corresponding laws and regulations. For example, BOT, TOT and franchise can introduce relevant legal constraints on market access, operation process, property rights issues and exit mechanism; The second is to strengthen the government's regulatory responsibilities. Economic and technical supervision in market access, operation process and other links should be strengthened to ensure fair and efficient delivery of project services.

The rights and responsibilities of private entities in public-private cooperation on environmental pollution control. First, in the market access link of bidding for environmental pollution control projects, the private sector should strengthen the main position of bidding, enhance the comprehensive competitiveness, fully collect materials, and formulate competitive bidding prices. In order to balance the rights and responsibilities of the public and private parties, the government should clarify the price system, assess the risks reasonably, and reduce the investment risks of the private sector while expanding the bidding. What the private sector should do is to continuously manage and improve its own level, enhance its core competitiveness, strengthen accounting, and optimize the cost-benefit structure^[6]. Second, in the project operation, the private participants mainly bear the main management responsibility of the operation, relying on their own advantages, the use of professional talents, technology and other advantages of operation management, in order to improve the quality and efficiency of services, reduce costs and achieve benefits; For the common interests of both public and private parties, private participants should consciously and strictly abide by the project contract, perform their own duties, and actively cooperate with the supervision work of relevant departments on the basis of implementing the relevant policies of government departments. Third, in the transfer process after the completion of the project, the private party generally does not have the ownership of the project in many public-private cooperation modes, and the government always holds the ownership of the property right. The private participants mainly provide services and are responsible for the construction, operation, production, sales and maintenance of the project to ensure the provision of efficient service quality. After the end of the business period, the assets will be accounted for and returned. During the business period, the private participants can charge appropriate fees to the service purchasers and the public, so as to realize their own profits and losses^[7]. For example, in the BOT model, the private partner needs to have strong financial strength and advanced management and operation experience. During the period of operation, although the private partner has the right to collect part of the fees from the beneficiaries of the service,

the government must take measures to restrict the right to use the private partner's assets. Meanwhile, the private partner should also make relevant efforts to preserve and increase the value of the state-owned assets, such as the awareness of full responsibility for the financing, construction and even maintenance of environmental pollution control projects. To realize the development goals of the project by enhancing the research and development and application of advanced technologies and innovating management models.

In a word, public-private partnership divides the rights and obligations of both parties by signing agreements. The private sector runs the project in detail, the government controls the laws and policies in a macroscopic way, and risks and benefits are shared^[8]. After the contract is signed, the public sector and the private sector will naturally have legal effect, and the actions of the parties are bound by the contract. The two parties reach an agreement on the basis of negotiation, on the premise of agreement and willingness, and honestly perform the contract in accordance with the spirit of the contract.

3.2.2.3. Legal liability

Chapter VI of the Environmental Protection Law could incorporate provisions regarding the legal liabilities of both parties engaged in public-private partnerships for environmental pollution control. In the event that the private sector contravenes laws, administrative regulations, and national mandatory standards, or procures projects through fraudulent, bribe-seeking, and other inappropriate means, thereby seriously endangering public interests or leading to significant quality and safety accidents, the relevant authorities shall mandate corrections within a specified time frame and mete out punishment in accordance with the law. Should the private sector fail to make the necessary corrections and the circumstances are severe, the collaboration may be terminated. If the case constitutes a criminal offense, criminal liability shall be pursued in accordance with the law. Additionally, if the public sector and its personnel fail to execute their statutory responsibilities, provide ineffective supervision, interfere with the private sector's normal business operations, engage in misconduct for personal gain, abuse their authority, or neglect their duties, they shall be subject to administrative sanctions in accordance with the law. If the case constitutes a criminal offense, criminal liability shall be investigated according to the law.

4. Conclusions

The significance of environmental pollution control in our nation is self-evident, as it is an urgent matter. The public-private cooperation system serves as a litmus test for a country's social and economic development, as well as its government's capacity to govern and coordinate. Although the implementation of public-private cooperation in environmental pollution control in our country is still in its infancy, establishing its guarantee system necessitates the collaboration of numerous forces. It is crucial to note that the public-private partnership system is not a panacea. Introducing the private sector in environmental pollution control does not guarantee a harmonious coexistence of green water and mountains with gold and silver mountains. However, incorporating the public-private partnership system into environmental pollution control represents an innovative approach that transforms the original financing and governance model, thereby propelling the reform and upgrading of environmental pollution control. In terms of specific applications, it is vital to enhance the legal protection system to guide and regulate the behavior of participants, explore and innovate cooperation models that cater to varying needs in practice, and ultimately ensure the stable and orderly development of public-private cooperation on environmental pollution control. This will contribute to a significant improvement in the environmental pollution situation and mitigate the occurrence of extreme environmental pollution phenomena, allowing for the sustainable development of ecological resources and the ecological environment.

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