Policy, legal and regulatory frameworks for successful PPPs

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Overview

- The Importance of Policy
- Policy framework
- The Regulatory environment
- The Legal environment
- Areas to be reviewed
- PPP Law
- Main lessons for success
Why is the Policy, legal and regulatory framework important for PPP’s?

- PPP’s are complicated long term transactions that are affected by many areas of law;
- Any one area of law may cause insuperable problems for the implementation of PPP’s in a country;
- Any investor will carry out a full due diligence of the existing legal framework of a country to ensure that the legal environment is sufficiently attractive for it to bid for a project;
- It is therefore important to carry out a full review of all parts of the legal framework to ensure that there is nothing that prevents, or appears likely to prevent, the successful implementation of a PPP and define the project scope;
- Successful PPPs depend on the effectiveness of the national and municipal legislative and regulatory structures;
Policy Framework

- A Policy Framework is necessary to:
  - Encourage PPP Investment
  - Inform widely within Government
  - Give Government officials the confidence to use PPP’s
  - Inform widely Stakeholders including consumers/users

- Benefits:
  - Facilitates planning and implementation
  - Instils confidence and understanding by the private sector
  - Provides an enabling environment for PPP
  - Defines the role of the Government in the implementation of PPPs
What should the policy contain?

- Overall Policy, objectives, direction, benefits, costs, etc.
- Legal and Regulatory framework
- Risk Management Framework
- Procurement guidelines & Model PPP contracts
- Financial guidelines (inc. tolls and public sector support)
- The Project Cycle and the role of Advisors
- Technical design and service standards
- Procedure for approval of projects
Regulatory Framework

- **Regulation is important when:**
  - The service involved is a natural monopoly;
  - There is significant market power (e.g. highway with alternatives that are congested or in very poor conditions)
  - The rights and obligations in a PPP concession agreement rely on regulatory interpretation.

- **Typically, the functions of a regulator include:**
  - Establish standards for the terms and conditions for supply of services
  - Regulate rates (tariffs) and other service charges
  - Establish market rules for the sector (issue, review and cancel licenses)
  - Monitor performance of the regulated entities
  - Arbitrate and settle disputes within the sector

- **Some areas of common concern:**
  - Clarity of responsibilities: which department is responsible?
  - who should the private sector deal with?
  - Tariffs:
    - are they too low to be economically viable?
    - How are they reviewed/regulated?
The Legal Framework

- **The Legal System:**
  - The Rule of Law!
  - Reliability (or otherwise!) of the Courts and the judiciary
  - Enforceability of International arbitration awards

- **The procurement process:**
  - Is it fair, open and transparent?
  - Are ministry responsibilities clear?
    - PPP Unit
    - Ministry of Finance
    - Line Ministries
  - Is there sufficient government support: financial (tariffs/capital support) and political?
  - Are the Guidance and documentation sufficient?
  - Is there sufficient monitoring capability within government?
What Areas need to be reviewed?

- **Company Law**
  - Is there a right to establish a Project Company?
  - Are there sufficiently clear and reliable procedures for:
    - Establishing the company
    - Corporate Governance
    - Issuing of shares and their transfer
    - Borrowing money by the company and granting security
    - Ensuring Limited Liability

- **Commercial Contracts Law/Civil Code**
  - Should be sufficiently clear, robust and flexible to deal with the needs of all stakeholders including:
    - Investors
    - Lenders
    - Sub-Contractors
    - Users/off takers
  - Where there are doubts about the efficacy or the enforceability of contracts, the project is highly likely not to even get started

- **Foreign Investment Law**
  - Is there sufficient certainty that profits of the investors can be repatriated?
What Areas need to be reviewed?

- Property and Planning Law
  - Are there any restrictions on foreign or private investment?
  - Is there adequate and clear provisions for the ownership and use of property?
  - Is there an effective property registration system (Cadastre)?
  - Is there sufficient certainty that title to the property will not be subject to third party claims and the risk of unknown factors affecting the site minimised?
  - Planning: what are the risks of failing to get planning permission of obtaining it with unsatisfactory conditions attached?
  - Is the compulsory acquisition legislation sufficiently robust to allow a project to go ahead?
  - Are resettlement provisions adequate?
What Areas need to be reviewed?

- **Tax Law**
  - Is the tax system sufficiently transparent?
  - How much discretion do the tax authorities have?
  - Are the guidelines and instructions on taxation sufficiently clear?
  - How objective is the criteria used to calculate tax liabilities?

- **Environmental Law**
  - Are the obligations clear enough to enable the impact to be assessed by an investor?
  - What are the circumstances that could give rise to denial of a licence? Are they sufficiently clear to give certainty?
  - Are the penalties for breach of environmental laws clear?
What Areas need to be reviewed?

- Intellectual Property Law
  - PPP projects often use new or advanced technologies
  - Is there adequate protection for the intellectual property rights of the investors? Are those rights sufficiently enforceable?
  - Consider an IP Framework by adherence to international agreements e.g. UNCITRAL Convention on assignment and Receivables in International Trade

- Anti Corruption Laws
  - Is there fair competition in the bidding process?
  - Are there adequate penalties for breach of the law? E.g. freezing or seizure of assets, protection of witnesses etc.
  - Are those penalties enforced?
  - Is there a supervising body ensuring enforcement that has sufficient strength?
  - Warning: ensure that the anti corruption protection does not inhibit the necessary flexibility required for successful PPP’s
What Areas need to be reviewed?

- **Security/ Pledge law**
  - Is there sufficient protection for the rights of lenders?
  - Are step-in rights able to be utilized to give the lenders security?

- **Dispute Resolution**
  - Investors need a clear understanding of the mechanisms available for protection and enforcement of their rights.
  - Lenders are often not comfortable when enforcement is exclusively in the Courts of the authority granting the concession:
    - Consider international arbitration
    - Local enforcement of arbitration decisions still vital
What Areas need to be reviewed?

- **Budget Law**
  - E.g. Mongolia: no department allowed to commit to spending beyond 3 years

- **Insolvency Law**
  - Do creditors have the ability to foreclose?
  - Do they have priority over lenders?
A PPP Law?

- Law should be permissive, not restrictive
- Example: Russian Concessions Law
  - Unclear relationship with the Civil Code and the Foreign Investment Law – restricted to immovable property
  - Concession rights must be registered as a charge on the right of ownership
  - Russian law to apply and Russian courts have exclusive jurisdiction i.e. no foreign arbitration
  - Constructed assets will be owned by the grantor - not by the concessionaire
  - IP rights acquired during the concession will belong to the grantor
International Standards and Guidelines

- Guidelines for Successful Public Private Partnerships (March 2003, EC)
- Law in Transition (April, 2007, EBRD)
- Guide to Promoting Good Governance in PPP (UNECE)
- UNCITRAL Model Law on International Commercial Arbitration
- Legislative Guide on Privately Financed Infrastructure Projects (UNCITRAL)
- EBRD Core Principles for a Modern Concessions Law 2006
Lessons for success

• a well defined legal framework with model concession contracts giving a balanced risk allocation

• An attractive government financial support system

• Careful and realistic revenue forecasting

• Some system of ensuring value for money (public sector comparator?)

• Good institutional capacity within government

• Use of expert advisors (legal, technical and financial)
Main Lessons for Success

- A well defined legal framework with well developed model concession contract
- Simple and transparent procurement
- Shared risk-reward concession structure
- Projects should have social benefits as well as commercial viability
- Particular attention to revenue forecasting
- Public sector comparator is a must
- Need for institutional capacity to manage PPP projects with external expert advice
- Appropriate Government revenue support system
Thank You

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