Successful Public - Private Partnerships

Pierre Chartier
ESCAP Transport Division
Assessing infrastructure

The need for infrastructure

- One of the most important asset in any country
- Plays a key role in economic and social development
- Improves productive capacity
- Attracts foreign direct investment

The infrastructure challenge

- Seamless Asia* requires US$ 8 trillion over 2010-2020
- Budgetary allocations cannot cover the bill
- Banks’ rules to lending are more stringent than in the past

* Source: Asian Development Bank
Assessing infrastructure

The infrastructure challenge

- Seamless Asia* requires US$ 8 trillion over 2010-2020
- Budgetary allocations cannot cover the bill
- Banks’ rules to lending are more stringent than in the past

* Source: Asian Development Bank

- Government’s budgetary allocation
- Technical assistance from development partners
- Private sector investment
Assessing infrastructure

Private sector investment

To be kept in mind before starting

- PPPs are complicated long-term transactions that are affected by many areas of laws
- Any one area of law may cause intractable problems for the implementation of PPPs in any country
- Any investor will carry out detailed review of the existing legal framework of a country to ensure that the legal environment is sufficiently attractive to bid for a project
- Important to carry out a full review of the legal framework to ensure that there is nothing that prevents, or appear to prevent, the successful implementation of a PPP
- Successful PPPs depend on the effectiveness of the national and local legislative and regulatory structures
Assessing infrastructure

Private sector investment

A policy framework

Necessary to

- encourage PPP investment
- give confidence to government officials in tackling PPPs
- inform other stakeholders

Benefits

- facilitates planning and implementation
- spread confidence and the understanding by the private sector
- defines role of government in the implementation of PPPs
Assessing infrastructure

Private sector investment

A policy framework

Contents

- overall policy, objectives, expected benefits
- legal and regulatory framework
- risk management framework
- procurement guidelines and model PPP contracts
- project cycle
Assessing infrastructure

Private sector investment

A legal framework

The legal system

- rule of law

- reliability of the courts and judiciary

- enforceability of international arbitration
Assessing infrastructure

Private sector investment

A legal framework

The procurement process
- is it fair, open and transparent?
- are responsibilities clear (PPP units / ministries / line ministries)
- are the guidance and documentation sufficient?
- is there sufficient monitoring capability within government?

Company law
- right to establish project company?
- are there sufficiently clear and reliable procedures for:
  - establishing company
  - issuing shares
  - borrowing money

Foreign investment law
- certainty that investors can repatriate profits
Assessing infrastructure

Private sector investment

A legal framework

Property and planning law

- are there 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?
- is there sufficient certainty that title to the property will not be claimed by third party?
- is there sufficient certainty that the risk of unknown factors affecting the site is minimised?
- (planning) what are the risks of failing to get planning permission or obtaining it with unsatisfactory conditions attached?
- are resettlement provisions adequate?
Assessing infrastructure

Private sector investment

A legal framework

Tax law
- is the tax system sufficiently transparent?
- how much discretion do the tax authorities have?
- are guidelines on taxation sufficiently clear?
- how objective is the criteria used to calculate tax?

Environmental law
- are the obligation clear enough to enable good impact assessment?
- are the laws / penalties for breaching the law clear enough?

Intellectual property law
- is there adequate protection for the intellectual property rights of the investor? Are those rights easily enforceable?
Assessing infrastructure

Private sector investment

A legal framework

Anticorruption law

- is there fair competition in the bidding process?
- are there adequate penalties for breaching of the law?
- are the penalties enforced?
- is there a supervisory body with sufficient power/independence to ensure compliance/enforcement

! Caution: anticorruption procedures must not inhibit flexibility

Budget law

- can government agencies commit spending over long periods or are there restrictions?

Insolvency law

- do creditors have the ability to foreclose?
Assessing infrastructure

Private sector investment

A legal framework

Dispute resolution
- investors need a clear understanding of the mechanisms available for protection and enforcement of their rights

! Caution: lenders not comfortable when enforcement is in the courts of the authorities granting the concession – International arbitration

Law should be permissive, not restrictive
Assessing infrastructure

Private sector investment

Moving forward

International standards and guidelines

- Guidelines for Successful Public Private Partnerships
- Law in Transition (*EBRD, 2007*)
- Guide to Promoting Good Governance in PPP (UNECE)
- Investors need a clear understanding of the mechanisms available for protection and enforcement of their rights
- UNCITRAL Model Law on International Commercial Arbitration
- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects
- OECD Basic Elements of a Law on Concession Contracts
- EBRD Core Principles for a Modern Concession Law
Assessing infrastructure

Private sector investment

Moving forward

International experts and experienced national agencies

UNCITRAL

(United Nations Commission on International Trade Law)

- core legal body of the United Nations system in the field of international trade law.
- formulating modern, fair, and harmonized rules on commercial transactions. These include:
  - conventions, model laws and rules which are acceptable worldwide
  - legal and legislative guides and recommendations of great practical value
  - updated information on case law and enactments of uniform commercial law
  - technical assistance in law reform projects
  - regional and national seminars on uniform commercial law

Anthony Smith, Member UN PPP Team of Specialists
e-mail: anthony.lawsmith@gmail.com

(provided most of inputs for this presentation)
Assessing infrastructure

Moving forward

International experts and experienced national agencies

PIMAC
(Public and Private Infrastructure Management Center)

- Researcher
  - support for formulation of PPP plan
  - policy studies on PPP programs
  - development of implementation guidelines

- Advisor and facilitator
  - development of PPP projects
  - review of concession agreements
  - assistance in tendering and negotiation

- PPP promoter
  - training programs and seminars for public officials
  - international cooperation

Mr. Hyeon Park, Executive Director
Public & Private Infrastructure Investment Management Center
Korea Development Institute
hpark@kdi.re.kr
www.pimac.kdi.re.kr
Thank you

www.unescap.org/our-work/transport
info.: escap-ttd@un.org