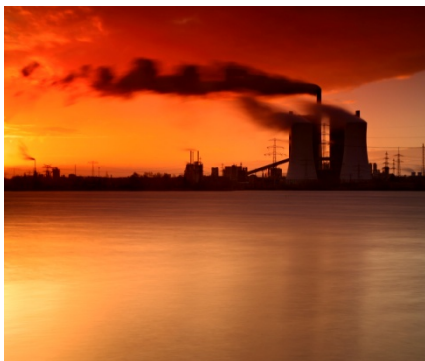




Session 15

Dealing with Legal and Governance Issues



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Overview



- **Legal:**
 - **Why is a legal framework important for PPP's?**
 - **What areas of the legal framework should be reviewed?**
 - **International Guidelines**
- **Governance**
 - **Governance Challenge**
 - **Objectives**
 - **Key Principles**
 - **Benefits**

Why is a legal 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**

What areas of the legal framework should 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 of the legal framework should 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 minimized?
 - Planning: what are the risks of failing to get planning permission or 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 of the legal framework should 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 license? Are they sufficiently clear to give certainty?
 - Are the penalties for breach of environmental laws clear?

What areas of the legal framework should 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 of the legal framework should 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?
- Insolvency Law
 - Do creditors have the ability to foreclose?
 - Do they have priority over lenders?
- 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

Legislation and regulations governing PPPs 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

Going Forward:



- What to do, going forward:
 - Consider amending existing laws and framework
 - Consider new PPP or Concession Law



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)
- OECD Basic Elements of a Law on Concessions Contracts 1999-2000
- EBRD Core Principles for a Modern Concessions Law 2006

Governance issues



Governance Challenge

- Good governance matters:
 - Need to build enabling institutions, procedures and processes
 - Need to build capacity of the public sector in PPP's
 - Need to establish accepted guidance and contract documentation
 - Need to involve citizens and other stakeholders:
 - Case study Zurich Soccer Stadium Project
- But it's not an easy concept to define:
 - Processes and Government actions
 - Quality of institutions and their effectiveness in translating policy into successful implementation
- The Challenge:
 - To develop the institutions, procedures, processes and documentation for effective PPP delivery and to build expertise and capacity in the public sector

Governance issues



The key principles present institutional challenges as the vast majority of governments are still at the early stages of PPP implementation:

- PPP use uncommon and infrequent
- Difficult to implement in many cases due to the need to develop institutions, processes, procedures and documentation. This is highlighted by:
 - Protracted length of procurement and negotiations (with associated cost implications)
 - The slowness in reaching project closure
 - Lack of flexibility in risk sharing
 - Cancellation of many projects going through the procurement procedure and the consequent adverse waste and adverse impact on the market
- Clear and publicly known lines of responsibility between government departments and between national, regional and local government takes time and political commitment

Governance issues



What are the objectives of good governance?:

- A fair and transparent selection process enabling Governments to develop partnerships:
- Assurance that value for money has been obtained:
 - Higher quality for the same money or the same quality for less money
- Improvement of essential public services
- Fair incentives for all parties and fair returns for risk takers combined with commercial success
- Sensible negotiation of disputes:
 - To assure the continuation of service provision
 - To avoid the collapse of the projects

Governance issues



Good Governance involves key principles:

- Participation:
 - the amount of involvement of all stakeholders
- Decency:
 - The degree to which the formation and stewardship of the rules is undertaken without harming or causing grievance to people
- Transparency:
 - The clarity and openness with which decisions are made

Governance issues



Good Governance involves key principles:

- **Accountability:**
 - The extent to which the decision makers are responsible to society for what they do
- **Fairness:**
 - The degree to which rules apply equally to everyone
- **Efficiency:**
 - The extent to which limited human and financial resources are applied without waste, delay or corruption and without prejudicing future generations
- **Standardisation/ simplicity**
 - Do not keep re inventing the wheel, wheels are expensive!

Governance issues



Where should these key principles be applied?:

- Government:
 - Stewardship of the system and policies as a whole
- Public Administration:
 - Where the policies are implemented
- Judiciary:
 - Where disputes are settled
- Society:
 - Where stakeholders are able to have their views taken into account

Governance issues



What are the benefits of good governance?:

- An effective, open and fair procurement regime means that Governments can procure services and infrastructure of higher quality and lower prices
- It will increase the support of stakeholders and society for PPP's and give policy makers the confidence to provide the political support for the process
- Well planned projects, supported by all stakeholders have less chance of collapse and recourse to law (with the subsequent cost and delay) and more chance of delivering the services that are required

Governance issues

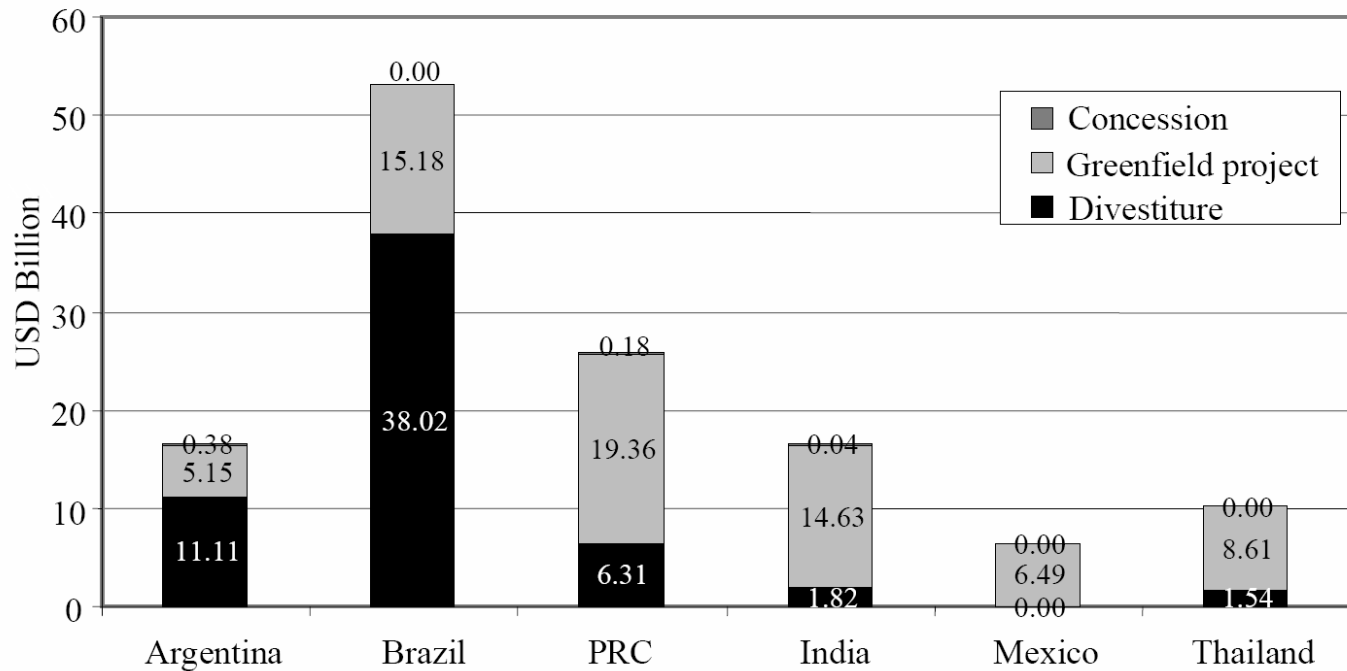


What are the benefits of good governance?:

- Conducting procurement in an open manner is a significant factor in boosting the confidence of private sector bidders in entering into partnerships with the procuring authority and therefore enhances competition and ultimate value for money
- Good governance and efficient procurement and institutions are strongly linked to faster rates of economic growth and development



Private Investment in the Power Sector (1991-2004) A Cross-Country Comparison



Source: World Bank PPI Database

Summary



- PPP's provide an important tool to bridge the massive 'infrastructure deficit' around the world
- The benefits of using PPP's is becoming increasingly clear around the world:
 - Lower cost
 - Higher level of service
 - Reduced risk
- Good governance is essential to building a successful PPP Programme



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Thank you



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