

Approach

Conciliating Objectives

One of the biggest challenges in any PPP is attempting to reconcile the differing objectives of the various interested actors in such a way that each party stands to gain if the project is successfully completed. Although such objectives are sometimes difficult to reconcile in the short-term, they are often found to match in the long-term.

A government's objectives are usually shaped by what is in the public interest such as promoting a new highway around its capital to ease traffic congestion. When a government decides to allow the private sector to develop a project, it will typically have some of the following objectives:

- satisfy the public interest and having the project completed (to the government's specifications) as quickly as possible;
- bring the project back into public ownership once the private sector has received an acceptable return on its investment;
- have adequate safeguards and assurances that the project will be operated properly and safely;
- reduce or eliminate the need to use the taxpayers' money or government's borrowings;
- limit the tasks allotted to the State to the most essential public tasks or functions;
- benefit from the private sector know-how and technology while keeping the government's discretion unrestricted as far as possible;
- transfer risk from the public sector to the private sector.

The private sector's *raison d'être* is about taking risks and making profit, and that is true in any country where there is a private sector. Private entrepreneurs are keen to access the large infrastructure markets and road construction and maintenance is one of the largest in the world. Then, investors and lenders are also prepared to take bigger risks associated with infrastructure project finance in order to make bigger profit. However they would assume only measurable risks, have control over key project decisions and take control of the project as soon as possible in times of difficulties.

Enabling framework for PPP

A PPP legal framework, as it has been described by its two components, Legislation and Contracts, is not something carved in stone forever that should be adopted and implemented universally. On the contrary it is infinitely diverse in the form and combination of these two components. However, underlying such diversity, there are a number of well-established guiding principles.

Some countries have developed private sector participation in road infrastructure without specific PPP or road sector legislation, leaving it to the parties, public authorities and private sector entities to agree on terms and conditions on a purely contractual basis. This can be described as a contractual framework. Historically this path has been followed by countries of both continental law and common law systems, in developed economies, some with long-established traditions of State intervention in the economy and others with relatively well-defined market structures.

Other countries have adopted extensive legislation and regulations, either general or sector specific, particularly where the remuneration of the highway operator was to come from tolls paid by users, precisely in order to allow the operator to collect such tolls. This can be described as a statutory framework. It has been adopted by countries which have come more recently to the promotion of private sector participation in public infrastructure, in developing or transition economies.

These two approaches are not mutually exclusive. On the contrary, several countries which had favored a contractual approach are now legislating, for a variety of reasons. Others which had adopted general or sector specific legislations are now discovering the flexibility and adaptability of the contractual approach.

The perfect system would be the one which finds the right balance between what should be addressed by the law and what should be left for the parties to negotiate in the contract, that is a law which is not over prescriptive, but still protects the legitimate interests of both parties.

The objective of this toolkit is not therefore to advocate for the statutory or the contractual framework, as both have their merits, but to describe them highlighting their strengths and weaknesses so that each country can choose for themselves what suits them best depending upon their own legal tradition and culture as well as their state of economic and social development and organization.

Furthermore, recent experiences and studies have shown that an enabling framework is not in itself a guarantee for successful partnerships. This also requires mature partners that are dedicated and competent operators and public authorities, with adequate skills and resources to select and implement projects, as well as independent adjudicators to enforce their rights and settle their disputes.

Module 1 provides an overview of the enabling framework (Module 1 -> Enabling PPPs) and of the strategy required (Module 1 -> PPP Strategy). Module 3 -> PPP Policy Framework provides details of the components of the PPP policy framework.