Legislative Framework

In the context of this toolkit, the legislative framework includes two different types of laws: (i), the laws that make PPP possible, also called the "enabling" law or framework. This would be a country concession law or PPP law, and (ii) the laws that may have an impact on a PPP project. These are numerous because PPPs are large and complex multi faceted projects. The most relevant ones will be addressed here.

The enabling law could either be general or sector specific:

- Concession and PPP laws;
- Sector specific laws.

The following laws typically would have the most impact on a PPP project in highway infrastructure:

- Public procurement;
- Foreign investment laws;
- Property laws;
- Dispute resolution;
- Company laws;
- Security and insolvency laws;
- Tax laws;
- Accounting standards;
- Labor laws;
- Intellectual/industrial property laws;
- Environment laws;
- Competition laws;
- Tort laws.

Concession and PPP laws

Legislation plays a central role in promoting PPP in infrastructure projects. The law embodies a political commitment, provides specific legal rights and represents an important guarantee of stability of the country legal regime.

Under their constitutional law, certain countries need to adopt specific legislation for individual projects. In other countries with a well-established PPP tradition, the Government is authorized by general legislation to award to the private sector any activity carried out by the public sector with an economic value which makes it worthwhile being exploited by a private entity. Such a general legislation creates a framework for a uniform treatment of issues common to PPP projects in different infrastructure sectors.

Even when general legislation was enacted, supplementary sector specific legislation may allow the legislator to formulate rules that take into account the market structure of a specific sector. As in many countries these were adopted when the infrastructures were

under State monopolies, it is advisable to check the existing sector specific legislation so as to ensure it is suitable for privately financed infrastructure projects.

Legislation may also be required to authorize the State to award concession to private entities. Enacting such legislation will contribute to foster the confidence of potential investors in the country PPP in infrastructure policy. This may be particularly important where it is envisaged to engage private entities to provide certain services that used to be available to the public free of charge.

Where general legislation is adopted, it is advisable to clearly identify the competent public authority to award infrastructure projects and act as contracting authority. Likewise it is advisable to identify the sector in which a concession may be awarded, or alternatively, where this is not feasible, the law may identify the activities which may not be the object of a concession, such as national defense or security.

It may also be useful for the law to define the nature and purpose of PPP projects, according to the extent of rights and obligations assumed by the private investor (eg, BOT, BOO, BTO). However given the wide variety of schemes, it may be difficult to provide exhaustive definition of all of them. Therefore given the wide scope of PPP projects that Governments may wish to develop and that PPP Laws are intended to cover, it would be sensible for legislators to adopt a broad definition of PPP projects that goes beyond BOTs and BOOs, including for example operation and maintenance contracts.

One additional important point to address in the law concerns the nature of the rights vested in the concessionaire, in particular whether the right to provide the service is exclusive or whether the concessionaire will face competition from other infrastructure facilities or service providers; however, in some countries this point would be left for negotiation in the concession agreement between the contracting authority and the private investor.

This point is illustrative of the difficulty to arbitrate between the law and the contract. Whilst it is perfectly legitimate for the contracting authority to decide how the road infrastructure market is to be structured and whether or not competition should be introduced, setting this in the law might just be a deterrent to private investment from the outset. Moreover, the same result could easily be achieved at the contract negotiation stage by providing for this requirement in the request for proposals.

This could be an example of the law being over prescriptive, with potential adverse consequences on the feasibility of the project since what would have been set in the law could only be varied by amending the law, if this is what the parties finally agreed. Needless to say that such a process could add substantial delay and costs to the project.

Concessions and PPP laws:

Bulgaria: New Concession Act 2006
Source: Ministry of Administrative Reform

Peru: Supreme Decree N°059-96 Infrastructure Concession

Source: Official gazette

Russia: Federal Law on Concessive Agreements, N°115-FZ of 21 07 2005

Source: Kodeks Law Database

Tunisia: Law on Concessions regime, N° 2008-23 of 1st April 2008

www.cnudst.rnrt.tn

Source: Official Journal of the Republic of Tunisia

Ukraine: Law on Concession N° 997-XIV, 16.07.1999

Source: JSC Informtechnology (unofficial English translation) ;

France: Ordonnance 2004-559 du 17 06 2004, Les Contrats de Partenariat (in French)

France: Loi 2008-735 du 28 07 2008, Les Contrats de Partenariat (in French)

Source: The Official Journal http://www.legifrance.gouv.fr

Greece: Law N°3389 Partnerships between the public and private sectors

Source: Ministry of Economy and Finance http://www.mnec.gr

The Infrastructure and Law website of the World Bank (General Legislation section) presents more detail on PPP and concession laws a number of sample annotated concession agreements and links to other concession agreements and DBOs.

Infrastructure and Law website (UserID and password required; refer "Create account" for free access)

Sector specific laws

Many countries have also adopted laws specifically governing the granting of concessions for toll roads. It is typical for such laws to identify the government agency responsible for overseeing the bidding, construction, and operation of the projects and set parameters for each, as well as to authorize a private operator to collect tolls from users of the infrastructure, if that is the financing method envisaged for the particular project. As a corollary the law will sometimes restrict access to users paying the toll and grant the concessionaire the right to prevent access to the road by persons not paying the toll. This has been felt necessary in some countries to prevent abuse by employees of the contracting authorities, as well as in other cases to circumvent abuse made possible by the physical lay out of the road.

Toll road concession laws will also set standards and methods of toll collection, technical specifications for the physical structure and route and will set forth the state's obligations toward the concessionaire with respect to land acquisition and ownership of public assets, a critical point in countries where the general law does not allow private ownership of public roads or highways, which can prove a serious obstacle and deterrent to securing the financing required by preventing the concessionaire to grant security rights over such assets. Other key terms of toll road legislation include the term of the concession (usually around 30 years), required percentage of domestic participation (more likely in less developed countries), and possibly limitations on the transfer of shares to third parties until the project is complete.

The toll road concession law will also usually address the methods of financing, in some cases including State funding as part of the concession; and may also address the question of exclusivity of the concession by stipulating whether the concessionaire will face competition or will have an exclusive right to provide the service.

The U.S. Department of Transportation has prepared model PPP legislation as well as PPP enabling legislation for highway projects :

http://www.fhwa.dot.gov/ppp/

http://www.fhwa.dot.gov/ppp/tools_state_key_elements.htm

Source : US Department of Transportation – Federal Highway Administration

Portugal offers an example of such sector specific legislation:

PORTUGAL Toll Road Legislation

Portugal provides an illustrative model for toll road legislation. Realizing the need for a rapid expansion of its infrastructure and faced with limited public funds, the government first allowed private participation in road projects in 1997 with the enactment of Decree-Law Nr. 9/97, of January 10, 1997. .../...

.../...
The program allows for both real toll roads, on which travelers pay tolls themselves, and shadow toll roads for which the government reimburses the concessionaire based on traffic volume. The Decree designates a special agency with responsibility for overseeing a two stage procurement process in which initial bidders are narrowed to two finalists, which then negotiate the terms of the concession with the government and submit final best offers.

The concession is then awarded to a special purpose project company organized as a "Sociedade Anonima", which is responsible for arranging the financing, construction, and operation of the toll road. The program is one of the largest privately funded road programs in Europe.

Other examples of toll road legislations can be found at

The UK : New Roads and Street Works Act 1991
http://www.hmso.gov.uk/acts/acts1991/Ukpga_19910022_en_1.htm

India: toll collection regulations for national highways, 1997
http://www.nhai.org/rules1997.htm

California Toll Road Law

Polish Law on Toll Motorways

Public procurement

The process followed for tendering and awarding a PPP of a concession contract should be in accordance with criteria understood and recognized by all potential bidders, so as to inspire confidence in the fairness and transparency of the selection process. Indeed, most international financial institutions, such as the World Bank and the IDB, require a transparent, competitive bidding process as a condition for financing a project. Others like the EBRD have a policy objective to encourage public tendering as part of their objectives to facilitate the transition to market economies.

General guidelines for selecting private firms in PPPs are presented in Module 5 -> Procurement.

The position of the World Bank is given in:

Procurement in privately provided infrastructure (PPI) Projects financed by the World Bank, Ribeiro, World Bank, 1998.

Comprehensive guidelines and international standards can be found in:

Legislative Guide on Privately Financed Infrastructure Projects, 2000, and Model Legislative Provisions on Privately Financed Infrastructure Projects. UNCITRAL. 2003

Some countries have general procurement legislation governing any form of contracts in all industries, while others have more specific procurement laws in order to promote the private participation in a particular sector. Still others, like the Philippines' "B.O.T. Law," have laws designed to attract private participation for projects with particular contractual frameworks.

In federal countries where procurement legislation may be adopted both at federal and state levels, it should be made clear to private investors which set of laws will apply to a particular road project.

This section outlines the rationale behind bidding practices. Module 5 -> Procurement describes in detail the bidding process for competitive bidding and unsolicited bids.

What are the advantages/disadvantages of a competitive bidding process?

The best way for a country to attract private sector capital investment in the development of its public infrastructures is to inspire confidence in investors and lenders that the process for awarding tenders in that country is fair and, particularly where foreign investors – unfamiliar with local jurisdiction conditions - are involved, to allay their concerns regarding corruption or unfairness.

A clearly written procurement law provides greater stability and predictability in the bidding process by granting both government officials and bidders clear guidance as to the procedures to be followed and the parameters within which negotiations are to be concluded. The complexity and size of highway PPPs generally have the effect of making the bidding process both time-consuming and costly. As a result, private investors will only bid if they are confident that the process is transparent and fair, in addition to considering whether the proposed project is commercially sound and has the necessary political support.

The procurement laws of most countries allow for a particular contract to be awarded after either direct negotiations with a sole bidder (through an unsolicited bid or otherwise) or through a competitive bidding process. Private parties generally will favor a negotiated award because of the substantial investment of time and money that a competitive procurement process involves. Host governments would generally favor competitive bidding in most circumstances, although some specific considerations should be taken into account with respect to the procurement of PPP projects, as will be explained here hereinafter.

Although the use of competitive selection procedures in PPP projects is widely advocated, it should be noted that no international legislative model or standard has yet been specifically devised for PPP projects, while at the same time, domestic laws

on competitive procedures for the procurement of works, goods or services may not be entirely suitable for PPP projects. Indeed experience in PPP has shown the limitations of traditional forms of competitive selection procedures, such as the tendering method.

In view of the particular issues raised by PPP projects, it would be advisable for Governments to consider adapting such procedures for the selection of their concessionaires, in such areas as: (i) range of bidders; (ii) definition of project requirements; (iii) evaluation criteria; (iv) negotiation with bidders.

(i) Range of bidders

The sheer scale of most infrastructure projects makes it unlikely to obtain proposals from a large number of suitably qualified candidates. Open tendering without a pre-selection phase, may actually deter competent candidates who may be reluctant to participate in procurement proceedings for high value projects if they have to compete with unrealistic proposals and proposals submitted by unqualified bidders. Open tendering without pre-selection is therefore usually not advisable for the award of PPP projects.

However experience has shown that a pre-selection could lead to collusion, by limiting the number of bidders to those who satisfy certain qualification criteria and verifying only certain formal requirements, such as proof of technical capability.

Governments should therefore consider carefully on a case by case basis whether a pre-selection phase is required for a particular PPP project, and if it is, ensure that appropriate safeguards are in place to provide the contracting authority with as transparent, fair and efficient a selection process as possible. Such a process should include the publication of the invitation to the pre-selection proceedings, not only in the local gazette, but also in an international publication, or in the Development Business publication of the United Nations Secretariat. Then the pre- selection should be made on the basis of the relevant criteria for the particular project including not only technical qualifications, but also evidence of financial and human resources, managerial capabilities, reliability and experience in operating public infrastructures or providing public services.

Where domestic preferences are desired and not inconsistent with that country's international obligations, then such preference could be given following the UNCITRAL Model Procurement Law guidance which allows the contracting authority to favor local contractors that are capable of approaching internationally competitive standards, but without simply excluding foreign competition.

(ii) Definition of project requirements

In traditional public procurement of construction works for example, the contracting authority assumes the position of the Employer, while the selected contractor plays the role of the performer of the works. Invitations to tender therefore usually contain extensive and detailed specifications and the contracting authority will be responsible to ensure that these are adequate to the type of infrastructure, which will thus be operated efficiently.

In PPP projects, the contracting authority, having established an infrastructure need, may prefer to leave to the private sector partner the responsibility of proposing the best solution for meeting such a need.

The selection process may thus give more emphasis to the output expected from the project (ie the services or goods to be provided) than to the technical details of the works to be done or means to be used to provide those services.

(iii) Evaluation criteria

In traditional public procurement where works, goods or services are purchased with funds available under approved budgetary allocations, the objective of the contracting authority is to obtain the best value for the money it spends. In such a case the selection of the winner among several technically acceptable offers is often made on the global price offered for the construction works.

PPP on the contrary are expected to be self sustainable, with development and operational costs being recovered from the project own revenue. Other factors will therefore need to be considered in addition to the construction and operation costs and the price to be paid by the users. The contracting authority will need to consider the financial and commercial feasibility of the project, the soundness of the financial arrangements proposed by the candidates and the reliability of the technical solution used.

Also the evaluation will aim at giving sufficient weight to the need to ensure a continuous provision of and, as appropriate, universal access to the public service concerned, which given the long duration of infrastructure concessions is likely to be an important factor.

(iv) Negotiation with bidders

In traditional domestic tendering procedures as well as certain international guidelines, negotiations between a contracting authority and a contractor is often prohibited, for fear that it might result in an "auction" in which a proposal made by one candidate is used to apply pressure on another candidate to offer a lower price or an otherwise better proposal. As a result contractors are required to sign standard contracts provided to them during the procurement process. In this respect, article 35 of the UNCITRAL Model procurement law states that "No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor".

However, the selection process in PPP projects does not fit within such parameters. Because of their size, complexity and duration, it is unlikely that a contracting authority and a selected candidate could agree on the terms of a draft project agreement without negotiation and adjustments to adapt those terms to the particular needs of the project. It remains, however, necessary to ensure that these negotiations are carried out in a transparent manner and do not lead to changes to the basis upon which the competition was carried out.

What are the specific considerations for selecting a private partner in a PPP project?

In some countries' legal tradition, PPP projects involve the delegation by the contracting authority of the right and duty to provide a public service. As a result, a special regime applies which is different, as regards contract award, from the regime that applies generally to the award of public contracts for the procurement of works, goods or services. In such countries, a distinction is made between public contracts where the public authority buys goods, services or works for itself, from contracts where the public authority buys works, goods or services that are to be delivered to the public.

Given the specific nature of the services required, including their complexity and the amount of investment involved, and more importantly the undertaking of public service obligations, the selection process emphasizes the freedom of the contracting authority to choose the operator who best suits its needs, in terms of professional qualifications, financial strength, ability to ensure the continuity of the service, equal treatment of the users and quality of the proposal. In contrast to more structured competitive selection procedures used for other public contracts, which sometimes may appear too rigid, in a PPP selection process preference is given to more flexibility and discretion on the part of the contracting authority. This freedom does not however mean arbitrary choice, as the law in such countries does provide mechanisms to ensure transparency and fairness in the selection process.

In such countries, guidelines issued to contracting authorities advise the use of negotiations whenever possible for the award of PPP projects. The rationale is to free the contracting authority from predetermined requirements and rigid specifications, and give the authority more flexibility for taking advantage of innovative or alternative proposals that may be submitted by the candidates in the selection process, as well as for adjusting its own requirements in the event that more attractive options to meet the infrastructure needs are formulated during the negotiations.

When coupled with appropriate measures to ensure transparency, integrity and fairness, such negotiations have in such countries led to satisfactory results.

However such negotiations may have certain disadvantages in a number of countries which do not have the same tradition. They also require highly skilled human resources, experienced in negotiating complex projects, structured negotiating teams, clear lines of authority and a high level of coordination among all the offices involved. They may not ensure the level of transparency that can be achieved by more structured competitive procedures, and may carry with them a higher risk of abusive or corrupt practice. For these reasons, the use of negotiations may not constitute a viable alternative but may rather be considered a useful option to be restricted to exceptional circumstances.

An example of procurement law for PPPs in force in the Philippines can be found at:

http://www.chanrobles.com/republicactno9184.html

Foreign investment and foreign exchange laws

Foreign investment

To the extent that a country wishes to attract foreign capital or technology for the development of its highway infrastructure, then careful attention should be paid to that country's foreign investment laws. Foreign investment legislation has two general purposes: to control and to encourage/promote foreign investment within its territory. In countries actively seeking foreign investment because of a shortage of local capital and technology, the legislative framework tends to emphasize the promotion aspect. In countries which are wary of the benefits of private participation by reasons of political philosophy or experience, the framework tends to emphasize control rather than encouragement.

Part of investment protection is the legislation on expropriation. Expropriation is the term given to actions by a government that effectively abrogate the property rights of a private entity. Expropriation can be direct, as in nationalization or condemnation by the government of a roadway, or indirect, such as eliminating a concessionaire's right to collect tolls and thereby nullifying the object of an investment. In either case, the concession contract should include provisions that entitle the Sponsors to compensation should any event of expropriation occur. Often, expropriation is included as an example of default or as a materially adverse governmental action, which then allows the Concessionaire to leave the deal in exchange for fair compensation.

Foreign exchange

Foreign exchange laws restrict the amount of foreign money that may be brought into or out of a country, thereby limiting the amount of foreign currency. Sponsors may take as profits, to service foreign debt, or to pay for imported services and supplies. Foreign exchange laws are often complex and differ greatly among countries depending on their level of development, convertibility and stability of its currency, and its general attitude toward foreign investment. The recurring balance of payments difficulties of many host countries and their need to conserve foreign exchange to pay for essential goods and services greatly reduce their ability and willingness to grant investors the unrestricted right to make monetary transfers. Most countries, therefore, have exchange-control laws to regulate the conversion and transfers of currency abroad by narrowly defining the investor's rights to make monetary transfers, restricting the types of currencies with which payments can be made, tightly controlling the exchange rate, and restricting the time in which such transfers can be made.

Transportation projects are particularly vulnerable to foreign exchange controls because revenue from the project is almost always paid in the local currency. Therefore restrictions on convertibility may adversely affect repatriation of the revenue or the ability to service foreign debt. (Module 4 -> Contracts -> Contract Provisions -> Currency Conversion, Availability, & Transferability).

Common instruments to deal with this risk are guarantees from the government granting the concession or the central bank that a certain level of revenue will be convertible, or that payments will be made in hard currency. Contract provisions should also anticipate the introduction of foreign exchange controls after the concession is signed, treating new regulations as changes that entitle the Sponsors to adequate compensation.

Law of the Republic of Kazakhstan on currency regulation

The Indian foreign exchange act is a good example of foreign exchange law (first of ten chapters)

http://www.indiainfoline.com/lega/fera/ch01.html

Property laws

Under international standards, countries willing to attract PPP in public infrastructure are advised to ensure that their property laws contain adequate provisions on the ownership of land, as well as movable and intangible property. A private concessionaire should also be able to purchase, sell, transfer and license the use of property, as appropriate. This is particularly important in road/highway projects where considerable amout of land will need to be acquired. Such land will either be a public asset from the outset, or will become so as a result of the project, under specific acquisition procedures (see below). The legal status of such public assets as well as the ability of the public authority to transfer rights of ownership or interests in such assets to a private concessionaire will be one of the essential elements to secure the funding of the project.

Ownership of land should be clearly and unequivocally established through adequate registration and publicity procedure. Concessionaires and lenders will need clear proof that ownership of land will not be subject to dispute, and will not commit funds unless the laws of the country provides adequate means of ascertaining ownership of the land.

The law should also provide effective mechanisms for the enforcement of property and possessory rights granted to the concessionaire, against violation by third parties, such as enforcement of easements and rights of way that the concessionaire may need to provide the service.

In certain countries, the laws may restrict foreign ownership of land or land rights, or, conversely, may mandate that key assets or rights be held by domestic entities. Even in countries that do not restrict foreign participation in project companies, it is unlikely that the project company itself will be organized outside the host country. Oftentimes foreign ownership restrictions are identified in the relevant concession law but they may also appear only in separate laws affecting ownership of securities or land, or in laws pertaining to a specific sector such as roads. Foreign ownership legislation varies widely among countries, with both developed and developing countries having enacted

restrictions on foreign ownership. All such restrictions should be clearly identified beforehand.

Where the Government assumes the responsibility for providing the land required for implementation of a project, that land may be either purchased from its owner, or compulsorily acquired against payment of adequate compensation, under procedures called “compulsory acquisition” or “expropriation”. The conditions under which such procedures may be used together with the resulting costs and time constraints should be precisely identified and the associated risks measured and allocated between the public authority and the concessionaire. Where the Government does not assume the responsibility for providing the land required for the project, then the law should clearly state on what legal basis will the concessionaire be allowed to acquire the land required, and where foreign ownership of land is not permitted, on what basis will the concessionaire be allowed to proceed with the construction of the road.

Many countries have such legislation which would most probably apply for the acquisition of land in a PPP road infrastructure project. Governments may wish to review their existing legislation on compulsory acquisition for reasons of public interest with a view to ascertain its effectiveness, for indeed, inadequate provisions in this respect have often proven to be a serious cause of delay and additional project costs.

Dispute Resolution

The implementation and operation of PPP projects inevitably lead to disputes. Notwithstanding that, investors and lenders will be encouraged to participate in projects in countries where they have the confidence that any disputes arising out of the project contracts will be resolved fairly and efficiently.

Specific constraints of PPP projects

A project agreement by which the private concessionaire has to design, finance, build and operate a highway infrastructure will require the concessionaire typically to enter into several ancillary agreements with different parties, in order to provide the design, the construction, the financing and the operation of such infrastructure. These agreements will necessarily be interrelated, with cross default provisions between them, so that a breach under one agreement will trigger a breach under another one or more of the other agreements. It is possible and in fact often the case, that each of these agreements will be governed by different sets of laws and will have different dispute resolutions mechanisms.

In order to provide an attractive legal framework in this respect, Governments should therefore ensure that certain basic principles are given effect, as follows: (i) foreign companies should be guaranteed access to the courts under substantially the same conditions as domestic ones; (ii) parties to private contracts should have the right to choose foreign law as the law applicable to their contract; (iii) foreign judgment should be enforceable, and there should be neither unnecessary restrictions to access to non judicial dispute settlement mechanism, nor legal impediments for the creation of facilities for settling disputes amicably outside the judicial system.

Unlike traditional procurement of a highway infrastructure under State budgetary resources, a privately funded infrastructure project will place the concessionaire under extreme time pressure to contain the cost of the funds that he will have borrowed. This will be particularly so for a highway project which involves substantial initial costs.

However the resolution of a dispute will often run in favor of the party who is not constrained by the clock, and will therefore place the concessionaire at a disadvantage and in the difficult situation of having to arbitrate between maintaining a tough contractual position over a period of time as long as necessary but costly, and agreeing to a quicker but less satisfactory compromise.

For this reason it will be important for the concessionaire to have an adequate set of tools available to resolve the wide variety of disputes he may be faced with. Adequacy in this instance will mean proportional, that is, a set of graduated responses to the threats actually caused: technical disputes by technical experts; contractual disputes by contract representatives or experts; major disputes by arbitrators or courts. Adequacy will also mean efficiency, that is, a mechanism that will resolve the dispute effectively and prevent it from escalating further or disrupting the construction works or even harming the business relationship between the two parties.

The tools for preventing and resolving disputes

(i) Early warning

If one of the parties feels that some events that have occurred have the potential to cause disputes, these should be brought to the attention of the other party as soon as possible. The first party should submit a quantified claim with supporting evidence within a given time period, with failure to do so preventing that party from pursuing the claim.

In infrastructure projects, such early warning provisions refers to events that might adversely affect the quality of the works, increase their cost, or cause delays to completion. Such clause would be useful throughout the construction phase of a highway project.

(ii) Partnering

The "partnering" relationships between the various parties to a project are defined in workshops usually organized by the contracting authority and attended by the key parties. An initial workshop would establish a mutual understanding of this concept, define the goals for all the parties and agree on a procedure for resolving critical issues quickly. A "partnering charter" would be signed by all parties signifying their commitment to work jointly towards the success of the project.

This mechanism is meant to create an environment of trust, teamwork and cooperation among all the parties involved in the project. It has been proved useful to avoid disputes and to commit the parties to work to achieve the project goals.

(iii) Facilitated negotiation

At the beginning of the project, the parties appoint a facilitator whose function is to assist them in resolving their dispute without providing his own opinion but rather coaxing them into analyzing thoroughly the merits of their case. This method is useful when numerous parties are involved who would find it difficult to coordinate all the differing opinions without such facilitation.

(iv) Conciliation and mediation

In choosing conciliation, the parties appoint a person or a panel to assist them in an independent and impartial manner to reach an amicable settlement of their dispute. In practice such a method is referred to by various expressions including "mediation". In some countries however the mediation would go further by allowing the mediator to suggest terms for the resolution of the dispute.

This method is usually private, confidential and informal. It may also be quick and inexpensive. The conciliator may assume multiple roles and is generally more active than a facilitator. It is non binding, as the conciliator task is to facilitate settlement by directing the parties' attention to the issues and possible solutions rather than passing judgment. It is particularly useful when there are many parties involved.

(v) Non binding expert appraisal

The parties appoint a neutral third party with the task of providing them with an appraisal on the merits of the dispute and suggested outcome. It gives them an indication of what the possible outcome of a binding procedure would be. It is usually followed by negotiations either direct or facilitated, and is especially useful when parties have become entrenched in their positions and cannot see its own weaknesses or the strengths of the other party's position.

(vi) Mini trial

This is a mock trial with each party project contract team representatives making submissions to a "tribunal" composed of a senior executive of each side and a third neutral person. After the hearing the executives enter into a facilitated negotiation procedure with the assistance of the neutral third party, and try to reach agreement taking advantage of the issues that have been elucidated during the trial. The purpose of this method is to inform senior executives of the issues involved in the dispute and give them an indication of what the outcome of a real trial might be.

(vii) Senior executive appraisal

This method is similar to the mini-trial but is more consensus oriented. Both the mini-trial and the senior executive appraisal tend to be less of a strong reality check than the non binding expert appraisal and therefore less likely to motivate difficult decisions in the absence of commercial pressure to do so.

(viii) Review of technical disputes by independent expert

During the construction phase of a road infrastructure project, the parties may wish to refer certain types of dispute to an independent expert appointed by them. The parties may appoint a design inspector or a supervisor engineer to assess whether the works comply with the contractual specifications or technical standards. The powers of this expert and the circumstances of his intervention should be set forth in advance in the project agreement. His intervention may also be sought as a condition to meeting milestones, or obtaining certain consent from the contracting authority.

Independent experts are widely used in the construction industry, and the procedure and practices developed may be used mutatis mutandis in PPP infrastructure projects, bearing in mind however the different nature of the agreements and contractual relationships between a concession agreement and a construction contract.

(ix) Dispute review boards (DRB)

In large infrastructure projects the parties may wish to appoint a permanent panel of experts specialized in the various technical fields covered by the project, which will be ready to act at a party's request in a way that can be more informal and expeditious than other binding procedures and will play the role of an early dispute resolution mechanism, when it is given the power to render a binding decision, thus preventing differences or misunderstanding between the parties from escalating into formal full-fledged disputes.

By being permanently appointed and regularly informed of the project development, DRB can effectively contribute to dispute prevention and mitigation. However, results of actual dispute resolution by binding decisions have been mixed, with uncertainty in some jurisdictions about the possibility to enforce such a decision, since it does not have the status of an arbitral award, even though the parties may have agreed to be bound by the Board decision. In some cases, such panels are called "dispute adjudication boards" ("DAB") to stress that they have the power to actually resolve the disputes, but that does not however eliminate the inherent limitation of such a system.

(x) Non binding arbitration

This method is sometimes used when the less adversarial methods as mentioned above have failed. It is conducted like a binding arbitration except that it ends with a recommendation only, and contemplates that the parties will proceed directly to litigation if the dispute remains unresolved, because the parties have reservations about the binding nature of arbitration. It works as an incentive to avoid both arbitration and litigation: arbitration because it would seem redundant to go through the same procedure twice, and litigation because of its length and cost.

(xi) Arbitration

Arbitration is being used increasingly for resolving dispute under PPP infrastructure projects whether arising under the main project agreement, the concession, or under the construction contract or the financing agreements. Arbitration in a country other than the host country is often preferred and in many cases required by investors and lenders.

Arbitration is also the preferred method for dispute resolution where multiple parties in multiple jurisdictions make litigation a very expensive option. International commercial arbitration is possible so long as national laws allow it, and those that do permit disputes to be resolved by independent third party arbitrators in a neutral location thereby facilitate foreign investment in a project. In some cases, however, national laws require that disputes be resolved either within the host country or using the national courts. Even if arbitration is allowed, such provisions may not permit the government to submit to arbitration, limiting that option to those contracts to which the government is not a party.

The choice of law governing a contract determines the applicable law with regard to whether arbitration is permitted. Assuming the law of the contract permits arbitration, the contracting parties usually can then select the arbitrators among experts in the project sector, as well as the place and the language of arbitration, the procedure and controlling law for the arbitration. It is not uncommon for the project documents and finance documents to be governed by separate jurisdictions. Reconciling or managing differences in dispute resolution provisions between the projects contracts is thus an important concern when seeking investors and structuring the deal.

With respect to arbitration, there are two main issues that need addressing in the legislative framework of a country wishing to attract PPP in infrastructure. The first one is the issue of sovereign immunity of the host State, and the second one is the issue of effectiveness of the arbitration agreement and enforceability of an arbitration award.

Legislators may wish to review their legislation on sovereign immunity and clarify the cases when contracting authorities may or may not invoke sovereign immunity. Sometimes the law is unclear and even though arbitration is allowed and has been agreed between the parties, it may still be frustrated if the contracting authority is able to invoke sovereign immunity either as a bar to commencement of arbitral proceedings or as a defense against recognition and enforcement of the award. It may also raise immunity from execution against public property. National laws vary greatly on this point which must also be clarified. In some instances contracting authorities have waived their immunity from execution. An express written waiver would in all cases be recommended as it is unclear whether a tacit waiver would be given effect.

The effectiveness of an arbitration agreement also depends on the legal regime of the place of arbitration. If the host country regime is seen as unsatisfactory, for instance, because it imposes unreasonable restrictions on the parties' autonomy, a party might then wish to agree on a place of arbitration outside the host country.

In such a case, the effectiveness of the arbitration agreement would depend on the legislation governing the recognition and enforcement of foreign arbitral awards. An international agreement on this subject was signed in 1958, the New York Convention, deals with the recognition of an arbitration award and states the grounds on which a court may refuse to recognize or enforce an award. Enforcement of foreign arbitration awards is required by the New York Convention, which 122 countries have signed.

The fact that a host country is a party to the New York Convention is likely to be considered as a positive element in assessing the reliability of arbitration as a method for solving disputes.

(xii) Judicial proceedings

In some countries, disputes arising out of agreements related to the provision of public services fall within the exclusive jurisdiction of the judicial or administrative courts. In others, parties have the choice between court and arbitral proceedings.

Where the parties can choose, the contracting authority would in most cases prefer to resort to the courts, because of their familiarity with the law of the country including its public policy, the court procedure and the language of the proceedings.

In contrast, prospective private investors and lenders are likely to consider that arbitration is preferable to judicial proceedings because being subject to the agreement of the parties it is in a position to resolve a dispute more efficiently. They may also be reluctant to submit to the jurisdiction of local courts under rules unfamiliar to them.

In assessing whether to resort to judicial rather than arbitral proceedings, the parties would consider the following factors: their confidence in the independence of the courts; the time frame within which the court is likely to decide; the efficacy of the national judicial system and the availability of adequate judicial relief; the technical skills and knowledge required to resolve the dispute; the confidentiality of the proceedings, and the ability to award appropriate remedies. On the last 3 points, arbitration is said to have a comparative advantage over court proceedings, but on the first point, court magistrates are sometimes considered to have more independence.

A good example of a PPP project dispute resolution system can be found in the Channel Tunnel experience.

The Channel Tunnel dispute resolution scheme

The tunnel under the Channel between the UK and France is one of the largest ever PPP project in rail and road infrastructure. It provides road vehicles a fixed link by rail between the motorways of England and France, and as such has sometimes been described as a “rolling highway” infrastructure. As it links two countries, its international nature gives its dispute resolution scheme distinct features, which are worth describing.

1. The dispute resolution mechanisms

There was not one but several dispute settlement mechanisms in the Channel Tunnel project, reflecting the diversity of its contractual framework. This framework was made up of four main agreements, with four different dispute resolution systems.

The project agreement between the contracting authorities, the British and French Governments, and the concessionaire, Eurotunnel, was governed by the principles of international law, and disputes were to be resolved by ad hoc arbitration under public international law, with French law and English law only applicable to govern obligations arising under French or English law.

The construction contract was governed by the principles common to English and French law, and in their absence, by the general principles of international trade law as applied by national and international tribunals. Disputes were first to be referred to a panel of 3 persons acting as independent experts but not as arbitrators who had 90 days to give their decision, which was to be unanimous and was final and binding on the parties unless and until it was referred to arbitration. Arbitration was under ICC rules. .../...

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The loan agreement between the concessionaire and the lenders, a syndicate of more than 200 banks, was subject to English law, and disputes referred to English courts.

The operation agreement, a railway usage contract between the concessionaire and the French and British railways, to allow the passage of trains through the tunnel, was governed by French law and disputes were to be referred to an internal senior executive conciliation procedure to be followed by arbitration under ICC rules.

2. The disputes

There were many disagreements between the contracting authorities and the concessionaires, particularly over the design of the infrastructure, and these were mainly resolved through negotiations with the assistance of an independent technical expert. However two main disputes were subject to arbitration.

One about the additional costs imposed to the concessionaires by the contracting authorities during the construction. This was settled by a 10 year extension of the concession in favor of the concessionaire. The second one was about the failure of the contracting authorities to provide adequate safety and security around the French terminal site. The arbitral tribunal found in favor of the concessionaire.

There were 22 references to the panel of experts for disputes between the concessionaire and the contractors. The panel gave 14 decisions, 6 claims were withdrawn and 2 were settled. Out of the 14 decisions, 7 were in favor of the contractors, 6 in favor of the concessionaire, and there was 1 draw. Only 2 of these claims were referred to arbitration. One was won by the concessionaire, and the other one was settled.

There were many disagreements and several major disputes with the main users of the tunnel, the French and English railways. Most were resolved through the internal conciliation procedure, but 2 major disputes, about costs to be shared, were referred to arbitration. One was won by the railways, the other one was won by the concessionaire.

There were no actual disputes between the concessionaires and the lending banks, but countless negotiations, and 4 or 5 major renegotiations of the loan agreements.

In addition to the above, the concessionaire experienced the judicial system of both England and France, either as a claimant seeking redress through judicial review against decisions of the public authorities in one country or the other, or, as a defendant against disgruntled third parties or service providers alleging breach of public procurement rules or unfair competition. In summary, this shows a wide variety of claims that called for as diverse a dispute resolution system as could be imagined.

3. The lessons

Are there lessons that can be drawn for other infrastructure projects from the successes and failures of this project?

For a project of this magnitude and complexity whose construction lasted a little over 7 years only, the number of disputes does not seem to have exceeded usual standards, certainly if one considers the number of disputes that have gone all the way to arbitration.

PPP infrastructure projects have at least two characteristics that impact on dispute resolution and are of particular importance for the private sector concessionaire.

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The first one is the specific contractual framework in place which, as described above, is a network of interconnected contractual relationships of 3 or 4 agreements with cross default provisions whereby a dispute under one agreement, say the construction contract, is likely to trigger a dispute under the project agreement, because the additional costs charged by the contractors were actually the consequences of additional requirements imposed by the contracting authorities, which will have a knock-on effect on the loan agreement. The concessionaire cannot therefore handle such disputes separately on their own merits, but must take into account the broader impact on the project as a whole.

The second characteristic is time. Time is of the essence in a PPP infrastructure project. Any additional day on the timetable increases the project costs, which because of the size of the investment can reach an insuperable level of debt for the project company that, contrary to traditional public procurement, has had to borrow money to fund the project. Disputes must therefore be considered in the light of this constraint, and experience has shown that the outcome of disputes is often in favor of the party who has no time constraint and to the detriment of the party who is dependent on the timetable.

What the experience of this project also shows is that a good dispute resolution system is one which, (i) reduces the number of disputes between the parties, (ii) prevent the disputes from escalating once they can no longer be avoided, and (iii) provides a mechanism to resolve them quickly when they have arisen.

4. Minimize disputes

The best dispute settlement system is one where the parties comply with the contract, either voluntarily or because a judge or an arbitrator imposed it on them at the outset.

That result was not achieved in this case because the first binding decision from an arbitral tribunal did not occur until 4 years after the start of the project, and that was too late. During those four years the parties had referred a number of disputes to the panel of experts, whose task was more to bring the parties to compromise and prevent interruption of the works, than to strictly apply the contract. 22 claims over a 7 year period, that gives an average of 3 claims per year, which considering the construction contract alone, would seem a reasonable achievement.

However, considering the fact that the concessionaire was at the same time also progressing an arbitration claim under the project agreement as well as a claim under the operation agreement, that made an overall fairly litigious environment.

In order to minimize the number of disputes, the parties must have a clear appreciation of the scope of their contractual obligations. This is not always the case, particularly when such obligations arise under a foreign legal system. The choice of governing law plays therefore an important role in this respect by narrowing or broadening the parties' margin of appreciation of their contractual obligations. This points towards the choice of one national law rather than an hybrid solution where the parties for political rather than legal reasons, choose to refer to principles common to various national laws, or international trade laws principles which are not applied in the same manner in all countries, and therefore create uncertain obligations. Experience shows that when obligations are uncertain, they are not respected.

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5. Prevent escalation

If one considers the number of claims made to the panel of experts versus the number of such claims that were taken to arbitration, then the system can be said to have worked. Also none of the claims escalated into a major conflict which could have caused the cessation of the works and precipitated the end of the project.

To achieve this, the parties need to have adequate tools available, which provide a graduated response proportional to the threat. Even though there are a wide variety of such tools, in practice they often lack and the parties only have ultimate retaliation measures such as stopping the works for the contractor, and stopping the payments for the concessionaire.

Installing a permanent panel of experts was certainly a positive contribution in preventing escalation, but it was costly, and had some side effects such as bringing claims management within the two organizations, much closer to the operations.

6. Provide a mechanism for a quick resolution of disputes which have arisen.

Infrastructure construction does lead to numerous technical disputes, with both the public authority which is concerned by its design and its long-term sustainability, and with the contractor which is entrusted with the task of building it to the required specifications or performance requirements.

It is therefore crucial that such disputes are resolved quickly either by an independent technical expert or a panel of experts, whose powers need not necessarily be that of a judge, i.e. whose decisions are binding. However when disputes become contractual, then it is equally important that the parties be allowed to submit them to an arbitrator or a judge whose decisions are binding.

The practice of entrusting the resolution of contractual disputes to an expert or a panel without binding power has shown its limits. By obliging the claimant whose claim has been rejected by the panel or dispute board, to start all over again before the arbitrator, one has created a preliminary stage whose usefulness is doubtful, lost precious time, and encouraged the parties to behave outside the scope of their contractual obligations. The Channel Tunnel experience showed that it was not until 3 or 4 years into the construction that an arbitrator was able to remind the parties of their obligations. Until then the parties had developed their own practice which the arbitrator could not completely ignore.

If, as stated earlier, the best dispute resolution system is one in which the parties comply with their contractual obligations, then it is important that a judge or an arbitrator can intervene to sanction potential breaches from the very beginning.

Company law

In most PPP Greenfield road infrastructure projects the project promoters will establish the project company as a separate legal entity in the host country.

Adopting modern company laws

The project company may take various forms in different countries, although in most cases a corporation form is selected. For such a form, it is important for the host country to have adequate company laws with modern provisions on essential matters such as establishment procedures, corporate governance, issuance of shares and their sale or transfer, accounting and financial statements and protection of minority shareholders.

Furthermore the recognition of the investor's ability to establish a separate entitiy to serve as special purpose vehicle ("SPV") for raising finance and disbursing funds may facilitate the financing of the project.

When structuring the project company particular attention should be paid to laws in the host country which may limit foreign ownership of key aspects of the project. Regulations may limit the percentage of foreign equity that can be held in any domestic company or in the project company being granted a concession.

If it is intended that the project company will offer shares to the public, limited liability to the value of their shares in the company's capital will be necessary for the prospective investors, who will usually only purchase those shares for their investment value and will not be closely involved in the operation of the project company.

The responsibilities of Directors and administrators of the project company should also be addressed including the basis for criminal liability. Modern company laws often contain provisions regulating the conduct of managers so as to prevent conflicts of interest. Such provisions may be particularly relevant where the concessionaire may wish to engage its own shareholders at some stage of the project to perform work or provide services in connection with the operation of the project.

Choosing the appropriate structure

One of the first steps in any project financing is for the sponsor to determine an appropriate structure for the project company, the so called "special project vehicle" (SPV"), or "special project company"("SPC") . Primary factors to be considered when determining an ownership structure for the SPV will include: the need for a relatively high equity to debt ratio, project management responsibilities, taxation treatment and balance sheet considerations; the transferability of interests in and profits from the project company; and the distribution of liability.

The SPV may take a variety of forms, including a corporation, limited liability company, general partnership, limited partnership, or joint venture arrangement. However, the relevant jurisdiction's company law will need to be examined in order to determine the feasibility of each type of structure for the SPV. Such laws may, for example, set special financial, technical or business requirements for shareholders, mandatory capitalization ratios or required statements of purpose. A Shareholders Agreement (or form of partnership or other agreement as the case may be) will set forth the respective rights and obligations of the owners of the SPV.

(i) Corporation

A single purpose corporate entity is the most common form of SPV. The principal advantage of the corporate form is limited liability of its shareholders. Frequently the sponsor will form a subsidiary corporation in the jurisdiction where the project will be implemented solely to carry out the concession. This insulates the parent from liabilities incurred by the project company in the course of the project. The corporate SPV also allows other equity participants to enter into the project with equal protections.

When forming a corporate SPV, special consideration should be paid to ensuring the entity has sufficient capital and credit rating to support the financial risks associated with the underlying loan obligations of the project. In many cases the SPV will need to arrange some form of credit enhancement to justify the project. This may take the form of a guarantee supplied by the parent/project sponsor to assume the obligations of the subsidiary/project owner. In some jurisdictions parents of a corporate SPV must be vigilant in adhering to corporate formalities to avoid the risk that courts will "pierce the corporate veil" and allow liability to attach to the parent.

The disadvantages of the corporate form are less flexibility in designing or altering the management structure, more difficulty in extracting profits, and potentially higher tax liabilities. In a BOT structure, a parent or subsidiary relationship may create problems when the term of the project ends and the company is transferred to the government. For example, there could be unforeseen tax repercussions or questions as to dividend disbursements to the corporate parent prior to transfer. Second, project sponsors may be unwilling to provide guarantees to cover project obligations in what otherwise would be a limited liability investment. Also, some countries do not allow complete foreign ownership of corporate entities or, in cases where the government demands a role in managing the project company, laws may prohibit the government from owning equity.

(ii) General Partnership

A general partnership structure for a project financing is typically utilized when the project sponsor has inadequate capital, all partners have similar tax positions, or all partners desire equal participation in project management and control. Such an arrangement may be insisted upon by a host government that is strongly concerned about the protection of the public interest.

General partnerships afford the participants no limitation on liability, however, and the decisions of the partnership are equally binding on all members.

In BOT project financing, as distinguished from other types of project finance, these factors may not exist. The sponsor selected by a host government for such projects would most likely possess sufficient equity for the initial start-up. Also, in the event the host government is supposed to be an active participant in the project, state participation in management and control should remain somewhat limited, at least in the initial stages of the project, to provide the private sponsor with freedom to arrange financing and to ensure favorable credit enhancement. Further, host governments may be reluctant to enter project financing organized as general partnerships because of unwillingness to assume associated joint and several liability resulting from any negligent operation of the project.

(iii) Limited Partnership

In a limited partnership each "limited partner" shares in the project profits while enjoying the associated limitation of liability of a limited partner. This structure can facilitate equity contributions by passive project investors, such as contractors and equipment suppliers. Such contributions can supplement project financing and ensure that construction and equipment goals are achieved. Once the project enters the operational stage and begins earning returns, limited partnership interests can be purchased by the project sponsor or host government, or otherwise transferred to protect operational integrity.

Limited partnerships must have at least one general partner, which, as in a general partnership, assumes all of the liabilities and decision making power of the partnership. In this way the dominant partner may control a project, but will be exposed to significant financial risk. In some jurisdictions the general partner may be a corporation, which merges the benefits of corporate limited liability with the organizational benefits of the partnership.

(iv) Joint Venture

A joint venture arrangement is the most flexible form of SPV, however it is more common with oil and gas projects than in road financing. Under a joint venture BOT arrangement, an investor is typically licensed to construct and operate the project facility on land granted by the host government. Thus, host government becomes responsible for providing land-use, construction, and operation rights and the private partner is responsible for coordinating the design, construction and funding of the facility. For the duration of the concession period, the joint venture company will hold the exclusive right to operate the network facility and collect service charges. Subsequently, at the concession's termination, all rights and assets of the company, including the facility itself, are transferred to the local project partner at little or no cost.

(v) Limited Liability Company

The modern limited liability company is a relatively new but effective company structure that can be utilized in project financing. It combines the limited liability of a corporation with the flow-through tax benefits and the control rights of a partnership. In contrast to the limited partnership arrangements, these companies do not require the existence of a general partner who is exposed to unlimited personal liability.

Security and insolvency laws

Security arrangements are crucial for financing infrastructure projects, in particular where the financing is structured under a "project finance" modality, because the lenders rely upon the project revenues to reimburse the loans, it is important that such revenues and the assets that produce these revenues be protected from other creditors of the concessionaire.

A security package therefore includes both security over physical assets related to the project and security over intangible assets held by the concessionaire. Another form of security often given is an assignment to lenders of proceeds from contracts with

customers of the concessionaire. Those proceeds typically include the tariffs charged to the public for the use of the infrastructure, such as tolls on a toll road.

It should be noted that in some legal systems security given to the lenders that allow them to take over the project is only allowed under specific conditions, namely the agreement of the contracting authority for their creation, and an undertaking that their enforcement will not affect the obligations of the concessionaire as regard the continuity of the service.

Given the long-term nature of PPP projects, the parties may wish to define the assets that are given as security specifically or generally. They may wish such security to cover present and future assets.

A model for the development of modern legislation on security interests is offered in the

Model Law on Secured Transactions, prepared by the European Bank for Reconstruction and Development (EBRD), 2004.

The World Bank has also made available relevant information on creditors'rights and insolvency which can be found on the following website under Principles and Guidelines.

World Bank Global Insolvency Law Database
http://web.worldbank.org/external/default/secmain?theSitePK=4817374&pagePK=4710368&contentMDK=21759230&menuPK=5099523&piPK=64860384#sample

Security arrangements are meant to protect the interests of creditors, in case the debtor becomes insolvent or bankrupt, by giving the creditors a preference in the distribution of the debtor's assets upon sale. Most countries legislation contain detailed provisions regarding secured claims in particular whether secured creditors may foreclose on the security despite the opening of bankruptcy proceedings, whether secured creditors are given priority for payments made with the proceeds of the security and how claims of secured creditors are ranked.

Likewise in a PPP project, security is granted by the project company over its assets to the benefit of the lenders, should the project company become insolvent. However in the context of PPP projects, some countries have adopted special rules to deal with the insolvency situation of the project company, including rules that enable the contracting authority to take the measures required to ensure the continuity of the project.

Maintaining the continuity of the project would normally prevent the lenders from enforcing their security, but in a PPP project the interest of the lenders is also to maintain the continuity of the service, or pursue the construction until the project can become operational, because under a traditional project finance scheme, the lenders rely on the project revenue to obtain the reimbursement of the loans. The interest of the lenders therefore met the interest of the contracting authority.

The insolvency laws of such countries were therefore adapted to allow the lenders to enforce their security to the extent that such enforcement would not prevent the continuation of the project. This could be achieved by organizing the substitution of the project company by the lenders, in allowing the lenders, under certain conditions and approval by the contracting authority, to take over all the rights and obligations of the project company, that is to "step in" the shoes of the concessionaire until full repayment of the loans, thereby maintaining the continuation of the project.

These so called « step in » rights require the lenders to have entered into agreements directly with the main contractors of the concessionaire for the outset in order to be able to continue the operation of the project. Hence such agreements are called « direct agreements ». Usually lenders will have entered into a direct agreement with the building contractors, with the main users of the infrastructure, as well as with the Contracting Authority which will reserve the right to approve the exercize of such « step in » rights by the lenders, sometimes called « substitution », subject to the lenders satisfying predefined technical and financial conditions.

Tax laws

PPP projects require a predictable cash flow. It is therefore crucial that all tax potential implications be readily assessable throughout the life of the project, since unanticipated tax changes may reduce the cash flow and have serious adverse consequences As a result, the tax laws of the host country greatly affect the private sector's desire to participate in a project, since tax laws have a direct impact on the profitability of a project.

Private investors must therefore take great care in understanding the host country's tax system to determine how its tax laws are applied in practice, at the various levels of government, central, provincial and municipal, since what ultimately matters is the cumulative effect of all taxes combined that needs to be taken into consideration. One characteristic of PPP projects in this respect is the possibility that foreign companies participating in the project be subject to double taxation, that is taxation of profits, royalties and interests in their own home country as well as in the host country. Many countries have entered into bilateral agreements to eliminate or reduce the negative effect of double taxation, which is seen by private investors as a positive factor in the decision to invest in such countries.

While tax systems differ around the world, most host countries adjust their tax systems in order to attract private investment for key infrastructure projects such as toll roads.

One of the most common tax law incentives is the "tax holiday," which exempts the enterprise or the investor from local income and other taxation for a specific period of years. The host country may also grant exemptions from taxes on dividends, interest payments, property taxes, and numerous other charges and fees for which the project, its investors, creditors and contractors would otherwise be liable.

A variation of the tax holiday often found is "tax stabilization", which guarantees that the approved enterprise will pay no more than a specified maximum tax rate for a determined period of time. An approved project may often obtain the right to import capital goods, spare parts, or even raw materials for such large infrastructure projects

at reduced tariff rates or without the payment of the high customs duties prevailing in most developing countries.

Accounting standards

Special accounting rules for infrastructure operators have been introduced in some countries to take account of the particular revenue profile of infrastructure projects. Road projects in particular are characterized by a relatively short investment period with high financial costs and no revenue stream, followed by a longer period with increasing revenue and decreasing financial costs, and under normal circumstances, stable operating costs. To avoid the distortion that traditional accounting rules would imply in such a situation, and the adverse tax consequences, some countries have adopted special accounting rules that allow the concessionaire to defer part of the financial cost accrued during the initial deficit phase to the subsequent financial years, according to financial rules provided in the project agreement.

Labor laws

The host country's labour laws can be a major area of concern for the private sector when entering into a PPP. Even when hourly wages in many countries are extremely low, labour laws can impose additional costs on the project so as to make the real cost of labour significantly higher than originally calculated. For example, the labour laws of many host countries make it virtually impossible for a PPP to release a worker, so that in times of low demand the project will be unable to reduce its payroll. It may even prove difficult to fire workers who are inefficient or dishonest. Labour laws may also be part of concession, procurement, or toll road legislation which will often require a certain percentage of local labour to be hired for work on any toll road project. Labour legislation may further require the payment of substantial benefits for social security, medical insurance, vacation and housing and clothing allowances. The existence of these labour laws can therefore have an impact on the choice of technology used for the toll road and on the methods of selecting and hiring workers. Finally, host country laws will also typically lay down a framework for industrial relations. In many developing countries, for example, the law may forbid workers to strike, but instead require the parties to go through a form of arbitration or mediation.

Intellectual and industrial property laws

PPP infrastructure projects frequently involve the use of new or advances technology, protected under patent or other intellectual or industrial property rights, or innovative solutions that are proprietary information protected under copyright laws.

Investors bringing such technology into the host country will need to be assured that their IP rights will be protected and that they will be able to enforce those rights against infringements.

A legal framework for the protection of IP rights may be provided by adherence to international agreements regarding the protection and registration of intellectual

property. These agreements are numerous. Among the most important ones are the Paris Convention for the Protection of industrial property of 1883, The Patent Cooperation Treaty of 1970, the Madrid Agreement Concerning the International registration of Marks of 1891.

Environment laws

It is widely accepted that environmental protection is a critical prerequisite to sustainable development, and is also likely to have a direct impact on the implementation of a PPP infrastructure project at various levels. Experience also shows that environmental matters are among the most frequent causes of disputes.

Environmental protection encompasses a wide variety of issues ranging from handling of waste and hazardous substances to relocation of persons displaced by large infrastructure projects, such as highways. Public authorities should ensure they have adequate means to monitor compliance with environmental standards, which standards should be made clear to potential investors.

Environment laws often require prior authorization for a number of activities which may be particularly stringent for some type of infrastructure projects, such as road projects.

It is therefore advisable to include in legislation measures that make obligations arising from environmental laws transparent, including environmental liability, conditions for limitation of such liability and whether such liability is based on negligence or breach, as in some countries, or is a strict liability as in other countries . Conditions under which licenses are to be issued and the circumstances that justify the denial or withdrawal of a license should be clear. Also important are the provisions that guarantee the applicant's access to appeal procedures and judicial review.

Adhering to international treaties relating to the protection of the environment may help to strengthen the applicable regime of environmental protection.

Most international financial institutions, including the World Bank, now require an environmental impact assessment before a project can proceed.

Competition laws

Laws and regulations regarding competition are an essential element of a country legal framework because they affect all stages of PPP infrastructure projects, from the very decision to engage the private sector, to the selection of the concessionaire, the construction of the infrastructure, starting with the award of the construction contract followed by the award of all the sub contracts, and, upon completion of the project, the operation of the infrastructure, with the competition issues within the same mode, and the exclusivity sometimes granted to the operator against competing non toll roads, as well as the competition issues with other modes.

Competition often plays a critical part in an investor's decision to invest or not in a given country, because it affects the Operator's revenue flows which are essential elements in raising the private finance for the infrastructure.

Competition laws are being used either to introduce competition in a market or to ensure that proper competition is maintained, but also sometimes to protect a project against competition as a means to ensure for its viability for a given period of time.

Countries should therefore ensure their legislation is clear and transparent and that enforcement mechanisms are available in case of breach.

Tort law

As indicated at the outset, Governments objectives in PPP projects are to transfer risk from the public sector to the private sector, and benefit from the private sector know-how and technology while keeping the government's discretion in the public interest unrestricted as far as possible. Governments will therefore want adequate safeguards and assurances that the project will be operated properly and safely.

Many private operators have taken this seriously and work towards bringing down accidents with personal injury or property damage so that a clean and safe transport infrastructure is seen profitable for both the public and private sector.

However, the construction or operation of highways infrastructure facilities may sometimes result in personal injury or death to employees of the operator, or users of the facility or third parties, or in damages to their property.

The compensation to be paid to the injured parties in such cases raises specific issues in a PPP infrastructure project which are not governed by the law applicable to the project agreement concerning contractual liability, but by applicable legal rules governing extra- contractual liability, or tort law. Such rules are often mandatory to the effect that the project agreement cannot limit the liability of the operator or the contracting authority to compensate third parties, who are not parties to the project agreement. In some legal systems, there are special mandatory rules governing the extra-contractual liability of public authorities, while in others, public authorities might be protected by their sovereign immunity.

It is therefore advisable for the contracting authority and the concessionaire to provide for an internal allocation of risks between them as regards damages to be paid to third parties for personal injury or death or damage to their property, to the extent that this allocation is not governed by mandatory rules. It is also advisable for the parties to provide for insurance against such risks.

Where the parties to the project agreement have agreed that the concessionaire alone should bear any responsibility in that regard, and that the contracting authority should not bear any liability as regards third party claims (save for serious breach or recklessness of the contracting authority), it may be useful to provide that the mere approval of the design or specifications of the facility by the contracting authority, or its acceptance of the construction works, or its use by the public does not entail the assumption by the contracting authority of any liability for damages sustained by users or third parties.

Moreover, since provisions on the allocation of liability may not be enforceable against third parties under the applicable law, it may be advisable to provide that the contracting authority should be protected and indemnified in respect of compensation claims brought

against it by third parties. The project agreement should also provide that the parties should inform each other of any claim in respect of which the contracting authority is entitled to be indemnified, and give reasonable assistance to one another in the defense of such claims.