

Framework Assessment

This section will address the following two questions: (i) why is it important to evaluate a country legislative framework - what purpose does it serve, and (ii) how this should be done.

The aim of any evaluation or assessment is to identify one’s strengths and weaknesses, and on the basis of the findings of such evaluation, take the actions required to improve the efficiency; in the case of PPPs in highways, the aim is to make the country’s legal framework more attractive to private investors.

Multilateral development agencies, such as the International Bank for Reconstruction and Development, have devised comprehensive methods for evaluating regulatory systems.



Handbook for Evaluating Infrastructure Regulatory Systems, by A.C. Brown, J.Stern and B. Tenenbaum, 2006).

Other regional IFIs, such as the European Bank for Reconstruction and Development (“EBRD”), have created and implemented a concession laws assessment methodology, with the aim of improving the legal environment in its countries of operation.

The World Bank methodology analyzes two dimensions of any regulatory system: regulatory governance and regulatory substance. The latter examines the content of the regulation, i.e. the laws and institutions contained in the system, whereas the former refers to the processes by which such laws and institutions were arrived at.

The EBRD focuses only on the substance of the regulation, but analyzes both its extensiveness, by conducting an assessment of “the laws on the books”, and its effectiveness, providing a subjective evaluation by a third party of how such laws are applied in practice.

For the purpose of this toolkit and in order to assist countries wishing to conduct an evaluation of their legislative framework with a view to identify the reforms needed, reference will be made to the EBRD methodology, i.e. what the law is and whether it is applied.

Although the EBRD conducted this assessment for its own countries of operation (now 29), it can indeed be used as a tool by any country, to measure its own performance and take the legislative or regulatory remedial actions they think fit.

Evaluation of the extensiveness of a legal framework

EBRD has made an assessment of the legal environment of each of its countries of operation on the basis of answers to a detailed questionnaire, benchmarked against best international practices on private sector participation in public infrastructure projects, in six specific core areas: general policy framework and general concession framework;

definition and scope of the concession law; selection of the concessionaire; project agreement; security and support issues and, settlement of disputes and applicable law.

General policy framework and general concession framework

The questions in this core area aim to assess the country general policy framework and the country efforts to promote PPP and improve PPP legal framework.

The existence of a specific law or a comprehensive set of laws regulating PPP with easy access to a clear and stable legal environment is evaluated, such laws being general or sector specific (eg, road infrastructure), bearing in mind that what is considered positive is the clarity of the legal regime rather than the mere existence of the law.

The existence of a policy framework and a PPP task force are also considered as positive signs.

Definition and scope of the concession law

The questions in this core area aim to assess whether the scope of the concession legal framework is clearly defined, inter alia, in terms of the public authorities allowed to enter into a PPP agreement, and whether the sector concerned is eligible to PPP.

Selection of the concessionaire

The questions in this core area aim to evaluate whether the selection process is fair and transparent, whether competitive tender procedures are compulsory and direct negotiations the exceptions; how unsolicited proposals are dealt with, and whether illegal awards may be challenged.

Project agreement

The questions in this core area aim to assess the flexibility with which the parties may agree on the provisions of the project agreement, and particularly the allocation of risks between them, without unnecessary constraints or compulsory requirements that are likely to affect the project bankability (such as onerous obligations, freedom of tariff restrictions, etc.). It also checks if standard model concession agreements exist, and whether such are compulsory.

Security and support issues

The questions in this core area aim to assess the availability of security instruments on the assets and cash flow of the concessionaire that may be given to the lending banks as part of the conditions for the funding of the project.

Also relevant is whether the said banks have the right to be substituted to the concessionaires, in their rights and obligations, in case of default by the concessionaire,

so as to be able to complete the project, start operation and generate the cash flow to reimburse the loans.

It also checks whether financial support to the implementation of a concession is available from the Government, in what form and from which authority.

Settlement of disputes and applicable law

The questions in this core area aim to evaluate whether the parties to a PPP agreement are free to agree on the law governing their contractual relationship and choose a procedure for resolving their disputes.

It checks whether recourse to international arbitration and enforcement of arbitral awards are possible and regards the ratification of the international convention as positive in the evaluation of this core area.

The EBRD methodology then provides keys for the assessment of each question and each core area, as well as for an overall assessment of the extensiveness of country written legal framework.

Since 2004 EBRD has conducted at least two evaluation exercises, which showed the progress achieved and areas/countries where issues remained outstanding. It also allowed the Bank to fine tune its methodology and highlighted the limits of the evaluation. It is to address some of these limits that EBRD carried out another exercise with a view to measure how the concession laws were applied in practice, that is, their effectiveness.

Evaluation of the effectiveness of a legal framework

The existence of laws, general or sector specific, however extensive they may be, is not in itself a guarantee of success for PPP projects, or indeed generally, if such laws are not enforced.

It is therefore very important for policy makers and legislators to be able to assess the effectiveness of their legal framework, not only to identify which of their substantive law should be amended, but also to identify which areas of their institutional framework needs improving.

The EBRD method of evaluation

In 2006, EBRD conducted a separate review of the effectiveness of the legislation by measuring how the law is applied in practice, through a series of questions on a case study designed to describe how one's legislative and regulatory would operate in such a situation, The 2006 Legal Indicator Survey on concessions.

The aim of this exercise was to create an instrument that would assess how a particular legal and institutional framework functions in practice.

The case study presents a real life scenario that can be encountered in many countries and is followed by a series of questions relating to how the legal and institutional framework might operate in such a case. It covers four core areas of the framework:

Presence – whether concessions have been implemented successfully or whether there is a potential for such;

Process – whether there is a fair and transparent selection process measured by the possibility of challenging a concession award effectively;

Implementation – whether there is fair and transparent implementation of concessions, measured by how effectively the Contracting authority adheres to the project agreement terms and the efficiency of remedial action in case of non compliance;

Termination – whether an investment can be recovered in case of early termination, measured by the capacity to enforce arbitral awards and counter obstruction by the Contracting authority.

The Survey also provides a rating methodology, and highlights the limits inherent in such an exercise, which intentionally seeks the subjective evaluation of a legal practitioner in a given country.

Notwithstanding their limits which are acknowledged, it is believed that the combination of these two studies on extensiveness and effectiveness of a legal framework provides a comprehensive assessment tool of a country PPP legal framework. Both studies are available at the following address:



<http://www.ebrd.com/country/sector/law/concess/assess/index.htm>

The lessons from an evaluation of effectiveness

As shown in three out of the four core areas of investigation – selection process, concession implementation, and concession termination – the test by which effectiveness is measured is whether enforcement measures are available, that is whether the parties to a project agreement have the ability and willingness to resort to the State court system or to alternative dispute resolution methods to enforce their rights.

The ability to resort to courts supposes the existence of an independent State judiciary. The ability to resort to arbitration requires a waiver by the State of its sovereign immunity. The willingness to resort to State courts or arbitration tribunals implies the confidence in such systems to enforce contract rights.

Despite the prevalent view in business that court adjudication or arbitration can hardly provide an adequate solution to a business dispute, it is nevertheless important that such enforcement methods be available because it is their very existence that may eventually induce the parties to a contract to abide by their obligations.