Dispute Resolution

The PPP policy and framework in each country should make reference to the proposed means of resolving disputes. This is because, as noted below, conflict is common and ensuring the principles of dispute resolution is within the PPP policy, encourages investors by giving them confidence that should problems occur there are ways to try to resolve them.

At the detailed level, contracts should always include both formal and informal approaches to dispute resolution.

Clear and fair processes to resolve disputes to attract investors are not the only objective. They allow many disputes to be resolved at an earlier stage than otherwise saving time and money to both parties. Long and acrimonious disputes also generate bad publicity and deter investment.

The Need for Dispute Resolution

Regulatory conflicts are common in the infrastructure sector for a number of reasons:

- There are many occasions for conflict
- The contract is long-term and circumstances are bound to change
- The public nature of the services with a private partner
- Large investments in immovable assets
- Projects can be large and complex

Typically the conflicts may involve disputes between government authorities or regulators and private companies and will concern subjects such as tariff reviews, award of concessions, permits, operations and enforcement of obligations on either side.

The mechanisms that are available to resolve disputes and conflicts are a major part of the assessment of regulatory risk by private investors in PPP projects.

The **standard model**, and initial basis, for conflict resolution is the government department or independent regulator adjudicates based on law, contracts, norms or other guidance. This model is often improved through the development of appeal procedures, establishing rules for due process and norms for dispute resolution. This is the method often favored by governments as they have most control over the outcomes but governments with a poor track record of objective decision making means that regulatory risks will remain high.

The **second model** is to allow third parties to serve as an appeal body and solve the conflict through the judicial system although this can be slow and seldom adequate if the issues are technically complex and the judiciary known to be semi independent at best.

The **third option** is through specialized independent panels of experts or arbitrators and has long been used to settle commercial disputes related to investment and trade but relatively less in PPP matters.

The **fourth method** is international arbitration.

All four methods have advantages and disadvantages and it is for either or both parties to clearly utilize, through their advisors, the best dispute resolution method, if possible, related to the characteristics of the situation.

Experience of Chile

Chile is one country that has often successfully used the third method as described below. It is noted that experience in Chile with toll roads includes that the Concession law includes a special mechanism that allows a panel of experts to both initially provide a conciliation function and then subsequently an arbitration function, assuming no resolution in the first stage.

In Chile the composition of the panel is made up of three experts; one nominated by the Ministry of Public Works (Toll Roads), one by the company and one by mutual agreement. If no agreement is made on the third expert, one is appointed by the court of appeal. Each member has a substitute in case of illness etc.

Experience showed that in Chile the most frequent sector in which regulatory disputes needed resolution was in toll roads (nearly 50% of the total). Interestingly up to 2005, there were 45 claims presented to the Conciliation/Arbitration body which resulted in 14 accepted conciliations and 17 solved arbitrations.

Experts Panels in regulation of Infrastructure in Chile; A Jadresic, Working Paper No 2, WB/PPIAF 2007.

Concessions for Infrastructure: A Guide to their Design and Award.
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