

Land Environmental and Social Issues

Full Description

Restrictions on transfer of rights in public assets to private sector operator

PPP projects may require the transfer of rights in public assets to the private sector operator. The awarding authority may wish to transfer rights over, or ownership of, project assets to the project company or operator and there may be a requirement for the project company to transfer ownership of assets to the awarding authority after construction or at the end of the PPP project.

The awarding authority will want to find a mechanism that gives the operator sufficient rights to enable it to fulfil its obligations while allowing the awarding authority to maintain a sufficient interest in the public assets and rights of reversion.

The law of the country may include restrictions on transfer of rights over public assets, such as:

- to what extent can the operator receive rights over land and/ or assets from the government? Are there any limitations imposed by law on the transfer of rights over land and public assets?
- are there restrictions on whether interests in land can be transferred to a foreign entity?
- can the operator transfer, sub-license or dispose of rights in those assets or land?
- can assets be removed, replaced or demobilized?
- to what extent can lenders obtain security over the assets and land?
- is the operator protected by law in the event that government expropriates the assets or land (see section on [Expropriation](#) below).
- what liabilities run with the assets transferred (e.g., environmental liabilities, occupier's liability, etc.).

Clear title in interest in land and land registration

In most PPP projects, particularly where the service provider is investing in existing or new infrastructure, the service provider will want assurance that it has rights in the land where the infrastructure is to be built or whether this is ownership of the land or some right less than ownership (such as lease or license over the land).

Where third party finance is being provided, the lender may have as its sole source of security a charge over the assets and will want certainty that there is a clear form and effective method of establishing a security interest over the land or land rights.

A host government will be cautious about granting any interest in the land greater than is necessary to enable the project to proceed.

It will, therefore, be important to consider if there is a clear method of registering and enforcing rights of property in the country. The service provider and lender will be concerned that there are no competing third party claims to the land to be used for the project.

Vesting of Rights of Access to and use of Third Party Land

The service provider may be responsible for installing and/ or maintaining assets on third party land, such as laying pipes or lines across third party or public land. For this, it will need rights of land use such as rights of access and power to dig trenches, etc.

These rights are usually granted by law to the utility or authority - the parties will need to check that the awarding authority has such rights and that the awarding authority has the right to delegate or vest these rights in the service provider. If it cannot delegate the powers, then it will need to continue to perform these activities during the contract period and the contract will have to allocate responsibilities and liabilities for this between the parties.

It will also be important to determine the process for diverting or closing public roads and highways to enable the project to proceed. In the case of construction of a road, railway or bridge, this is likely to be for an extended period.

Acquisition of Land for Project from Third Parties

Governments should ask the following key questions:

- Is it going to be necessary to acquire land for the project to proceed? For example, in highway, railway and dam projects a considerable amount of land will need to be acquired for the project to proceed.
- Has the government already acquired the land?
- If not, does the government have power to compulsorily purchase land? Is this something that the government has a right to do?
- Do land owners have right to legal redress against such compulsory acquisition? Do they have a right of resettlement?
- Do land owners have a right to petition to stop the resettlement from proceeding?
- Is the government required to compensate citizens? If so, are there set levels or formulae for assessing compensation?
- Can the government acquire land on behalf of a third party?

See also the [World Bank Operational Policies on Involuntary Resettlement](#) and [World Bank - Land](#).

Expropriation

Expropriation is the act of a government removing the property rights of a private entity or person. Expropriation can be direct, as in nationalization or condemnation by the government of a roadway, or indirect, such as eliminating an operator's right to collect tolls and thereby nullifying the object of the operator's investment.

- Are there provisions in the law of the host country setting out the levels of compensation available in the event of expropriation?
- Is the compensation likely to be adequate to cover the sunk investment costs of the operator and the costs of debt service?
- Does the law limit or prevent the awarding authority from providing compensation in the contract different from that under the law?

Planning permission

Projects invariably give rise to planning issues, whether involving the creation or extension of facilities. The government, as well as other interested stakeholders such as local authorities and citizens will be concerned to ensure that there is the least possible disruption caused by the project and that existing amenities and services will not be affected.

If a country does not have any established planning laws, it may wish to introduce them, whether for the specific project or more broadly, to cover anything from unsightly buildings, access to facilities, harmony with the neighboring countryside, etc.

If the country has a protracted planning process, however, then this can delay the commencement of often much needed infrastructure projects for years and so a balance should be struck between ensuring that projects cause minimal disruption and ensuring the planning process does not cause undue delays to projects.

A service provider will be keen to leave the duty of obtaining planning permission with the awarding authority as it is likely have greater influence over the planning authority and be more familiar with the planning processes. At the very least, the service provider will require a contractual obligation on the awarding authority to provide support in obtaining such permission and should seek to include in the delay triggers resulting in an extension of time to complete construction works delays in obtaining planning permission.

Environmental and social issues and environmental assessment

Potential damage to the environment and impact on society are key issues when planning an infrastructure project – it is important for the government to determine whether the detrimental impact on the environment or on society from a project outweighs its potential benefits and, where a project is necessary, how the environmental and/ or social impact can be kept to a minimum.

These standards should be included in the parameters of the project agreement but there may also be certain standards that are required to be met by law. The government will also need to consider how to monitor the operator to ensure compliance with these standards and the consequences of the project company or operator failing to meet these standards at the outset and during the project term – for example, a government will be keen to ensure that the service provider is discouraged from polluting or even allowing pollution – and indeed polluters may face criminal liability for their offence in the particular country.

- **International Finance Institutions Requirements**

Many international finance institutions, including the World Bank, and other lending institutions, will require adherence to environmental and social principles and environmental impact assessments to be carried out before a project can proceed.

The World Bank and the International Finance Corporation (IFC) follow the IFC's [Environment, Health and Safety Guidelines](#) which were developed over an extensive period, with significant collaboration between the World Bank and IFC. For more on how these are to be implemented, particularly on World Bank and IFC funded projects, go to [World Bank Environmental and Natural Resources](#).

EBRD has a set of environmental standards, which can be found on the [EBRD website](#).

- **Equator Principles**

The “Equator Principles” form "a financial industry benchmark for determining, assessing and managing social & environmental risk in project financing". Increasingly, the Equator Principles have been accepted and implemented by private finance institutions as a move towards establishing an industry standard for managing environmental issues. The principles vary slightly from institution to institution. For more on the Equator Principles and an up-to-date list of institutions that have adopted them, go to [The Equator Principles Web site](#).

- **Limitation of Environmental Liability**

The developer or operator will seek to limit the circumstances where it is penalized for breaching environmental standards where such breach is not within its control – for example, a wastewater treatment plant operator will wish to avoid prosecution or even liability for pollution caused by a pollutant in the influent which the treatment plant cannot treat - or will at least want to have the power to pursue the polluter to stop the pollution and/or obtain compensation. The developer or operator will therefore need to determine whether it is possible to transfer civil or criminal liability for pollution to a third party or avoid prosecution if it can show that it was not the cause of the pollution - some legal systems allow for this but many do not.

The developer or operator will also seek to limit its liability for environmental damage - whereas the government will want to ensure that the developer or operator is incentivized to comply with environmental standards and has ample insurance cover for any environmental damage.

Further Reading and Resources

- [World Bank - Land](#).

3RD Party Related Content

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