PPP Legal Frameworks Post-COVID-19

Practice Note

One of the key constraints to economic growth in developing countries is the lack of adequate and well-maintained infrastructure. As governments lack the resources needed to fully finance their infrastructure needs, engaging the private sector is critical to close the infrastructure gap. According to recent World Bank estimates[1], the range of infrastructure investment required to meet the United Nations' Sustainable Development Goals (SDGs) annually between 2015 to 2030 is $640 billion (in a minimum spending scenario) to $2.7 trillion (in a maximum spending scenario). Public-private partnerships (PPPs) are one way to mobilize private capital for essential infrastructure assets and services and drive innovation and efficiency.

While PPPs may be implemented on a one-off basis without any specific supporting legal and institutional arrangement, most countries with successful PPP programs rely on a concise legal framework and a solid institutional basis for preparing and implementing them. As such, legal frameworks for PPPs are part and parcel of the enabling environment for such projects, comprising a set of policies, rules, and regulations that together define how PPP projects are identified, assessed, selected, prioritized, budgeted, procured, monitored, and accounted for.

The COVID-19 pandemic presents an unforeseen major shock to the global economy and has affected infrastructure projects, and in particular PPPs, at all stages and in all sectors with implications for governments, providers of infrastructure assets and services, their financiers, and users. The impact of the pandemic has underscored the importance of strengthening key provisions in PPP legal frameworks to ensure that resilience to global disasters, like pandemics, and other kinds of external shocks is stronger integrated in PPP projects and programs. This Practice Note aims to provide the basis for further discussion regarding the core content of such PPP legal frameworks that build on best practice and takes into account lessons learned as well as the new market reality post COVID-19.

1 World Bank. 2019. "Beyond the Gap: How Countries Can Afford the Infrastructure They Need while Protecting the Planet".

Why PPP Legal Frameworks?

Properly designed PPP legal frameworks are meant to guide governments and private sector partners through each step of developing a PPP in a consistent, transparent, and efficient manner, ensuring that projects will satisfy the needs of governments, are fiscally sustainable, achieve value for money (VfM), and are financially viable for the private sector. This applies irrespective of whether such frameworks are put in place through PPP-specific legislation or otherwise.

A number of common law countries with successful PPP programs that are often used as precedents (e.g., the United Kingdom, Australia, Canada, and South Africa) as well as the majority of high-income Organization for Economic Co-operation and Development (OECD) member countries have not always found a need to introduce specific PPP legislation at the national level. However, all of these countries regulate key rules and requirements for PPPs either as part of other legislation (e.g., general procurement laws), guidelines, standardized contracts, or otherwise. Other countries have launched substantial PPP programs based on a stand-alone PPP law (such as Kenya and the Philippines). This is a practice that appears to be followed more and more by particularly nascent or emerging PPP markets such as Bangladesh, Jordan, Senegal, and Ecuador. For the purpose of this Practice Note, the term "PPP legal framework" refers to both the latter and the former approach.

Regardless of whether documented in a separate law or a collective of legal instruments, there are a number of key features that are both typically found in PPP legal frameworks around the world and recommended by international best practice.[2]

Objective: A policy statement noting the strategic relevance of PPPs to the relevant government and priority sectors if any;

Scope/Defining PPP models: Definition of the framework's scope, including a defined PPP model;

Alignment with relevant overarching frameworks and strategies: Provisions that ensure that the development of PPPs is aligned with government's overall public investment management processes as well as with other relevant overarching regimes such as those relating to disaster risk management or climate change;

Institutional procedures and roles: Clear institutional responsibilities of ministries and government agencies (including of any PPP unit) as well as concise rules for the preparation and implementation of a PPP project;

2 Drawing on country-specific examples, some international organizations have published guidance and/or sample language concerning the development of successful PPP legal frameworks. Recent examples include the UNCITRAL Legislative Guide on Public-Private Partnerships and accompanying Model Legislative Provisions on Public-Private Partnerships (2020) as well as the Draft People-first PPP Model Law and Commentary (2019) developed in partnership by the UNECE and the EBRD.

Rules for the various stages of the PPP project cycle: Provisions relating to the identification and prioritization of PPPs, their preparation, structuring, and procurement as well as contract management;

Fiscal commitments and contingent liabilities: Provisions regarding fiscal management and the accounting treatment of PPP projects;

Financing and government support mechanisms: Guidance on financing mechanisms and government support available for PPPs;

Legal issues relevant for private sector participation: Provisions addressing, among others, the right for the private sector to charge fees, lender rights, the taking of security, dispute resolution mechanisms, and clear, transparent rules on foreign investment and investor protection.

But do they make for sustainable and resilient projects?

Apart from regulating the above-noted key components, PPP legal frameworks also play an important role in ensuring the development of sustainable and resilient PPPs. Particularly against the backdrop of the SDGs, it is increasingly acknowledged that frameworks for PPPs must provide guidance on how countries can (i) incorporate sustainability and resilience aspects into PPP infrastructure projects, including resilience to climate change and other external shocks and crises and (ii) mitigate and manage any risks the respective PPP itself may create for sustainable development, such as environmental and social impacts.

Various international initiatives have been launched that are aimed at ensuring that infrastructure investment supports low-carbon pathways and strengthens resilience to climate change as well as other kinds of disasters while equally benefitting local communities that may be affected by a given project.[3]

3 See for example the Draft Guiding Principles on People-First Public-Private Partnerships (PPPs) for the United Nation's Sustainable Development Goals (UN SDGs) (May 2018). The variables used by the Economist Intelligence Unit (EIU)'s Infrascope index publications include many of the PPP framework elements described above and have recently added sustainability criteria that examines inter alia the alignment of regulatory frameworks with disaster risk management, climate change, social inclusion, and gender equality. The Technical Brief on Resilient Infrastructure Public-Private Partnerships: Policy, Contracting, and Finance (WBG, PPIAF and others 2019) was developed based on country case studies on Japan, India, and Kenya and highlights key considerations and good practices for structuring resilient infrastructure through policy and legislation. In addition, the G20 Principles for Quality Infrastructure of 2019 stress the need to integrate resilience and other disasters and social considerations in infrastructure investment. For additional guidance notes and toolkits see also the "Climate-smart PPPs" and other sections that are related to infrastructure PPPs and SDGs on the PPPLRC website (e.g. "PPPs for the Poor" and "Gender Impacts of PPPs").

Likewise, national reforms related to PPP legal frameworks are increasingly focused on the development of more resilient and sustainable high-quality PPPs that incorporate requirements concerning disaster risk reduction and considerations related to SDGs.[4]

Impacts of the COVID-19 crisis

These considerations around sustainability and resilience of PPPs gain new importance in light of the current COVID-19 crisis whose impacts have affected PPP programs and projects globally as user demand and supply chains have been disrupted and health and safety requirements have changed the way infrastructure will need to be designed, constructed, and operated.

1.Project pipelines and projects under preparation

The implementation of COVID-19 emergency actions, from social distancing to lockdown policies, are having a large impact on the demand for user-funded infrastructure services. Most vulnerable to COVID-19 are the transport (including roads, airports, ports, ferries) and energy sectors, which have felt a sharp decrease in demand and revenue.[5] In addition, supply chain disruptions as well as new health and safety regulations, including social distancing requirements and travel restrictions, slow down processes at all stages of the PPP project cycle.

Due to these challenges, PPP project preparation and procurement has often been delayed as demand forecasts and existing feasibility studies need to be adjusted or market soundings be redone completely. Some project proposals are being withdrawn, reconsidered, or have experienced a delay in preparation. In response, governments have adjusted timelines and sometimes suspended procedural deadlines, e.g., the deadlines related to procurement processes that were initiated before a lockdown.[6] Moreover, project timelines are being reconsidered in an attempt to get better traction from the market.

Against the backdrop of changing investor interest but equally changing needs of society, governments may need to consider reprioritizing their PPP project pipelines. As demand for scaling up intensive health care and digital services is surging, health PPPs and projects in the digital sector are likely to be prioritized. Meanwhile, the development of ambitious infrastructure PPP projects with substantive fiscal risk in sectors affected by decreased demand and social distancing may shift towards smaller projects in more dynamic sectors that are less likely to be negatively affected by crises.

4 At the national level the Public-Private Partnership Government Resolution of the Philippines (December 2019) includes guidance on how to integrate climate change considerations into PPP projects. In Japan, disaster risk and PPPs are regulated separately but are strongly aligned. To ensure the development of risk-informed and resilient infrastructure the requirements related to disaster risk reduction are, for example, included in PPP bidding documents and technical specifications (for details see Resilient Infrastructure Public-Private Partnerships: Contracts and Procurement – The Case of Japan of December 2017). In India, the National Disaster Management Authority has developed guidelines for the construction of disaster resilient buildings and infrastructure aimed specifically toward projects funded under PPP and private schemes. The report Improving Climate Resilience in Public Private Partnerships in Jamaica of 2020 includes an action plan with short, medium- and long-term steps the country could take to better include climate resiliency aims in their planning process. For more resources see also: PPPLRC "Climate-smart PPP Policies and Legislation."

5 The way infrastructure PPP projects are affected by the effects of COVIDCOVID-19 depends, however, on the type of project and sector. For example, the demand for hospital services has increased worldwide during the crisis. At the same time, hospitals have to deal with staff and supply shortages and higher maintenance and operating costs due to the increased intensity. According to Art. 103 of Law Decree no. 18/2020 in Italy the deadline for submitting expression of interest or tenders and other procedural deadlines, such as those for responding to requests for preliminary assistance, proof of requirements, verification of abnormally low tenders, or for approving the award proposal have been suspended. (cited after COVID-19 - Impact on public procurement around the world, Bird & Bird 2020).

6 According to Art. 103 of Law Decree no. 18/2020 in Italy the deadline for submitting expression of interest or tenders and other procedural deadlines, such as those for responding to requests for preliminary assistance, proof of requirements, verification of abnormally low tenders, or for approving the award proposal have been suspended. (cited after COVID-19 - Impact on public procurement around the world, Bird & Bird 2020).

2.Projects under construction or under operation

Those most severely affected by the crisis are PPP projects post-financial close. While projects under construction are delayed due to supply chain issues and new health and safety standards, plummeting demand and revenue in the most vulnerable sectors together with supply and staff shortages affect the ability of private operators to fulfill their performance obligations. Often PPP contracts – and particularly typical contractual relief mechanisms like force majeure or economic equilibrium provisions – may not suffice or be flexible enough or legally certain to respond adequately to these various difficulties triggered by the COVID-19 crisis.

Where the contractual equilibrium has been affected, PPP contracts are in fact often modified or 'replaced' by temporary emergency regimes. To alleviate the burden for the private sector, governments have modified KPIs or other contractual requirements to allow for more flexibility (e.g., granting extensions of time for completing certain project milestones or acceptance of lower standards while maintaining availability payments).[7] At times, governments have sometimes also temporarily lifted contractual provisions related to penalties and payment deductions where a breach of contract is related to COVID-19 emergency measures[8] or where performance is affected despite best efforts to ensure that essential services are at least maintained at a minimum level.[9] In addition, measures to support the financial sustainability of infrastructure operators have been explored with lenders on a case-by-case basis, including the postponing of loan payments and creating mechanisms to inject liquidity into critical projects under construction.

3.Cross-cutting fiscal concerns

Irrespective of projects' development stages, the COVID-19 crisis has put governments' fiscal space under further pressure. In addition to loss of public revenue due to the overall slowdown of economic activity, public funds are redirected to pandemic mitigation. Because of these constraints several governments, especially in developing countries, are having difficulties fulfilling their payment obligations (e.g., availability payments) under PPP contracts. This is further exacerbated by concerns related to the triggering of contingent liabilities (such as those arising from demand guarantees) and the necessity for further government support (for example, through viability gap funding) in order to maintain projects' bankability where demand will be depressed in the long term. In response, many governments have introduced austerity programs like general spending cuts and rebalanced their investment priorities.

7 For example, in the UK according to the applicable Guidance Note by the Infrastructure and Projects Authority of April 2020 (Private Finance Initiative and PF2 Projects: Supporting vital service provision in PFI /PF2 (and related) contracts during the COVID-19 emergency) increased costs of operations must be reflected in the payment mechanism if the increase is caused by contract requirements and performance standards that were changed due to COVID-19 (e.g., additional cleaning requirements).

8 In Italy pursuant to Art. 91 of Law Decree no. 18/2020 the contractor's compliance with the emergency measures adopted at a national level in order to face the COVID-19 pandemic may exclude liability (and as a consequence the application of penalties) in the event that the respect of such measures leads to an infringement to the contractual provision (e.g., a delay in the delivery of the supplied goods). Please note, however, that the contractor's liability shall be assessed by the Court in the context of each specific case (cited after COVID-19 - Impact on public procurement around the world, Bird & Bird May 2020).

9 For example, according to a Guidance Note published by the UK's Infrastructure and Projects Authority of April 2020 (Private Finance Initiative and PF2 Projects: Supporting vital service provision in PFI /PF2 (and related) contracts during the COVID-19 emergency PFI contractors delivering vital public services must continue to deliver during the current COVID-19 emergency. In turn, contracting authorities ensure where services or performance are affected by COVID-19 despite the best efforts of the PFI contractors, there should be a temporary moratorium on related payment and performance mechanism deductions/points so that PFI contractors con continue to operate as far as possible and pay their workforce and suppliers.

Opportunities for PPP Legal Frameworks Post-COVID-19

As illustrated, governments worldwide have so far predominantly taken immediate, ad hoc and often temporary action to stabilize PPP markets and to prevent the failure of PPP programs and projects. But what about the long term? Both the ongoing crisis and expected future (similar) crises may merit bespoke provisions in PPP legal frameworks that enable practical, commercially sensible solutions for the public and private sector. At the same time, lessons learned through the COVID-19 crisis as well as increasing public awareness of and demand for more sustainable, resilient, and inclusive PPPs[10] may inform new approaches to building resilience and preparedness into projects and programs. In exploring the need for adapting PPP legal frameworks going forward, the following key components (as initially referenced at the beginning of this Practice Note) will likely merit further attention and bespoke solutions:

Objective: Against the backdrop of the COVID-19 pandemic, countries are revisiting and reprioritizing project pipelines and sectors of particular relevance for PPP. This may warrant reflection in/changes to existing objectives of PPP legal frameworks.

Scope/defining PPP models: Risk allocation and project structures of PPPs in project pipelines will need rethinking to ensure their ability to absorb external shocks like the COVID-19 crisis. Demand risk, in particular, will most likely be treated differently going forward and may need re-balancing or protection (e.g., through revenue risk sharing, guarantees, or regulatory tariffs linked to demand) depending on the sector and project specifics.[11] Equally, given the difficulty of long-term contracts to respond to unforeseen changes, moving to shorter term, smaller, and hence more flexible PPP contracts or different contract forms altogether (e.g., "alliance contracting") may become desirable or more attractive for governments and investors alike depending on the type of infrastructure asset involved and the overall country risk.

Alignment with relevant overarching frameworks and strategies: To ensure the identification of suitable PPP projects in newly proclaimed priority areas and sectors, PPP legal frameworks need to be further harmonized with countries' long-term public investment strategies as well as instruments relating to disaster risk management, climate change mitigation and adaptation, and the achievement of the SDGs more generally.[12]

10 Compare the above-noted section on efforts to integrate elements in legal frameworks that ensure the preparation and implementation of low carbon, socially inclusive, and resilient PPPs.

11 To improve the risk allocation in times of crisis, the government of the Philippines is, for example, planning to shift towards hybrid projects, with the government taking on capital expenditures and the private sector taking on operating expenditures.

12 According to Climate Risk and Resilience in Infrastructure PPPs: Issues to be Considered, PPIAF 2016 climate change policies, plans, and strategies are not necessarily fully aligned with PPP legislation.

Strengthening of institutions: External shocks put greater emphasis on well-planned, coordinated, and executed institutional arrangements to maximize the activities of public authorities responsible for disaster risk management. With regard to the creation of a more resilient PPP legal framework, it may be worthwhile to explore whether having a centralized coordinating unit that facilitates disaster response is an appropriate structure, and what processes need to be in place to ensure successful coordination and collaboration across concerned agencies, line ministries, and private sector stakeholders in emergency situations as well as targeted capacity building (e.g., knowledge transfer and training of staff for new challenges).[13]

Strengthening rules for fiscal treatment and budgeting of PPPs: Major external shocks like the COVID-19 crises are likely to affect all projects of a given PPP portfolio in some way and to add strain on public finances. Against this background, methodologies for the assessment of fiscal risk and contingent liabilities may need to be reviewed in order to deal with these types of emergency situations and excessive fiscal risk. As budgeting for contingent liabilities can be particularly challenging in the context of disaster risks, governments may also consider introducing particular mechanisms, such as creating a contingent liability fund.

Methodologies for project appraisal: While assessments at the appraisal stage are already increasingly looking at the cost and benefits of a project in a broader sense taking into account, for example, climate change risks as well as risks and benefits for affected communities,[14] the current pandemic emphasizes the necessity to strengthen these approaches. In particular, impacts of large-scale disruptions will need to be factored into respective standard methodologies and risk assessments, including financial models.

Refining procurement to achieve resilience: Metrics to evaluate innovative ideas and incentivize out-of-the-box solutions that ensure greater resilience of PPP projects may need to be introduced to procurement regimes going forward.[15] Similarly, permitting a lifecycle costing approach that takes into account the prevention of negative externalities to some extent when selecting the economically most advantageous tender may provide further incentive for the private sector to propose innovative solutions with regard to disaster risk prevention and mitigation. For example, in the case of the Sendai School Meal Supply Center PPP Project, the evaluation criteria put high emphasis on earthquake-resistant designs as well as institutional arrangements that enable prompt emergency response and recovery. When disaster struck, the project recovered about 2.5 months earlier than did facilities directly operated by the government, owing to the private operator’s flexible selection of suppliers for emergency goods and equipment.

---

13 According to Disaster Management and Public-Private Partnership in Turkey by B.E. Sahin, G.Tunk, E.Ozsarac, New Zealand, for example, put in place a comprehensive and integrated risk management framework to deal with natural disasters. The roles and responsibilities of central government agencies, local authorities, emergency services, and utilities responsible for essential infrastructure services are clearly defined in the legislation, and all of these entities are expected to routinely incorporate business continuity arrangements into their business planning and risk management processes, and to regularly monitor and report on their progress as appropriate. The central PPP support unit is tasked to coordinate with disaster risk management agencies and private sector stakeholders.

14 According to Resilient Infrastructure Public-Private Partnerships (PPPs): Contracts and Procurement – The Case of Japan of December 2017, Sendai City in Japan considers, for example, resilience and business continuity in their VfM analysis by comparing two scenarios: (a) where the project is handled by a public administrator and (b) where a private operator builds and operates the facility under the build-operate-transfer (BOT) scheme. In the first case, disaster response would require time and human resources from Sendai City to evaluate damage, apply for a contingency budget, and submit documents to the municipal assembly. As a result, Sendai City considers the BOT model to have more advantages than traditional public works for the municipal administration, in terms of the municipality’s personnel and time saving in response to a natural disaster.

15 In order to motivate the private sector partner to invest in more resilient infrastructure, bidders may, for example, be asked to comply with disaster risk management specifications that cover robust facility designs, resilient operation and maintenance, emergency preparedness, and response planning including emergency inspection and evaluation of damage.

PPP contract design and management: As the COVID-19 crisis has changed the perception of risk, risk allocation frameworks together with performance standards will likely need adjustment. If not already drafted flexibly enough to allow for appropriate and nuanced response to crises like the current pandemic, force majeure and similar relief mechanisms in PPP contracts (such as material adverse government action and change in law provisions) may need to be clarified[16] by law or standardized provisions in PPP legal frameworks to permit the adjustment of timelines, performance parameters and the suspension of penalties for non-performance caused by disasters. Other contractual provisions that may benefit from further legislative guidance in this context include step-in-rights; suspension of performance; termination rights; dispute resolution provisions; provisions relating to financing requirements and conditions; government support mechanisms (such as project development and viability gap funds); and insurance. This is in addition to provisions and stipulations related to demand, exchange rate, and inflation risk. Lastly, contract amendment mechanisms may need revision to better accommodate global emergency situations. In this context, emergency regimes similar to COVID-19 response measures introduced in some countries[17] could be considered, as they grant the flexibility to adapt projects and their performance to unanticipated circumstances.

Insurance: Well-developed insurance markets can enable public authorities and private operators to effectively transfer risks and ensure the availability of sufficient cashflows to continue operations following a disaster. While decisions about insurance are usually not in the hands of government in the context of a PPP, the government can support the development of insurance and reinsurance markets to develop effective risk transfer options, while assuming some key risks in the interim to avoid placing excessive disaster risk on the private sector.[18] Availability of insurance products for certain disaster risks and their cost-effectiveness are considerations to take into account when considering whether and under which circumstances the government should mandate disaster risk insurance under PPP legal frameworks.

Government support mechanisms and innovative financing: Governments can play a key role in facilitating disaster finance arrangements to increase resilience of infrastructure PPP projects. This is either by means of direct support, facilitation of developing innovative private sector financing mechanisms such as resilience bonds, or various types of risk pooling targeted at improving liquidity for specific sectors, industries, or economic regions. Examples for government instruments that are already discussed with regard to climate change and may also be available for pandemics are policies that establish a risk retention program, (which may include specialized government reserves, a contingency budget, or reconstruction funds). Other options for governments to address short- or medium-term liquidity or solvency needs during disaster events is to provide support to PPPs either directly (e.g., through loans, guarantees, viability gap funding, tax relief, specified subsidies payable under predefined conditions, etc.) or through national or regional development banks. As these kinds of government financial support may be limited under PPP legal frameworks, reforms around suitable support mechanisms targeted to ensure greater resilience of PPP infrastructure projects would need to be examined.

---

16 In Kosovo, for instance, due to COVID-19, the standard force majeure, termination and mitigation clauses are being reassessed and expanded by the government.

17 For example, the UK government has sought to address the specific challenges the COVID-19 pandemic presents for PFI and PPP contracts through guidance notes, e.g., Private Finance Initiative and PF2 Projects: Supporting vital service provision in PFI /PF2 (and related) contracts during the COVID-19 emergency published by the UK's Infrastructure and Projects Authority of April 2020.

18 Disaster risk insurance is, for example, available in Kenya to cover risks of drought and flood, among other natural hazards, in infrastructure PPP contracts. The government of Kenya has implemented requirements for mandatory disaster risk insurance coverage.

Putting the Pieces Together

While changes to PPP legal frameworks around the globe are not imminent given the continuing need for immediate and rapid response of both governments and the private sector to the current pandemic, discussions around the above-noted matters will increasingly come to the forefront as countries move from stabilization to recovery and preparedness for similar future crises. While recognizing that many best practice examples for PPP legal frameworks exist on a national level or through international initiatives, there remains a gap in terms of practical guidance on critical components of PPP legal frameworks and how these can contribute to the preparation and implementation of PPPs that are more resilient to disasters and external shocks.

To fill this knowledge gap and to advance the global discussion in this context, the World Bank intends to develop a succinct practitioner's tool regarding PPP legal frameworks. This guidance will identify key provisions of PPP legislation, while highlighting those elements critical for building resilience in PPP structures, as well as modifications necessary to allow for differences in legal systems and markets of differing maturity. With drafting is envisaged to commence in late fall 2020 and tentative release of the guidance is expected during the summer of 2021, the process will include multiple rounds of stakeholder consultations to inform the final product and reflect inputs from the public and private sector', civil society, and international development organizations inputs toward the advancement of high-quality PPP legal frameworks globally.

This Practice Note was prepared by the Infrastructure Finance, PPPs and Guarantees Group of the World Bank.
Learn more about our work at [www.worldbank.org/ppp.](http://www.worldbank.org/ppp)

WORLD BANK GROUP
Infrastructure Finance, PPPs & Guarantees