# Trinity International LLP

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**PPPs – International Best Practice**

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# Public Private Partnerships

- **What is a PPP**

**“infrastructure projects that involve an obligation, on the part of the selected investors, to undertake physical construction, repair or expansion works in exchange for the right to charge a price, either to the public or to a public authority, for the use of the infrastructure facility or for the services it generates” (UNCITRAL)**

**"infrastructure" covers "public infrastructures“ defined as "physical facilities that provide services essential to the general public" i.e. “public service”**

- **Too much temptation to provide for a specific set of PPP** structures/forms in concession PPP legislation (BOT, BOO, DBFO etc)

- **What is needed is maximum flexibility**, allowing the law to cater for the full range of existing structures the market deploys and the inevitable evolution of new ones

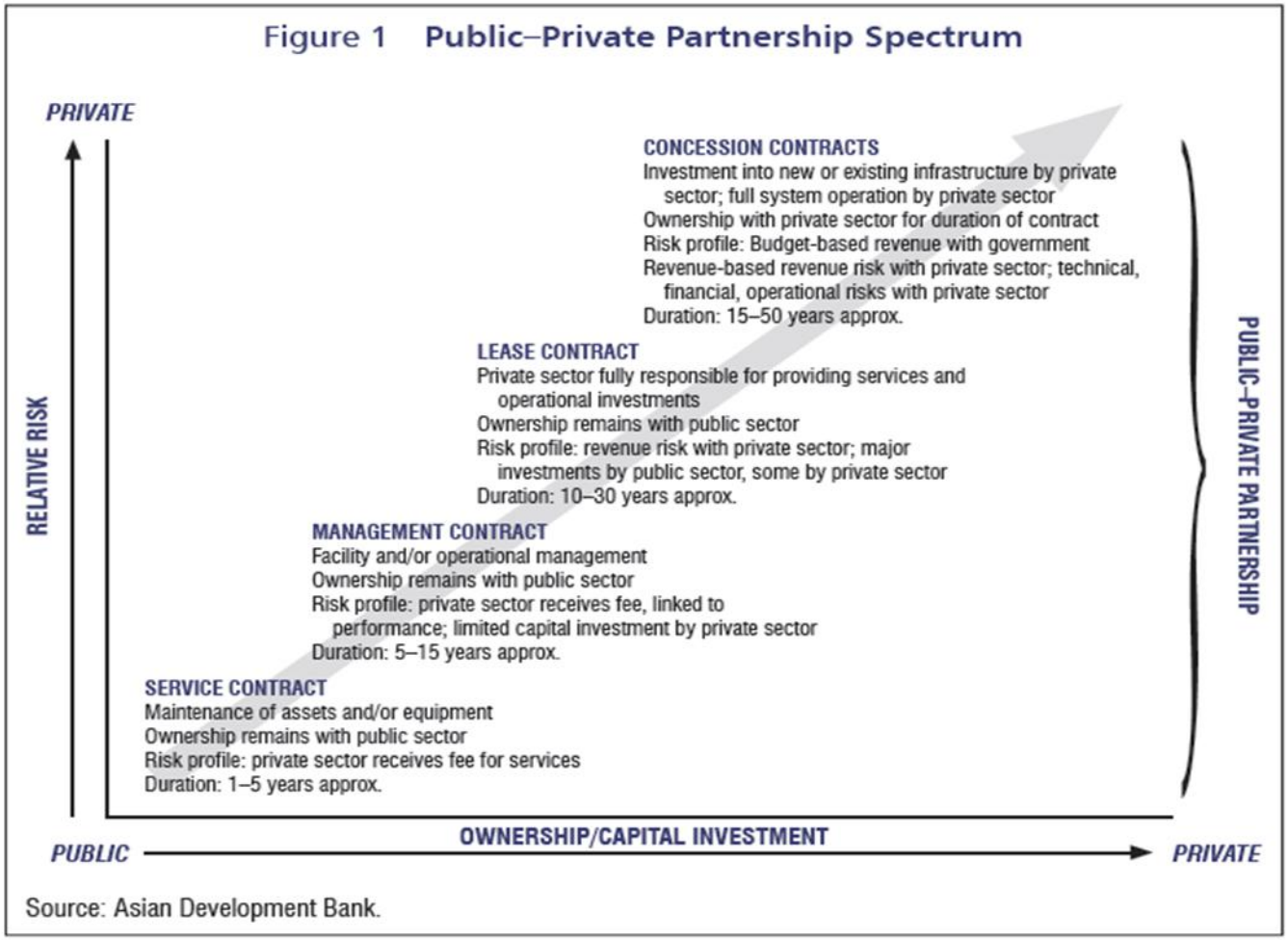
Figure 1 Public–Private Partnership Spectrum
PRIVATE
RELATIVE RISK
CONCESSION CONTRACTS
Investment into new or existing infrastructure by private sector; full system operation by private sector
Ownership with private sector for duration of contract
Risk profile: Budget-based revenue with government
Revenue-based revenue risk with private sector; technical, financial, operational risks with private sector
Duration: 15–50 years approx.
LEASE CONTRACT
Private sector fully responsible for providing services and operational investments
Ownership remains with public sector
Risk profile: revenue risk with private sector; major investments by public sector, some by private sector
Duration: 10–30 years approx.
MANAGEMENT CONTRACT
Facility and/or operational management
Ownership remains with public sector
Risk profile: private sector receives fee, linked to performance; limited capital investment by private sector
Duration: 5–15 years approx.
SERVICE CONTRACT
Maintenance of assets and/or equipment
Ownership remains with public sector
Risk profile: private sector receives fee for services
Duration: 1–5 years approx.
PUBLIC–PRIVATE PARTNERSHIP
OWNERSHIP/CAPITAL INVESTMENT
PUBLIC
PRIVATE
Source: Asian Development Bank.

# Advantages of PPPs

- **Ability to control life cycle costs**
- **Ability to efficiently allocate risks**
- **Innovativeness and technological changes**
- **PPPs can help bridge the infrastructure financing gap needed to finance new infrastructure**
- **PPP can help bring long term finance required for the development of much needed infrastructure**
- **Public sector doesn't have an adequate budgets for all their infra needs**
- **Selection of appropriate infrastructure projects**

PPPs are not a panacea for all infrastructure development initiatives. It is therefore crucial that in the planning phase relevant PPP projects are selected based on the market and private sector interest.

# Key PPP Considerations

**Ensuring Value for Money (VfM) in a Project**

- The PPP **must be a VfM transaction** by generating a net profit for a public institution in terms of quantity, quality or service, cost and risk transfer

**To achieve VfM the governments need to develop:**

- A robust procurement procedure
- A clear and predictable institutional framework
- All investment project should be prioritised at senior political level
- No institutional, procedural or accounting bias either in favour of or against PPPs

# Key PPP Considerations

**The following elements should be included in a VfM examination:**

- What are the comparative costs of (a) finance, (b) construction (c) operation, as calculated over the whole lifetime of the project?
- Can the risks of the project be clearly defined, identified and measured?
- Can the right types of risk be transferred to the private partner to ensure value for money?
- Is the risk appetite of potential private sector partners sufficiently robust to explore a PPP?
- Do potential private sector partners have a track record of good service delivery, responsible business conduct and PPP experience?
- Is there sufficient market interest in the project to generate a robust competition that will ensure a value for money outcome?
- Can the risks, cost and quality trade-offs be quantified and managed by the public sector?
- Is the potential PPP project of a size sufficiently large to justify transaction costs?

# PPP Project Cycle

**Feasibility and Base Case**

- PPP screening
- VfM analysis
- Risks analysis
- Market analysis

**Public Services Regulation**

- Regulate tariffs
- Regulate quality of service

**Procurement**

- Retain transaction advisors
- Draft RFP
- Draft PPP contract
- Negotiate final contract

# International Best Practice – Institutional Requirements

- Precise **identification** of public authorities **empowered to award** PPPs

- Precise **identification** of public authorities **empowered to enter** into PPP agreements

The law should provide which public authorities may provide financial or economic support to the implementation of the project (where needed) and what type of support they are authorised to provide

- **Coordinated** functioning of these public authorities

- **Existence of a "task force" (PPP Unit)**

"one-stop-shop" gathering all relevant PPP experience of the country: expands the learning curb advisor to national or local public authorities from preparatory phase to closing may be assisted by external consultants (e.g. international or local financial, legal, technical advisers)

- **Delivery of Projects and Pathfinders**

Pilot projects should be prepared and delivered with the help of the government to showcase the country's PPP potential and capabilities to international developers and lenders

- **List of sectors where PPP may be awarded** (e.g. roads, railways, energy, waste, water) or excluded (usually sectors related to National Security such as Defence)

# International Best Practice – Procurement Phase

- Selection of the private sponsor must be **transparent**

  - ✓ **Publicity** of project information and award (e.g. Through international and national press)
  - ✓ **Avoid long and non-transparent PPP agreement negotiations**
  - ✓ Establish a **selection committee** composed of **impartial members**
  - ✓ **Availability of standard tender documents** providing at the same time **clear guidance** - guaranteeing a certain degree of objectivity and minimum standards - **and sufficient flexibility** for contracting authorities while organising procedures for pre-selection and requests for proposals

- Selection of the private sponsor must be **non-discriminatory**

  - ✓ **Selection criteria should apply equally to all bidders** – no criterion, requirement or procedure shall be imposed that has not been set forth in the pre-selection documents
  - ✓ **Non-discrimination** of domestic and/or foreign persons in becoming private partners
  - ✓ **Procedures for aggrieved bidders and third parties** shall exist

- Selection of the private sponsor must be **efficient**

  - ✓ Establish a **selection committee** composed of **qualified members**

# International Best Practice – Operational Phase

- **Government support and guarantees**

- ✓ Possibility of **government financial support or the guarantee** by the contracting authority of proper fulfilment of its obligations should be allowed

- **Repatriation of profits and capital**

- ✓ Existence of **bilateral investment / tax treaties** between host country and originating country of project sponsors:
  - ✓ **availability of foreign exchange** for transfer or repatriation of proceeds of investment
  - ✓ **transfer of capital** between contracting parties (e.g. **payment of dividends** abroad or **repatriation of investment**)
  - ✓ **no double taxation** (e.g. witholding tax + taxation in the sponsors' originating country)

# International Best Practice – Operational Phase

- **Tariffs**

✓ Private partner should be allowed to **collect tariffs or user fees** (PPP agreement to provide for methods and formulas for their adjustment)
✓ If a **tariff or fee regulatory body exists**, mechanisms for periodic and extraordinary revisions of the tariff **adjustment formulas** should exist in the law
✓ **Direct payments** / **take-or-pay mechanisms** / **availability payments** should be possible

- **Security interest**

The concessionaire should have the right **to secure its financing for the project with a security interest in any of its property** with:

- a pledge of shares of the project company
- a pledge of the proceeds and receivables arising out of the concession
- etc.

✓ Subject to any law that might prohibit the creation of security interests in **public property** PPP agreement should determine which assets will be public property and which assets will be the private partner's property

# International Best Practice – Adjustment Issues

- **Step-in Rights**

✓ Allow the lenders to "**step into the shoes**" **of the private partner** in case the project goes badly

- **Termination of the project agreement and compensation**

✓ Three main types of **termination payments**:
  - Termination payment **A = Debt**
  - Termination payment **B = Equity**
  - Termination payment **C = Lost Profits**

✓ **Formulae should be negotiated** by the parties in the PPP agreement depending on the event triggering termination (e.g. Prolonged Force Majeure Event, Grantor Event of Default, Sponsor Event of Default)

- **Expropriation/ Nationalisation**

✓ PPP agreement should provide that expropriation or nationalisation is considered as **Grantor Event of Default** and is compensated accordingly (generally with termination payments **A + B + C**)

- **Settlement of disputes and applicable law**:

✓ Ratification by the country of relevant **international conventions** (e.g. NY Convention 1958)

✓ Parties **free to agree on the governing law** and **choice of dispute resolution procedure**

# How to design the best PPP Legal and Regulatory Framework - Recommendations

- Provide for **clear selection** procedures
- Allow sufficient scope and **flexibility for the parties** to agree on the contents of the project agreement as best suited to the needs of any particular project
- Allow the developer to **raise and structure the finance** it needs for the project
- Enable the developer to **grant adequate security** over the project assets
- Regulate properly **step-in rights** so that there is **no need for a new tender**
- Allow to refer disputes to **international arbitration**
- Create a special regime **facilitating the transfer of title to land plots** to the private partner
- Make **tariffs** regulations more **straightforward and PPP friendly**

# Risk Allocation

- Host country's legal system should contain as few restrictions as possible on risk allocation - therefore risk allocation patters should not be prescribed in law
- Risk allocation **is an art as much as a science** – contracts should govern risk allocation as different projects will have different allocations depending on source of finance available etc.
- **Flexibility has to be the rule!**
- In most jurisdictions where PPPs have been successfully implemented, there was an evolution of the risk allocation in the PPP contracts as competition within the private sector increased and deal flow established.
- **Success breeds success in the PPP market.**

# Risk Allocation

- Governments should not kill the market before it has been demanded by creating a risk allocation that is not suitable for a developing market.

- Advisors to the government should be carefully chosen as some advisors try to transplant complex risk structures from the well-developed PPP market into emerging market jurisdictions which is not appropriate.

- New sources of funding from BRIC countries will result in more hybrid types of PPP/IPP structures consequently impacting on the underlying risk allocation structures and expectations of what makes a project bankable. Thus the legal and regulatory frameworks should be flexible to ensure that they adapt to the requirements of the market.

- Key is to deliver a number of schemes to demonstrate deal flow. Once a number of clear precedents have been established, then it will be possible to push the market for better and better terms.

# About Trinity

**Trinity is a fully regulated, niche corporate, commercial and finance law practice offering high quality legal services to financiers, developers and governments undertaking energy, resources and infrastructure transactions in Africa and other emerging economies. The team comprises senior lawyers from large international UK and US law firms.**

**Trinity is ranked by Chambers & Partners' Chambers Global 2013 the guide to the world's leading lawyers (including project finance lawyers) and by Legal 500 2012 for its emerging markets, infrastructure and power work. The 2013 edition of Chambers Global ranks Trinity International for "Projects & Energy: Africa" alongside some of the largest and best firms in the market. 25 firms rated, Trinity is equal first in terms of number of named individuals. Trinity is ranked in the same category as Allen & Overy LLP, Chadbourne & Parke LLP, Dewey & LeBoeuf, Milbank Tweed and Mayer Brown.**

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# Market position/recognition for Trinity

- **Project Finance Magazine 2013** onshore wind IPP of the year for the Chirongeni Wind IPP (Romania);
- **Chambers & Partners 2012:** Trinity International LLP rated as a firm and all Trinity partners named "leaders in their field";
- **the Africa Energy Awards Best Renewable Project (2011)** for the Cabeolica wind farm in Cape Verde, where we advised Finance Corporation;
- **InterContinental Finance Magazine Global Award 2010:** "Niche Law Firm of the Year - UK" and "Project Finance Law Firm of the Year – UK";
- **African Renewables Deal of the Year 2009,** Project Finance Magazine/Euromoney and **Best EMEA Sustainability Deal 2008**, EMEA Finance**:** Olkaria III Geothermal IPP, Kenya
- **the Project Finance International (PFI) and Project Finance Magazine (2008/2009)** power deal of the year , Project Rabai in Kenya, where we acted for the sponsors;
- **Lawyer Awards 2008**: Runner up "Niche Law Firm of the Year"
- **Infrastructure Deal of the Year 2008,** for both Project Finance International and Project Finance Magazine**:** Lekki/Epe Expressway, Nigeria
- **Power Deal of the Year 2008**, for both Project Finance International and Project Finance Magazine: Rabai Power Station, Kenya
- **Project Finance Magazine Africa Deal of the Year 2006,** acting on for the management team in its MBO of Copperbelt Energy Corporation (Zambia).

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