

**Building Legal Frameworks to Support Public-Private Partnerships
at Regional, National, and Municipal Levels**

Infrastructure: Legal Structures for Reducing Conflict

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February 26, 2009

Promoting Public-Private Partnerships requires the creation of trust among a number of stakeholders. Private investors will emphasize: “Trust but verify.” Political leaders will focus on the “long term opportunities” in the sector. The private sector *has* been successful in expanding telecommunications networks—partly because potential demanders are vocal in their desire for new services and because prices are not anchored by past practices. Electricity has a mixed record, as investors have bought assets and made greenfield investments in many nations. Water is probably the most difficult sector for private investment, given public attitudes towards privatization.²

In some situations, management contracts have served as mechanisms for introducing change. Other forms of private participation are also feasible. For example, investment funds could come from the issuance of bonds—which represents a promising source of capital. However, no private investor will view an infrastructure firm as an attractive investment without an up-to-date asset registry, audited income statements and balance sheets, and years of data on operating performance. Currently, those requirements are lacking for many firms. So the best source of external funds is closed unless, and until, nations mandate the collection and publication of financial and operating statistics.

Strategies for promoting public-private partnerships start with improved institutional frameworks, involving internal governance (appropriate incentives), external oversight (“independent” regulation), and political commitment (sound policy framework). Based on their studies of water utilities in a number of Latin American countries, Savedoff and Spiller strongly recommended (1) corporatization of utilities (treating them as enterprises and not as government agencies), (2) disaggregation of utilities and the promotion of competition, (3) regulatory frameworks that limited government discretion, and (4) privatization (emphasizing domestic ownership). Whether all those strategies are feasible today is questionable. I would place much greater emphasis on the role of information and benchmarking. Even for a consolidated system, there is no reason not to report data by region. For example, Uganda has a single state-owned (aggregated) enterprise, but the National Water and Sewerage Corporation publishes benchmarking information on each municipality and utilizes yardstick comparisons to establish performance targets and to reward managers (Mughisa, Berg, and Muhairwe (2007).

In addition, information can establish a foundation for resolving differences of opinion about actual and potential performance (in terms of network expansion, prices, and returns). The promotion of public-private partnerships requires that conflicts be identified and resolved in a timely fashion. If the arrangements are not acceptable to both political leaders and to private investors (or if disagreements are merely swept under the rug), the situation will not be sustainable.

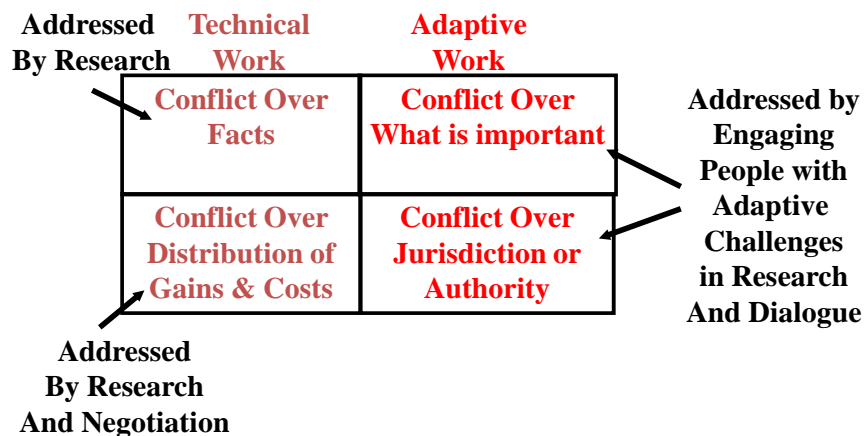
¹ Adapted from Berg (2008) which was presented at a Conference sponsored by CIDOB, Barcelona, Spain.

² Urban water has been described by Savedoff and Spiller (1999) as a *low level equilibrium*: revenues may not cover operating costs; in addition, investments primarily occur when the national development bank or Water Ministry or donor agencies make funds available. However, the investments are not maintained, leading to leaks. Service is poor, leading to non-payment (high number of non-collected bills). Essentially, in many nations, consumers pretend to pay for the service (where prices are held low) and producers pretend to supply the service (where quality is low and network expansion is slow). No financially sustainable business plan exists. Public support erodes, and under-performing water utility managers are not replaced.

It is possible to identify four potential sources of conflict in the design and implementation of infrastructure policies: factual (cognitive) conflicts (based on technical disagreements regarding the analysis and interpretation of performance data), interest conflicts (where different groups—utilities, customers, un-served citizens, regions, and unions—benefit or lose, depending on the decision), values conflicts (involving ideological differences or differential preferences for sector outcomes), and authority conflicts (reflecting jurisdictional disputes over who has the last word). Identifying and resolving these conflicts is central to the development of public-private partnerships. If joint initiatives are perceived as socializing the losses and privatizing the profits, then stakeholders are unlikely to support the arrangements. Stakeholders must have a clear understanding of facts, procedures, objectives, and responsibilities.

One can argue that resolving the four conflicts involves two types of work: technical and adaptive. Figure 1 indicates how the four types of conflict are addressed by different types of activities.

Figure 1. Conflict Resolution Matrix



From Mark Jamison

The following points underscore how better information can play a role in promoting public-private partnerships that improve infrastructure performance:

1. Research: What are the Facts? It is said that everyone is entitled to their own opinions, but not their own facts. Data collection is essential if one is to document relative utility performance, reward those who are on the efficiency frontier, and identify those who are far inside the frontier. Investors focus on the likelihood that funds will be used productively, providing returns to capital. International donors should apply similar standards to avoid wasting scarce capital and to provide incentives for utilities to move towards best practice. However, without facts, investors and donors are in no position to supply funds for infrastructure initiatives. Furthermore, national development banks have other uses for funds as well—in education, hospitals, and roads. Without evidence of good performance in infrastructure, other claims on scarce government resources are likely to be more compelling.

1. *Public Information:* Making information available (public) improves performance. Customers' awareness of baselines and trends improves their understanding of what is feasible and can put citizen pressure on utility regulators and managers. Service delayed is service denied.
2. *Managerial Information:* Small companies and entities need support to obtain and to use data for benchmarking purposes. Such data is first and foremost a managerial requirement—managers can only manage what they measure. Records document what has happened in the past which provides a baseline for future developments.
3. *Performance Benchmarking:* Benchmarking is part of tariff review; it can be used as a yardstick for comparing the performance of similar utilities. In addition, it helps potential investors and donors analyze the financial sustainability of service providers.
4. *Data Timeliness and Accuracy:* Data quality is central to any benchmarking process: decision-makers need to be included in the process to promote both accountability and sound business practices.

2. Research and Negotiation: How Should Benefits and Costs Be Allocated? Even though stakeholders have different interests, all segments of society share a concern for the sustainability of the sector over time.

5. *Data Definitions and Business Plans:* Information helps both the operator and the regulator – working as a team is recommended: this process need not be adversarial. Clear definitions and a logical structure for data collection and verification are key factors for successful programs. Transparency is fundamental for achieving citizen confidence in the system.
6. *Performance Improvements and Incentives:* Infrastructure presents win-win possibilities for various stakeholders. As better information becomes a by-product of operations, the process leads to improved performance. Analysis of performance indicators helps managers save resources by identifying possible problems in the production process: efforts can be directed in a more focused manner. Reward superior cost-containment with higher returns.
7. *Comprehensive Performance Evaluation:* Benchmarking infrastructure sectors at a country level yields rankings that provide policy-makers with a factual basis for analyzing, evaluating, and rewarding service providers' performance. Benchmarking needs to become comprehensive; it should cover social information as well as firm financial and operational data. Social information goes beyond production processes to include coverage, access for the poor, water resource sustainability, and related issues.

3. Adaptive Work: What Is Important? (Values) People in government ministries, utilities, regulatory agencies, NGOs, and with other affiliations place different emphasis on the pace and pattern of network expansion and improved quality of service; however, there is no doubt that it is important to maintain dialogues within nations so stakeholders can understand the concerns of one another.

8. *Establishing Priorities:* Identification and prioritization of goals in a benchmarking process is crucial: if improvements in sector performance cannot be documented, the system loses legitimacy in the eyes of citizens. Furthermore, targets need to be realistic and specific, so decision-makers can be held accountable for sector performance.

9. *Believing Is Seeing*: Our preconceptions shape (and even determine) our perceptions. Getting fundamental values out in the open can help stakeholders see areas for collaboration and consensus. Being grounded in the reality of business plans, best practice, and financial constraints can help stakeholders understand what must be given up to achieve particular objectives.
10. *Cumulative Improvements*: Benchmarking is a valuable tool for the operator; it is an incremental process involving steps that strengthen organizational capabilities. Once basic information has been processed, the experience yields improvements in procedures as managers better understand information flows and performance outcomes in segments of the utility. Clear and timely information helps managers identify emerging problems—reducing delayed responses.
11. *Urban/Rural Initiatives*: For managers, urban systems have the cost advantages of density; for elected officials, large cities have political clout, as public protests are easier to organize. Small towns and rural areas are often neglected. Benchmarking should include rural areas to bring awareness to policy-makers regarding resource allocation within the sector.

4. Adaptive Work: Who Has Jurisdiction? Currently, the jurisdictional overlaps and gaps are significant in many regions. Capacity to collect and analyze data is weak. Authority conflicts distract agencies and managers from doing their jobs: harming sector performance.

12. *Data Frameworks*: Companies need comprehensive information systems in order to improve data quality and provide timely information. Such systems need not involve highly advanced information technologies that integrate Geographical Information Systems with real-time measurement of system performance. Rather, careful reporting of basic data to a centralized data library provides a good starting point.
13. *Information Is Power*: Those currently controlling access to information must be convinced of the benefits of a centralized (and accessible) database that helps avoid duplication. A changed organizational culture is as important as developing technical capabilities. The latter can be accomplished via training programs; however, these are necessary, but not sufficient, for performance improvements.
14. *Clarify Jurisdictional Responsibilities*: The starting point is having clearly defined authority. In addition, political leaders, managers, and other stakeholders must commit themselves to enhancing infrastructure performance.

An important use of benchmarking comparisons involves linking managerial incentives more directly to performance. This step is important for state-owned enterprises, since incentives are central to improved performance. Some scholars (e.g., Shuttleworth, 2005; Cubbin, 2005) are skeptical of applying efficiency scores due to the sensitivity of results to model specification, sample size, and outliers. However, caution does not preclude the thoughtful application of appropriate models.

Benchmarking serves as a catalyst for (1) collecting data to mitigate information asymmetries (for regulation), (2) identifying sector trends and performance outliers (for documenting the impacts of investments and policies), and (3) designing incentive-based managerial compensation plans (as part of the internal reforms required for cost containment and quality improvements). It is likely that far more waste has occurred due to poor management practices (and weak incentives) in developing

countries than to the misapplication of infrastructure benchmarking techniques. Nevertheless, benchmarking is no panacea: some groups like the status quo. Information contributes towards the identification of those benefiting from the “low level equilibrium.” Those beneficiaries fight change.

Based on the observations presented here, legal frameworks for promoting public-private partnerships should:

- (1) *Facilitate fact-finding*: require data reporting by operators (promoting transparency and reducing information asymmetries);
- (2) *Ensure institutional capacity*: provide authorities with the resources to attract and retain professional staff who can effectively interact with all stakeholders;
- (3) *Identify and prioritize performance objectives*: ensure that those setting policy are clear about their goals and that they are held accountable for promises made regarding related initiatives.
- (4) *Define the roles and responsibilities of different agencies*: promote clarity and accountability in the institutional division of labor.

Attention to these four features enables the legal framework for regulating infrastructure to reduce conflict, thus contributing to a more stable and predictable policy environment.

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