US Infrastructure Regulation:
Legal Structures for Reducing Conflict

Sanford Berg

ABAR
VI Congresso Brasileiro de Regulacao
May 18-20, 2009
Rio de Janeiro

Some Thoughts

Spare us from cowardice that shrinks from new truths;

Spare us from laziness that is content with half-truths; and

Spare us from arrogance in thinking that we know all truth.

I. Information as Central Key Problem

What damages the performance of private-public partnerships?

Lack of Information ("Trust but verify")
-Historically, poor record keeping

-Absence of transparency and participation

Information Asymmetries
-Managers know what (possibly) can be accomplished

-Policy-makers and Regulators do not know the short and long term opportunities

Stakeholders

Regulatory Commission (responsible for policy implementation in the sector: internal consensus?)

Government Sector Ministry (charged with policy development)

Government Treasury (addressing fiscal issues)

International Investors (bond, equity, and strategic management teams)

**Incumbent Service Providers & Potential Entrants** (state-owned enterprise or privately owned)

Un-served Citizens (rural and urban poor)

Current and <u>Future</u> Customers (consider potential conflicts among groups)

Multilaterals, donors, and NGOs (as a potential infrastructure project donor/funding agency)

II. Sources of Conflict

1. **Cognitive (Factual) Conflicts**: disagreements regarding current or historical facts and causal linkages

2. **Interest Conflicts**: stakeholders benefit differentially from decisions

3. **Value Conflicts**: conflicting priorities and different weights on outcomes

4. **Authority Conflicts**: lack of clarity of roles
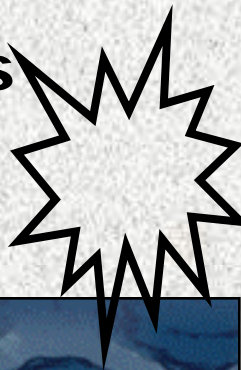
Four Issues that Need to be Resolved for Private-Public Partnerships

1. What *can* be done? (Facts)

2. Who should benefit from decisions? (Interests)

3. What *should* be done? (Values)

4. Who should make the decisions? (Jurisdictional Authority)

Regulator: Conflict Resolution--Facts

✓ Benchmarking Studies:
– Input Data (physical and monetary)
– Output Data (connections, water delivered, continuity, quality)

✓ Financial Sustainability Studies
– Income and Cash Flow Statements
– Balance Sheets

Examine Incentives and Estimate time to reach "the" frontier.

Benchmarking provides information on trends, comparisons, and feasible targets.

Interest Conflicts

✓ *"Interest" conflicts* reflect the differential impacts of policies on various stakeholder groups: Who benefits from the policy?

✓ If the situation is actually a zero-sum game, one group benefits at another's expense (unless there is compensation).

✓ <u>Special Interests</u>: The political economy of regulation suggests that when the beneficiaries of a particular policy are concentrated (and per capita benefits are high) the beneficiaries will lobby.

✓ If losers are diffuse (and the per capita damages are low), the result is a policy that benefits well-organized stakeholders— even when the costs to the losers outweigh the benefits to the winners.
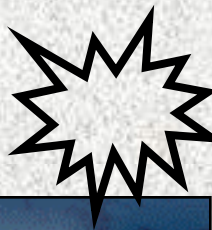
Values Conflicts

- ✓ *"Values" conflicts* are more ideological in nature, reflecting the different preferences or values of groups.

  ## What should be?

- ✓ Is there a political consensus over the weight assigned to particular outcomes, especially outcomes involving non-monetary impacts?

- ✓ Targets: Preferred outcomes depend on citizen attitudes. Who counts? Who matters?

- ✓ Political processes establish priorities

Regulator: Conflict Resolution--Values

- ✓ Public Education
  - – Publish Performance Comparisons
  - – Identify Trade-offs
  - – Report to the Legislature

- ✓ Promote Citizen Participation
  - – Talk Radio
  - – News Conferences
  - – Citizen Advisory Boards

Limit the Rhetoric: Articulate a Vision

Authority Conflict

"Authority" conflicts" reflect different views regarding where decisions will or ought to be made.

Who decides?

✓ Jurisdiction may not yet be assigned or the issue might be addressed by multiple agencies.

✓ Stakeholders will go jurisdiction-shopping—selecting the agency or the level of government most likely to support its interests in policy design and implementation.

✓ Appeals procedures within the judicial system can delay implementation. In such situations, benefits delayed are (effectively) benefits denied.

✓ Issues include: Finance Ministry vs. Water Ministry, Environmental Regulator vs. Sector Regulator, Municipality (and powerful interests) vs. water utility

Conflict Resolution--Authority

✓ Seek Changes in the Law—legal clarity

✓ Cooperate with Sister Agencies (avoid turf wars)

✓ Establish Task Forces to Address Issues

✓ Educate the Courts and Promote Transparency

✓ Improve Appeals Procedures

III. Technical and Adaptive Work: Conflict Resolution Matrix

Addressed By Research

Technical Work

Adaptive Work

Conflict Over Facts	**Conflict Over What is important**
Conflict Over Distribution of Gains & Costs	**Conflict Over Jurisdiction or Authority**

Addressed by Engaging People with Adaptive Challenges in Research And Dialogue

Addressed By Research And Negotiation

From Mark Jamison

1. Research: *What are the Facts?*

Donors and Investors cannot supply funds without the factual basis for the project.

- Public Information improves performance: transparency reveals data.
- Managerial Information: Small companies need support.
- Performance Benchmarking is part of Tariff Review (baselines, trends, best practice)
- Timeliness and Accuracy of Information: data quality is central.

2. Research & Negotiation: *Who gets the Benefits?*

Shared interest in sustainability

- **Business Plans: Information helps operators, policy-makers and regulators (monitor performance vs. plan)**

- **Performance Improvements and Incentives: win-win possibilities (reward superior cost-containment with returns)**

- **Comprehensive Performance Evaluation: Data on Finances, Operations, and social information (such as coverage) for broadest perspective**

3. Adaptive Work: *What is Important?*

Stakeholders place different values on particular outcomes (pace and pattern of network expansion).

- Establish Priorities and Realistic Targets to promote accountability
- "Believing is Seeing": since preconceptions shape perceptions—collaboration is essential
- Benchmarking: measure & manage.
- Rural areas warrant attention (lack economies of density).

4. Adaptive Work:
Who has Jurisdiction?

Jurisdictional overlaps and gaps are significant in many regions. Authority conflicts over implementing and enforcing rules distract agencies and managers from doing their jobs, harming performance. Strengthen capacity to collect and analyze data.

- **Create Central (accessible)Data repository**
- **Information is power: change the organizational culture (operators and gov)**
- **Work out jurisdictional responsibilities**

Concluding Observations

- **Facilitate fact-finding (promoting transparency and reducing information asymmetries)**

- **Ensure institutional capacity (provide agencies with resources to attract and retain staff who are able to interact with stakeholders with diverse interests)**

- **Identify and prioritize Project performance objectives**

- **Define the roles and responsibilities of agencies and institutions.**
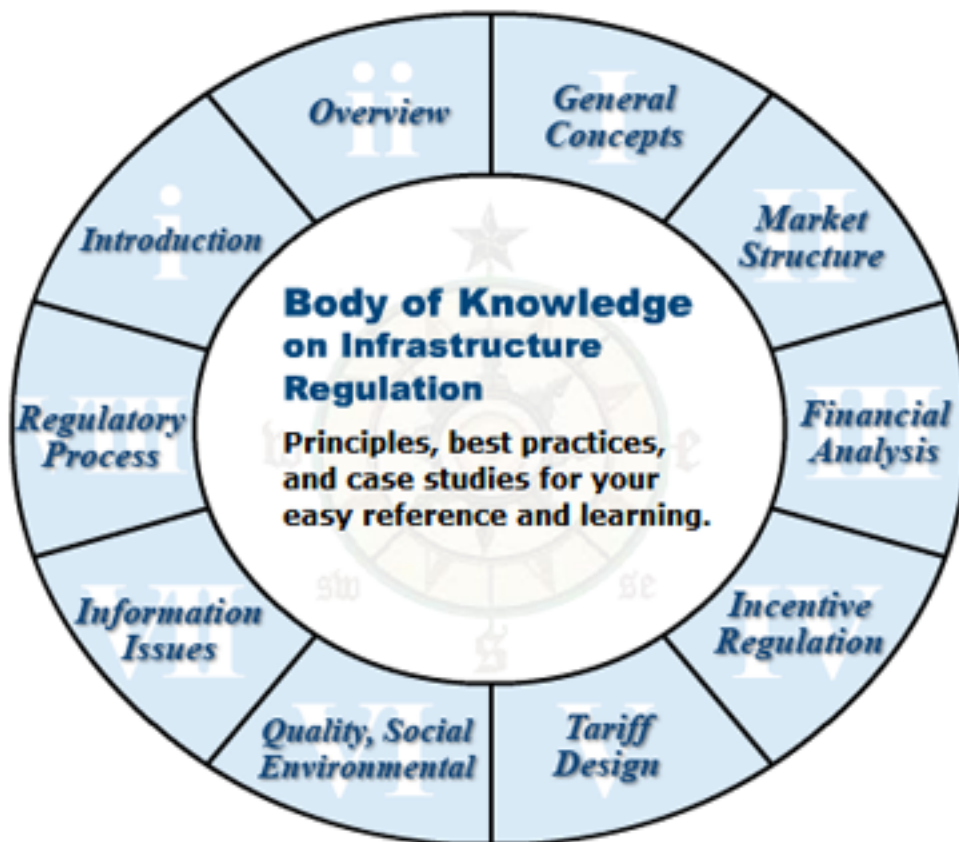
Point your browser to http://www.regulationbodyofknowledge.org to access the homepage

www.regulationbodyofknowledge.org

- Survey of critical regulatory issues
  - Pricing
  - Incentives
- Over 300 Readings
- Glossary in Portuguese (and forthcoming in Mandarin Chinese)
- Self-paced quizzes for capacity-building

Updates and Extensions:

- Frequently Asked Questions
- Transportation Sector

Public Utility Research Center

Research Expanding the body of knowledge in public utility regulation, market reform, and infrastructure operations (e.g. benchmarking studies of Peru, Uganda, Brazil and Central America)

Education Teaching the principles and practices that support effective utility policy and regulation (e.g. PURC/World Bank International Training Program on Utility Regulation and Strategy, January 2010)

Service Engaging in outreach activities that provide ongoing professional development and promote improved regulatory policy and infrastructure management (e.g. in-country training and university collaborations)

www.purc.ufl.edu

Sappington: Four Main Drivers of Regulatory Decisions

1. Politics

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4. Economics