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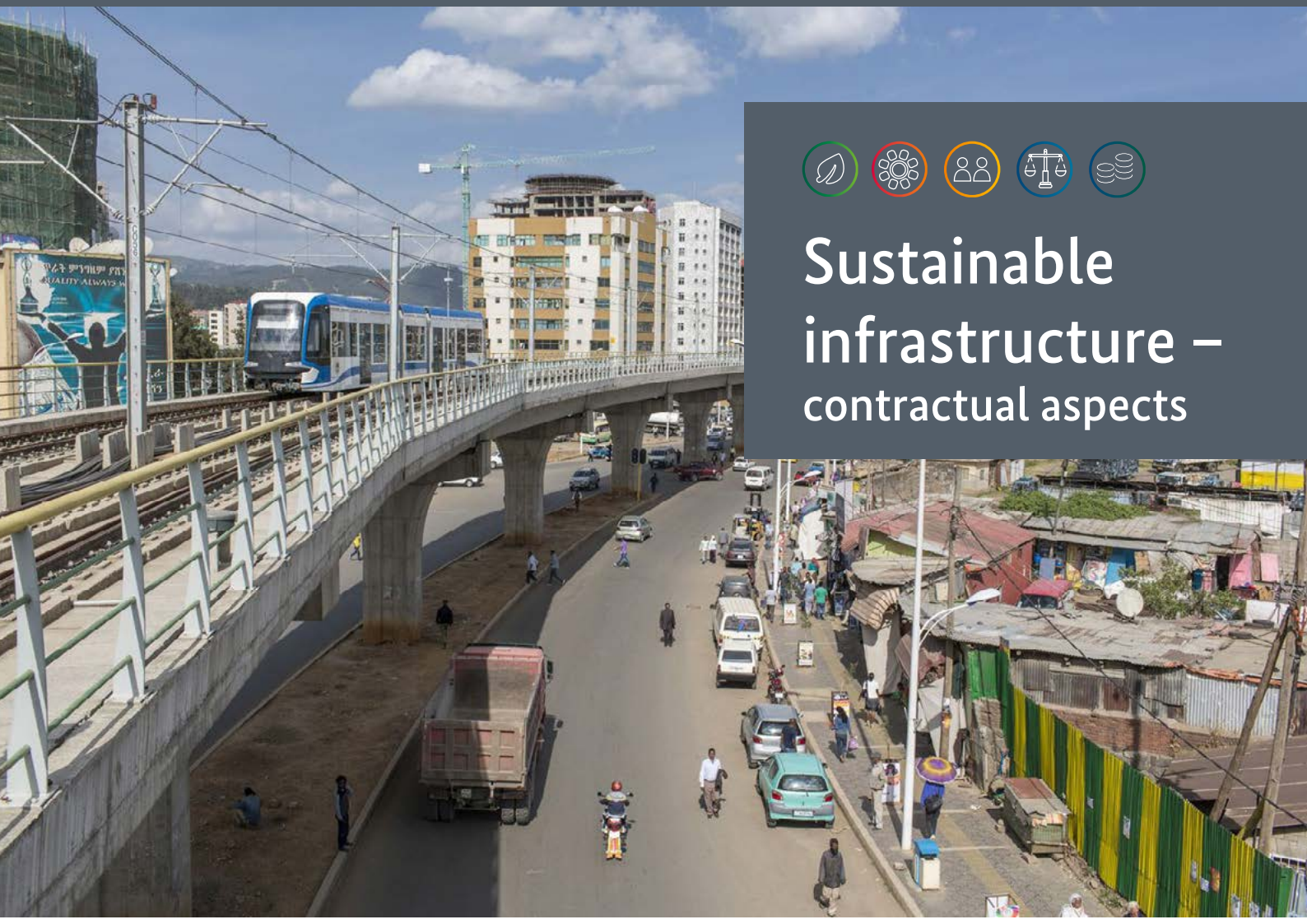
Contract Negotiation Support

CLAUSE INSIGHTS



Sustainable infrastructure – contractual aspects

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With today's infrastructure investment gaps measuring in the billions of USD, enormous opportunities exist for new infrastructure contracts to bring value to people and to the environment. These opportunities come with a convincing business case and create generational projects which offer more for less. Below are a few aspects that governments should thoroughly understand and consider before concluding a contract of that scale.

WHAT DOES "SUSTAINABLE" INFRASTRUCTURE IN A CONTRACT ACTUALLY MEAN?

The term "sustainability" usually focuses on climate change mitigation or environmental safeguards. This is really only ¼ of the whole story. Sustainability has four extremely relevant contractual dimensions:

» **Economic or financial** refers to value for money and an adequate cost recovery supported by (if necessary) well-targeted subsidies to address affordability. Project risks must be transparent and fairly distributed between partners.

- *Economic and financial provisions: Think about clauses that ensure the investor is creating value for money (and the economy), such as prescribing a project business case in the annex or using locally-sourced goods and services (and measuring very specifically what that means, including facilitating the use of local goods and services). Has the business case been triangulated with government experts? At the same time, the government needs to ensure that a favourable rate of return for the company does not leave the state or its citizens with lost value.*

» **Environmental** spans the use of sustainable construction materials, the application of technologies for increased resource efficiency as well as circularity or the incorporation of innovative approaches to climate resilience.

- *Environmental and Social impact management plans: Incorporate a clause on the compliance with the environmental and social impact management plan, including monitoring.*
- *Examples here may include reducing the use of concrete or steel (and their large carbon footprint) or keeping track of trends, which may reduce the scope of a project, such as more public mobility solutions instead of traditional private, individual options such as cars.*
- *Technological advances may mean that a certain financial outlay or aspect of operation and maintenance could be significantly reduced as technology advances. How will the state and the company agree to its introduction, potential experimentation and to also rewarding of the technology?*

» **Social** represents infrastructure that is inclusive, accessible, and affordable for everyone. Infrastructure procurement should be transparent to civil society, comply with human & labor rights and manage cultural/heritage preservation.

- *Disclosure clause: a clause describing the disclosure of non-confidential information and data throughout the project lifecycle for the general public.*
- *For projects which have a large physical footprint, leading to resettlement or impacting livelihoods, CSOs should be kept informed and also be provided an opportunity to comment. CSOs can serve as an important bridge to impacted communities and not including them may adversely impact the project.*
- *Ignoring the social issues dramatically increases "non-technical risk", which erodes project economics and can considerably delay projects.*
- *Some infrastructure (such as a port) will not have a traditional market, so this aspect of accessibility or affordability may not be as relevant. However, a project with a broader market, such as transport,*

should take into consideration the market, potential users and price the service accordingly. This may also include how much access to the general public is provided outside of the project's main purpose (so-called third-party access).

» **Institutional** refers to robust governance systems and institutional capacity that define procedures for planning, procuring, and operating the infrastructure asset and its services.

- *Monitoring clause: A clause ensuring institutional sustainability could mean monitoring the asset in accordance with the design and planning requirements of the contracting authority;*

- *While one ministry may be in the lead, it is important that governments include all relevant ministries, to avoid any potential surprises or pitfalls. Monitoring agencies need to not only be aware, but plan on allocating the appropriate human and financial resources to properly monitor the project.*

PRACTICAL INSIGHTS FROM SUSTAINABLE INFRASTRUCTURE CONTRACTS IN DIFFERENT SECTORS

The following examples showcase how the different aspects of sustainability can be upheld in the contract of different types of infrastructure.

1. **Economic and financial provisions for road infrastructure:** The project business case should be annexed in a contract and include a "Value for Money" analysis comparing the PPP model to the cost of delivering and operating the road using alternative means. An assessment of the cost and risks of delivery using public sector resources should be externally audited or reviewed. Public officials can learn from other jurisdictions and involve experienced advisors. In roads with toll concessions, a thorough analysis of demand should be included in the business model annex.

2. **Environmental and social management plans for port infrastructure:** The construction and expansion of ports can negatively impact marine biodiversity as ship traffic increases. Traffic congestion and starkly deteriorated air quality from the increase in heavy vehicles are also common challenges. These risks need to be mitigated as part of E&S management plans through stakeholder consultations and expert analyses. A baseline study for each potential impact is crucial – what has not been measured cannot be monitored.

3. **Monitoring in bridge construction projects:** The condition and quality of bridges have a significant impact on the safety of people, so continuous monitoring needs to identify damaged bridge segments and potential safety hazards. The contract should prominently cite monitoring and ensure public enforcement through sufficient capacity in oversight bodies. Monitoring can also include innovations in the form of digitization using sensors to collect data or the use of drones to assess any damage or cracks. This type of infrastructure technology (InfraTech) can increase bridge use safety and save public funds. It is equally important that state budget lines are allocated to these important functions. The all-too-common practice of having the private company pay for state inspectors is widely perceived as a conflict of interest.

FOUR RECOMMENDATIONS TO CONSIDER BEFORE DRAWING UP YOUR SUSTAINABLE INFRASTRUCTURE CONTRACT:

1. **Value for money is value for your people** – every infrastructure project will cost money over its lifetime (roughly 10-30 years) and this means that calculating the funding for the project's entire life when planning it is crucial. This also means that the investor provides a sound project business plan with a fair return on investment.

2. **Rethink how the government procures infrastructure services** – collaborate with procurement and sustainability experts to identify potential gaps (e.g., sourcing local materials and incentivizing companies to buy more locally) in your procurement policies to prevent uneconomic, costly and unsustainable partnerships with private contractors. How have habits changed since Covid-19? Any project drawn up before Covid-19 should have a thorough reexamination to ensure that it is still viable, i.e., a transport project, which may have decreased demand because of new rules of working from home.

3. **Thoroughly engage stakeholders and sustainability experts before the contract** – creating environmental and social management plans for infrastructure requires input from those that depend on the

infrastructure - local communities, civil society, trade unions and business associations, as well as sustainability and urban planning experts. Many projects will leave crucial impacts to the environmental impact assessment (EIA) process. Some issues are too important to be discussed in the EIA process three or six months after the contract's signing. An initial overview of the options and the implications (such as design and impacts on land, people and natural resources) will save considerable time and money during the EIA process. ***Remember, it is better to dialogue, design and deliver a project than design, deliver and then have to defend it.***

4. **Mainstream standards for planning and monitoring** – increasingly multilateral and bilateral donors look out for standards (e.g., IFC Performance Standards or the G20 Quality Infrastructure Investment Principles) to track financial, institutional, environmental and social targets and impacts of projects. Demonstrating that you have incorporated and are monitoring these standards in your project design will increase the attractiveness of your investment opportunities.

Meeting the Sustainable Development Goals and the Paris Agreement requires governments to value and monitor these sustainability considerations in all their contracts. Infrastructure projects can and should play an active role in contributing to continued socio-economic development and sustainable growth in emerging economies. Better understanding the larger themes and the small detail of infrastructure contracts (with the help of legal and technical experts) will ensure that governments negotiate a better deal, allowing more value, as well as better service to their people.

To find more information on sustainable infrastructure and identify the right tool to better plan and develop your infrastructure project or portfolio, GIZ has together with UNEP set up the Sustainable Infrastructure Tool Navigator, an online tool database with guidelines, standards and rating systems that you can access here: Home - Infrastructure Tool Navigator (sustainable-infrastructure-tools.org). Start navigating today and create infrastructure that brings value to people and the environment!

Dr. Micaela Mihov is an Advisor at GIZ's Infrastructure Solutions Incubator, working with governments on mainstreaming sustainability into infrastructure planning, financing and development processes.

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Deutsche Gesellschaft für
Internationale Zusammenarbeit (GIZ) GmbH
Registered offices
Bonn and Eschborn, Germany

Friedrich-Ebert-Allee 32+36
53113 Bonn, Germany
T +49 228 44 60-0
F +49 228 44 60-17 66

Dag-Hammarskjöld-Weg 1–5
65760 Eschborn, Germany
T +49 61 96 79-0
F +49 61 96 79-11 15

E info@giz.de
I www.giz.de

Contact:
CONNEX Support Unit
Potsdamer Platz 10
10785 Berlin, Germany
E support@connex-unit.org
I www.connex-unit.org

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Richard Dion, Senior Advisor
dion@connex-unit.org

www.connex-unit.org