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A Conflict's Impact on Project Goals and Reputation Risk: Lessons from Kosovo Privatization Program

When designing and implementing a project in a conflict-affected country, some of the conflict's more obvious impacts—damage to infrastructure and energy supplies—are apt to immediately come to mind. However, based on the experiences with the Kosovo privatization program, there are additional problems related to a conflict's aftermath that may be overlooked during a project's design but which should be addressed, and these form the basis for this Smart-Lesson paper.

Background

This SmartLesson for Kosovo is timely, given the province's declaration of independence from Serbia on February 17, 2008. This declaration is the latest chapter in Kosovo's long history, which includes centuries of close links to Serbian cultural identity, the conflicts of the 1990s between ethnic Albanians and Serbians, the 1999 NATO bombings, which ejected Serbian forces from the province, and the subsequent nine years of governance by the United Nations Interim Administration Mission in Kosovo (UNMIK).¹

Kosovo was the last region of the former Yugoslavia to start privatizing its so-called socially owned enterprises (SOEs) commercial, manufacturing, mining, and agricultural business entities analogous to state-owned enterprises. The Kosovo Trust Agency, established by UNMIK legislation, was charged with selling the approximately 300 Kosovar SOEs in order to prevent further deterioration of the assets and to promote economic development. After many stops and starts, the privatization program started in earnest in mid-2004, and most expected sales have recently been completed.

Lessons Learned

1) An official policy regarding the conflict should be established and should be incorporated into a project's design and implementation plan

Every conflict is different, taking into account the historic build-up to the conflict, actions that took place during the conflict, and how the conflict was resolved. It is vital that a policy regarding the conflict and its aftermath be adopted by IFC (and agreed to by any donor organization providing funding) at the



Italian NATO Kosovo Force patrol, Gjakova

¹ This SmartLesson tries to use legal terminology that was appropriate during 2002–2006 and refers to political policies in place by donor countries and the United Nations during that period.

outset and incorporated into a project. The lack of such a policy can impact local buy-in with the project, cause reputation risk, and, in extreme situations, undermine political reconciliation.

POLICY EFFECT ON PROJECT DESIGN

UN Security Council Resolution 1244, which established UNMIK in 1999, created a temporary political solution in Kosovo with the support of NATO members and much of the international community. UNMIK, along with the donor countries for the privatization program, followed a policy of not prejudicing Kosovo's eventual final status and equal treatment of ethnic groups.

The privatization program was therefore designed with these policies in mind. From the design standpoint, the donor organizations advocated having the sale proceeds from privatization held in trust, pending a resolution of Kosovo's status. Additionally, rather than selling ownership of land held by an SOE, a long-term leasehold arrangement was developed. The board of directors of the Kosovo Trust Agency has both Albanian and Serbian representatives, along with a controlling number of international board members, owing to the UNMIK mandate over the province. In order to obtain local tie-in, experts did their best to address local concerns in the design, within the context of the political mandate. For example, a high-level trade union official on the agency's board of directors was able to successfully lobby donors and UNMIK to ensure that a portion of each sale's proceeds were allocated to each SOE's employees. Because on-going safety concerns made it difficult for Albanians and Serbians to travel to each other's regions, privatization tender procedures allowed for the submission of bids in both a Serbian majority and an Albanian majority city, and legal claims arising from privatization can be filed both in Pristina and Belgrade.

POLICY EFFECT ON PROJECT IMPLEMENTATION

A project's management should also ensure that the conflict policy is incorporated into the day-to-day implementation of the project. This is because the appearance of taking sides in the conflict can arise even in the most innocuous of implementation actions. Within Kosovo's privatization program, there were frequent accusations of political decision-making whenever the Kosovo Trust Agency did or did not schedule a company for sale that was based in a Serbian enclave.

All advisory staff should be instructed and reminded to follow the official conflict policy of their employer and donor: remind them that they were hired for their advisory services expertise, not for political expertise. For USAID-funded personnel in Kosovo, our chief of party would brief consultants on the U.S. policy toward the conflict upon their arrival in Kosovo, and remind them when their actions may have come close to violating that policy. Privatization line managers were always open to discussing difficult ethical and policy issues, and the privatization and UNMIK lawyers routinely reviewed privatization-related documentation and actions to ensure compliance with UN Security Council Resolution 1244.

In Kosovo, the privatization agency had field offices throughout the province in both Albanian and Serbian areas. Because there was very little intermingling between the ethnic groups, advisory services experts in these offices were often exposed to only the Albanian or the Serbian perspective of the conflict, rather than to both. Vigilance was necessary to maintain the official policy of neutrality with regard to the conflict, often through the staff's over-reliance on the agency's international lawyers to catch actual, perceived, and inadvertent biases during legal reviews of privatization documentation. Some bias still occasionally slipped through: In one extreme example, a letter to the editor from an international advisor printed in the International Herald Tribune, calling for the independence of Kosovo, was a contributing factor in that advisor's dismissal.

If real or perceived bias is seen by the larger community in everyday project activities, this can undermine trust established with local partners and the public, resulting in a damaged reputation for IFC, a potential weakening of donor resolve, and ultimately jeopardizing the success of a project.

2) Because missing information can raise unexpected risks for advisory service goals and IFC reputation, the issue of such information should be addressed during both project design and implementation.

If damage during a conflict has been significant and widespread, a policy should be developed to manage operational and reputation risk resulting from missing information related to key assets and personnel of local project partners and clients. If a client or partner does not have a proper relationship with its key assets and personnel, legal and practical complications will inevitably occur.

When developing such a policy, a pragmatic balance needs to be struck between the reduction of such risks and the risk of operational paralysis; any policy must accept that surprises will inevitably occur and that the risks can only be mitigated rather than eliminated.

MISSING CRITICAL OFFICIAL INFORMATION

The 1999 conflict in Kosovo resulted in a large percentage of destroyed or missing government and company records related to land registration, title to assets, and liabilities of the SOEs scheduled for privatization. For the privatization program, this frequently resulted in uncertainty as to whether there was a legal right to sell certain assets if ownership/registration could not be comfortably determined. Our advisory services resulted in UNMIK-adopted legislation aimed at establishing a form of eminent domain (government appropriation of private property) over assets of uncertain ownership in order to allow the Kosovo Trust Agency to sell these assets with clear title. Despite this legislation, litigation, human rights complaints, frequent bad press, and ad hoc protests resulted when competing evidence of asset ownership surfaced.

While such factual uncertainties are particularly important for a privatization program, they can also pose a reputation

risk for all types of advisory services providers and can undermine the achievement of project goals. In order to mitigate this risk, a policy of due diligence as to the ownership of key assets should be developed something that might not be necessary in a non-conflict-affected country. When primary information is missing, ownership can often be inferred through court checks, indirect documentary evidence such as tax records, and statements from disinterested parties. A contingency plan should also be developed for when inevitable surprises arise. In the case of the Kosovo privatization program, there were periods during the tender and sale completion processes during which claims against sale assets were reviewed before proceeding to final sale.



Historic buildings, Pristina

MISREPRESENTATION BY PEOPLE WITH APPARENT AUTHORITY

Another problem was the arrival of people who purported to be managers of an enterprise scheduled for privatization but who in fact had no such authority². This can result in embarrassment for the advisory services implementer and put project goals at risk. Therefore, this is another topic worthy of supplemental due diligence in a post-conflict country. Should primary information be missing, asking to see labor books (a type of work-history passport used in some countries) or other indirect evidence such as tax records and interviews with subordinate staff can help increase the comfort level.

² Likely reasons for these ploys included: to facilitate asset stripping, to operate the enterprise assets for personal profit, and to try to start economic activity for a community using a defunct, abandoned enterprise. In some cases, the purported manager claimed to have been the manager before the mass firings of Albanians started in 1989.

3) A policy should be developed regarding who should be excluded as project partners and clients, tailored to balance reputation risk, the need to achieve advisory or investment goals, and the nature of the conflict.

Regular people can get involved in wrongful behavior during a conflict everything from smuggling and looting to war crimes. Further, in the fog of conflict, and in an ethnically or politically charged environment, current and past accusations against individuals and eventual convictions may not be based on accurate facts.

When designing the Kosovo privatization program, experts struggled over who should be allowed to bid for companies and assets. It was difficult to develop criteria that were pragmatic, even-handed, and politically acceptable to local interests, taking into consideration the repressive tactics of Serbian authorities against Albanians before 1999 and atrocities committed by both ethnic groups in the lead-up to and the aftermath of the NATO intervention. In addition to AML/CFT (anti-money laundering and combating the financing of terrorism) checks similar to what IFC performs, criminal background checks of winning bidders were carried out. Ultimately, the privatization rules of tender barred people from bidding if they had been convicted of a felony after June 1999, with that date reflecting the end of major hostilities and the introduction of international administration and NATO control. This was not a fully satisfactory exclusionary policy, however, and after each wave of tenders, there was relief when criminal background checks failed to find legally and morally questionable bidders that were not excluded in the above policy.

IFC should do its best to develop objective policies on whom it will or with not work with in a conflict-affected country. Such a policy should balance the typical exclusionary rules of IFC and the nature of the conflict. The policy likely needs to have more flexible standards than what might be developed for a non conflict-affected country; otherwise, it might be too restrictive to achieve project goals.

4) Design and implement a system for preserving project memory

In a conflict-affected country, a high turnover of international staff is common, due to the hardships in such a posting and the fact that it is often unsuitable for dependents. The result can be a revolving door of foreign experts and the risk of endless reinvention of the wheel.

This problem was especially acute with the Kosovo privatization program. Some foreign experts would dump 20 lever arch files into a storage room on their last day in the office and say, "All my files are there." With that act, a year or more of insights, lessons learned, and the work product could become immediately obscured. When new managers or experts would arrive, they would often be eager to "make their mark" and start designing new systems or policies that could directly contradict a preceding policy or result in the throwing out of months of work product. A frustrating example of this was the endless renegotiation of the rules of

tender for privatization with all stakeholders every time a new agency manager or expert would arrive.

To ameliorate this, as one of the project members with the longest institutional memory, I began a file memorandum system, explaining in detail the policies that went into the development of key features of the privatization implementation system and how I conducted legal analysis of privatization deals. Admittedly, this represented only a portion of all the policy and implementation work by the agency. It is therefore recommended to have an institutional memory plan from the outset of advisory service operations; this could include requiring consultants to produce such “memory memos” as a contract deliverable.

Conclusion

While the conflict in Kosovo was particularly complex and had an unprecedented post-conflict period with its status as a UN protectorate, universal lessons can still be drawn from the advisory services work conducted in furtherance of Kosovo’s privatization program. The lessons summarized above will hopefully be useful for IFC’s work in other conflict-affected countries, or for future IFC work in a newly independent Kosovo.

DISCLAIMER

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